

# Draft Works-in-Kind Agreement Policy

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# **CONTENTS**

<b>1. PURPOSE .....</b>	<b>1</b>
<b>2. APPLICATION .....</b>	<b>1</b>
<b>3. LEGISLATIVE CONTEXT .....</b>	<b>1</b>
<b>4. THE WIK AGREEMENT PROCESS .....</b>	<b>1</b>
1.1. Step 1 – Discuss WIK proposal with Council .....	2
1.2. Step 2 – Submit a WIK Agreement Application .....	3
1.3. Step 3 - Assessment of WIK Agreement Application .....	3
1.4. Step 4 - Preparation of the WIK Agreement .....	5
1.5. Step 5 – Construction Phase .....	5
1.6. Step 6 – Handover and Finalisation of Work .....	6
<b>5. THE DEVELOPER’S OBLIGATIONS .....</b>	<b>7</b>
<b>6. DEFINITIONS.....</b>	<b>8</b>
<b>7. REVIEW .....</b>	<b>9</b>
<b>8. APPLICATION OF ESD PRINCIPLES.....</b>	<b>9</b>
<b>ATTACHMENT 1 – WORKS IN KIND AGREEMENT TEMPLATE .....</b>	<b>10</b>

## **1. PURPOSE**

Shoalhaven City Council (Council) is committed to ensuring a fair, transparent and accountable process for developers seeking to enter into a Works-in-Kind (WIK) Agreement.

The purpose of this Policy is to provide a comprehensive policy framework to enable decisions regarding WIK Agreements, in lieu of Section 7.11 Development Contributions, including;

- Procedures for making an application and entering into a WIK Agreement; and
- How Council will assess applications and determine whether to enter into a WIK Agreement.
- Probity measures associated with WIK applications and agreements.

As Council is ultimately responsible for the infrastructure constructed under a WIK Agreement, this Policy sets out the criteria that must be met.

## **2. APPLICATION**

This policy applies when a developer seeks to construct community infrastructure, in full or part, to satisfy requirements imposed by a condition of a development consent, as an alternative to paying Section 7.11 Development Contributions.

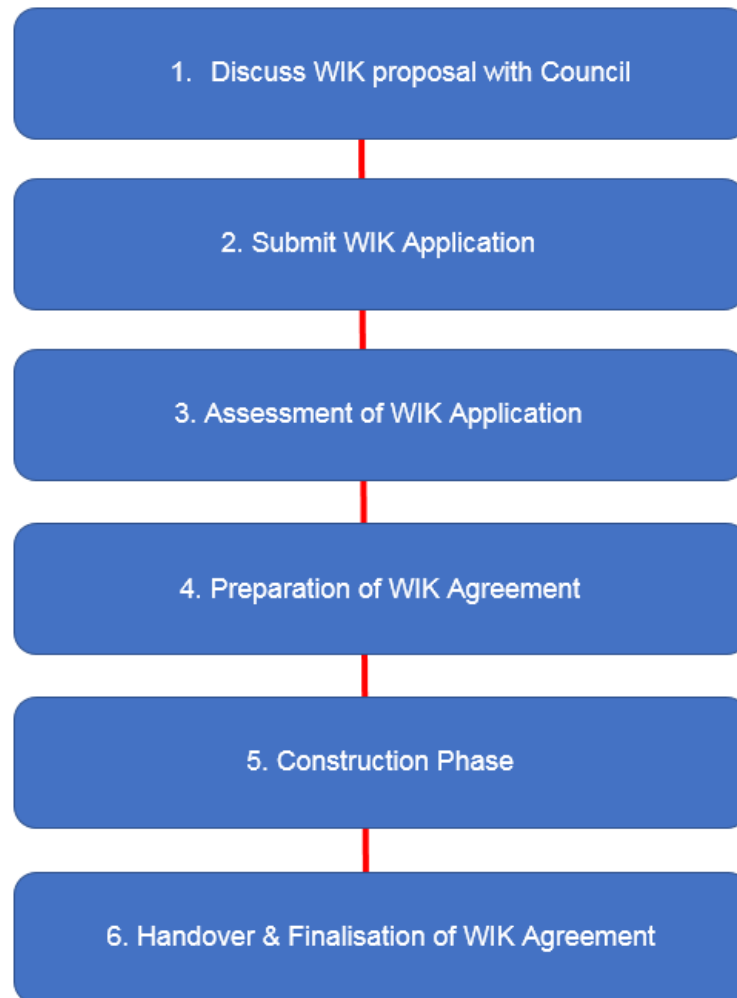
## **3. LEGISLATIVE CONTEXT**

Section 7.11 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) enables Council, via the Shoalhaven Contributions Plan 2019 (the Contributions Plan), to levy monetary development contributions or require the dedication of land (or both) for the provision of community infrastructure which is required because of that development.

