



Works-In-Kind Guidelines – Environmental Planning & Assessment Act Matters

For Works-In-Kind relating to Development Contributions levied under Section 7.11 of the *Environmental Planning and Assessment Act, 1979*

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Purpose

The purpose of the Works-In-Kind (WIK) Guidelines is to ensure that there is a transparent and consistent approach to the lodgement, assessment and conditioning of a WIK Agreement.

This Guideline will be used in the assessment and negotiation of proposals seeking to provide a material public benefit in the form of WIK, in lieu of full or partial satisfaction of Development Consent conditions requiring payment of contributions levied in accordance with a Section 7.11 Contribution Plan under the provisions of the *Environmental Planning & Assessment Act, 1979 (NSW)*.

Scope

The Guidelines are to be applied by all personnel employed by Council, any person or organisation contracted to or acting on behalf of Council, any person or organisation employed to work on Council premises or facilities, and all activities of the Council, who is/are involved in the assessment, evaluation, negotiation, refusal or execution of WIK Agreements.

The Guidelines have also been prepared for the information of applicants that have received Development Consent subject to a Section 7.11 payment condition, and who propose the provision of material public benefits in the form of WIK as full or partial satisfaction of such a payment.

Background

1. The EPA Act permits Councils to collect Local Infrastructure Contributions (LICs), otherwise known as development contributions, to contribute to the provision of local facilities, services and other infrastructure required to serve the needs of the community.
2. The purpose and value of LICs are defined by Section 7.11 or Section 7.12 Development Contribution Plans, prepared and adopted by Councils.
3. When a development is granted development consent, the payment of LICs, and the amount and purpose thereof, are applied as conditions to that development consent by the relevant consent authority and the condition wording sets out the required payment at a time as specified by the consent.
4. In some cases, applicants may seek to provide a material public benefit in the form of WIK, in lieu of full or partial satisfaction of the conditioned LICs.
5. Council recognises that the provision of WIK offers an alternative solution for the timely delivery of local facilities, services and other infrastructure.

Procedure

Applications to Undertake WIK

6. Council is under no obligation to accept offers to enter into WIK Agreements.
7. Applications to undertake WIK will generally be progressed in accordance with the process as outlined at Attachment 1 to these Guidelines.
8. Council will only consider applications to enter a WIK Agreement where the relevant Section 7.11 Contributions Plan provides that WIK Agreements may be entered into for the carrying out of works as full or partial satisfaction of a Section 7.11 Development Contribution Condition of a Development Consent.
9. Applications to enter into WIK Agreements will only be considered where the proposed works are identified within the applicable Section 7.11 Development Contribution Plan/s Works Schedule.
10. The dedication of land to Council, prescribed or otherwise by the applicable Section 7.11 Development Contribution Plan, is not considered as a WIK. However, the embellishment of such land if identified within the relevant Section 7.11 Contribution Plan Works Schedule and requires the payment of a Development Contribution by a condition of Development Consent, may be eligible for consideration as a WIK proposal.
11. Preliminary negotiations for a WIK Agreement may commence prior to the determination of a Development Application seeking Development Consent. However, a WIK Agreement will not be executed prior to the issuing of a Development Consent and relevant Construction Certificate, and must conform with the general principles of the original proposal.
12. Applications to enter into a WIK Agreement must be lodged in a format as prescribed by Council, supported by the payment of the relevant fees as described by Council's Fees and Charges applicable at the time of lodgement.
13. Any variation sought by an applicant to the standard WIK Agreement template (at Attachment 2 of this Policy) must be documented with relevant supporting justification, lodged at the same time as the WIK application.

Evaluation and Negotiation of proposed WIK

14. The Assessing Officer and their direct supervisor identified in the Assessment Report for a Development Application for which WIK are proposed shall take no part in the consideration or negotiation of an application for a WIK Agreement.

15. The evaluation and any negotiations required to facilitate amendments of proposed WIK will be undertaken by the relevant Contribution Officer (as the “Evaluation Officer”) and peer reviewed by the relevant Section Manager in the Strategic Planning Unit.
16. All WIK applications will be evaluated against the following criteria:
 - a. the nature and extent of WIK proposed, in terms of the:
 - i. value of the works,
 - ii. the priority for infrastructure delivery; and
 - iii. context with proposed development and any adjoining development;
 - b. whether the Development Contribution Plan/s Work Schedule or Contribution Plan Works Value is valid or requires amendment;
 - c. the value of existing funds available within the relevant Contribution Plan;
 - d. the design, maintenance burdens, standards and delivery timing of the proposed works;
 - e. any likely or potential precedent that may be created by the acceptance of the WIK and/or whether works will/will not prejudice the timing/delivery of public services in the Development Contributions Plan work program;
 - f. any proposed variations to the standard WIK Agreement template by the applicant or Council.
17. As part of the evaluation:
 - a. Council will obtain the services of a suitably experienced and qualified civil estimator (at the expense of the applicant but independent of the applicant) to validate the costs and standards proposed within the WIK application. This will occur only after the applicant has agreed in writing to pay the costs associated with the civil estimator;
 - b. The applicant and/or their representatives or agents will have no contact with the suitably experienced and qualified civil estimator engaged by Council; and
 - c. Council staff with relevant technical and specialist skills may be requested to comment on the contents of the proposed WIK, including but not limited to designs, construction standards, maintenance costs etc.
18. All WIK applications and their evaluations will be referred to Council’s Development Contributions Committee (DCC) for review.

