



THE HILLS WORKS-IN-KIND POLICY

Policy 28/2024-2028

DATE

Ordinary Meeting of Council 27 May 2025

POLICY NO:	28/2024-2028
LEGISLATIVE REQUIREMENTS	<i>Environmental Planning and Assessment Act 1979 (NSW) and Environmental Planning and Assessment Regulation 2021 (NSW).</i>
RESPONSIBILITY:	FORWARD PLANNING
OBJECTIVE:	To provide guidance and establish criteria by which Developers may make an application to enter into a Works-in-Kind Agreement with Council for the construction or provision of public amenities and/or public services, and / or the dedication of land identified in a works schedule in a Contributions Plan that applies to the site of the development, in part or full satisfaction of a Section 7.11 condition imposed under the EP&A Act.
REVIEW:	Within the first 12 months of each term of Council or as required.

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ATTACHMENT 1: WORKS-IN-KIND AGREEMENT TEMPLATE

ATTACHMENT 2: REIMBURSEMENT AGREEMENT TEMPLATE

1. INTRODUCTION

1.1. Name of this Policy

This policy is known as The Hills Shire Council Works-in-Kind Policy ("Policy").

1.2. Application of the Policy and commencement

This Policy applies to Works-in-Kind (WIK) Agreements and reimbursements, including applications to Council to enter into a WIK Agreement or seek reimbursement of developer contributions. This Policy was endorsed by resolution of Council on 27 May 2025.

1.3. What is a Works-in-Kind Agreement

New urban development creates the need for additional public amenities and public services. The *Environmental Planning and Assessment Act 1979* (EP&A Act) empowers Council to require new urban development to contribute towards the provision of these public services and amenities. Council's Contributions Plans provide information on:

- (1) the extent of anticipated development
- (2) public services and amenities needed to support new development; and
- (3) the contributions that new development must make to fund the provision of these services and amenities.

Where a Developer would like to undertake works that are identified in a Contributions Plan in either full or partial satisfaction of development contributions required by a condition of a Development Consent, the Developer will:

- (1) require written agreement from Council that it will accept the provision of the 'Works-in-Kind'; and
- (2) specify the extent to which the provision of the material public benefit satisfies the development contributions required.

Such an agreement is known as a 'Works-in-Kind' Agreement which is a legal contract entered into by both Council and a Developer. The decision to enter into a WIK Agreement is at the sole discretion of Council (see Part 5.4 of this Policy).

1.4. Objectives of this Policy

The purpose of this policy is to provide a fair, transparent and standard procedure and framework for the making and assessment of an offer to enter into a WIK Agreement.

This document provides an overview of the legal requirements of WIK Agreements under the applicable legislation as well as the approval process for WIK Agreements internally within Council.

Further, the Policy seeks to ensure that a fair, transparent, efficient and accountable framework governs the use of WIK Agreements to facilitate the provision of public facilities, services and amenity outcomes in satisfaction of requirements to pay development contributions in accordance with the provisions of the EP&A Act and that align with, or are consistent with Council's corporate and strategic planning context, including Council's Development Contribution Plans.

1.5. Legislative context

Section 7.11 of the EP&A Act provides that where a consent authority is satisfied that development for which Development Consent is sought will (or is likely to) require the provision of (or increase the demand for) public amenities and services within an area, the consent

authority may grant Development Consent subject to conditions which require the dedication of land free of cost, the payment of a monetary contribution, or both. In order to require such a contribution, Council must have a Contributions Plan in place which authorises the imposition of any such condition of consent.

In accordance with Section 7.11(5) (b) of the EP&A Act, a consent authority may accept the provision of a material public benefit (other than the dedication of land or payment of monetary contributions) in full or partial satisfaction of the condition imposed which requires contribution towards the provision of public services and amenities. This material public benefit is most commonly the construction of works which have been identified in the relevant Contributions Plan.

This Policy is to be read in conjunction with the current version of the Contributions Plan that applies to a site.

Provisions of the following legislation and instruments will be relevant when considering whether to enter into a WIK Agreement:

- a. The EP&A Act.
- b. The EP&A Regulation.
- c. The *Local Government Act 1993* (NSW).
- d. The current Local Environmental Plan or State Environmental Planning Policy that applies to the site of the Development or Works.
- e. Any Development Control Plan that applies to the site of the Development.
- f. any applicable Contributions Plan or draft Contributions Plan; and
- g. this policy,

(each as amended from time to time).

1.6. When is a Works-in-Kind Agreement Not Appropriate?

a. Public Benefits not identified within a Contributions Plan

The undertaking of a work or provision of a facility that is not specifically included within a Contributions Plan (or is not identified within the specific Contributions Plan applicable to a particular development) will not be accepted as 'Works-in-Kind'. In those circumstances, an offer to enter into a planning agreement should be submitted in accordance with Council's Planning Agreement Policy.

b. Dedication of Land

Council will generally not accept the dedication of land (identified for public purposes) to offset a required monetary contribution, and instead the Developer will be required to pay the full contribution relating to land acquisition. The value of land can then be negotiated separately between the applicant and Council, and a value formally agreed upon prior to payment.

An appropriate condition may be included in any Development Consent applying to land identified for public purposes to ensure that the land is transferred to Council. These consents would require satisfactory arrangements being made with Council's Manager – Strategic Property & Buildings.

c. *Reimbursement Claim (outside of a Works-in-Kind Agreement)*

It should be noted that a WIK Agreement differs from a 'reimbursement claim' for works completed by a Developer on behalf of Council. A 'reimbursement claim' occurs when a Developer pays the full monetary contributions imposed as a condition of Development Consent and then separately seeks to claim reimbursement for works completed as part of the development which are also identified within a Contributions Plan.

Any claim for reimbursement with respect to works (as opposed to requests to enter into a WIK Agreement to offset or reduce the contributions payable) should be submitted to the relevant Council Manager or Managers (i.e. Infrastructure & Transport Planning or Asset Management, Roads & Parks). Further guidance with respect to 'reimbursement claims' is provided in Part 7 of this Policy.

It is critical to note that Developers will not be entitled to any reimbursement for works completed unless formal agreement has been reached with Council prior to commencement of the works.

1.7. Policy not binding

This policy is not legally binding and Council is not bound to strictly apply this policy for every WIK agreement entered into by Council. However, Council will generally seek to apply this policy, as far as reasonably practicable, in relation to WIK agreements (including their negotiation).

2. TERMS AND DEFINITIONS

The following detailed terms used in this Policy have the meanings described to them below.

Community infrastructure	means public amenities and public services.
Contributions Plan	means a public document prepared and adopted by Council under to Section 7.11 and/or Section 7.12 of the EP&A Act.
Council	means the Hills Shire Council.
Developer	is a person or party who has made or proposes to make a development application, or who has entered into an agreement with or is otherwise associated with such a person or party.
Development	has the same meaning as the EP&A Act, being the following (except where specifically excluded by the EP&A Regulations): (a) The use of land. (b) The subdivision of land. (c) The erection of a building. (d) The carrying out of a work. (e) The demolition of a building or work. (f) Any other act, matter or thing that may be controlled by an environmental planning instrument.
Development Application	has the same meaning as the EP&A Act, being an application for consent under Part 4 of the EP&A Act to

	carry out development but does not include an application for a complying development certificate.
Development consent	has the same meaning as the EP&A Act, being consent under Part 4 of the EP&A Act to carry out development and includes, unless expressly excluded, a complying development certificate.
Development contribution	means the payment of a monetary contribution, the dedication of land, the provision of a material public benefit (the carrying out of Works-in-Kind) or any combination of these.
DPHI	Department of Planning, Housing and Infrastructure.
EP&A Act	means the <i>Environmental Planning and Assessment Act 1979</i> (NSW).
EP&A Regulation	means the <i>Environmental Planning and Assessment Regulation 2021</i> (NSW).
Instrument change	means a change to an environmental planning instrument.
LEP	Local Environmental Plan.
Material Public Benefit	has the same meaning as Works-in-Kind.
Planning Benefit	A Development Contribution that confers a net public benefit, that is, a benefit that exceeds the benefit derived from measures that would address the impacts of particular development on surrounding land or the wider community.
Provision of public infrastructure	includes: <ul style="list-style-type: none"> • the provision, extension and augmentation of (or the recoupment of the cost of providing, extending or augmenting) public infrastructure, and • the funding of recurrent expenditure relating to the provision, extension and augmentation of public infrastructure, and • the conservation or enhancement of the natural environment, and • any action of a planning authority in connection with the exercise of any statutory function under this Act, including the carrying out of any research or investigation and the preparation of any report, study or instrument.
Public benefit	is the benefit enjoyed by the public as a consequence of a development contribution.
Public infrastructure	includes facilities and services (capital and land) that support the population within a given area, including but not limited to open space, community facilities, drainage and road works.
Regional infrastructure contributions (Special Infrastructure Contributions and/or Housing and Productivity Contributions)	means any contribution so directed by the Minister under Section 7.24 of the EP&A Act.

Unclaimed Value

means the value of any approved Works-in-Kind in excess of the contributions required for the relevant infrastructure category as a condition of development consent.

Works-in-Kind

means the whole or part undertaking of a work or provision of a facility, public amenity or service and/or embellishment of land that is specifically included within a works schedule in a Contributions Plan, in lieu of the part or full payment of either a monetary contribution or the dedication of land that is required as a condition of development consent.

Note: Unless otherwise specified, this Policy adopts the terms and definitions as used in the EP&A Act and EP&A Regulation (if applicable).

3. ASSESSMENT CRITERIA FOR WORKS-IN-KIND APPLICATIONS

In considering an application for Works-in-Kind, Council will have regard to the requirements of any current Legislation, Practice Notes or other relevant Government guidelines and may consider matters such as, but not limited to the following:

- a. Whether Council has received sufficient detail from the Developer (to Council's satisfaction) in relation to the Developer's application to provide works-in-kind (including the scope of any embellishments) to allow Council to adequately assess the Developer's application.
- b. Whether the proposed work-in-kind will be to a suitable standard for Council to eventually accept.
- c. The benefits of the works (and timing of provision) to the community.
- d. The overall benefit of the works to the current and future development in the area.
- e. Finalisation of, or consistency with, the detailed design of the facilities.
- f. The submission of plans and cost estimates to Council of the proposed works to be undertaken by the Developer.
- g. Whether the location, siting and design of the proposed works has regard to the applicable Development Control Plan and Contributions Plan.
- h. The monetary value of the proposed works-in-kind and the amount of offset sought by the Developer.
- i. Council's capacity to deliver the works and whether this would provide better value for money.
- j. The timing of completion and future recurrent costs including staffing and maintenance and future management (particularly if work is to a higher standard than proposed under the applicable Contributions Plan).
- k. Council may consider works to a higher standard than the Contributions Plan allowance, however no reimbursement of additional costs will be provided.

- l. The financial implications for cash flow and whether the proposed works pre-empt the future orderly implementation of the works as identified in the works schedule.
- m. The impact of committing funding to the project or the funding of other works in either Council's Shire Management Plan, 10 Year Works Program or any other strategic plan.
- n. If the provision of the works is likely to prejudice the timing or the manner of the provision of public facilities included in Council's works program.
- o. Council's priorities for infrastructure delivery.
- p. Future dedication, handover and management arrangements.

The acceptance of an offer for a Works-in-Kind is at the sole discretion of Council.

4. OFFSETTING WORKS-IN-KIND AGAINST CONTRIBUTIONS PAYABLE

The purpose of a Works-in-Kind Agreement is to offset the monetary contribution or land dedication required to be provided by the Developer under a condition of Development Consent imposed under Section 7.11 of the Act. If the works proposed relate to a facility covered by a specific category Council will only offset the value of works-in-kind against the development contribution required for that particular category. For example, construction of a road (or part thereof) can only be offset against contributions required for the purposes of transport. The construction of a road could not be offset against contributions required for the purposes of open space or water management etc.

The value of any offset will be equivalent to the cost of the work, as determined to Council's satisfaction in reliance on a report from an independent quantity surveyor, up to the maximum value specified for the work within the Works Schedule to the relevant Contributions Plan. That is, the value of any offset for works will be capped at the estimated value specified for that same works item under the applicable Contributions Plan (even if the Developer is proposing to provide the works at a higher standard than that envisaged under the Contributions Plan).

There may be cases where the Developer proposes to carry out Works-in-Kind for works included in a Contributions Plan, but the cost of these works exceeds the amount of the monetary contribution required to be paid by the Developer as a condition of the Development Consent for the relevant infrastructure category (**Unclaimed Value**). In these situations, the Developer may be eligible to be reimbursed for the actual costs of the works if this has been approved by Council as being consistent with the Contributions Plan.

Where certain infrastructure provision or works would normally be required to be provided as part of a development by way of a condition of development consent, then these would be considered to be in addition to any Works-in-Kind contribution. No reduction in the Works-in-Kind contribution would be accepted in recognition of works required to be carried out in connection with the proposed development or already required via a condition of consent.