Section 7.11(5)(b) of the EP&A Act provides that the development contribution requirements may be satisfied by the provision of WIK or other material public benefit (other than the dedication of land or payment of monetary contributions).

## **4. THE WIK AGREEMENT PROCESS**

The WIK Agreement process, from start to finish, consists of 6 key steps as outlined in **Figure 1** and explained below.



**Figure 1: Summary of WIK Agreement Process Steps**

### **1.1. Step 1 – Discuss WIK proposal with Council**

Prior to submitting a formal proposal for a WIK Agreement, the applicant must meet with Council's Development Contributions Coordinator (and other relevant staff) to:

- Establish the impending need to construct the works for which the contributions are to be offset and the benefit to both Council and the community;
- Discuss the concept design to establish Council's preliminary expectations for a WIK Agreement, understand background information and ensure the proposal meets Council's requirements;
- Identify relevant Council policies, procedures and technical specifications requiring consideration;
- Demonstrate that the relevant assessment criteria can be satisfied;
- Discuss the approval process.

Whilst Development Assessment Planners may be involved in preliminary discussions associated with a WIK Agreement, for probity, there is a need for the separation of responsibilities. As such, Development Assessment Planners are not to be involved in the negotiation of WIK Agreements.

**Following this meeting, Council staff will provide advice as to whether the WIK Agreement proposal should progress to the application stage, or not.**

## **1.2. Step 2 – Submit a WIK Agreement Application**

Following support from Council staff at Step 1, the WIK Agreement proposal is to be formally submitted to Council. Council's WIK Agreement Application Form [\[Insert Hyperlink\]](#) must be completed and submitted, along with the required fees and relevant supporting information which will include (not exclusively):

- The subject land to which the proposal applies, including the legal description;
- The relevant development consent highlighting the Section 7.11 condition/s which requires a monetary development contribution to be paid;
- Owners consent for all land affected by the WIK proposal;
- A description of the WIK proposal, including:
  - The relevant contributions project/s noting the contribution value for that work contained in the Contributions Plan.
  - Evidence that the proposed WIK Agreement is for the same category of infrastructure or infrastructure item as the monetary contribution required (e.g. car parking) and not the total development contributions levied.
  - Value to which the proposed WIK Agreement relates (i.e. estimated construction value, including detailed quotations, tenders);
  - The extent of the development contribution sought to be satisfied by the works, including the difference, if any, of the WIK value and the monetary 7.11 contributions proposed to be satisfied by the WIK.
  - Whether works comprise the whole or part of an infrastructure item in the contributions plan;
  - Identification of any components of the proposed works that is not in accordance with the Contributions Plan.
- Copies of all written documentation including (not exclusively) approvals, plans, contracts and specifications for the proposed works;
- A construction program including proposed timing (including commencement and completion dates), relevant milestones and standard of delivery.

To avoid delays and to allow sufficient time for the WIK Agreement application to be considered, the application should be submitted to Council as soon as practicable following the issue of the development consent.

**A WIK Agreement Application will not be accepted where a development consent has not been issued.**

## **1.3. Step 3 - Assessment of WIK Agreement Application**

The WIK Agreement Application will be assessed based on:

- The written and supporting information provided at Step 2;

- The relevant components of the Shoalhaven Contributions Plan 2019; and
- The benefit of the work to the community;
- Council's priorities for infrastructure delivery and the need to construct the works to which contributions are to be offset.
- Council's ability to deliver the works and if WIK would be a better outcome for the community.
- Financial and implementation implications relating to the Contributions Plan.

The WIK Agreement must operate in one of the following three ways:

1. Where the contribution value of works undertaken is equal to the monetary development contributions required as a condition of consent, the WIK will be considered to fully satisfy the payment of those development contributions; or
2. Where the contribution value of the works undertaken is less than the monetary development contributions required as a condition of consent, the WIK will be considered to partly satisfy the payment of those development contributions and the difference will be payable to Council by the developer. This will be set out in the WIK Agreement; or
3. Where the contribution value of the works undertaken exceeds the monetary development contributions required as a condition of consent, the WIK will be considered to fully satisfy the payment of those Development Contributions. The Council will generally not provide any credit or reimbursement for the amount that the contribution value exceeds the monetary development contributions.

Any difference between the agreed contribution value of the WIK Agreement and the actual costs of constructing the WIK in accordance with the agreement will be to the advantage or disadvantage to the developer. The developer is not entitled to claim any credits or reimbursement for the difference.