Acceptance and Execution of WIK Agreements

19. The DCC may require further amendments to the WIK application before finalisation and approval of a WIK Agreement.
20. If the DCC decline to support a WIK application, the decision of the DCC is final. Any revised proposal must be re-lodged as a new WIK application.
21. Advice will be provided for the information of the applicant if the DCC declines to support a WIK application.
22. If the DCC agree to support a WIK application, Council's Delegate with the requisite level of financial delegation (in accordance with Council's Delegation of Authority Policy) will be briefed, and the applicant will be advised.
23. All costs (including legal costs) and fees associated with the assessment of a WIK application and the drafting, review and finalisation of the WIK Agreement, are to be borne by the applicant.
24. Upon request and prior to the lodgement of a WIK application, a written quote for the anticipated costs and fees will be provided to the applicant.
25. Council's Legal Unit may require amendments to the draft WIK Agreement. Council's relevant Contribution Officer will act as the liaison between the applicant and Council's Legal Unit.
26. Once a WIK Agreement is agreed to by all parties, the applicant will be required to sign two copies of the WIK Agreement in the presence of a witness, and return to Council for execution by the relevant delegate of Council. One copy of the WIK Agreement will be returned to the applicant.
27. The authority to endorse and execute a WIK Agreement is to be based on the financial delegations of Senior Management on the Development Contributions Committee, or the CEO, whichever is attributable to the financial value of the WIK.

Registration of the WIK Agreement

28. A completed WIK Agreement will be recorded on a register maintained by Council and recorded in Council's Record Management System.

Credits and Offsets

29. Council will only consider offsetting the Development Contributions payable by a condition of a Development Consent, for the works shown in that Development Contributions Plan Works Schedule which is the subject of the WIK Agreement.

Conditions of Consent

30. A Development Consent will itemise the contributions applicable under any relevant s7.11 Development Contribution Plan.
31. Works within a Development Contributions Plan with a direct nexus to the development will be conditioned within a Development Consent.
32. Generally, works within a Development Contributions Plan will not be reflected as a condition of consent where there is an insufficient nexus to the development.
33. Notwithstanding the above, Council may impose conditions for works required by a Development Contributions Plan if the work is primarily required for the development (e.g. roadworks) instead of primarily for the provision of a public amenity.
34. The arrangements of a WIK Agreement cannot be conditioned within a Development Consent.

Further Assessments and Development Consents

35. Where there is insufficient information submitted with a Development Application to assess works required for a WIK Agreement, the applicant will be responsible for obtaining any necessary development consents, approvals and/or permits prior to the commencement of the works.

Payment and Release of Securities

36. All WIK Agreements will require payment of securities.
37. The securities will be retained by Council.
38. The value of the security is to be set in accordance with the value specified by Council's Civil Works Specifications – Construction Specification. The total value of the security bond and the timing for its payment is to be set out in the WIK Agreement.
39. Refund of securities will be associated with the completion of relevant deliverables as set out within the WIK Agreement.
40. Council reserves the right to retain a portion of the securities for a specified period (both as set out in the WIK Agreement) post-handover of the completed WIK for use by Council to rectify any defects or unplanned maintenance associated with the WIK post-handover. Any securities not utilised at the completion of this period will be refunded to the applicant.

Works commenced without an Executed WIK Agreement

41. Where works which would be the subject to a WIK Agreement have commenced or have been completed without a WIK Agreement being executed, Council will not enter into a retrospective WIK Agreement and will not reimburse the costs associated with the works undertaken.

Compliance, monitoring and review

42. Suspected breaches or misuse of this Guideline are to be reported to the Chief Executive Officer. Alleged breaches of this policy shall be dealt with by the processes outlined for breaches of the Code of Conduct, as detailed in the Code of Conduct and in the Procedures for the Administration of the Code of Conduct.
43. These Guidelines will be reviewed every four years or as required by legislative change or for other purposes.

Records management

44. All staff must maintain all records relevant to administering this policy in Council's electronic recordkeeping system.

Definitions

Act: means the *Environmental Planning and Assessment (EP&A) Act, 1979*.

Applicant: means the person who has the written authority to act on behalf of the landowner of the land who has the benefit of a development consent that relates to that land.

Consent Authority: has the same meaning as within the Act.

Contributions Plan/s: means a plan prepared by Council in accordance with the provisions of Part 7, Division 7.1, Subdivision 3 of the Act and Regulations for the purposes of Section 7.11 or 7.12 of the Act.

Contributions Plan Works Schedule: means the schedule within a Contribution Plan which itemises the works, costs, staging and timing thereof to be delivered by the plan.

Contributions Plan Works Value: means the value assigned to the provision of an item of work or facility under a Contribution Plan.

Council: means the Central Coast Council which includes any reference to the former Wyong Shire Council or Gosford City Council

Development Application: has the same meaning as within the Act.

Development Consent: has the same meaning as within the Act.

Development Contribution: means a Local Infrastructure Contribution (LIC) made by an applicant under a planning agreement, monetary contribution, the dedication of land free of cost, or the provision of a public benefit to be used for or applied towards a public purpose.

Development Contribution Condition: means a condition imposed by the Consent Authority relating to the payment of monies in accordance with applicable Development Contribution Plans.

Development Contributions Committee (DCC): means the internal Council Development Contributions Committee, comprising relevant employees of the Council that review and provide advice in relation to offers from applicants for proposed WIK in lieu of payment of contributions.

Guidelines means the guidelines supporting this policy.