For accounting purposes, any offsets will be done in one of three (3) ways:

- a. Where the value of works undertaken is equal to the contribution required for the relevant infrastructure category as a condition of consent, Council will consider those works to be the equivalent of the payment of the contribution in that facility category in full.

- b. Where the value of the works undertaken is less than the contribution required for the relevant infrastructure category as a condition of consent the Developer will be required to pay the difference to Council as monetary contribution.
- c. Where the value of the works undertaken exceeds the value of the monetary contribution required for the relevant infrastructure category as a condition of consent, Council will consider those works to be equivalent of the payment of the contribution in that facility category.

To apply Works-in-kind credit for the aforementioned a, b, and c methods, the condition requiring the payment of the contributions needs to be modified. Therefore, an application to modify the consent by deletion or modification of the existing Section 7.11 condition of the consent would need to be made.

Works-in-kind credit cannot be applied once development contributions have been paid.

With respect to reimbursement of Unclaimed Value, the following should be noted:

- Developers should not expect reimbursement of Unclaimed Value in full. The possibility and level of reimbursement is limited to the funds collected from contributions received from other developers for those specific works pursuant to the relevant Contributions Plan and the possibility for funds to be distributed equitably to multiple developers as reimbursement of their respective Unclaimed Values.
- Council retains the right to repay Council's outstanding financial liabilities for local infrastructure projects forward funded by Council's Capital Works Program and invest funds collected from other developers to other local infrastructure projects, prior to reimbursing any Unclaimed Values to Developers.
- Indexation will not be applied to any Unclaimed Values.
- Payment of Unclaimed Value, and the terms of any such payment are at the sole discretion of Council.
- Developers are only entitled to re-imbursement of Unclaimed Value to the extent of re-imbursement included in a binding WIK Agreement entered into before the commencement of the relevant works.

5. PROCESS FOR WORKS-IN-KIND AGREEMENTS

5.1. Pre-Lodgement Discussions

At the pre-lodgement meeting for a Development Application, assessing officers will refer to the relevant Contributions Plan in order to identify works items in the vicinity of, or relating to, the development that qualify for and which may be carried out as Works-in-Kind. Developers should be made aware of opportunities to undertake Works-in-Kind by assessing officers at the pre-lodgement meeting.

5.2. Written Application

A WIK Agreement can be considered by Council either as part of a Development Application, or alternatively, as soon as practicable following the issue of Development Consent for the subject development.

To commence the process, the Developer must submit a formal written application to Council advising its desire to undertake Works-in-Kind, specifying the particular works identified in a Contributions Plan it proposes to provide and requesting approval to enter into a WIK Agreement.

A formal written application must satisfy the following criteria:

- a. It must be made in writing to the relevant Council Manager (i.e. Development Assessment or Subdivision & Development Certification).
- b. Provide legal description of the land on which any works are proposed to be carried out.
- c. If available, identify the Development Consent issued for the development with which the works are associated (consent number and date of consent) or alternatively, the identification number of any associated Development Application currently under assessment.
- d. Provide a detailed description of the works proposed to be undertaken (including concept/detailed design drawings and report/s).
- e. Provide details of which Contributions Plan works schedule in which the works are identified in.
- f. Detail whether the proposed works are intended to be completed in full, or only partially completed, relative to the specifications contained in the relevant Contributions Plan and any existing Development Consent/s for the works.
- g. Include an estimated value of the works with a sufficient level of detail to enable Council to verify the value of the works. The Developer must establish to the satisfaction of Council the value of the Works-in-Kind offered, including where required by a report from a qualified, practicing independent quantity surveyor with associate or higher membership of an accredited professional institution in Australia. Any variations, between the cost identified in the Contributions Plan and the estimated cost of works should be identified.
- h. Identify the differentiation of components of the works that are in accordance with the Contributions Plan and those that are not.
- i. Include a detailed timeframe for the design, construction and handover of the works.
- j. Include a summary table of the development contributions payable under the Development Consent and the extent the proposed WIK Agreement will offset these contributions.

A formal written application should be submitted by the Developer as early as possible in order to allow sufficient time for Council to assess the application without impacting on the Developer's development schedule. Delays in development are not a relevant factor for Council in considering any application for Works-in-Kind.

5.3. Council Assessment

The application will be considered by Council's internal 'Infrastructure Advisory Group', typically comprising Council's Group Manager – Strategic Planning, Chief Financial Officer, Manager – Forward Planning, Manager – Infrastructure & Transport Planning and Manager – Special Property Projects. The Infrastructure Advisory Group will consider the application having regard to the matters detailed in Part 3 of this Policy.

Council may consult with other developer stakeholders who would be required to contribute to the works-in-kind, prior to assessing the application. Preliminary ('without prejudice') Acceptance.

Having regard to the recommendations of the Infrastructure Advisory Group, Council will advise the Developer on a without prejudice basis of whether or not the offer of Works-in-Kind is acceptable, in principle, subject to formal Council endorsement. The letter will include:

- a) the agreed value of the Works-in-Kind;
- b) the agreed timing of the works; and
- c) the next steps and any other considerations.

If deemed necessary, Council may request additional information in order to obtain evidence satisfactory to Council of the value of the works, including where appropriate a report by a qualified practicing quantity surveyor. Should additional information be required, the offer of Works-in-Kind would again be considered by the Infrastructure Advisory Group following the receipt of the additional information required.

5.4. Developer to Submit Draft Agreement

Upon receipt of the letter referred to in Section 5.3 confirming in principle acceptance, the Developer has 60 days from the date of the letter to enter into a WIK Agreement.

Where the Developer wishes to proceed with the proposed WIK Agreement, it should submit to Council a draft WIK Agreement based on Council's template WIK Agreement (refer Attachment A of this Policy) and having regard to any preliminary advice received from Council. The WIK agreement will include terms relating to the following (as a minimum):

- a) Design requirements and relevant standards for the works.
- b) Security bonds and defects liability periods.
- c) Insurance requirements.
- d) Indemnities provided by the Developer to Council.
- e) Inspections required.
- f) Work Health and Safety requirements.

5.5. Council to Review Draft Agreement

The draft WIK Agreement submitted by the Developer will then be reviewed by Council officers, including Council's legal advisor (where required), for consistency with any conditions of the preliminary acceptance and the requirements of this Policy. Any comments will be provided to the Developer in writing (which may include edits to the draft WIK Agreement).

Where more complex issues arise Council may engage the assistance of consultants including solicitors and engineers. Any costs incurred in engaging these consultants must be reimbursed to Council by the Developer as a condition of entry into the WIK Agreement.

The Developer must take into account any comments of Council officers and submit a revised draft WIK Agreement. Council officers and the Developer will negotiate in good faith to seek to agree the terms of the WIK Agreement.

The draft WIK Agreement will then be reported to Council for consideration. The decision to enter into a WIK Agreement is at the sole discretion of Council (irrespective of any preliminary advice or discussions with Council officers) and execution will only occur where Council has resolved to do so.

5.6. Securities

Council will require every WIK Agreement entered by it to contain appropriate security provisions which allow for the enforcement of the WIK Agreement by suitable means in the event of a breach of the WIK Agreement by the Developer.

Such provisions may include the following (by way of example):

- a) Requiring the works to be completed prior to the issue of a Subdivision Certificate for the Development.
- b) Requiring the Developer to lodge separate irrevocable and unconditional bank guarantees or bonds (Securities) as security for the performance of the obligations of the Developer under the WIK Agreement (including for any Defects Liability Period for the Works), at a value agreed between the parties. The cost of procuring Securities will be borne by the Developer.

If the Securities are included in the WIK Agreement, the Securities may be for:

- c) the agreed value of the works (Primary Security); and
- d) an additional amount to be held as security against defects for the relevant defects period specified in the WIK Agreement (Defects Security),

and must be provided to Council prior to execution of the WIK Agreement.

5.7. Insurances

The Developer must produce evidence of current policies of insurance relevant to the construction of the Works-in-Kind. The values of the policies will be determined having regard to the nature and extent of the Works-in-Kind and the risks inherent in carrying out the Works-In-Kind.

The policies of insurance required include:

- a) Public liability with \$20,000,000 minimum cover (or as otherwise required by Council taking into consideration the nature of the proposed work);
- b) Professional indemnity;
- c) Workers compensation;
- d) Insurance of the works; and
- e) Motor vehicle insurance.

Any insurance to be effected by the developer is to be in the joint names of the Developer and Council and include a cross liability clause.

5.8. Execution

Where Council has resolved to enter into a WIK Agreement, the Developer must execute the WIK Agreement (in duplicate) and submit this to Council for execution together with any other documents as may be required including:

- a) any of the Securities above;
- b) any certificates of currency for the Insurances above; and
- c) construction plans for the Works-in-Kind.

5.9. Approval for Works and Access to Land

Where the Works-in-Kind have not yet been approved, the Developer must lodge a Development Application for the works and obtain the relevant Development Consent and

construction certificate, at its cost, prior to commencement of the works. It is the responsibility of the Developer to ensure that it has all necessary consents to undertake the Works-in-Kind.

It is important for the Developer to understand that Council entering into a WIK Agreement does not imply that Development Consent for the subject work has, or will be given. The standard development assessment process under the Act will apply.

Where the Works-in-Kind are to be undertaken on land not owned by the Developer, the Developer is responsible for making appropriate arrangements with the landowner. Where works are undertaken on the road reserve, consent from Council will be required under Section 138 of the *Roads Act 1993* (NSW) and where works are undertaken on other land owned by Council, an access licence may be required.

5.10. Documentation of Offsets

a. Where Offer is made as part of a Development Application

Where the provision of the Works-in-Kind is negotiated and agreed (and a WIK Agreement is executed by both parties) as part of the Development Application process, the agreed works will be set out in the Development Consent as a condition and the development contributions will be adjusted (or deleted if necessary) to reflect the agreed offset as per the executed WIK Agreement.

b. Where Offer is made following issue of Development Consent

Where the provision of Works-in-Kind is negotiated and agreed (and a WIK Agreement is executed by both parties) following the granting of Development Consent, any existing conditions requiring the payment of the full contributions under the applicable Contributions Plan must be modified. The applicant is to submit a modification application requesting modification of existing development contribution conditions to recognise monetary value of the executed Works-In-Kind agreement.

In such instances, the actual payment required to be made to Council will be calculated by deducting the offset amount as per the executed WIK Agreement from the contribution amount payable under the conditions of the Development Consent.

c. Where Offer is made following issue of Development Consent and Payment of Contributions

It is critical to note that offsets and credits for Works-in-Kind cannot be applied once development contributions have been paid. Council will not refund development contributions which have already been paid by the Developer in association with the development in recognition of Works-in-Kind.

5.11. Commencement of Works

Subject to the Developer obtaining the necessary consents and licences, including a Construction Certificate, for the Works-in-Kind, the Developer must promptly commence and undertake the works in a proper and efficient manner.

Offsets or credits for Works-in-Kind will only be granted where a WIK Agreement has been executed by both parties prior to the commencement of the works. Council will not, under any circumstances, retrospectively reimburse a Developer for any works completed, unless a formal WIK Agreement has been executed by both parties prior to the commencement of the subject works.

5.12. *Variations of Work*

Once Council has agreed to the specific works identified in a WIK Agreement, no additions or alterations, including variations to costs should be made to these works without the prior written consent of Council. Unless approved by Council no credits will be recognised for works carried out by the Developer which exceed the approved contribution.

5.13. *Inspection by Council*

As Council will ultimately be responsible for the Works-in-Kind and the future maintenance of those works, the works will be inspected by Council's representative as they progress to ensure that they are being completed to the standard specified in the WIK Agreement. The proposed timing of these inspections will be identified in the WIK Agreement.

It is important for the Developer to understand that these inspections are separate and distinct from any inspections by Council in its capacity as a consent authority.

The developer is to allow for Council's representative unhindered access to the entire works site.

To facilitate the identification of faults and discussion on rectification options, a representative of the Developer is to accompany Council's representative during the entire duration of the works inspection.

5.14. *Dedication of Works-in-Kind*

Upon completion of the works identified in the WIK Agreement, Council will inspect the works and identify any faults to assess the acceptability of the Works-in-Kind. The Developer will be notified of the outcome of the inspection in writing.

If incomplete works or defective works are identified, the developer will be required to complete the works to Council's satisfaction in accordance with the specifications, the design documents and the WIK agreement. If the works can be accepted by Council, it will issue a Certificate of Practical Completion to the Developer.

Upon rectification of any faults identified, Council will accept dedication of the Works-in-Kind. The Developer must dedicate the works (including by providing Council copies of the works-as-executed drawings) to Council within a timeframe which is acceptable to Council.

The Developer is required to meet all costs associated with the dedication of the Works-in-Kind.

6. OTHER MATTERS

a. *Ownership of works provided by Works-in-Kind Agreements*

Works become the property of Council when they are 'handed over'/dedicated to Council in accordance with, and subject to, the terms of the relevant WIK Agreement. The WIK Agreement will specify a 'hand over date'.