At this stage, all WIK Agreement Applications will be considered by the Contributions Panel (panel of relevant Council staff). The WIK Agreement offer will then be reported to Council for formal consideration, except in the following circumstances:

- The WIK Agreement is in a template format, and
- The WIK Agreement consists of works that are listed in Shoalhaven Contributions Plan 2019, and
- The value of works which are recognised are consistent with the value as specified in Shoalhaven Contributions Plan 2019, and
- The works satisfy s7.11 contributions of the same category of infrastructure as the works, and
- The WIK Agreement does not involve credit or refund arrangements, or has credit or refund arrangements which are set out in template format.

In relation to WIK Agreements that are to be reported to Council in Step 3, Council at this may stage resolve to delegate authority to Council's Chief Executive Officer, or his delegate, to negotiate, enter into and register the WIK Agreement (and any associated tender process under s55 of the *Local Government Act 1993*, as relevant) consistent with the detailed key terms.

**Council is not under any obligations to enter into a WIK Agreement. In the event that a proposal for WIK Agreement is not supported by Council, the Section 7.11 contributions condition must be wholly paid by the Developer.**

#### **1.4. Step 4 - Preparation of the WIK Agreement**

Based on the detailed information in the WIK Agreement Application, a draft WIK Agreement will be prepared based on Council's WIK Agreement Template at **Attachment 1**.

The WIK Agreement will include, but not be limited to:

- The Scope of Works
- Obligations to Carry out Works
- Ownership of Works
- Effect of Developer's Compliance with this Agreement
- Value of Works
- Access of the Works on the Site
- Completion of Works
- Defects Liability Period
- Delay/Timing
- Guarantee (the amount of which will be determined by Council and utilised in the event works are not completed to Council's satisfaction and as otherwise allowed under the WIK Agreement).
- Insurance
- Indemnity
- Assignments and Dealings
- Dispute Resolution
- Failure to Carry Out Works
- Termination & Notices
- Other General Terms

**At this point, the applicant must pay Council's legal costs relating to the preparation and negotiation of the WIK Agreement. Once prepared, all parties must sign the WIK Agreement to enable execution of the agreement.**

#### **1.5. Step 5 – Construction Phase**

Following execution of the WIK Agreement, an application for a Construction Certificate or any other relevant approval for the construction of the infrastructure can be made.

When all the relevant pre-construction requirements of the WIK Agreement have been met, and all relevant approvals for construction of the infrastructure have been obtained, the construction of the infrastructure can commence.

For all works carried out under a WIK Agreement, a principle certifying authority (PCA), must be nominated prior to works commencing. The nominated PCA can either be Council (preferred) or a private certifier. Inspections of the works will be conducted throughout the construction process, as outlined in the WIK Agreement and in accordance with any legislative or industry requirements.

## **1.6. Step 6 – Handover and Finalisation of Work**

### Final Inspection

The Developer must notify Council in writing when the works are considered to be practically complete.

An inspection will be carried out by Council to determine whether works are practically complete. Once Council is satisfied that works are practically complete, Council will issue written notice of practical completion to the developer confirming Council's acceptance that the works are practically complete.

### Incomplete or Defective Works

If, following the inspection the Council is not satisfied that the works are practically complete, the Council will issue a written notice identifying the issues and require the developer to complete and rectify the works.

### Defects Liability and Maintenance Periods

The Defects Liability Period and Maintenance Periods will commence from the date the Council gives a notice of practical completion.

### Hand-over of Works

Before the end of the Defects Liability Period or Maintenance Period (whichever is later), the developer must notify the Council in writing of the end of that period.

An inspection will be carried out by Council to determine whether the all defects have been rectified and all maintenance has been carried out in accordance with the WIK Agreement. Once Council is satisfied that all defects have been rectified and that maintenance has been carried out, Council will issue a written Final Certificate evidencing acceptance of the work.

If, following the inspection the Council is not satisfied that defects have been rectified or maintenance has been carried out as required under the WIK Agreement, then Council will issue a written notice identifying the issues and require the developer to complete and rectify the works.



### Dedication of Land

Where the infrastructure is located on land not yet in the ownership of Council, the land is to be dedicated to Council free of cost. A separate planning agreement may be required for the dedication.

Where the infrastructure is provided on land which will not be dedicated to Council, a restriction on use, easement, covenant or other encumbrance is to be placed on the title to the satisfaction of Council.