Local Infrastructure Contribution (LIC) are fees charged by Councils in accordance with a Contributions Plan when new development occurs. They are used to provide infrastructure to support development, including but not limited to open space, parks, community facilities, local roads, footpaths, stormwater drainage and traffic management.

Material Public Benefit: means a Work-In-Kind (WIK) which is listed in the works schedule of a Development Contributions Plan for which a monetary contribution would be normally sought, or the provision of certain public amenities or services that may or may not exist in the area that is not included in a Development Contributions Plan. A Material Public Benefit is not the dedication of land or the payment of a monetary contribution under the Act.

Security/Securities: means a financial amount of money paid to Council to pay costs associated with completion of any outstanding works to be undertaken by the applicant and/or rectification of defects of the works once completed.

Regulations: means the *Environmental Planning and Assessment Regulation, 2000 (NSW)*

Work: has the same meaning as within the Act.

Works-In-Kind (WIK): means the undertaking of work, or the provision of amenities, services or facilities, as nominated in a Contribution Plan's Work Schedule and includes reference to Contribution Offsets. It does not include the dedication of land.

Works-In-Kind Agreement: means the agreement between an applicant and Council which details the works, plans, costing, timing and other matters deemed necessary for the provision of WIK.

Works-In-Kind Guidelines: means these operational Guidelines, as amended from time to time, and endorsed by the DCC or CEO.

Works-In-Kind Policy: means the Central Coast Council Works-In-Kind (WIK) Policy CCC101, as amended from time to time, and endorsed by Council.

Related resources

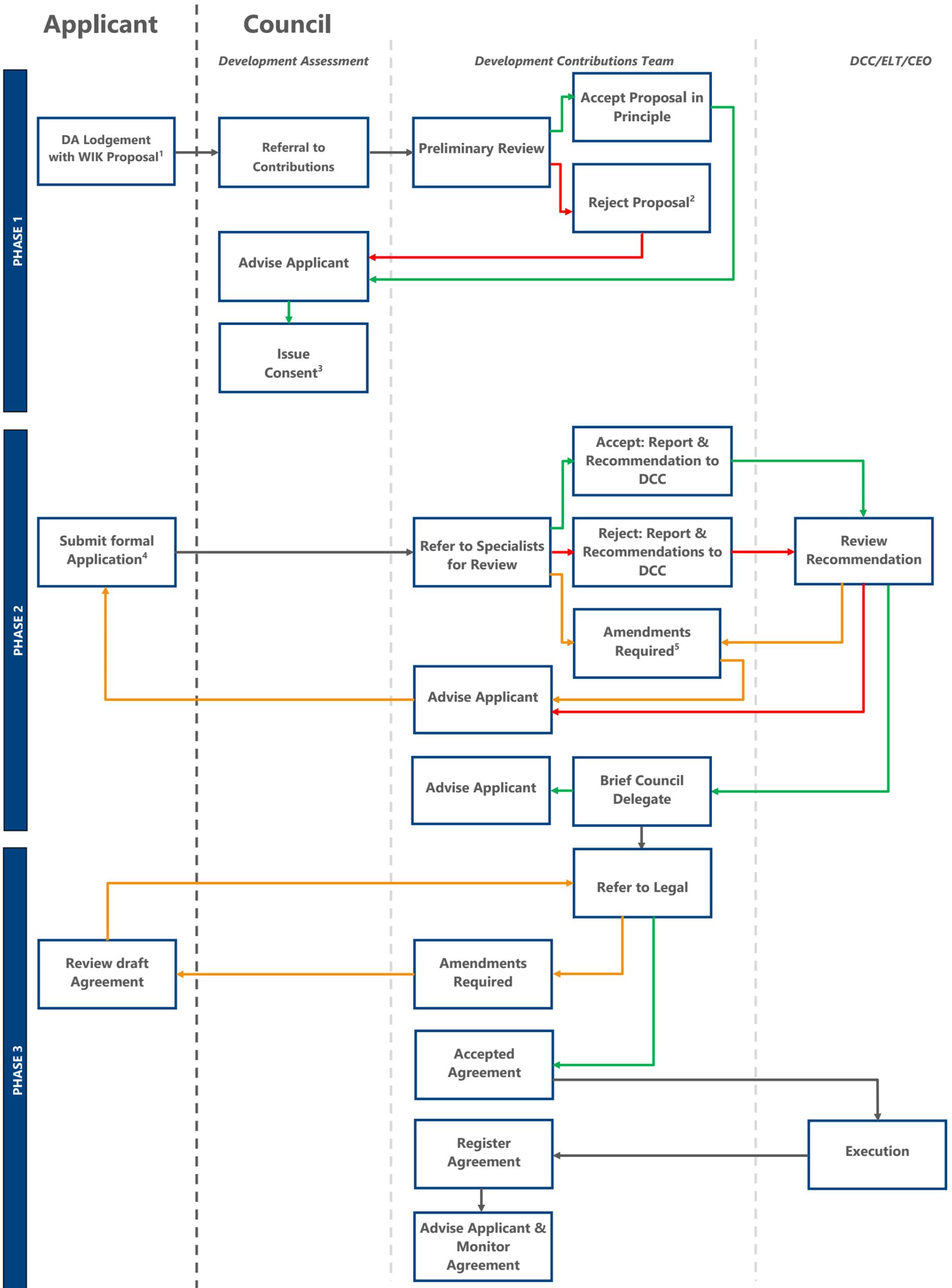
45. Legislation:

- a. Environmental Planning and Assessment Act, 1979 (NSW)
- b. Environmental Planning and Assessment Regulation, 2000 (NSW)
- c. Local Government Act, 1993 (NSW)

46. Associated/Internal documents:

- a. Code of Conduct
- b. WIK Policy CCC101 (For WIK relating to Development Contributions levied under Section 7.11 of the Environmental Planning and Assessment Act, 1979 (NSW))
- c. Delegations of Authority granted under the Local Government Act, 1993 (NSW)
- d. Central Coast Council s7.11 Development Contribution Plans (multiple)
- e. Central Coast Council s7.12 Development Contribution Plan
- f. Central Coast Civil Works Specifications – Construction Specification

Appendix 1: WIK Lodgement & Assessment Process Flow Chart



Appendix 2: WIK Agreement Template

WIK Agreement

Central Coast Council (ABN 73 149 644 003)

and

Insert name ABN and address

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WIK Agreement

Date	
Parties	<p>Central Coast Council ABN 73 149 644 003 of 2 Hely Street, Wyong New South Wales 2320 and 49 Mann Street Gosford NSW 2250</p> <p style="text-align: right;">(Council)</p> <p>Insert name ABN and address ACN of ###</p> <p style="text-align: right;">(Applicant)</p>
Background	<p>A. The Applicant has been granted the Development Consent or is otherwise entitled to act upon the Development Consent</p> <p>B. Condition "[Insert details]" of the Development Consent requires the Applicant to make the Monetary Contributions</p> <p>C. Condition "[Insert details]" of the Development Consent requires the Applicant to carry out the Works on the Land</p> <p>D. The Applicant offered to enter into this Agreement by letter to the Council dated "[Insert date]"</p> <p>E. The Council and the Applicant wish to enter into this Agreement to make provision for the carrying out of the Works by the Applicant in partial satisfaction of the Applicant's obligation to pay the Monetary Contributions under condition "[Insert details]".</p> <p>F. The Act authorises the Council and the Applicant to enter into this Agreement to make provision for the carrying out of the Works by the Applicant in partial satisfaction of the Monetary Contributions.</p>

Agreement

1. Definitions\and Interpretation

1.1 In this Agreement the following definitions apply:

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

Contributions Plan means the [identify Plan] made by the Council under s7.18EA of the Act and adopted by the Council on [insert] as amended.

Works-in-Kind Agreement

Contribution Value means the amount specified in Column 3 of Schedule 3.

Defects Liability Period means the period specified for that item in Column 2 of Schedule 3, commencing on the date the Works are taken to be Handed-Over in accordance with clause 9.5.

Development means the development the subject of the Development Consent.

Development Application means development application DA "[Insert DA number]" made by the Applicant to the Council on "[Insert date]"

Development Consent means the development consent granted by the Council under s4.16 of the Act to the Development Application on "[Insert date as notified by the Council to the Applicant in accordance with s4.18 of the Act on [Insert date].

Development Contribution means a monetary contribution or the dedication of land free of cost.

Final Lot means a lot in the Development created for separate occupation and disposition or a lot of a kind or created for a purpose that is otherwise agreed by the parties, not being:

- (a) a lot created by a subdivision of the land that is to be dedicated or otherwise transferred to the Council, or
- (b) a lot created by a subdivision of the Land which may be further subdivided.

GST has the same meaning as in the GST Law.

GST Law has the meaning given to that term in A New Tax System (Goods and Services Tax) Act 1999 (Cth) and any other Act or regulation relating to the imposition or administration of the GST.

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

Item of Works means an item of the Works.

Land means the land specified or described in Schedule 1.

Location Plan means the plan contained in Schedule 2.

Monetary Contributions means the monetary Development Contributions required to be paid to the Council under the following condition xxx of the Development Consent for the following public purposes and in the following amounts (which have

Works-in-Kind Agreement

been indexed in accordance with condition "[insert details]" of the Development Consent to the date of this Agreement):

Condition	Public Purpose	\$ Amount
Condition "[insert details]"	"[insert details]"	\$ "[insert details]"
Condition "[insert details]"	"[insert details]"	\$ "[insert details]"

Party means a party to this agreement, including its successors and assigns.

Rectification Certificate means a compliance certificate within the meaning of s6.4(e)(iv) (or s109C(1)(a)(v) as the case may be) of the Act 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 a work and requires rectification of the defect within a specified period of time.

Regulation means the *Environmental Planning and Assessment Regulation 2000*.

Security means an unconditional bond or bank guarantee in a form, and on terms otherwise acceptable, to the Council.

Surplus Value means the amount by which the sum of all Contribution Values exceeds the value of the Monetary Contributions.

Works means the works specified or described in Column 1 of Schedule 3 to this Agreement 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.

1.2 In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:

1.2.1 Headings are inserted for convenience only and do not affect the interpretation of this Agreement. '

1.2.2 A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.

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- 1.2.3 If the day on which any act, matter or thing is to be done, under this Agreement is not a business day, the act, matter or thing must be done on the next business day,
- 1.2.4 A reference in this Agreement to dollars or \$ means Australian dollars and all amounts, payable under this Agreement are payable in Australian dollars.
- 1.2.5 A reference in this Agreement to any law, legislation or legislative, provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- 1.2.6 A reference to an applicable law includes a reference to anything required to be done by or under the law in relation to the Works, including anything required to be done by reason of a requirement lawfully imposed by a person or body exercising functions under the law.
- 1.2.7 A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- 1.2.8 A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
- 1.2.9 An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- 1.2.10 Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- 1.2.11 A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender. denotes the other gender.
- 1.2.12 References to the word 'include' or 'including' are to be construed without limitation.
- 1.2.13 A reference to this Agreement includes the agreement recorded in this Agreement.
- 1.2.14 A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.
- 1.2.15 Any schedules, appendices and attachments form part of this Agreement.