No Credit will be provided for the works until they have been handed over to Council or in the case of works to be completed after a Subdivision Certificate has been issued, appropriate security has been provided for those Works. Where the works are located on land not owned by Council, the 'hand over' of the works will not be accepted until Council owns the land on which the works are located.

When the work undertaken by the Developer includes the 'design' of an item of infrastructure, the design work will become the intellectual property of Council. All plans and related documentation must be provided to Council for credit to be acknowledged for the work.

b. *Standard Template Works-in-Kind Agreement*

Council has invested its resources in preparing a standard WIK Agreement template (refer Attachment A of this Policy). This is to be the standard template used for WIK Agreements. Variations to the WIK Agreement template will only be made at Council's absolute discretion.

c. *Payment of Council's Costs*

The Developer is expected to pay Council's costs that are incidental to negotiating, preparing, entering and enforcing the WIK Agreement, including those related to the engagement of external consultants or quantity surveyors and any or legal costs (including where variation to the standard template WIK Agreement is required).

Assuming a resolution of Council to enter into the WIK Agreement, an invoice for the payment of Council's legal costs will be forwarded to the Developer prior to Council executing the Agreement.

d. *Financial Risk and Liability*

Council does not accept any financial risk associated with the construction of the works and will only cover those attributable costs agreed to in the WIK Agreement entered by the Developer. Any costs beyond this will be borne by the Developer.

Council does not accept any liability for costs associated with altering the design, approval or construction of works if the applicant has received Development Consent for the works prior to execution of a WIK Agreement.

e. *Requirements for Tendering*

Where the value of works to be provided through a WIK Agreement exceeds \$270,000, or the amount otherwise specified in Section 55 of the *Local Government Act 1993* (NSW), the Developer will be required to either:

- submit a brief to enable Council to tender for the works; or

- justify in accordance with Section 55(3) of the Local Government Act why Council should resolve not to require a public tender process.

Upon considering this request, Council may resolve not to tender in accordance Section 55(3) of the *Local Government Act 1993* (NSW), but will still have an obligation to ensure the WIK Agreement provides good value for money.

7. REIMBURSEMENT CLAIMS

A 'reimbursement claim' occurs when a Developer completes works which are identified within a Contributions Plan as part of a development, accepts and pays the full monetary contributions required to be paid as condition of consent under Section 7.11 or Section 7.12 of the Act and then separately seeks reimbursement for the value of the works completed as part of the development. This differs from a WIK Agreement as the developer pays the full contribution, rather than seeking to use the value of the Works-in-Kind to offset or reduce the contributions payable.

While 'reimbursement claims' are not technically WIK Agreements, the process and considerations for each are similar. The process for 'reimbursement claims' is as follows:

- **Pre-lodgement discussions:** At the pre-lodgement meeting for a Development Application, assessing officers will refer to the relevant Contributions Plan to identify works items in the vicinity of, or relating to the development which may be carried out by the Developer.
- **Approval for the works:** The Developer receives Development Consent for the proposed works.
- **Written Application:** The Developer writes to the Council Manager advising of their intent to pay the contributions required under the Development Consent in full and subsequently seek reimbursement for works to be completed as part of the development which are also identified for provision within a Contributions Plan. The written application must satisfy the criteria specified in Part 5.2 a) to i) of this Policy.
- **Council Assessment:** The written application will be considered by Council's internal 'Infrastructure Advisory Group' comprising Council's Group Manager – Strategic Planning, Chief Financial Officer, Manager – Forward Planning, Manager – Infrastructure & Transport Planning, and Manager – Strategic Property & Buildings. The Infrastructure Advisory Group will consider the application having regard to the matters detailed in Part 3 of this Policy.
- **Preliminary Acceptance:** Having regard to the recommendations of the Group Council will advise the developer on a without prejudice basis of whether the 'reimbursement claim' is supported, in principle, subject to formal Council endorsement. The letter will include the agreed value of the reimbursement, the agreed timing of the works and the next steps and any other considerations. If deemed necessary, Council may request additional information to obtain evidence satisfactory to Council of the value of the works, including where appropriate a report by a qualified practicing quantity surveyor.
- **Submission of Draft Agreement:** Council has invested its resources in preparing a standard Reimbursement Agreement template (refer Attachment B of this Policy). This is to be the standard template used for Reimbursement Agreements. Variations to the template will only be made at Council's absolute discretion.
- **Council Consideration of Reimbursement:** Any reimbursement claim must be ratified by Council by way of budget approval and endorsement of the associated expenditure and any budget variations (if required).

It is critical to note that Developers will not be entitled to any reimbursement for works completed unless 'preliminary acceptance' has been provided as above and the expenditure has been endorsed by Council prior to commencement of the works.

ATTACHMENT 1: WORKS-IN-KIND AGREEMENT TEMPLATE



WORKS-IN-KIND AGREEMENT [ADDRESS / APPLICATION]

THE HILLS SHIRE COUNCIL

**[DRAFTING NOTE: INSERT NAME OF EXTERNAL
PARTIES]**

[INSERT DATE]

The Hills Shire Council
3 Columbia Court, Norwest NSW 2153
PO Box 7064, Norwest 2153
Phone (02) 9843 0555

**WORKS-IN-KIND AGREEMENT
SUMMARY SHEET**

Council	Name	The Hills Shire Council
	Address	3 Columbia Court, Norwest NSW 2153
	Telephone	(02) 9843 0555
	Facsimile	(02) 9843 0258
	Email	council@thehills.nsw.gov.au
	Representative	General Manager
Developer	Name	[Drafting Note: to be completed]
	Address	[Drafting Note: to be completed]
	Telephone	[Drafting Note: to be completed]
	Facsimile	[Drafting Note: to be completed]
	Email	[Drafting Note: to be completed]
	Representative	[Drafting Note: to be completed]
Land	[Drafting Note: to be completed]	
Proposed Development	[Drafting Note: to be completed]	
Development Consent	[Drafting Note: to be completed]	
Monetary Contributions	See Schedule 2	
Works	See Schedule 3	
Security	[Drafting Note: to be completed]	
Contribution Plan	[Drafting Note: to be completed]	

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Works-in-Kind Agreement

Dated [Insert]

Parties

The Hills Shire Council ABN 25 034 494 656 of 3 Columbia Court, Norwest NSW 2153 (Council)

"[Developer Name]" ABN "[Insert ABN]" of "[Insert Address]" New South Wales "[Insert Postcode]" (Developer)

"[Landowner Name]" ABN "[Insert ABN]" of "[Insert Address]" New South Wales "[Insert Postcode]" (Landowner)

[Drafting Note: Delete if there is no Landowner party. Insert other Landowner parties if there is more than one Landowner.]

Background

- A. The Developer [intends to undertake]/[is undertaking] [Drafting Note: Delete whichever is inapplicable] the Proposed Development.
- B. In order to meet the demand for the provision of public facilities arising from the Proposed Development, Council has implemented the Contributions Plan.
- C. As a condition of the Development Consent, the Developer is required to make the Monetary Contributions.
- D. To satisfy the obligation to pay the Monetary Contributions, the Developer proposes to carry out the Works.
- E. Council has agreed that if the Works are carried out in accordance with the terms of this document, then such provision will satisfy the Developer's obligation to provide the Monetary Contributions to the extent set out in this document.
- F. This document records the terms upon which the Developer will carry out the Works.

Operative provisions

1. Defined meanings

Words used in this document and the rules of interpretation that apply are set out and explained in clause 24.

2. No restriction on Council's Powers

2.1 The parties acknowledge that Council is a consent authority with statutory rights and obligations pursuant to the terms of the Planning Legislation.

2.2 This document, or anything done under this document:

2.2.1 is not to be taken as approval or consent by Council as a regulatory authority; and

2.2.2 does not in any way operate to inhibit, deter or prejudice the power of Council to make any Laws or the exercise by Council of any statutory functions, duties or powers,

pursuant to the Planning Legislation (**Discretion**).

2.3 No provision of this document is intended to, or does, constitute any unlawful fetter on any Discretion. If, contrary to the operation of this clause, any provision of this document is held by a court of competent jurisdiction to constitute an unlawful fetter on any Discretion, the parties agree:

- a) they will take all practical steps, including the execution of any further documents, to ensure the objective of this clause 2 is substantially satisfied; and
- b) in the event that paragraph (a) cannot be achieved without giving rise to an unlawful fetter on a Discretion, the relevant provision is to be severed and the remainder of this document has full force and effect; and
- c) to endeavour to satisfy the common objectives of the parties on relation to the provision of this document which is held to be an unlawful fetter to the extent that it is possible having regard to the relevant court judgment.

2.4 Where the Law permits Council to contract out of a provision of that Law or gives Council power to exercise a Discretion, then if Council has in this document contracted out of a provision or exercised a Discretion under this document, then to the extent of this document is not to be taken to be inconsistent with the Law.

2.5 Nothing in this document will be deemed to impose any obligation on Council to exercise any of its functions under the Act in relation to the Development Consent, the Land or the Proposed Development in a certain manner.

3. Obligation to Carry Out Works

3.1 The Developer must, at its own cost, carry out and complete the Works at the locations shown on the Location Plan and by the times set out in Schedule 3.

3.2 The Developer's obligation under this clause 3 exists irrespective of whether the Developer:

- 3.2.1 carries out the Works itself, or
- 3.2.2 enters into an agreement with another person under which the other person carries out the Works on the Developer's behalf.

3.3 Before the Developer commences the Works, the Developer, at its own cost, must:

- 3.3.1 prepare and submit to Council or a person specified by Council, detailed plans and specifications in relation to the Work; and
- 3.3.2 obtain Development Consent, and any other form of consent required by a relevant authority, for the construction and use of the Works.

3.4 Council (acting reasonably) may request that the Developer amend the plans and specifications after they are provided by the Developer under clause 3.3, in

which case the Developer must amend the plans and specifications and re-submit them for approval by Council under this clause 3.

3.5 The Developer must not commence the Works unless Council or the person specified by Council, has given the Developer written approval of the plans and specifications relating to the Work.

3.6 The Developer must carry out and complete the Works in accordance with any relevant Australian standards applicable to works of the same nature and in a good and workmanlike manner having regard to the intended purpose of the Works and otherwise to the satisfaction of Council, in accordance with:

3.6.1 the Development Consent;

3.6.2 the specifications set out in Schedule 3;

3.6.3 the Construction Certificate for the Works;

3.6.4 all applicable laws, including those relating to work health and safety;

3.6.5 this document to the extent that it is not inconsistent with the Development Consent or an applicable law; and

3.6.6 the written approval given under 3.5.

3.7 It is the Developer's responsibility to ensure that everything necessary for the proper performance of its obligations under this document has been validly obtained by the Developer.

3.8 The Works are to be Handed-Over to Council:

3.8.1 no later than the Hand-Over Date for the Works, and

3.8.2 otherwise in accordance with this document.

3.9 The materials used for the Works must be new and fit for purpose.

3.10 The Developer must provide to the Council all documentation that Council requests in relation to the Works upon Hand Over which includes but is not limited to receipts for all goods and services paid for by the Developer in relation to the Works.

4. Ownership of Works

4.1 Ownership of the Works passes to Council on Hand-Over and nothing in, or done under, this document gives the Developer, after Hand-Over any right, title or interest in the Works.

4.2 On Hand-Over the Developer must cause the legal title in the Works and all materials and component of the Works to pass to Council free of any Encumbrance. The Developer warrants that after Hand-Over the Works are not subject to any security interest (as defined in the *Personal Property Securities Act 2004* (Cth) (PPSA)) and any security interest noted in the Personal Property Securities Register has been discharged. The Developer indemnifies Council for all claims, costs, losses and expense Council may suffer arising from any

breach of this warranty or any claim or action taken by any person in respect of any security interest (as defined in the PPSA) in the Works.

5. Effect of Developer's Compliance with this document

For the purposes of section 7.11(5)(b) of the Act, Council accepts the provision of the Works as a material public benefit in [Drafting Note: Insert 'part' or 'full'] satisfaction of the requirement of the Developer to pay the Monetary Contributions to the extent of the Contribution Values. [Drafting Note: If the Works are offered in part satisfaction of the Monetary Contributions, specify the value of the offset and remaining Monetary Contributions payable within Clause 5 and the associated Schedule 2]

6. Determination of Value

- 6.1 For the purposes of this document, the parties acknowledge that the Contribution Value in relation to each Item of the Works is the amount specified in Schedule 3.
- 6.2 Subject to clause 6.3, the Contribution Value of the Works is to be offset against the contributions payable by the Developer under the Development Consent. The entitlement of the Developer to this offset arises upon Hand Over of the Works.
- 6.3 No offset can be claimed for an Unclaimable Value.
- 6.4 If the Developer's actual cost of carrying out the Works, including any costs incurred pursuant to this document, determined at the date on which the Works are Handed-Over to the Council, is greater than the Contribution Value, then the Developer is not entitled to claim credit or reimbursement, as the case may be, for the difference.