## **5. THE DEVELOPER'S OBLIGATIONS**

Where Council agrees to enter into a WIK Agreement, a developer shall:

- Work cooperatively with Council to develop a design that achieves a positive outcome for the community having regard to aesthetics, sustainability, life cycle costs and value for money;
- Comply with all statutory requirements that relate to the work, including the requirements of the Local Government (General) Regulation 2005 and the Tendering Guidelines for NSW Local Government;
- Ensure that works reach practical completion on or before the date for practical completion, in accordance with the terms of the WIK Agreement.
- Be responsible for works undertaken, irrespective of whether they carry out the work themselves or a contractor carries out the works on their behalf.
- At their own cost, obtain all relevant approvals and consents, prior to commencing works and once approved, provide copies of these to Council.
- Carry out and complete the works, to the satisfaction of Council, and in accordance with:
  - (a) the development consent;
  - (b) any approvals and consents relating to the works;
  - (c) all applicable laws, including those relating to the environment and occupational health and safety;
  - (d) the WIK Agreement (to the extent that it is not inconsistent with the development consent, any other approval or consent, or applicable law); and
  - (e) any reasonable directions given by Council about the works.
- Financial information (cost of works, e.g. account statements, receipts and bank statements) needs to be provided to Council regularly as evidence of works completed to date and must differentiate between those costs relating to the WIK Agreement and other project costs.
- At their own cost, repair and make good, to the satisfaction of Council, any loss or damage to the works from any cause whatsoever which occurs before the date on which the works are handed over to the Council.
- Enable Council as a party to the WIK Agreement, to enter the land and inspect the works during construction including for any other purposes allowed under the WIK Agreement, provided Council give reasonable time and notice to the Developer. If the

site is not owned by the Developer, the Developer must obtain any necessary approval or consent from the landowner for the Council's entry.

- Adhere to Council's Work Health Safety Management System (WHSMS) and comply with all relevant statutory requirements during the work.
- Maintain an appropriate public risk insurance policy with a minimum liability of \$20,000,000. Maintain also other insurance policies in relation to the works and the carrying out of the works including but not limited to contract works insurance, professional indemnity insurance and comprehensive motor vehicle insurance. Depending on the nature of the works proposed, Council may require the amount of public liability insurance to be increased. Copies of all relevant insurances must be provided to Council.
- Provide a cash or unendorsed bank guarantee within 5 days of signing the WIK Agreement.
- Indemnify Council against all claims relating to the works undertaken;
- Not make any variations to the agreed works without written approval from Council;
- Notify Council when all inspections are required as per the WIK Agreement. Further details of these responsibilities may be included in the WIK Agreement.

Further details of responsibilities will be outlined within the WIK Agreement.

## 6. DEFINITIONS

**Applicant** means the person entitled to act upon a Development Consent.

**Certifying authority** has the same meaning as in the EP&A Act.

**Council** means Shoalhaven City Council.

**Defects liability period** means the period stipulated in a WIK Agreement.

**Developer** means a person 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.

**Development application** has the same meaning as in the EP&A Act.

**Development contribution** means a monetary contribution referred to in Section 7.11 of the EP&A Act.

**Contributions plan** means a document that has been publicly exhibited and adopted by Council pursuant to Section 7.18 (formerly Section 94EA) of the EP&A Act that authorises the imposition of a condition under Section 7.11 (formerly Section 94) of that Act, as amended from time to time.

**Development contributions value** means the value of the relevant development contributions referred to in the development consent.

**EP&A Act** means the *Environmental Planning and Assessment Act 1979*.

**Hand over** means the handover of the works to Council, which typically requires care, control and management.

**Infrastructure item** means an item identified in the Contributions Plan or such other public infrastructure item approved by the Council.

**Maintenance period** means the period stipulated in the WIK Agreement during which the developer must maintain an infrastructure item.

**Notification** means that a WIK Agreement will be available for public inspection for a minimum period of 28 days, in accordance with the requirements of the

**Public** includes a section of the public.

**Public benefit** means the benefit enjoyed by the public as a consequence of a development contribution.

**Works-in-kind (WIK)** means the construction or provision of the whole or part of an infrastructure item that is identified in a works schedule in a contributions plan in lieu (wholly or partially) of related Section 7.11 Development Contributions.

**Works-in-kind (WIK) agreement** means the formal agreement between Council and a developer for the works-in-kind provision of infrastructure.

## 7. REVIEW

This policy will be reviewed within one year of the election of every new Council, or earlier should circumstances arise to warrant revision.

## 8. APPLICATION OF ESD PRINCIPLES

This policy is in line with Council's adopted policy on integrating the principles of Ecologically Sustainable Development (ESD) into all Council's planning, decision-making and actions. The policy reflects the effective integration of economic and social considerations in the planning framework.

**ATTACHMENT 1 – WORKS IN KIND AGREEMENT TEMPLATE**

DRAFT

## **Works In Kind Agreement**

**[Insert Name of Works In Kind Agreement]**

Under s7.11(5)(b) of the *Environmental Planning and Assessment Act 1979*

**Shoalhaven City Council**

**[Insert Name of Developer]**

**[Insert Name of Party 3]**

**[Insert DA Details]**

**[Insert Reference]**

**[Insert Date]**

**Insert Name of Works In Kind Agreement]**

**Shoalhaven City Council**

**[Insert Name of Developer]**

**[Insert Name of Party 3 / Landowner]**

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## **[Insert Name of Works In Kind Agreement]**

**This Agreement** is made on the date set out in **Item 1** of **Schedule 1**.

### **Parties**

- (1) **The Council of the City of Shoalhaven** of Bridge Road, Nowra, NSW 2541 (**Council**), and
- (2) **The party set out Item 2 of Schedule 1 (Developer)**.