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2. Obligation to Carry Out Works

- 2.1 The Applicant is to carry out and complete the Works on the Land at the locations shown on the Location Plan.
- 2.2 The Applicant's obligation under clause 2.1 exists irrespective of whether the Applicant:
- 2.2.1 carries out the Works itself, or
 - 2.2.2 enters into an agreement with another person under which the other person carries, out the Works on the Applicant's behalf.
- 2.3 The Applicant is to carry out and complete the Works 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:
- 2.3.1 the Development Consent, and
 - 2.3.2 the Construction Certificate with reference number SCC/xx/xxxx, and
- all applicable laws, including those relating to occupational health and safety, and
- 2.3.3 this Agreement to the extent that it is not inconsistent with the Development Consent or an applicable law.
- 2.4 In the event of an inconsistency between this Agreement and the Development Consent or any applicable law, the Development Consent or the law prevails to the extent of the inconsistency.
- 2:5 It is the Applicant's responsibility to ensure that everything necessary for the proper performance of its obligations under this Agreement is supplied or made available.
- 2.6 The Works is to be Handed-Over to the Council in accordance with this Agreement.

3. Ownership of Works, etc

- 3.1 Nothing in, or done under, this Agreement gives the Applicant:
- 3.1.1 any right, title or interest in the Works, or
 - 3.1.2 any estate or interest in the Land,
- whether at law or in equity.

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4. Effect of Applicant's Compliance with this Agreement

4.1 For the purposes of condition "[Insert details]" of the Development Consent and s7.11(5)(b) of the Act:

4.1.1 the Hand-Over of the Works under this Agreement by the Applicant satisfies the Applicant's obligation under the Development Consent to make the Monetary Contributions to the extent of the sum of all Contribution Values, and

4.1.2 the Applicant is not required to pay the Monetary Contributions to that extent.

5. Determination of Value

5.1 For the purposes of this Agreement, the Parties acknowledge that the Contribution Value in relation to the Works is the value of the Works specified by, or determined in accordance with, the Contributions Plan or as otherwise agreed between the Parties

5.2 If the Applicant's actual cost of carrying out the Works, including any costs incurred pursuant to this Agreement, determined at the date on which the Works is Handed-Over to the Council:

5.2.1 exceeds the Contribution Value, the Applicant is not entitled to claim credit or reimbursement, as the case may be, for the difference, or an increase to the Contribution Value,

5.2.2 is less than the Contributions Value, then for the purposes of this Agreement the Contribution Value is taken to be the actual cost of carrying out the Works.

6. Access to the Land

6.1 Subject to any applicable law, the Party that owns the Land authorises the other Party to enter the Land for the purposes of this Agreement.

7. Protection of People and Property

7.1 The Applicant is to ensure in relation to the carrying out of the Works that:

7.1.1 necessary measures are taken to protect people and property, and

7.1.2 unnecessary interference with the passage of people and vehicles is avoided, and

7.1.3 nuisances and unreasonable noise and disturbances are prevented.

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8. Damage and Repairs to the Works

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

9. Hand-Over of Works

- 9.1 The Applicant is to give the Council not less than 20 calendar days written notice of the date on which it proposes to Hand-Over the Works to the Council, which is not to be later than the Hand-Over Date.
- 9.2 The Council may, at any time before the date specified in the notice referred to in clause 9.1, direct the Applicant in writing:
- 9.2.1 to carry out work specified in the notice to complete the Works in accordance with clause 2.3 before it is Handed-Over to the Council, and
 - 9.2.2 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.
- 9.3 The Applicant is to comply with a direction referred to in clause 9.2 according to its terms and at the Applicants own cost.
- 9.4 Before the Works is handed-over to the Council, the Applicant is to remove from the Land:
- 9.4.1 any rubbish or surplus material, and
 - 9.4.2 any temporary works, and
 - 9.4.3 any construction plant and equipment;
- relating to the carrying out of the Works as the case requires.
- 9.5 The Works is taken, to be Handed-Over to the Council when all all of the following have occurred:
- 9.5.1 the Council gives the Applicant written notice that the Works, including any direction given under clause 9.2 have been completed to the Council's satisfaction, and
 - 9.5.2 the Council issues the Subdivision Certificate for the Development, and

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9.5.3 the Council gives the Applicant written notice that Works-As-Executed-Plan satisfactory to the Council have been provided to the Council, and

9.5.4 the Applicant has given the Council Security under clause 14.

10. Works-As-Executed-Plan

10.1 Works As Executed Plans are to be submitted to Council prior to the issue of the Subdivision Certificate for the Development.

11. Rectification. of Defects

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

11.1.1 the Works requiring rectification,

11.1.2 the action required to be undertaken by the Applicant to rectify those Works, and

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

11.2 The Applicant must comply with a Rectification Notice at its own cost according to the terms of the Notice whether or not the cost of doing so exceeds the amount of Security provided under clause 14.

11.3 When the Applicant considers that rectification is complete, the Applicant may give to the Council a Rectification Certificate relating to the Works the subject of the relevant Rectification Notice.

11.4 A Rectification Certificate discharges the Applicant from any further obligation to comply with the relevant Rectification Notice.