7. Access to the Land and location of Works

- 7.1 The Developer must permit Council, its officers, employees, agents and contractors to enter the Land at any time, upon giving reasonable prior notice, in order to inspect, examine or test any of the Works.
- 7.2 The Developer must enable Council, its officers, employees, agents and contractors access to the location of the Works where this is not the Land, Council owned land or a public road.

8. Protection of People, Property and the Environment

- 8.1 The Developer must ensure in relation to the carrying out of the Works that:
 - 8.1.1 all necessary measures are taken to protect people, property, and the Environment;
 - 8.1.2 unnecessary interference with the passage of people and vehicles is avoided;
 - 8.1.3 nuisances and unreasonable noise and disturbances are prevented; and
 - 8.1.4 all relevant laws and regulations with respect to water, air, noise and land pollution (including 'pollution incidents') as defined under the Protection of the *Environment Operations Act 1997* (NSW)

9. Damage and Repairs to the Works

The Developer, at its own cost, must repair and make good to the satisfaction of Council any loss or damage to the Works from any cause whatsoever which occurs prior to the date on which the Works are Handed-Over to the Council.

10. Hand-Over of Works

10.1 The Developer must give Council not less than twenty (20) business days written notice of:

10.1.1 the date on which it proposes to Hand-Over any item of Works to Council, being a date not later than the Hand-Over Date; and

10.1.2 the Items of Work the subject of the notice.

10.2 At any time before the date specified in the notice referred to in clause 9, Council may direct the Developer in writing:

10.2.1 to carry out work required to ensure that the relevant Item of Works has been completed in accordance with this document before it is Handed-Over to the Council; and

10.2.2 to Hand-Over the Works completed in accordance with the Council's direction to the Council by a specified date, irrespective of whether that date is later than the Hand-Over Date.

10.3 The Developer must comply with a direction referred to in clause 10.2 according to its terms and at the Developer's own cost.

10.4 Before the Works are Handed-Over to Council, the Developer is to remove from the Land:

10.4.1 any rubbish or surplus material;

10.4.2 any temporary works; and

10.4.3 any construction plant and equipment, relating to the carrying out of the Works as the case requires.

10.5 The Works are taken to be Handed-Over to Council when Council gives the Developer written notice to that effect.

11. Failure to Carry out and Hand-Over Works

11.1 The parties agree that the Hand-Over Date may be extended due to:

11.1.1 any delays on the part of any government authority (including Council in its capacity as consent authority) in granting any approval, consent, license or permit necessary for the Works to be completed; or

11.1.2 any direction Council gives extending the Hand-Over Date.

11.2 If Council considers that the Developer is in breach of any obligation under this document relating to the carrying out of the Works, Council must give the Developer a notice requiring:

11.2.1 the breach to be rectified to Council's satisfaction; or

11.2.2 the carrying out of the Works to immediately cease, except in relation to the rectification of the breach, and the breach to be rectified to Council's satisfaction.

11.3 A notice given under clause 11.2 is to allow the Developer a reasonable period (and in any case not less than twenty eight (28) days) to rectify the breach.

11.4 If the Developer fails to rectify the breach the subject of a notice given under clause 11.2, Council may:

11.4.1 call upon the Primary Security, and

11.4.2 carry out and complete or make safe the Works.

11.5 For the purposes of clause 11.4.2:

11.5.1 the Developer must allow Council, its servants, agents and contractors to enter the Land (or any other land under the control of the Developer that is necessary) for the purpose of completing the Works, and

11.5.2 any difference between the amount of the Primary Security called upon pursuant to clause 11.4.2, and the costs incurred by Council in carrying out, completing, or making safe the Works, may be recovered by Council from the Developer as a debt due in a Court of competent jurisdiction.

12. Works-As-Executed-Plan

12.1 No later than sixty (60) days after the Works are Handed-Over, the Developer is to submit to Council a full Works-As-Executed-Plan(s) in respect of the Works.

12.2 The Developer must provide with the Work-as-Executed Plan(s) all appropriate certificates to verify that the Works have been carried out in accordance with relevant standards.

13. Rectification of Defects

13.1 During the Defects Liability Period Council may give to the Developer a Rectification Notice in relation to the Works specifying:

13.1.1 the Works requiring rectification;

13.1.2 the action required to be undertaken by the Developer to rectify those Works; and

13.1.3 the date on which those Works are to be rectified.

- 13.2 The Developer must comply with a Rectification Notice at its own cost according to the terms of the Rectification Notice.
- 13.3 When the Developer considers that rectification is complete, the Developer may give to Council a Rectification Certificate relating to the Works the subject of the relevant Rectification Notice.
- 13.4 If the Developer does not comply with a Rectification Notice, Council may do such things as are necessary to rectify the defect and may:
- 13.4.1 call upon the Defects Security to meet its costs in rectifying the defect; and
 - 13.4.2 recover, as a debt due in a Court of competent jurisdiction, any difference between the amount of the Defects Security and the costs incurred by Council in rectifying the defect.

14. Cost of Works carried out by the Council

- 14.1 The parties acknowledge and agree that where, in accordance with this document, Council incurs a cost in carrying out, completing or rectifying a defect in the Works, Council may recover from the Developer in a Court of competent jurisdiction its full costs, including costs determined in accordance with clause 14.2.
- 14.2 Council's costs of carrying out, completing or rectifying the Works in accordance with this document include, but are not limited to:
- 14.2.1 the reasonable costs of the Council's servants, agents and contractors reasonably incurred for that purpose;
 - 14.2.2 all fees and charges necessarily or reasonably incurred by Council in order to have the Works carried out, completed, made safe or rectified; and
 - 14.2.3 without limiting the generality of the preceding sub-clause, all legal costs and expenses reasonably incurred by Council, by reason of the Developer's failure to comply with this document.

15. Indemnity and Insurance

- 15.1 The Developer indemnifies Council, its employees, officers, agents and contractors from and against all losses, damages, costs (including legal costs on a full indemnity basis), charges, expenses, actions, claims and demands whatsoever which may be sustained, suffered, recovered or made arising in connection with the carrying out by the Developer of the Works and any other obligation under this document, except to the extent that such losses, damages,

costs, charges, expenses, actions, claims and demands are caused by Council, its employees, officers, agents and contractors.

15.2 The Developer is to take out and keep current to the satisfaction of Council the following insurances in relation to the Works up until the relevant date of Hand-Over to Council:

15.2.1 contract works insurance, noting the Council as an insured party, for the full replacement value of the Works (including the cost of demolition and removal of debris, consultants' fees and authorities' fees), to cover the Developer's liability in respect of damage to or destruction of the Works;

15.2.2 public liability insurance for at least \$20,000,000 for a single occurrence, which covers Council, the Developer and any subcontractor of the Developer, for liability to any third party;

15.2.3 workers compensation insurance as required by law; and

15.2.4 any other insurance required by law.

15.3 If the Developer fails to comply with clause 15.2, Council may effect and keep in force such insurances and pay such premiums as may be necessary for that purpose and the amount so paid shall be a debt due from the Developer to Council and may be recovered by Council as it deems appropriate including:

15.3.1 by calling upon the Security provided by the Developer to Council under this document, or

15.3.2 recovery as a debt due in a Court of competent jurisdiction.

15.4 The Developer is not to commence to carry out the Works unless it has first provided to Council satisfactory written evidence of all the insurances specified in clause 15.2.

16. Provision of Security

16.1 Application of this clause

This clause does not apply if:

16.1.1 the Summary Sheet at the front of this document contains the words "Not Applicable" in relation to the Security, or

16.1.2 Council, by notice in writing to the Developer, has otherwise waived compliance by the Developer with this clause 16.

16.2 Provision of Security

Prior to, or simultaneous with, the execution of this document, the Developer must deliver to Council separate irrevocable and unconditional bank guarantees in a form acceptable to Council:

16.2.1 in an amount equivalent to the Contribution Value (**Primary Security**); and [Drafting Note: amount of primary security may be negotiated between the parties on a case-by-case basis]

16.2.2 in an amount equivalent to fifteen percent (%) [Drafting Note: Insert % amount] of the Contribution Value (**Defects Security**),

(collectively referred to as the **Security**).

16.3 Council may call on Security

If the Developer commits an Event of Default, Council, without limiting any other remedies available to it, may call on any Security to meet the damages incurred by Council as a result of that Event of Default.

16.4 Top up of Security

In addition to any other right to call on the Security under this document, if Council calls on the Security, Council, by notice in writing to the Developer, may require the Developer to provide a further or replacement Security in an amount that, when added to any unused portion of any Security then held by Council, does not exceed the amount of the Security Council is entitled to hold at that time under this document.

16.5 Release of Primary Security

Unless:

16.5.1 Council has made or intends to make a demand against any Security provided by the Developer in respect of any of the Works;

16.5.2 the Works on account of which that Security was provided have not been Completed; or

16.5.3 the Developer is in breach of this document at the relevant time, Council, upon a written request being made by the Developer, must return the Primary Security within ten (10) business days of such a request being made.

16.6 Release of Defects Security

Unless:

16.6.1 Council has made or intends to make a demand against any Security provided by the Developer in respect of any of the Works;

16.6.2 the relevant Defects Liability Period has not expired; or

16.6.3 the Developer is in breach of this document at the relevant time,

Council, upon a written request being made by the Developer, must return the Defects Security within ten (10) business days of such a request being made.

16.7 Indexation of Contribution Values

16.7.1 The Contribution Values will be indexed in accordance with the methods outlined in the applicable contributions plan.

16.7.2 The Developer must ensure that the Security held by Council at all times equals the indexed amount of the Contribution Values notified to the Developer by Council.

17. Default and Termination

17.1 Events of default

The Developer commits an “**Event of Default**” if:

17.1.1 it breaches a term of this document and does not rectify that breach within twenty eight (28) days of receiving notice to do so from Council; or

17.1.2 fails to comply with the terms of any approval with respect to the Works.

17.1.3 Where the Developer commits an Event of Default, Council may:

17.1.3.1 call upon any Security to the extent of any compensation claimed by Council arising from the Event of Default; and/or

17.1.3.2 claim damages for breach of contract from the Developer.

17.1.4 The rights vested in Council pursuant to clause 17.1.3 do not prevent Council from exercising any other rights that it may possess at law.

17.2 Termination

This document may be terminated by a party on the occurrence of the following events:

17.2.1 the parties agree in writing to terminate the operation of this document at any time;

17.2.2 an Insolvency Event affects a party; and

17.2.3 in the case of Council, where the Developer has committed an Event of Default.

17.3 Consequence of termination

Upon termination of this document:

17.3.1 all future rights and obligations of the parties are discharged; and

17.3.2 all pre-existing rights and obligations of the parties continue to subsist.

17.4 Legal costs and expenses

Where this document is terminated by Council as a result of the Developer committing an Event of Default the Developer must pay to Council the amount of any damages suffered by Council and any enforcement costs incurred by Council in enforcing its rights under this document including, without limitation, legal costs (on a solicitor-own client basis) and court costs.

18. Private Certifiers

Where Council is not the certifying authority for any aspect of the Proposed Development the Developer must on the appointment of a private certifier provide a copy of this document to the private certifier.

19. Notices

19.1 Any notice to or by a party under this document must be in writing and signed by the sender or, if a corporate party, an authorised officer of the sender.

19.2 Any notice may be served by delivery in person or by post or transmission by email to the address or number of the recipient specified in the Summary Sheet or most recently notified by the recipient to the sender.

19.3 Any notice is effective for the purposes of this document upon delivery to the recipient or production to the sender of an email receipt confirmation before 4.00pm local time on a day in the place in or to which the written notice is delivered or sent or otherwise at 9.00am on the next day following delivery or receipt.

20. Dispute resolution

20.1 Disputes

If there is any dispute, difference of opinion or failure to agree relating to or arising from this document that dispute must be referred for determination under this clause.

20.2 No legal proceedings

The Parties must not bring or maintain any action on any dispute (except for urgent injunctive relief to keep a particular position) until it has been referred and determined as provided in this clause.

20.3 Notice of disputes (Dispute Notice)

A Party referring a dispute for determination must do so by written notice to the other parties which must specify the nature of the dispute and a nominated officer of the referring party with sufficient authority to determine the dispute.

20.4 Negotiated resolution and selection of expert

20.4.1 On service of the Dispute Notice the receiving Parties must refer the Dispute to an officer with sufficient authority to determine the Dispute. The nominated officers of each Party must meet at least once and use reasonable endeavours to resolve the Dispute by negotiation within ten (10) business days of service of the Dispute Notice. Any resolution must be recorded in writing and signed by each nominated officer. By

agreement, the nominated officers may employ the services of a mediator to assist them in resolving the Dispute.