### **Background**

- A. The Developer has been granted the Development Consent or is otherwise entitled to act upon the Development Consent.
- B. The Development Consent contains the Condition which requires the Developer to pay the Contributions in respect to the development.
- C. The Developer has offered to carry out the Works in lieu of paying the Contributions.
- D. The Developer and Council wish to enter into this Agreement to make provision for the carrying out of the Works by the Developer in [whole/part] satisfaction of the Developer's obligation to pay the Contributions.
- E. Section 7.11(5)(b) of the Act authorises Council and the Developer to enter into this Agreement.

### **Agreed Terms**

#### **1. Scope and design of Works**

- 1.1** The Developer and Council agree that the scope of Works to be carried out and completed by the Developer under this Agreement is set out in **Schedule 2**.
- 1.2** Prior to the Developer commencing design of any item of the Works, the Developer is to request that the Council provide the Developer with:
  - (a) its requirements for the design, materials and specifications for the provision of the item of the Works; or
  - (b) written notice of its in-principle agreement to the design, materials and specifications proposed by the Developer.
- 1.3** Once the Developer receives the Council's requirements under clause 1.2(a), or receives written notice of the Council's in-principle agreement under clause 1.2(b), and before the commencement of the Works, the Developer must (at its cost) :
  - (c) prepare a detailed design for the Works in accordance with the Council's requirements or agreement under clause 1.2;

- (d) obtain the approval of Council for the detailed design;
- (e) prepare construction drawings for the Works; and
- (f) obtain the approval of Council for the construction drawings.

**1.4** The Developer must prepare any detailed design or construction drawings for the Works in accordance with the standards set out in **Schedule 2**.

## **2. Variation to design**

**2.1** The design or specification of the Works that is required to be carried out by the Developer under this Agreement may only be varied by agreement in writing between the Parties, acting reasonably.

**2.2** Without limiting clause 2.1, the Developer may make a written request to the Council to approve a variation to the design or specification of the Works in order to enable it to comply with the requirements of any Authority imposed in connection with any approval relating to the carrying out of the work.

**2.3** The Council is not to unreasonably delay or withhold its approval to a request made by the Developer under clause 2.2.

**2.4** Clause 2.1 does not apply to a variation that is trivial or inconsequential.

## **3. Obligation to Carry out Work**

**3.1** The Developer is to carry out and complete each of the Works and must ensure that the Works reach Practical Completion on or before the Date for Practical Completion and are Handed-Over in accordance with the terms of this Agreement.

**3.2** The Developer's obligation under clause 3.1 exists irrespective of whether the Developer:

- (a) carries out the Works itself; or
- (b) enters into an agreement with another person under which the other person carries out the Works on the Developer's behalf.

**3.3** The Developer must (at its cost):

- (a) obtain all relevant approvals and consents for the carrying out of the Works whether from the Council or any other relevant Authority; and
- (b) before commencing the Works, give to the Council copies of all approvals and consents for the Works (except those granted by Council); and
- (c) from time to time, give to Council such information as requested by the Council relating to the carrying out of the Works

**3.4** The Developer must carry out and complete the Works in a good and workmanlike manner

**[Insert Name of Works In Kind Agreement]**

**Shoalhaven City Council**

**[Insert Name of Developer]**

**[Insert Name of Party 3 / Landowner]**

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having regard to the intended purpose of the Works and otherwise to the satisfaction of Council in accordance with:

- (a) the Development Consent;
- (b) any approvals and consents relating to the Works;
- (c) all applicable laws, including those relating to the environment and occupational health and safety;
- (d) this Agreement to the extent that it is not inconsistent with the Development Consent, any other approval or consent, or applicable law; and
- (e) any reasonable directions given by Council about the Works.

**3.5** The Developer must ensure, in relation to the carrying out of the Works, that it:

- (a) takes all necessary measures to protect people and property;
- (b) avoids unnecessary interference with the passage of people and vehicles; and
- (c) prevents any nuisance or unreasonable noise and disturbance; and
- (d) complies with the Council's work health & safety management systems as applicable to the Works.

**3.6** 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 before the date on which the Works are Handed-Over.

**3.7** The Council as a party to this Agreement and not as a consent authority may (but is not obliged) at reasonable times and on reasonable notice inspect the Works during the course of construction.

#### **4. Ownership of Works**

**4.1** Nothing in, or done under, this Agreement gives the Developer:

- (a) any right, title or interest in the Works; or
- (b) any estate or interest in the Site,

whether at law or in equity.