11.5 If the Applicant does not comply with a Rectification Notice, the Council may do such things as are necessary to rectify the defect and may:

11.5.1 call upon the Security to meet its costs in rectifying the defect, and

11.5.2 recover, as a debt due in a court of competent jurisdiction, any difference between the amount of the Security and the costs incurred by the Council in rectifying the defect.

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12. Cost of Works carried out by the Council

- 12.1 The Parties acknowledge and agree that where, in accordance with this Agreement, the Council incurs a cost in carrying out, completing or rectifying a defect in the Works, the Council may recover from the Applicant in a court of competent jurisdiction its full costs, including costs determined in accordance with clause 12.2.1-12.2.3.
- 12.2 The Council's costs of carrying out, completing or rectifying the Works in accordance with this Agreement include, but are not limited to:
- 12.2.1 the reasonable costs of the Council's servants, agents and contractors reasonably incurred for that purpose
 - 12.2.2 all fees and charges necessarily or reasonably incurred by the Council in order to have the Works carried out, completed or rectified,
 - 12.2.3 Without limiting the generality of the preceding sub-clause, all legal costs and expenses reasonably incurred by the Council, by reason of the Applicant's failure to comply with this Agreement.

13. Indemnity and Insurance

- 13.1 The Applicant indemnifies the Council, its employees, officers, agents, contractors and workmen 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 Applicant of the Works and any other obligation under this Agreement.
- 13.2 The Applicant is to take out and keep current to the satisfaction of the Council the following insurances in relation to the Works up until the relevant date of Hand-Over to Council:
- 13.2.1 contract works insurance, noting the Council as an interested 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 Applicant's liability in respect of damage to or destruction of the Works,
 - 13.2.2 public liability insurance for at least \$20,000,000 for a single occurrence, which covers the Council, the Applicant and any subcontractor of the Applicant, for liability to any third party,
 - 13.2.3 workers compensation insurance as required by law, and
 - 13.2.4 any other insurance required by law.

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13.3 If the Applicant fails to comply with clause 13.2, the 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 Applicant to the Council and may be recovered by the Council as it deems appropriate including:

13.3.1 by calling upon the Security provided by the Applicant to the Council under this Agreement, or

13.3.2 recovery as a debt due in a court of competent jurisdiction.

13.4 The Applicant is not to commence to carry out the Works unless it has first provided to the Council satisfactory written evidence of all the insurances specified in clause 13.2.

14. Provision of Security

14.1 Prior to the works being Handed Over to the Council and the Council giving notice under Clause 9.5 the Applicant must provide the Council with Security in the amount of "[insert amount]'.

14.2 The Council may call upon the Security if the Council considers that the Applicant has failed to comply with a Rectification Notice issued under clause 11 or any, notice referred to in clause 19.1 in respect of a Rectification Notice, or the Council gives the Applicant a termination notice under clause 20.3.

14.3 If the Council calls on the Security, the Council may, by notice in writing to the Applicant require the Applicant to provide a further Security in an amount which, together with any unused portion of any existing Security does not exceed the amount specified in clause 14.1.

14.4 The Council may apply the Security in satisfaction of:

14.4.1 the carrying out of the Works, and

14.4.2 any liability, loss, cost, charge or expense directly or indirectly incurred by the Council because of the failure by the Applicant to comply with this Agreement.

14.5 The Council is to release and return the Security to the Applicant, less any amount of the Security called upon by the Council, in accordance with clause 14.2, on the later of:

14.5.1 60 days after the expiry of the Defects Liability Period, and

14.5.2 all Rectification Certificates relating to Works the subject of all Rectification Notices having been given to the Council under clause 11.

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14.6 The Council is not required to return any part of the Security to the Applicant if the Council has given the Applicant a termination notice under clause 20.3.

15. Assignment, etc.

15.1 Unless the matters specified in clause 15.2 are satisfied, the Applicant is not to do any of the following:

15.1.1 if the Applicant is the owner of the Land, to transfer the Land to any person, or

15.1.2 assign or novate to any person the Applicant's rights or obligations under this Agreement.

15.2 The matters required to be satisfied for the purposes of clause 15.1 are as follows:

15.2.1 the Applicant has, at no cost to the Council, first procured the execution by the person to whom the Applicant's rights or obligations under this Agreement are to be assigned or novated, of an agreement in favour of the Council on terms satisfactory to the Council, and

15.2.2 the Council, by notice in writing to the Applicant, has stated that evidence satisfactory to the Council has been produced to show that the assignee or novatee, is reasonably capable of performing its obligations under the Agreement, and

15.2.3 the Applicant is not in breach of this Agreement.

16. Dispute Resolution – Expert Determination

16.1 This clause applies to a dispute under this Agreement which relates to a matter that, in the opinion of the Council, can be determined by an appropriately qualified expert.

16.2 Any dispute between the parties as to whether a dispute to which this clause applies can be determined by an appropriately qualified expert is to be referred to the Chief Executive Officer of the professional body that represents persons with the relevant expertise for determination, which is to be final and binding on the Parties.

16.3 Such a dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the dispute.

16.4 If a notice is given under Clause 16.3, the Parties are to meet within 14 days of the notice in an attempt to resolve the dispute.

16.5 If the dispute is not resolved within a further 28 days, the dispute must be referred to the President of the NSW Law Society to appoint an Expert for Expert Determination.

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- 16.6 Expert Determination is binding on the Parties except in the case of fraud or misfeasance by the Expert.
- 16.7 Each Party must bear its own costs arising from or in connection with the appointment of the Expert and the Expert Determination.