20.4.2 If the nominated officers are unable to resolve the Dispute within fourteen days of service of the Dispute Notice they must endeavour within the following ten (10) business day period to appoint an expert by agreement. That appointment must be recorded in writing and signed by each nominated officer.

20.4.3 If the nominated officers do not record the appointment of an expert within that second ten (10) business day period, the expert must be appointed, at the request of any party, by the President for the time being (or if none, the senior elected member) of the Law Society of New South Wales.

20.5 Assistance to the Expert (the Expert)

20.5.1 Once the Expert has been appointed, the Parties must:

- (a) each use their best endeavours to make available to the Expert all information the Expert requires to settle or determine the Dispute; and
- (b) ensure that their employees, agents or consultants are available to appear at any hearing or enquiry called by the Expert.

20.5.2 The Parties may give written submissions to the Expert but must provide copies to the other Parties at the same time.

20.6 Expert's decision

20.6.1 The decision of the Expert must:

- (a) be in writing and give reasons; and
- (b) be made and delivered to the parties within one month from the date of submission of the dispute to the Expert or the date of completion of the last hearing or enquiry called by the Expert, if later.

20.6.2 The Expert may conduct the determination of the dispute in any way it considers appropriate but the Expert may, at its discretion, have regard to the Australian Commercial Disputes Centre's guidelines for expert determination of disputes or such other guidelines as it considers appropriate.

20.6.3 The Expert's decision is final and binding on the parties.

20.6.4 The Expert must act as an expert and not as an arbitrator.

20.7 Expert's costs

20.7.1 The Expert must also determine how the expenses relating to the reference of the dispute (including the Expert's remuneration) should

be apportioned between the parties and in default of a decision by the Expert those expenses must be borne by the parties equally.

- 20.7.2 In determining the apportionment of costs the Expert may have regard to what the Expert, in its reasonable opinion, considers to be a lack of good faith or a failure to use reasonable endeavours by any party in assisting the Expert or resolving the dispute between the parties' nominated officers as required by this clause.

20.8 Confidentiality of information provided in dispute resolution process

- 20.8.1 The parties agree, and must procure that Expert agree as a condition of his or her appointment:

20.8.1.1 subject to paragraph 20.8.2, to keep confidential all documents, information and other material disclosed to them during or in relation to the Expert determination;

20.8.1.2 not to disclose any confidential documents, information and other material except to a party or adviser or consultant who has signed a confidentiality undertaking; or if required by Law or any Authority to do so; and

20.8.1.3 not to use confidential documents, information or other material disclosed to them during or in relation to the Expert determination for a purpose other than the Expert determination.

20.8.2 The parties must keep confidential and must not disclose or rely upon or make the subject of a subpoena to give evidence or produce documents in any arbitral, judicial or other proceedings:

20.8.2.1 views expressed or proposals or suggestions made by a party or the Expert during the Expert determination relating to a possible settlement of the Dispute;

20.8.2.2 admissions or concessions made by a party during the Expert determination in relation to the Dispute; and

20.8.2.3 information, documents or other material concerning the dispute which are disclosed by a party during the Expert determination unless such information, documents or facts would be discoverable in judicial or arbitral proceedings.

20.9 Continual performance

Each Party must continue to perform its obligations under this document while any dispute is being determined under this clause.

21. Costs

The Developer must pay or reimburse to Council, Council's costs associated with the negotiation, preparation, exhibition, legal review, administration and enforcement of this document within ten (10) business days of a written demand by Council for such payment.

22. GST

If any payment made by one party to any other party under or relating to this document constitutes consideration for a taxable supply for the purposes of GST or any similar tax, the amount to be paid for the supply will be increased so that the net amount retained by the supplier after payment of that GST is the same as if the supplier was not liable to pay GST in respect of that supply. This provision is subject to any other agreement regarding the payment of GST on specific supplies, and includes payments for supplies relating to the breach or termination of, and indemnities arising from, this document. Unless otherwise expressly stated, prices or other sums payable or consideration to be provided under or in accordance with this document are exclusive of GST.

23. General

23.1 Assignment

- 23.1.1 A party must not transfer any right or liability under this document without the prior consent of each other party, except where this document provides otherwise.
- 23.1.2 In the event that the Developer enters into a contract for the sale of the Land the subject of the Development Consent, the Developer (as vendor) must disclose to the purchaser the existence of this document.

23.2 Governing law and jurisdiction

- 23.2.1 This document is governed by and construed under the law in the State of New South Wales.
- 23.2.2 Any legal action in relation to this document against any party or its property may be brought in any court of competent jurisdiction in the State of New South Wales.
- 23.2.3 Each party by execution of this document irrevocably, generally and unconditionally submits to the non-exclusive jurisdiction of any court specified in this provision in relation to both itself and its property.

23.3 Relationship between the parties

- 23.3.1 No term of this agreement is to be construed so as to give rise to a Proscribed Relationship.
- 23.3.2 Each party must not represent, or otherwise foster the understanding, that the relationship between them is a Proscribed Relationship or represent or otherwise hold themselves out as representing or having the ability to bind the other party.

23.4 Amendments

Any amendment to this document has no force or effect, unless effected by a document executed by the parties.

23.5 Third parties

This document confers rights only upon a person expressed to be a party, and not upon any other person.

23.6 Pre-contractual negotiation

23.6.1 This document:

- (a) expresses and incorporates the entire agreement between the parties in relation to its subject matter, and all the terms of that agreement; and
- (b) supersedes and excludes any prior or collateral negotiation, understanding, communication or agreement by or between the parties in relation to that subject matter or any term of that agreement.

23.7 Further assurance

Each party must execute any document and perform any action necessary to give full effect to this document, whether before or after performance of this document.

23.8 Continuing performance

- (a) The provisions of this document do not merge with any action performed or document executed by any party for the purposes of performance of this document.
- (b) Any representation in this document survives the execution of any document for the purposes of, and continues after, performance of this document.
- (c) Any indemnity agreed by any party under this document:
 - (i) constitutes a liability of that party separate and independent from any other liability of that party under this document or any other agreement; and
 - (ii) survives and continues after performance of this document.

23.9 Waivers

Any failure by any party to exercise any right under this document does not operate as a waiver and the single or partial exercise of any right by that party does not preclude any other or further exercise of that or any other right by that party.

23.10 Remedies

The rights of a party under this document are cumulative and not exclusive of any rights provided by law.

23.11 Counterparts

This document may be executed in any number of counterparts, all of which taken together are deemed to constitute one and the same document. A party

who has executed a counterpart of this document may exchange it with another party by emailing a pdf (portable document format) copy of, the executed counterpart to that other party, and if requested by that other party, will promptly deliver the original by hand or post. Failure to make that delivery will not affect the validity and enforceability of this document.

23.12 **Party acting as trustee**

If a party enters into this document as trustee of a trust, that party and its successors as trustee of the trust will be liable under this document in its own right and as trustee of the trust. Nothing releases the party from any liability in its personal capacity. The party warrants that at the date of this document:

- (a) all the powers and discretions conferred by the deed establishing the trust are capable of being validly exercised by the party as trustee and have not been varied or revoked and the trust is a valid and subsisting trust;
- (b) the party is the sole trustee of the trust and has full and unfettered power under the terms of the deed establishing the trust to enter into and be bound by this document on behalf of the trust and that this document is being executed and entered into as part of the due and proper administration of the trust and for the benefit of the beneficiaries of the trust;
- (c) no restriction on the party's right of indemnity out of or lien over the trust's assets exists or will be created or permitted to exist and that right will have priority over the right of the beneficiaries to the trust's assets.

23.13 **Representations and warranties**

The Parties represent and warrant that they have power to enter into this document and comply with their obligations under the document and that entry into this document will not result in the breach of any law.

23.14 **Severability**

If a clause or part of a clause of this document can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this document, but the rest of this document is not affected.

24. **Definitions and interpretation**

In this document unless the context otherwise requires:

Act means the *Environmental Planning and Assessment Act 1979* (NSW).

Bank Guarantee means an irrevocable and unconditional written guarantee without any expiry date acceptable to Council and issued by an Australian Bank.

Business Day means a day that is not a Saturday, Sunday, public holiday or bank holiday in New South Wales.

Construction Certificate has the same meaning as in the Act.

Contributions Plan means the Section 7.11 Contributions Plan specified in the Summary Sheet.

Contribution Value means the amount specified for each item of Work in Column 4 of Schedule 3 in relation to the Works specified in Column 1 of that Schedule.

Defects Security has the meaning ascribed to it in clause 16.2.2

Development Application means the development application for the Development Consent.

Development Consent means the development consent granted by the Council under section 4.16 of the Act specified in the Summary Sheet.

Defects Liability Period means the period specified in Column 3 of Schedule 3 in relation to the Works specified in Column 1 of that Schedule commencing on the date a notice is given under clause 10.5 in relation to those Works.

Encumbrance includes any mortgage or charge, lease, (or other right of occupancy) or profit a prendre or other interest.

Event of Default has the meaning ascribed to it in clause 17.

Environment has the same meaning as set out in the Dictionary to the Protection of the Environment Operations Act 1997 (NSW).

GST means any tax, levy, charge or impost implemented under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GST Act) or an Act of the Parliament of the Commonwealth of Australia substantially in the form of, or which has a similar effect to, the GST Act.

Hand-Over means the hand-over to the Council of the Works in accordance with this document.

Hand-Over Date means the date specified in Column 2 of Schedule 3 in relation to the Works specified in Column 1 of that Schedule corresponding to that date, subject to any extension of that date under clause 12.

Hand-Over Notice means a notice issued by the Council under clause 11.

Insolvency Event means the happening of any of the following events:

- (a) Application which is not withdrawn or dismissed within 14 days is made to a court for an order or an order is made that a body corporate be wound up.
- (b) An application which is not withdrawn or dismissed within 14 days is made to a court for an order appointing a liquidator or provisional liquidator in respect of a body corporate or one of them is appointed, whether or not under an order.
- (c) Except to reconstruct or amalgamate while solvent, a body corporate enters into, or resolves to enter into, a scheme of arrangement, agreement of company arrangement or composition with, or assignment for the benefit of, all or any class of its creditors, or it proposes a reorganisation, moratorium or other administration involving any of them.
- (d) A body corporate resolves to wind itself up, or otherwise dissolve itself, or gives notice of intention to do so, except to reconstruct or amalgamate while solvent or is otherwise wound up or dissolved.
- (e) A body corporate is or states that it is insolvent.

- (f) As a result of the operation of section 459F(1) of the Corporations Act, a body corporate is taken to have failed to comply with a statutory demand.
- (g) A body corporate is or makes a statement from which it may be reasonably deduced that the body corporate is, the subject of an event described in section 459C(2)(b) or section 585 of the Corporations Act.
- (h) A body corporate takes any step to obtain protection or is granted protection from its creditors, under any applicable legislation or an administrator is appointed to a body corporate.
- (i) A person becomes an insolvent under administration as defined in section 9 of the Corporations Act or action is taken which could result in that event;
- (j) A receiver, manager or receiver and manager is appointed to the Company;
- (k) A body corporate becomes an externally administered body corporate within the meaning of the Corporations Act;
- (l) A claim is filed in a court against a person that is not defended, released or otherwise settled within 28 days of the date of its filing at the court; or
- (m) Anything analogous or having a substantially similar effect to any of the events specified above happens under the law of any applicable jurisdiction.

Item of Works means an individual item of the Works.

Land means the land on which the Works are being carried out.

Location Plan means the plan contained in Schedule 1.

Monetary Contributions means the monetary development contributions required to be paid to the Council under the conditions of the Development Consent as specified in Schedule 2.

Planning Legislation means the Act, the *Local Government Act 1993* (NSW) and the *Roads Act 1993* (NSW).

Primary Security has the meaning ascribed to it in clause 16.2.1.

Proposed Development means the proposed development as described in the Summary Sheet.

Proscribed Relationship means any of the following relationships:

- (a) Principal and independent contractor.
- (b) Joint venturers.
- (c) Partners.
- (d) Trustee and beneficiary.
- (e) Employer and employee.

Rectification Certificate means a certificate issued by the Developer to the satisfaction of Council to the effect that work the subject of a Rectification Notice has been completed in accordance with the notice.

Rectification Notice means a notice in writing that identifies a defect in an Item of Work and requires rectification of the defect within a specified period of time.

Regulation means the *Environmental Planning and Assessment Regulation 2021* (NSW).

Security means the Primary Security and Defects Security (if applicable).

Summary Sheet means the summary sheet at the front of this document.

Unclaimable Value means the difference between the approved Works in Kind and the Contributions Plan value for the relevant infrastructure category as a condition of development consent that the Developer cannot claim as an offset.

Works means the works specified or described in Schedule 3 and includes any Item of Works and any part of any Item of Works.

Works-As-Executed-Plan means detailed plans and specifications of the completed Works.