#### **5. Effect of Developer's Compliance with this Agreement**

**5.1** For the purposes of the Condition and s7.11(5)(b) of the Act:

- (a) the issuing of a Notice of Practical Completion for all the Works for [Insert category of infrastructure] satisfies the Developer's obligation under the Development Consent to



**Insert Name of Works In Kind Agreement]**

**Shoalhaven City Council**

**[Insert Name of Developer]**

**[Insert Name of Party 3 / Landowner]**

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pay the Contributions for [Insert category of infrastructure] to the extent of the sum of all the Works Value for those Works; and

- (b) the Developer is not required to pay the Contributions to that extent.

**6. Value of Works**

**6.1** For the purposes of this Agreement, the Council and Developer agree that the value of an item of the Works is the Works Value for that item as set out in **Schedule 2**.

**6.2** The Developer expressly acknowledges and agrees that

- (a) the Works Value as set out in **Schedule 2** is based on the value of the Works as specified in the Contributions Plan; and
- (b) if the Developer's actual cost of carrying out and completing the Works, including any costs incurred under this Agreement, determined at the date on which the Works reach Completion, differs from the Works Value, then:
  - (i) no party to this Agreement will be entitled to claim any credit or reimbursement, as the case may be, for the difference; and
  - (ii) the Developer is not entitled to change or reduce the scope of the Works by reason only that the costs actually incurred are greater than the Works Value.

**7. Access of the Works on the Site**

**7.1** If the Council owns the Site and subject to clause 7.2, the Council authorises the Developer to enter the Site in order to enable the Developer to properly perform its obligations under this Deed.

**7.2** Council may, by notice in writing, require the Developer to enter into a separate occupation licence in respect to the occupation and use of the Site and upon giving such notice, the Developer may not enter the Site except in accordance with such an occupation licence.

**7.3** The Council may enter the Site in order to inspect, examine or test the Works, or to remedy any breach by the Developer of its obligations under this Deed relating to the Works.

**7.4** The Council is to give the Developer prior reasonable notice before it enters the Site under clause 7.3.

**7.5** If the Site is owned by a third party, the Developer warrants that it has:

- (a) obtained any necessary approval or consent from the relevant landowner:
  - a. to enter the land for the purposes of carrying out the Works; and
  - b. for Council to enter the land for the purposes of this Agreement; and
- (b) if requested, provide Council with written evidence of such approval or consent.

## **8. Practical Completion of Works**

**8.1** When, in the opinion of the Developer, an item of the Works have reached a state of Practical Completion, the Developer must notify Council in writing. This notice must include:

- (a) a statement from the person with direct responsibility for completion of the item of the Works that in that person's opinion the item has reached Practical Completion;
- (b) copies of any warranties, guarantees, maintenance information or other material reasonably required for the ongoing maintenance or management of the item of Works;
- (c) a complete set of works-as-executed-plans for the item of Works including one set in electronic format.

**8.2** Within 10 Business Days of receipt of a notice under clause 8.1, Council will inspect the Works the subject of the notice.

**8.3** The Council must by written notice to the Developer:

- (a) issue a Notice of Practical Completion for an item of the Works if it is satisfied, acting reasonably, that Practical Completion of that item has been achieved; or
- (b) disagree that Practical Completion has been achieved, identify the errors or omissions in the item of the Works which in the opinion of Council prevent Practical Completion and direct the Developer to complete, rectify or repair the Works.

**8.4** Nothing in clause 8.3, or in any notice issued under clause 8.3, will be construed to reduce or waive in any manner the Developer's responsibilities to complete the Works and to correct minor defects or omissions, whether or not these are identified by Council.

**8.5** The Developer must comply with a direction given under clause 8.3(b) according to its terms and at the Developer's own cost. The Developer may then give Council further written notice in accordance with clause 8.1.

**8.6** An item of the Works is taken to have reached Practical Completion when Council acting reasonably gives the Developer a Notice of Practical Completion for that item.

## **9. Maintenance of Works**

**9.1** The Developer is to Maintain each of the Work during the Maintenance Period to the satisfaction of the Council.

## **10. Defects Liability Period**

**10.1** During the Defects Liability Period, Council may give to the Developer written notice in relation to the Works specifying:

**Insert Name of Works In Kind Agreement]**

**Shoalhaven City Council**

**[Insert Name of Developer]**

**[Insert Name of Party 3 / Landowner]**

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- (a) the Works requiring rectification;
- (b) the action to be undertaken by the Developer to rectify those Works; and
- (c) the date on which those Works must be rectified.

**10.2** The Developer must comply with a notice given under clause 10.1 according to its terms and at the Developer's own cost.