17. Dispute Resolution - Mediation

- 17.1 This clause applies to any dispute under this Agreement other than a dispute to which clause 16 applies.
- 17.2 Such a dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the dispute.
- 17.3 If a notice is given under 17.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the dispute.
- 17.4 If the dispute is not resolved within a further 28 days, the Parties must mediate the dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and must request the President of the Law Society, or the President's nominee, to select a mediator.
- 17.5 If the dispute is not resolved by mediation within a further 28 days, or such longer period as may be necessary to allow any mediation process which has been commenced to be completed, then the Parties may exercise their legal rights in relation to the dispute, including by the commencement of legal proceedings in a court of competent jurisdiction in New South Wales.

18. Arbitration Excluded

- 18.1 The arbitration of any dispute between the Parties arising under or in connection with Agreement is expressly excluded.'

19. Failure to Carry out Works

- 19.1 Subject to clause 20, if the Council considers the Applicant is in breach of any obligation under this Agreement relating to the carrying out of the Works, the Council may but is not obliged to give the Applicant a notice requiring:
- 19.1.1 the breach to be rectified to the Council's satisfaction, or
- 19.1.2 the carrying out of the Works immediately cease and the breach to be rectified to the Council's satisfaction.

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- 19.2 A notice given under clause 19.1 is to allow the Applicant a period of not less than 28 days to rectify the breach.
- 19.3 A notice given under clause 19.12 does not prevent the Applicant from rectifying the breach the subject of the Notice to the Council's satisfaction.
- 19.4 Without limiting any other rights Council has to enforce this Agreement, the Council may, if the Applicant does not comply with a notice given under clause 19.1:
- 19.4.1 call upon the Security in accordance with clause 14, and
- 19.4.2 carry out and complete the Works.
- 19.5 For the purposes of clause 19.4, any difference between the amount of the Security called upon by the Council and the costs incurred by the Council in completing the Works may be recovered by the Council from the Applicant as a debt due in a court of competent jurisdiction.
- 19.6 Clauses 16 and 17 do not prevent a notice being given under clause 19.1 and do not apply to such a notice or the circumstances relating to the giving of that notice, and any procedure commenced under clause 16 or clause 17 ceases to apply when such a notice is given.

20. Termination

- 20.1 If the Applicant commits a breach of this Agreement, the Council may, despite any other provision of this Agreement, give the Applicant a written notice requiring the Applicant to show cause why the Council should not terminate this Agreement.
- 20.2 A notice under clause 20.1 is to:
- 20.2.1 state that the notice is given under this Agreement, and 20.2.2 particularise the nature of the breach by the Applicant, and
- 20.2.3 require the Applicant to show cause by notice to the Council why the Council should not terminate this Agreement, and
- 20.2.4 specify a date by which the Applicant is to show cause as provided for in clause 20.2.3.
- 20.3 If the Applicant fails to show cause to the reasonable satisfaction of the Council why the Council should not terminate this Agreement in relation to the Applicant's breach, the Council may terminate this Agreement by written notice to the Applicant.

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- 20.4 If the Council terminates this Agreement under clause 20.3 the rights and liabilities of the Parties are the same as they would have been at common law had the Applicant repudiated this. Agreement and the Council elected to treat this Agreement as at an end and recover damages.
- 20.5 Clauses 16 and 17 do not prevent a notice being given under clause 20.1 or 20.3 and do not apply such a notice or the circumstances relating to the giving of that notice, and procedure commenced under clause 16 or clause 17 ceases to apply to when such a notice is given.

21. Governing Law & Enforcement

- 21.1 This Agreement is governed by the law of New South Wales.
- 21.2 This Agreement may be enforced by either Party in any court of competent jurisdiction.
- 21.3 Clauses 16 and 17 do not prevent the enforcement of this Agreement in any court of competent jurisdiction and any procedure commenced under clause 16 or 17 ceases to apply when such proceedings are commenced in such a court.
- 21.4 The Parties, submit to the non-exclusive jurisdiction of its courts and courts of appeal from them.
- 21.5 The Parties will not object to the exercise of jurisdiction by those courts on any basis.

22. Notices

- 22.1 Any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:
- 22.1.1 delivered or posted to that Party at its address set out in Schedule 4.
- 22.1.2 faxed to that Party at its fax number set out in Schedule 4.
- 22.1.3 emailed to that Party at its email address set out in Schedule 4.
- 22.2 If a Party gives the other Party 3 business days' notice of a change of its address or fax number, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.
- 22.3 Any notice, consent, information, application or request is to be treated as given or made if it is:
- 22.3.1 delivered, when it is left at the relevant address. 22.3.2 sent by post, 2 business days after it is posted.

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22.3.3 sent by fax, as soon as the sender receives/from the sender's fax machine a report of an error free transmission to the correct fax number.

22.4 If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

23. Approvals and Consent

23.1 Except as otherwise set out in this Agreement, and subject to any statutory obligations, a Party may give or withhold an approval or consent to be given under this Agreement in the Party's absolute discretion and subject to any conditions determined by the Party.

23.2 A Party is not obliged to give its reasons for giving or withholding consent or for giving. Consent subject to conditions.

24. Costs

24.1 The Applicant is to pay to the Council, within 7 days of receipt of a written demand by the Council, the Council's additional costs of preparing, negotiating, executing and stamping the final version of this Agreement and any document related to this Agreement.