25. Interpretation

In this document unless the context otherwise requires:

- (a) clause and subclause headings are for reference purposes only;
- (b) the singular includes the plural and vice versa;
- (c) words denoting any gender include all genders;
- (d) reference to a person includes any other entity recognised by law and vice versa;
- (e) where a word or phrase is defined its other grammatical forms have a corresponding meaning;
- (f) any reference to a party to this document includes its successors and permitted assigns;
- (g) any reference to a provision of an Act or Regulation is a reference to that provision as at the date of this document;
- (h) any reference to any agreement or document includes that agreement or document as amended at any time;
- (i) the use of the word **includes** or **including** is not to be taken as limiting the meaning of the words preceding it;
- (j) the expression **at any time** includes reference to past, present and future time and the performance of any action from time to time;
- (k) an agreement, representation or warranty on the part of two or more persons binds them jointly and severally;
- (l) an agreement, representation or warranty on the part of two or more persons is for the benefit of them jointly and severally;

- (m) reference to an exhibit, annexure, attachment or schedule is a reference to the corresponding exhibit, annexure, attachment or schedule in this document;
- (n) reference to a provision described, prefaced or qualified by the name, heading or caption of a clause, subclause, paragraph, schedule, item, annexure, exhibit or attachment in this document means a cross reference to that clause, subclause, paragraph, schedule, item, annexure, exhibit or attachment;
- (o) when a thing is required to be done or money required to be paid under this document on a day which is not a Business Day, the thing must be done and the money paid on the immediately following Business Day; and
- (p) reference to a statute includes all regulations and amendments to that statute and any statute passed in substitution for that statute or incorporating any of its provisions to the extent that they are incorporated.

Schedule 1 – Location Plan

[Drafting Note: Insert a copy of a Location Plan, showing the location of the Works]

Schedule 2 – Monetary Contributions

[Drafting Note: Insert amount of monetary contributions required to be paid under the development consent as well as the revised monetary contributions pursuant to the Agreement being executed]

Schedule 3 – Works

Column 1	Column 2	Column 3	Column 4	Column 5
Items of Works	Hand-Over Date	Defects Liability Period	Contribution Value	Specification
[Drafting Note: To be completed]	[Drafting Note: To be completed]	[Drafting Note: To be completed]	[Drafting Note: To be completed]	[Drafting Note: To be completed]
[Drafting Note: To be completed]	[Drafting Note: To be completed]	[Drafting Note: To be completed]	[Drafting Note: To be completed]	[Drafting Note: To be completed]

Execution Page

Executed as a deed

The common seal of The Hills Shire Council
was affixed under a resolution passed by
council on
in the presence of:

Mayor

Print Name

Signed, sealed and delivered by the Developer
in accordance with s127 of the Corporations
Act 2001 (Cth):

Secretary/Director

Director

Print name

Print name

ATTACHMENT 2: REIMBURSEMENT AGREEMENT TEMPLATE



REIMBURSEMENT AGREEMENT [ADDRESS / APPLICATION]

THE HILLS SHIRE COUNCIL

**[DRAFTING NOTE: INSERT NAME OF EXTERNAL
PARTIES]**

[INSERT DATE]

The Hills Shire Council
3 Columbia Court, Norwest NSW 2153
PO Box 7064, Norwest 2153
Phone (02) 9843 0555

**REIMBURSEMENT AGREEMENT
SUMMARY SHEET**

Council	Name	The Hills Shire Council
	Address	3 Columbia Court, Norwest NSW 2153
	Telephone	(02) 9843 0555
	Facsimile	(02) 9843 0258
	Email	council@thehills.nsw.gov.au
	Representative	General Manager
Developer	Name	[Drafting Note: to be completed]
	Address	[Drafting Note: to be completed]
	Telephone	[Drafting Note: to be completed]
	Facsimile	[Drafting Note: to be completed]
	Email	[Drafting Note: to be completed]
	Representative	[Drafting Note: to be completed]
Land	[Drafting Note: to be completed]	
Proposed Development	[Drafting Note: to be completed]	
Development Consent	[Drafting Note: to be completed]	
Monetary Contributions	See Schedule 2	
Works	See Schedule 3	
Security	[Drafting Note: to be completed]	
Contribution Plan	[Drafting Note: to be completed]	
Timing of Payment	[Drafting Note: to be completed]	

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Reimbursement Agreement

Dated [Insert]

Parties

The Hills Shire Council ABN 25 034 494 656 of 3 Columbia Court, Norwest NSW 2153 (Council)

"[Developer Name]" ABN "[Insert ABN]" of "[Insert Address]" New South Wales "[Insert Postcode]" (Developer)

"[Landowner Name]" ABN "[Insert ABN]" of "[Insert Address]" New South Wales "[Insert Postcode]" (Landowner)

[Drafting Note: Delete if there is no Landowner party. Insert other Landowner parties if there is more than one Landowner.]

Background

- A. The Developer [intends to undertake]/[is undertaking] [Drafting Note: Delete whichever is inapplicable] the Proposed Development.
- B. In order to meet the demand for the provision of public facilities arising from the Proposed Development, Council has implemented the Contributions Plan.
- C. The Developer has agreed to undertake the Works which are part of the Contributions Plan
- D. Council will pay the developer the Agreed Value of the Works upon satisfactory completion and satisfaction of the conditions set out in this agreement.
- E. This document records the terms upon which the Developer will carry out the Works.

Operative provisions

1. Defined meanings

Words used in this document and the rules of interpretation that apply are set out and explained in clause 24.

2. No restriction on Council's Powers

2.1 The parties acknowledge that Council is a consent authority with statutory rights and obligations pursuant to the terms of the Planning Legislation.

2.2 This document, or anything done under this document:

2.2.1 is not to be taken as approval or consent by Council as a regulatory authority; and

2.2.2 does not in any way operate to inhibit, deter or prejudice the power of Council to make any Laws or the exercise by Council of any statutory functions, duties or powers,

pursuant to the Planning Legislation (**Discretion**).

2.3 No provision of this document is intended to, or does, constitute any unlawful fetter on any Discretion. If, contrary to the operation of this clause, any provision of this document is held by a court of competent jurisdiction to constitute an unlawful fetter on any Discretion, the parties agree:

a) they will take all practical steps, including the execution of any further documents, to ensure the objective of this clause 2 is substantially satisfied; and

b) in the event that paragraph (a) cannot be achieved without giving rise to an unlawful fetter on a Discretion, the relevant provision is to be severed and the remainder of this document has full force and effect; and

c) to endeavour to satisfy the common objectives of the parties on relation to the provision of this document which is held to be an unlawful fetter to the extent that it is possible having regard to the relevant court judgment.

2.4 Where the Law permits Council to contract out of a provision of that Law or gives Council power to exercise a Discretion, then if Council has in this document contracted out of a provision or exercised a Discretion under this document, then to the extent of this document is not to be taken to be inconsistent with the Law.

2.5 Nothing in this document will be deemed to impose any obligation on Council to exercise any of its functions under the Act in relation to the Development Consent, the Land or the Proposed Development in a certain manner.

3. Obligation to Pay Contributions

3.1 It is agreed and acknowledged in this agreement that the development must accept and pay the full monetary contributions to be paid as a condition of consent under s7.11 or 7.12 of the Act prior to seeking or being entitled to a reimbursement under this agreement.

3.2 It is agreed and acknowledged by the parties to this agreement that it is not a form of 'works in kind' agreement nor an agreement to offset or reduce the contributions payable by the developer.

4. Obligation to Carry Out Works

- 3.1 The Developer must, at its own cost, carry out and complete the Works at the locations shown on the Location Plan and by the times set out in Schedule 3.
- 3.2 The Developer's obligation under this clause 3 exists irrespective of whether the Developer:
 - 3.2.1 carries out the Works itself, or
 - 3.2.2 enters into an agreement with another person under which the other person carries out the Works on the Developer's behalf.
- 3.3 Before the Developer commences the Works, the Developer, at its own cost, must:
 - 3.3.1 prepare and submit to Council or a person specified by Council, detailed plans and specifications in relation to the Work; and
 - 3.3.2 obtain Development Consent, and any other form of consent required by a relevant authority, for the construction and use of the Works.
- 3.4 Council (acting reasonably) may request that the Developer amend the plans and specifications after they are provided by the Developer under clause 3.3, in which case the Developer must amend the plans and specifications and re-submit them for approval by Council under this clause 3.
- 3.5 The Developer must not commence the Works unless Council or the person specified by Council, has given the Developer written approval of the plans and specifications relating to the Work.
- 3.6 The Developer must carry out and complete the Works in accordance with any relevant Australian standards applicable to works of the same nature and in a good and workmanlike manner having regard to the intended purpose of the Works and otherwise to the satisfaction of Council, in accordance with:
 - 3.6.1 the Development Consent;
 - 3.6.2 the specifications set out in Schedule 3;
 - 3.6.3 the Construction Certificate for the Works;
 - 3.6.4 all applicable laws, including those relating to work health and safety;
 - 3.6.5 this document to the extent that it is not inconsistent with the Development Consent or an applicable law; and
 - 3.6.6 the written approval given under 3.5.

- 3.7 It is the Developer's responsibility to ensure that everything necessary for the proper performance of its obligations under this document has been validly obtained by the Developer.
- 3.8 The Works are to be Handed-Over to Council:
 - 3.8.1 no later than the Hand-Over Date for the Works, and
 - 3.8.2 otherwise in accordance with this document.
- 3.9 The materials used for the Works must be new and fit for purpose.
- 3.10 The Developer must provide to the Council all documentation that Council requests in relation to the Works upon Hand Over which includes but is not limited to receipts for all goods and services paid for by the Developer in relation to the Works.

5. Ownership of Works

- 4.1 Ownership of the Works passes to Council on Hand-Over and nothing in, or done under, this document gives the Developer, after Hand-Over any right, title or interest in the Works.
- 4.2 On Hand-Over the Developer must cause the legal title in the Works and all materials and component of the Works to pass to Council free of any Encumbrance. The Developer warrants that after Hand-Over the Works are not subject to any security interest (as defined in the *Personal Property Securities Act 2004* (Cth) (PPSA)) and any security interest noted in the Personal Property Securities Register has been discharged. The Developer indemnifies Council for all claims, costs, losses and expense Council may suffer arising from any breach of this warranty or any claim or action taken by any person in respect of any security interest (as defined in the PPSA) in the Works.

6. Determination of Agreed Value

- 6.1 For the purposes of this document, the parties acknowledge that the Agreed Value in relation to each Item of the Works is the amount specified in Schedule 3.
- 6.2 If the Developer's actual cost of carrying out the Works, including any costs incurred pursuant to this document, determined at the date on which the Works are Handed-Over to the Council, is greater than the Agreed Value, then the Developer is not entitled to claim credit or reimbursement, as the case may be, for the difference.

7. Access to the Land and location of Works

- 7.1 The Developer must permit Council, its officers, employees, agents and contractors to enter the Land at any time, upon giving reasonable prior notice, in order to inspect, examine or test any of the Works.
- 7.2 The Developer must enable Council, its officers, employees, agents and contractors access to the location of the Works where this is not the Land, Council owned land or a public road.

8. Protection of People, Property and the Environment

8.1 The Developer must ensure in relation to the carrying out of the Works that:

- 8.1.1 all necessary measures are taken to protect people, property, and the Environment;
- 8.1.2 unnecessary interference with the passage of people and vehicles is avoided;
- 8.1.3 nuisances and unreasonable noise and disturbances are prevented; and
- 8.1.4 all relevant laws and regulations with respect to water, air, noise and land pollution (including 'pollution incidents') as defined under the Protection of the *Environment Operations Act 1997* (NSW)

9. Damage and Repairs to the Works

The Developer, at its own cost, must repair and make good to the satisfaction of Council any loss or damage to the Works from any cause whatsoever which occurs prior to the date on which the Works are Handed-Over to the Council.

10. Hand-Over of Works

10.1 The Developer must give Council not less than twenty (20) business days written notice of:

- 10.1.1 the date on which it proposes to Hand-Over any item of Works to Council, being a date not later than the Hand-Over Date; and
- 10.1.2 the Items of Work the subject of the notice.

10.2 At any time before the date specified in the notice referred to in clause 9, Council may direct the Developer in writing:

- 10.2.1 to carry out work required to ensure that the relevant Item of Works has been completed in accordance with this document before it is Handed-Over to the Council; and
- 10.2.2 to Hand-Over the Works completed in accordance with the Council's direction to the Council by a specified date, irrespective of whether that date is later than the Hand-Over Date.

10.3 The Developer must comply with a direction referred to in clause 10.2 according to its terms and at the Developer's own cost.

10.4 Before the Works are Handed-Over to Council, the Developer is to remove from the Land:

- 10.4.1 any rubbish or surplus material;
- 10.4.2 any temporary works; and
- 10.4.3 any construction plant and equipment, relating to the carrying out of the Works as the case requires.

- 10.5 The Works are taken to be Handed-Over to Council when Council gives the Developer written notice to that effect.