**10.3** The Works is taken to be rectified when Council gives the Developer written notice to that effect.

**10.4** Without limiting any other rights the Council has to enforce this Agreement, the Council may, if the Developer does not comply with a notice given under clause 10.1 do one or more of the following::

- (a) call upon the Guarantee and apply it in accordance with clause 12; and
- (b) do such things as are necessary to rectify the defect; and
- (c) recover, as a debt due and owing, any difference between the amount of the Guarantee and the costs incurred by Council in rectifying the defect.

**10.5** Clause 10.1 does not limit any other right, power or privilege of the Council whether arising under this Agreement or otherwise at law.

## **11. Hand-Over of Works**

**11.1** Not later than 10 Business Days before the end of the Defects Liability Period or Maintenance Period for an item of Works (whichever is later), the Developer is to give the Council written notice of the end of the Defects Liability Period and Maintenance Period.

**11.2** Within 10 Business Days of receipt of a notice under clause 11.1, Council will inspect the Works the subject of the notice.

**11.3** The Council must by written notice to the Developer:

- (a) issue a Final Certificate for the item of the Works if it is satisfied, acting reasonably, that any notice issued by the Council under clause 10.1 has been complied with and the Developer has Maintained the Works in accordance with this Agreement; or
- (b) disagree that all notices issued by the Council under clause 10.1 have been complied with or that the Works have been Maintained in accordance with this Agreement and identify the errors or omissions in the item of the Works which in the opinion of Council prevent completion and direct the Developer to complete, rectify or repair the Works.

**11.4** The Developer must comply with a direction given under clause 11.3(b) according to its terms and at the Developer's own cost. The Developer may then give Council further written notice in accordance with clause 11.1.

**11.5** An item of the Works is Handed-Over for the purposes of this Agreement when the Council

acting reasonably gives the Developer a Final Certificate for that item.

**11.6** If the Council is the owner of the land on which an item of the Works the subject of a notice referred to in clause 11.5 is given, the Council assumes responsibility for that item upon the issuing of the Final Certificate for the Works, but if it is not the owner at that time, it assumes that responsibility when it later becomes the owner or is granted an easement on terms satisfactory to the Council in respect of the Works.

**11.7** Before an item of the Works is Handed-Over to the Council, the Developer is to:

(a) remove from the Site:

- (i) any rubbish or surplus material, and
- (ii) any temporary works, and
- (iii) any construction plant and equipment,

relating to the carrying out of the work as the case requires, and

(b) assign to the Council all of the Developer's contractor's warranties under any building or construction contract entered into by the Developer in respect of the Works.

## **12. Easements, covenants etc. relating to Works**

**12.1** The Developer must create, or procure the creation of, any easement or covenant or any other instrument benefitting the Council that is reasonably required by the Council in relation to the Works.

**12.2** The costs required to be incurred by the Developer in doing so include, unless otherwise agreed in writing between the Parties, the payment of compensation to any person.

## **13. Delay**

**13.1** When it becomes evident to the Developer that anything, including:

- (a) any act or omission of Council;
- (b) delay or disruption caused by Council, or a breach of this Agreement by Council;
- (c) a change in legislative requirements;
- (d) an event of force majeure,

may delay the performance of any obligation under this Agreement, the Developer may within 20 Business Days of becoming aware of the delay, notify Council in writing with details of the possible delay, the cause and request an extension of time to perform the relevant obligation.

**13.2** If the Developer is delayed by any of the causes referred to in clause 13.1 and Council considers that such cause:

(a) could not be reasonably avoided; and

(b) affects an activity critical for completion or performance of the relevant obligation,

then the Developer will be entitled to an extension of time for the relevant obligation as determined by the Council acting reasonably.

**13.3** In any other case, the Council may approve or reject a request for extension of time in its absolute discretion.

#### **14. Guarantee**

**14.1** Within 5 Business Days of the date of this Agreement, the Developer must provide the Council with the Guarantee for the Guarantee Amount.

**14.2** If the Guarantee is provided by way of cash or unendorsed bank cheque, Council must hold the Guarantee in an interest bearing account on behalf of the Developer. Any interest earned by the Developer forms part of the Guarantee.

**14.3** Council may call upon the Guarantee if:

(a) the Developer fails to comply with a notice given under clause 10.1 or 20.1; or

(b) Council gives the Developer a termination notice under clause 21.

**14.4** The amount appropriated by the Council under clause 14.3(a) must be applied towards:

(a) the reasonable costs and expenses incurred by the Council in rectifying any default by the Developer under this Agreement; or

(b) carrying out the Works; or

(c) carrying out any works at the Site necessary for the protection of persons or property.

**14.5** The Developer acknowledges and agrees that:

(a) where the Council may call on the Guarantee under this Agreement, the Council may claim, and the bank will be entitled to make, payment under the Guarantee without reference to the Developer and despite any objection, claim or direction by the Developer to the contrary; and

(b) the rights of the Council under this Agreement are without derogation from the other rights and remedies available to the Council under this Agreement, at law or in equity in relation to the default of the Developer.