25. Entire Agreement

25.1 Subject to anything expressly provided for to the contrary in this Agreement:

25.1.1 this Agreement contains everything to which the Parties have agreed in relation to the matters it deals with, and

25.1.2 no Party can rely on an earlier document, or anything said or done by another Party, or by a director, officer, agent or employee of that Party, before this Agreement was executed, except as permitted by law.

26. Further Acts

26.1 Each Party must promptly execute all documents and do all things that another Party from time to time reasonably requests to effect, perfect or complete this Agreement and all transactions incidental to it.

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27. Joint and Individual Liability and Benefits

27.1 Except as otherwise set out in this Agreement, any agreement, covenant, representation or warranty under this Agreement by 2 or more persons binds them jointly and each of them individually, and any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.

28. No Fetter

28.1 Nothing in this Agreement shall be construed as requiring Council to do anything that would cause it to be in breach of any of its obligations at law, and without limitation, nothing shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

29. Representations and Warranties

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

30. Severability

30.1 If a clause or part of a clause of this Agreement 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.

30.2 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 Agreement, but the rest of this Agreement is not affected.

31. Modification

31.1 No modification of this Agreement will be of any force or effect unless it is in signed by the Parties to this Agreement.

32. Waiver

32.1 The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another Party.

32.2 A waiver by a Party is only effective if it is in writing.

32.3 A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given and is not to be taken as an implied waiver of any

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other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

33. GST

33.1 In this clause:

Adjustment Note, Consideration, GST, GST Group, Margin Scheme, Money, Supply and **Tax Invoice** have the meaning given by the GST Law.

GST Amount means in relation to a Taxable Supply the amount of GST payable in respect of the Taxable Supply.

GST Law has the meaning given by the A New Tax System (Goods and Services Tax) Act 1999 (Cth).

Input Tax Credit has the meaning given by the GST Law and a reference to an Input Tax Credit entitlement of a party includes an Input Tax Credit for an acquisition made by that party but to which another member of the same GST Group is entitled under the GST Law.

Taxable Supply has the meaning given by the GST Law excluding (except where expressly agreed otherwise) a supply in respect of which the supplier chooses to apply the Margin Scheme in working out the amount of GST on that supply.

33.2 Subject to clause 33.4, if GST is payable on a Taxable Supply made under, by reference to or in connection with this Deed, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.

33.3 Clause 33.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Deed to be GST inclusive.

33.4 No additional amount shall be payable by the; Council under clause 33.2 unless, and only to the extent that the Council (acting reasonably and in accordance with the GST Law) determines that it is entitled to an Input Tax Credit for its acquisition of the Taxable Supply giving rise to the liability to pay GST.

33.5 If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this Deed by one Party to the other Party that are not subject to Division 82 of the GST Law, the Parties agree:

33.5.1 to negotiate in good faith to agree the GST inclusive market value of those Supplies prior to issuing Tax Invoices in respect of those Supplies;

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- 33.5.2 that any amounts payable by the Parties in accordance with clause 33:2 (as limited by clause 33.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 33.6 No payment of any amount pursuant to this clause 33, and no payment of the GST Amount where the Consideration for the Taxable Supply is expressly agreed to be GST inclusive, is required until the supplier has provided a Tax Invoice or Adjustment Note as the case may be to the recipient.
- 33.7 Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred by a party, must exclude the amount of any Input Tax Credit entitlement of that party in relation to the relevant cost, expense or other liability.
- 33.8 This clause continues to apply after expiration or termination of this Agreement.

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Schedule 1

(Clause 1.1)

The Land

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Schedule 2 (Clause 1.1)

Location Plan

"[Insert plan]"

Schedule 3 (Clause 1.1)

The Works

Table

Column 1	Column 2	Column 3
Works	Defects. Liability.	Contribution Value
"[Insert details]"	"[Insert period]"	\$11insert amount]"
"[insert details]"	"[Insert period]" ,	\$"[Insert amount]"

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Schedule 4
(Clause 22)

Contact for Notices

Council

Attention: Shannon Turkington

Address: Central Coast Council 2 Hely Street Wyong and 49 Mann Street Gosford

Fax Number:

Email:

Applicant

Attention: "[Insert details]"

Address: "[Insert details]"

Fax Number: "[Insert details]"

Email: "[Insert details]"

Works-in-Kind Agreement

Executed as an Agreement

Signed, Sealed and Delivered for and on behalf)
of **Central Coast Council ABN** by authority of)
the directors in the presence of:)
)
)

.....
General Manager

.....
Director of Environment and Planning

.....
Name (please print)

.....
Name (please print)

Signed Sealed and Delivered for and on behalf of)
Insert name ABN and address ACN by authority)
of the directors in the presence of:)
)

.....
Secretary/Director

.....
Director

.....
Name (please print)

.....
Name (please print)

History of revisions

Amendment history	Details
Original approval authority details	<p data-bbox="600 551 703 584">Council</p> <hr/> <p data-bbox="600 678 1150 712">Ordinary Meeting of Council 29 June 2021</p> <p data-bbox="600 734 1107 768">Minute Number of Resolution - 194/21</p> <hr/> <p data-bbox="600 813 1401 1137">This document establishes the procedures and assessment guidelines for the assessment and negotiation of proposals seeking to provide a material public material public benefit in the form of WIK, in lieu of full or partial satisfaction of development consent conditions requiring payment of Contributions levied in accordance with a Section 7.11 Contribution Plan under the provisions of the <i>Environmental Planning & Assessment Act, 1979 (NSW)</i>.</p> <hr/> <p data-bbox="600 1249 1038 1283">CM document number: 14640931</p>