11. Failure to Carry out and Hand-Over Works

- 11.1 The parties agree that the Hand-Over Date may be extended due to:
- 11.1.1 any delays on the part of any government authority (including Council in its capacity as consent authority) in granting any approval, consent, license or permit necessary for the Works to be completed; or
 - 11.1.2 any direction Council gives extending the Hand-Over Date.
- 11.2 If Council considers that the Developer is in breach of any obligation under this document relating to the carrying out of the Works, Council must give the Developer a notice requiring:
- 11.2.1 the breach to be rectified to Council's satisfaction; or
 - 11.2.2 the carrying out of the Works to immediately cease, except in relation to the rectification of the breach, and the breach to be rectified to Council's satisfaction.
- 11.3 A notice given under clause 11.2 is to allow the Developer a reasonable period (and in any case not less than twenty eight (28) days) to rectify the breach.
- 11.4 If the Developer fails to rectify the breach the subject of a notice given under clause 11.2, Council may:
- 11.4.1 call upon the Primary Security, and
 - 11.4.2 carry out and complete or make safe the Works.
- 11.5 For the purposes of clause 11.4.2:
- 11.5.1 the Developer must allow Council, its servants, agents and contractors to enter the Land (or any other land under the control of the Developer that is necessary) for the purpose of completing the Works, and
 - 11.5.2 any difference between the amount of the Primary Security called upon pursuant to clause 11.4.2, and the costs incurred by Council in carrying out, completing, or making safe the Works, may be recovered by Council from the Developer as a debt due in a Court of competent jurisdiction.

12. Works-As-Executed-Plan

- 12.1 No later than sixty (60) days after the Works are Handed-Over, the Developer is to submit to Council a full Works-As-Executed-Plan(s) in respect of the Works.
- 12.2 The Developer must provide with the Work-as-Executed Plan(s) all appropriate certificates to verify that the Works have been carried out in accordance with relevant standards.

13. Rectification of Defects

- 13.1 During the Defects Liability Period Council may give to the Developer a Rectification Notice in relation to the Works specifying:
 - 13.1.1 the Works requiring rectification;
 - 13.1.2 the action required to be undertaken by the Developer to rectify those Works; and
 - 13.1.3 the date on which those Works are to be rectified.
- 13.2 The Developer must comply with a Rectification Notice at its own cost according to the terms of the Rectification Notice.
- 13.3 When the Developer considers that rectification is complete, the Developer may give to Council a Rectification Certificate relating to the Works the subject of the relevant Rectification Notice.
- 13.4 If the Developer does not comply with a Rectification Notice, Council may do such things as are necessary to rectify the defect and may:
 - 13.4.1 call upon the Defects Security to meet its costs in rectifying the defect; and
 - 13.4.2 recover, as a debt due in a Court of competent jurisdiction, any difference between the amount of the Defects Security and the costs incurred by Council in rectifying the defect.

14. Cost of Works carried out by the Council

- 14.1 The parties acknowledge and agree that where, in accordance with this document, Council incurs a cost in carrying out, completing or rectifying a defect in the Works, Council may recover from the Developer in a Court of competent jurisdiction its full costs, including costs determined in accordance with clause 14.2.
- 14.2 Council's costs of carrying out, completing or rectifying the Works in accordance with this document include, but are not limited to:
 - 14.2.1 the reasonable costs of the Council's servants, agents and contractors reasonably incurred for that purpose;
 - 14.2.2 all fees and charges necessarily or reasonably incurred by Council in order to have the Works carried out, completed, made safe or rectified; and
 - 14.2.3 without limiting the generality of the preceding sub-clause, all legal costs and expenses reasonably incurred by Council, by reason of the Developer's failure to comply with this document.

15. Indemnity and Insurance

- 15.1 The Developer indemnifies Council, its employees, officers, agents and contractors from and against all losses, damages, costs (including legal costs on a full indemnity basis), charges, expenses, actions, claims and demands whatsoever which may be sustained, suffered, recovered or made arising in connection with the carrying out by the Developer of the Works and any other obligation under this document, except to the extent that such losses, damages, costs, charges, expenses, actions, claims and demands are caused by Council, its employees, officers, agents and contractors.
- 15.2 The Developer is to take out and keep current to the satisfaction of Council the following insurances in relation to the Works up until the relevant date of Hand-Over to Council:
 - 15.2.1 contract works insurance, noting the Council as an insured party, for the full replacement value of the Works (including the cost of demolition and removal of debris, consultants' fees and authorities' fees), to cover the Developer's liability in respect of damage to or destruction of the Works;
 - 15.2.2 public liability insurance for at least \$20,000,000 for a single occurrence, which covers Council, the Developer and any subcontractor of the Developer, for liability to any third party;
 - 15.2.3 workers compensation insurance as required by law; and
 - 15.2.4 any other insurance required by law.
- 15.3 If the Developer fails to comply with clause 15.2, Council may effect and keep in force such insurances and pay such premiums as may be necessary for that purpose and the amount so paid shall be a debt due from the Developer to Council and may be recovered by Council as it deems appropriate including:
 - 15.3.1 by calling upon the Security provided by the Developer to Council under this document, or
 - 15.3.2 recovery as a debt due in a Court of competent jurisdiction.
- 15.4 The Developer is not to commence to carry out the Works unless it has first provided to Council satisfactory written evidence of all the insurances specified in clause 15.2.

16. Provision of Security

16.1 Application of this clause

This clause does not apply if:

- 16.1.1 the Summary Sheet at the front of this document contains the words “Not Applicable” in relation to the Security, or
- 16.1.2 Council, by notice in writing to the Developer, has otherwise waived compliance by the Developer with this clause 0.

16.2 Provision of Security

Prior to, or simultaneous with, the execution of this document, the Developer must deliver to Council separate irrevocable and unconditional bank guarantees in a form acceptable to Council:

- 16.2.1 in an amount equivalent to the-Agreed Value (**Primary Security**); and
[Drafting Note: amount of primary security may be negotiated between the parties on a case-by-case basis]
- 16.2.2 in an amount equivalent to 5 percent (#%) [Drafting Note: Insert #%% amount] of the Agreed Value (**Defects Security**),

(collectively referred to as the **Security**).

16.3 Council may call on Security

If the Developer commits an Event of Default, Council, without limiting any other remedies available to it, may call on any Security to meet the damages incurred by Council as a result of that Event of Default.

16.4 Top up of Security

In addition to any other right to call on the Security under this document, if Council calls on the Security, Council, by notice in writing to the Developer, may require the Developer to provide a further or replacement Security in an amount that, when added to any unused portion of any Security then held by Council, does not exceed the amount of the Security Council is entitled to hold at that time under this document.

16.5 Release of Primary Security

Unless:

- 16.5.1 Council has made or intends to make a demand against any Security provided by the Developer in respect of any of the Works;
 - 16.5.2 the Works on account of which that Security was provided have not been Completed; or
 - 16.5.3 the Developer is in breach of this document at the relevant time,
- Council, upon a written request being made by the Developer, must return the Primary Security within ten (10) business days of such a request being made.

16.6 Release of Defects Security

Unless:

- 16.6.1 Council has made or intends to make a demand against any Security provided by the Developer in respect of any of the Works;
 - 16.6.2 the relevant Defects Liability Period has not expired; or
 - 16.6.3 the Developer is in breach of this document at the relevant time,
- Council, upon a written request being made by the Developer, must return the Defects Security within ten (10) business days of such a request being made.

16.7 Indexation of Agreed Value

- 16.7.1 The Agreed Value will be not be subject to indexation.

17. Default and Termination

17.1 Events of default

The Developer commits an “**Event of Default**” if:

- 17.1.1 it breaches a term of this document and does not rectify that breach within twenty eight (28) days of receiving notice to do so from Council; or
- 17.1.2 fails to comply with the terms of any approval with respect to the Works.
- 17.1.3 Where the Developer commits an Event of Default, Council may:
 - 17.1.3.1 call upon any Security to the extent of any compensation claimed by Council arising from the Event of Default; and/or
 - 17.1.3.2 claim damages for breach of contract from the Developer.
- 17.1.4 The rights vested in Council pursuant to clause 17.1.3 do not prevent Council from exercising any other rights that it may possess at law.

17.2 Termination

This document may be terminated by a party on the occurrence of the following events:

- 17.2.1 the parties agree in writing to terminate the operation of this document at any time;
- 17.2.2 an Insolvency Event affects a party; and
- 17.2.3 in the case of Council, where the Developer has committed an Event of Default.

17.3 Consequence of termination

Upon termination of this document:

17.3.1 all future rights and obligations of the parties are discharged; and

17.3.2 all pre-existing rights and obligations of the parties continue to subsist.

17.4 Legal costs and expenses

Where this document is terminated by Council as a result of the Developer committing an Event of Default the Developer must pay to Council the amount of any damages suffered by Council and any enforcement costs incurred by Council in enforcing its rights under this document including, without limitation, legal costs (on a solicitor-own client basis) and court costs.

18. Private Certifiers

Where Council is not the certifying authority for any aspect of the Proposed Development the Developer must on the appointment of a private certifier provide a copy of this document to the private certifier.

19. Notices

19.1 Any notice to or by a party under this document must be in writing and signed by the sender or, if a corporate party, an authorised officer of the sender.

19.2 Any notice may be served by delivery in person or by post or transmission by email to the address or number of the recipient specified in the Summary Sheet or most recently notified by the recipient to the sender.

19.3 Any notice is effective for the purposes of this document upon delivery to the recipient or production to the sender of an email receipt confirmation before 4.00pm local time on a day in the place in or to which the written notice is delivered or sent or otherwise at 9.00am on the next day following delivery or receipt.

20. Dispute resolution

20.1 Disputes

If there is any dispute, difference of opinion or failure to agree relating to or arising from this document that dispute must be referred for determination under this clause.

20.2 No legal proceedings

The Parties must not bring or maintain any action on any dispute (except for urgent injunctive relief to keep a particular position) until it has been referred and determined as provided in this clause.

20.3 Notice of disputes (Dispute Notice)

A Party referring a dispute for determination must do so by written notice to the other parties which must specify the nature of the dispute and a nominated officer of the referring party with sufficient authority to determine the dispute.

20.4 Negotiated resolution and selection of expert

- 20.4.1 On service of the Dispute Notice the receiving Parties must refer the Dispute to an officer with sufficient authority to determine the Dispute. The nominated officers of each Party must meet at least once and use reasonable endeavours to resolve the Dispute by negotiation within ten (10) business days of service of the Dispute Notice. Any resolution must be recorded in writing and signed by each nominated officer. By agreement, the nominated officers may employ the services of a mediator to assist them in resolving the Dispute.
- 20.4.2 If the nominated officers are unable to resolve the Dispute within fourteen days of service of the Dispute Notice they must endeavour within the following ten (10) business day period to appoint an expert by agreement. That appointment must be recorded in writing and signed by each nominated officer.
- 20.4.3 If the nominated officers do not record the appointment of an expert within that second ten (10) business day period, the expert must be appointed, at the request of any party, by the President for the time being (or if none, the senior elected member) of the Law Society of New South Wales.

20.5 Assistance to the Expert (the Expert)

- 20.5.1 Once the Expert has been appointed, the Parties must:
 - (a) each use their best endeavours to make available to the Expert all information the Expert requires to settle or determine the Dispute; and
 - (b) ensure that their employees, agents or consultants are available to appear at any hearing or enquiry called by the Expert.
- 20.5.2 The Parties may give written submissions to the Expert but must provide copies to the other Parties at the same time.

20.6 Expert's decision

- 20.6.1 The decision of the Expert must:
 - (a) be in writing and give reasons; and
 - (b) be made and delivered to the parties within one month from the date of submission of the dispute to the Expert or the date of completion of the last hearing or enquiry called by the Expert, if later.
- 20.6.2 The Expert may conduct the determination of the dispute in any way it considers appropriate but the Expert may, at its discretion, have regard to the Australian Commercial Disputes Centre's guidelines for expert determination of disputes or such other guidelines as it considers appropriate.

20.6.3 The Expert's decision is final and binding on the parties.

20.6.4 The Expert must act as an expert and not as an arbitrator.

20.7 Expert's costs

20.7.1 The Expert must also determine how the expenses relating to the reference of the dispute (including the Expert's remuneration) should be apportioned between the parties and in default of a decision by the Expert those expenses must be borne by the parties equally.

20.7.2 In determining the apportionment of costs the Expert may have regard to what the Expert, in its reasonable opinion, considers to be a lack of good faith or a failure to use reasonable endeavours by any party in assisting the Expert or resolving the dispute between the parties' nominated officers as required by this clause.

20.8 Confidentiality of information provided in dispute resolution process

20.8.1 The parties agree, and must procure that Expert agree as a condition of his or her appointment:

20.8.1.1 subject to paragraph 20.8.2, to keep confidential all documents, information and other material disclosed to them during or in relation to the Expert determination;

20.8.1.2 not to disclose any confidential documents, information and other material except to a party or adviser or consultant who has signed a confidentiality undertaking; or if required by Law or any Authority to do so; and

20.8.1.3 not to use confidential documents, information or other material disclosed to them during or in relation to the Expert determination for a purpose other than the Expert determination.

20.8.2 The parties must keep confidential and must not disclose or rely upon or make the subject of a subpoena to give evidence or produce documents in any arbitral, judicial or other proceedings:

20.8.2.1 views expressed or proposals or suggestions made by a party or the Expert during the Expert determination relating to a possible settlement of the Dispute;

20.8.2.2 admissions or concessions made by a party during the Expert determination in relation to the Dispute; and

20.8.2.3 information, documents or other material concerning the dispute which are disclosed by a party during the Expert determination unless such information, documents or facts would be discoverable in judicial or arbitral proceedings.

20.9 Continual performance

Each Party must continue to perform its obligations under this document while any dispute is being determined under this clause.

21. Costs

The Developer must pay or reimburse to Council, Council's costs associated with the negotiation, preparation, exhibition, legal review, administration and enforcement of this document within ten (10) business days of a written demand by Council for such payment.

22. GST

If any payment made by one party to any other party under or relating to this document constitutes consideration for a taxable supply for the purposes of GST or any similar tax, the amount to be paid for the supply will be increased so that the net amount retained by the supplier after payment of that GST is the same as if the supplier was not liable to pay GST in respect of that supply. This provision is subject to any other agreement regarding the payment of GST on specific supplies, and includes payments for supplies relating to the breach or termination of, and indemnities arising from, this document. Unless otherwise expressly stated, prices or other sums payable or consideration to be provided under or in accordance with this document are exclusive of GST.

23. General

23.1 Assignment

- 23.1.1 A party must not transfer any right or liability under this document without the prior consent of each other party, except where this document provides otherwise.
- 23.1.2 In the event that the Developer enters into a contract for the sale of the Land the subject of the Development Consent, the Developer (as vendor) must disclose to the purchaser the existence of this document.

23.2 Governing law and jurisdiction

- 23.2.1 This document is governed by and construed under the law in the State of New South Wales.
- 23.2.2 Any legal action in relation to this document against any party or its property may be brought in any court of competent jurisdiction in the State of New South Wales.
- 23.2.3 Each party by execution of this document irrevocably, generally and unconditionally submits to the non-exclusive jurisdiction of any court specified in this provision in relation to both itself and its property.

23.3 Relationship between the parties

23.3.1 No term of this agreement is to be construed so as to give rise to a Proscribed Relationship.

23.3.2 Each party must not represent, or otherwise foster the understanding, that the relationship between them is a Proscribed Relationship or represent or otherwise hold themselves out as representing or having the ability to bind the other party.

23.4 Amendments

Any amendment to this document has no force or effect, unless effected by a document executed by the parties.

23.5 Third parties

This document confers rights only upon a person expressed to be a party, and not upon any other person.

23.6 Pre-contractual negotiation

23.6.1 This document:

- (a) expresses and incorporates the entire agreement between the parties in relation to its subject matter, and all the terms of that agreement; and
- (b) supersedes and excludes any prior or collateral negotiation, understanding, communication or agreement by or between the parties in relation to that subject matter or any term of that agreement.

23.7 Further assurance

Each party must execute any document and perform any action necessary to give full effect to this document, whether before or after performance of this document.

23.8 Continuing performance

- (a) The provisions of this document do not merge with any action performed or document executed by any party for the purposes of performance of this document.
- (b) Any representation in this document survives the execution of any document for the purposes of, and continues after, performance of this document.
- (c) Any indemnity agreed by any party under this document:
 - (i) constitutes a liability of that party separate and independent from any other liability of that party under this document or any other agreement; and
 - (ii) survives and continues after performance of this document.

23.9 Waivers

Any failure by any party to exercise any right under this document does not operate as a waiver and the single or partial exercise of any right by that party does not preclude any other or further exercise of that or any other right by that party.

23.10 Remedies

The rights of a party under this document are cumulative and not exclusive of any rights provided by law.

23.11 Counterparts

This document may be executed in any number of counterparts, all of which taken together are deemed to constitute one and the same document. A party who has executed a counterpart of this document may exchange it with another party by emailing a pdf (portable document format) copy of, the executed counterpart to that other party, and if requested by that other party, will promptly deliver the original by hand or post. Failure to make that delivery will not affect the validity and enforceability of this document.

23.12 Party acting as trustee

If a party enters into this document as trustee of a trust, that party and its successors as trustee of the trust will be liable under this document in its own right and as trustee of the trust. Nothing releases the party from any liability in its personal capacity. The party warrants that at the date of this document:

- (a) all the powers and discretions conferred by the deed establishing the trust are capable of being validly exercised by the party as trustee and have not been varied or revoked and the trust is a valid and subsisting trust;
- (b) the party is the sole trustee of the trust and has full and unfettered power under the terms of the deed establishing the trust to enter into and be bound by this document on behalf of the trust and that this document is being executed and entered into as part of the due and proper administration of the trust and for the benefit of the beneficiaries of the trust;
- (c) no restriction on the party's right of indemnity out of or lien over the trust's assets exists or will be created or permitted to exist and that right will have priority over the right of the beneficiaries to the trust's assets.

23.13 Representations and warranties

The Parties represent and warrant that they have power to enter into this document and comply with their obligations under the document and that entry into this document will not result in the breach of any law.

23.14 Severability

If a clause or part of a clause of this document can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or

part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this document, but the rest of this document is not affected.

24. Definitions and interpretation

In this document unless the context otherwise requires:

Act means the *Environmental Planning and Assessment Act 1979* (NSW).

Bank Guarantee means an irrevocable and unconditional written guarantee without any expiry date acceptable to Council and issued by an Australian Bank.

Business Day means a day that is not a Saturday, Sunday, public holiday or bank holiday in New South Wales.

Construction Certificate has the same meaning as in the Act.

Contributions Plan means the Section 7.11 Contributions Plan specified in the Summary Sheet.

Agreed Value means the amount specified for each item of Work in Column 4 of Schedule 3 in relation to the Works specified in Column 1 of that Schedule.

Defects Security has the meaning ascribed to it in clause 16.2.2

Development Application means the development application for the Development Consent.

Development Consent means the development consent granted by the Council under section 4.16 of the Act specified in the Summary Sheet.

Defects Liability Period means the period specified in Column 3 of Schedule 3 in relation to the Works specified in Column 1 of that Schedule commencing on the date a notice is given under clause 10.5 in relation to those Works.

Encumbrance includes any mortgage or charge, lease, (or other right of occupancy) or profit a prendre or other interest.

Event of Default has the meaning ascribed to it in clause 17.

Environment has the same meaning as set out in the Dictionary to the Protection of the Environment Operations Act 1997 (NSW).

GST means any tax, levy, charge or impost implemented under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GST Act) or an Act of the Parliament of the Commonwealth of Australia substantially in the form of, or which has a similar effect to, the GST Act.

Hand-Over means the hand-over to the Council of the Works in accordance with this document.

Hand-Over Date means the date specified in Column 2 of Schedule 3 in relation to the Works specified in Column 1 of that Schedule corresponding to that date, subject to any extension of that date under clause 12.

Hand-Over Notice means a notice issued by the Council under clause 11.

Insolvency Event means the happening of any of the following events:

- (a) Application which is not withdrawn or dismissed within 14 days is made to a court for an order or an order is made that a body corporate be wound up.

- (b) An application which is not withdrawn or dismissed within 14 days is made to a court for an order appointing a liquidator or provisional liquidator in respect of a body corporate or one of them is appointed, whether or not under an order.
- (c) Except to reconstruct or amalgamate while solvent, a body corporate enters into, or resolves to enter into, a scheme of arrangement, agreement of company arrangement or composition with, or assignment for the benefit of, all or any class of its creditors, or it proposes a reorganisation, moratorium or other administration involving any of them.
- (d) A body corporate resolves to wind itself up, or otherwise dissolve itself, or gives notice of intention to do so, except to reconstruct or amalgamate while solvent or is otherwise wound up or dissolved.
- (e) A body corporate is or states that it is insolvent.
- (f) As a result of the operation of section 459F(1) of the Corporations Act, a body corporate is taken to have failed to comply with a statutory demand.
- (g) A body corporate is or makes a statement from which it may be reasonably deduced that the body corporate is, the subject of an event described in section 459C(2)(b) or section 585 of the Corporations Act.
- (h) A body corporate takes any step to obtain protection or is granted protection from its creditors, under any applicable legislation or an administrator is appointed to a body corporate.
- (i) A person becomes an insolvent under administration as defined in section 9 of the Corporations Act or action is taken which could result in that event;
- (j) A receiver, manager or receiver and manager is appointed to the Company;
- (k) A body corporate becomes an externally administered body corporate within the meaning of the Corporations Act;
- (l) A claim is filed in a court against a person that is not defended, released or otherwise settled within 28 days of the date of its filing at the court; or
- (m) Anything analogous or having a substantially similar effect to any of the events specified above happens under the law of any applicable jurisdiction.

Item of Works means an individual item of the Works.

Land means the land on which the Works are being carried out.

Location Plan means the plan contained in Schedule 1.

Monetary Contributions means the monetary development contributions required to be paid to the Council under the conditions of the Development Consent as specified in Schedule 2.

Planning Legislation means the Act, the *Local Government Act 1993* (NSW) and the *Roads Act 1993* (NSW).

Primary Security has the meaning ascribed to it in clause 16.2.1.

Proposed Development means the proposed development as described in the Summary Sheet.

Proscribed Relationship means any of the following relationships:

- (a) Principal and independent contractor.
- (b) Joint venturers.
- (c) Partners.
- (d) Trustee and beneficiary.
- (e) Employer and employee.

Rectification Certificate means a certificate issued by the Developer to the satisfaction of Council to the effect that work the subject of a Rectification Notice has been completed in accordance with the notice.

Rectification Notice means a notice in writing that identifies a defect in an Item of Work and requires rectification of the defect within a specified period of time.

Regulation means the *Environmental Planning and Assessment Regulation 2021* (NSW).

Security means the Primary Security and Defects Security (if applicable).

Summary Sheet means the summary sheet at the front of this document.

Works means the works specified or described in Schedule 3 and includes any Item of Works and any part of any Item of Works.

Works-As-Executed-Plan means detailed plans and specifications of the completed Works.

25. Interpretation

In this document unless the context otherwise requires:

- (a) clause and subclause headings are for reference purposes only;
- (b) the singular includes the plural and vice versa;
- (c) words denoting any gender include all genders;
- (d) reference to a person includes any other entity recognised by law and vice versa;
- (e) where a word or phrase is defined its other grammatical forms have a corresponding meaning;
- (f) any reference to a party to this document includes its successors and permitted assigns;
- (g) any reference to a provision of an Act or Regulation is a reference to that provision as at the date of this document;
- (h) any reference to any agreement or document includes that agreement or document as amended at any time;
- (i) the use of the word **includes** or **including** is not to be taken as limiting the meaning of the words preceding it;

- (j) the expression **at any time** includes reference to past, present and future time and the performance of any action from time to time;
- (k) an agreement, representation or warranty on the part of two or more persons binds them jointly and severally;
- (l) an agreement, representation or warranty on the part of two or more persons is for the benefit of them jointly and severally;
- (m) reference to an exhibit, annexure, attachment or schedule is a reference to the corresponding exhibit, annexure, attachment or schedule in this document;
- (n) reference to a provision described, prefaced or qualified by the name, heading or caption of a clause, subclause, paragraph, schedule, item, annexure, exhibit or attachment in this document means a cross reference to that clause, subclause, paragraph, schedule, item, annexure, exhibit or attachment;
- (o) when a thing is required to be done or money required to be paid under this document on a day which is not a Business Day, the thing must be done and the money paid on the immediately following Business Day; and
- (p) reference to a statute includes all regulations and amendments to that statute and any statute passed in substitution for that statute or incorporating any of its provisions to the extent that they are incorporated.

Schedule 1 – Location Plan

[Drafting Note: Insert a copy of a Location Plan, showing the location of the Works]

Schedule 2 – Works

Column 1	Column 2	Column 3	Column 4	Column 5
Items of Works	Hand-Over Date	Defects Liability Period	Agreed Value	Specification
[Drafting Note: To be completed]	[Drafting Note: To be completed]	[Drafting Note: To be completed]	[Drafting Note: To be completed]	[Drafting Note: To be completed]
[Drafting Note: To be completed]	[Drafting Note: To be completed]	[Drafting Note: To be completed]	[Drafting Note: To be completed]	[Drafting Note: To be completed]

Execution Page

Executed as a deed

The common seal of The Hills Shire Council
was affixed under a resolution passed by
council on
in the presence of:

General Manager

Mayor

Print Name

Print Name

Signed, sealed and delivered by the Developer
in accordance with s127 of the Corporations
Act 2001 (Cth):

Secretary/Director

Director

Print name

Print name