**14.6** After the Council issues Notice of Practical Completion, the Developer may by written notice to the Council request a partial release of the Guarantee. This notice must include details of the Works and Works Value for which a Notice of Practical Completion has been given.

**14.7** Upon receipt of a notice under clause 14.6, Council may in its absolute discretion by written notice to the Developer:

**Insert Name of Works In Kind Agreement]**

**Shoalhaven City Council**

**[Insert Name of Developer]**

**[Insert Name of Party 3 / Landowner]**

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- (a) request that the Developer provide verification from an appropriately qualified expert of the Practically Completed Works and the Works Value;
- (b) subject to clause 14.10, partially release the Guarantee; or
- (c) refuse to partially release the Guarantee.

**14.8** If the Council refuses to partially release the Guarantee, on request by the Developer, it must give written reasons for its decision.

**14.9** Unless the Council is entitled to call upon the Guarantee, and subject to clause 14.10, Council will release the Guarantee to the Developer within 10 Business Days of the Council giving a Notice of Practical Completion of all the Works.

**14.10** Nothing in clauses 14.7 and 14.9 requires the Council to release any part of the Guarantee which will result in Council holding a Guarantee in an amount less than 10% of the Works Value.

**14.11** Unless the Council is entitled to the remaining Guarantee, Council will release the remaining Guarantee (and if applicable, together with any interest earned on the Guarantee less any charges payable to the bank) to the Developer within 10 Business Days of the Hand-Over of all of the Works.

## **15. Insurance**

**15.1** The Developer must:

- (a) take out and maintain public liability insurance, with an insurer approved by Council, with Council nominated as an interested party, for an amount not less than the amount set out in **Item 11 of Schedule 1** for a single occurrence covering all aspects of the Works;
- (b) take out and maintain all other necessary insurance policies in respect of the Works and the carrying out of the Works including, but not limited to, contract works insurance (noting the Council as an interested party, for the full replacement value of the Works), insurance against death or injury to persons employed in relation to the undertaking of the Works, professional indemnity insurance, comprehensive motor vehicle insurance, and any other insurances required at law;
- (c) submit a copy of the certificate of currency for each insurance to Council before commencement of the Works and when otherwise required by the Council;
- (d) maintain the insurance in clauses 15.1(a) and (b) until all of the Works have been Handed-Over for the purposes of this Agreement.

## **16. Indemnity**

**16.1** Except to the extent that the Council has by act or omission contributed to its loss, the Developer indemnifies and releases the Council against all damage, expense, loss or liability

of any nature suffered or incurred by the Council arising from any act or omission by the Developer (or any person engaged by it) in connection with the carrying out of the Works.

## **17. Assignments & Dealings**

**17.1** This Agreement is intended by the parties to bind successors in title to the Land.

**17.2** The Developer must not have any Dealings with the Land or assign its rights or obligations under this Agreement to another person unless the Developer:

- (a) first informs the proposed assignee, purchaser or other party (the **Incoming Party**) of this Agreement;
- (b) provides the Incoming Party with a copy of this Agreement;
- (c) enters into a novation deed with the Incoming Party and the Council on terms satisfactory to the Council, whereby the Incoming Party agrees to perform the obligations of the Developer under this Agreement;
- (d) remedies any default by the Developer, unless such default has been waived by the Council; and
- (e) pays the Council's reasonable costs in relation to the assignment and novation.

## **18. Dispute Resolution – Expert Determination**

**18.1** This clause applies to a Dispute between any of the Parties to this Agreement concerning a matter arising in connection with this Agreement that can be determined by an appropriately qualified expert if:

- (a) the Parties to the Dispute agree that it can be so determined, or
- (b) the Chief Executive Officer of the professional body that represents persons who appear to have the relevant expertise to determine the Dispute gives a written opinion that the Dispute can be determined by a member of that body.

**18.2** A Dispute to which this clause applies is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.

**18.3** If a notice is given under clause 18.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.

**18.4** If the Dispute is not resolved within a further 28 days, the Dispute is to be referred to the President of the NSW Law Society to appoint an expert for expert determination.

**18.5** The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.

**18.6** Each Party is to bear its own costs arising from or in connection with the appointment of the expert and the expert determination.



**Insert Name of Works In Kind Agreement]**

**Shoalhaven City Council**

**[Insert Name of Developer]**

**[Insert Name of Party 3 / Landowner]**

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**18.7** The Parties are to share equally the costs of the President, the expert, and the expert determination.

## **19. Dispute Resolution – Mediation**

**19.1** This clause applies to any Dispute arising in connection with this Agreement other than a Dispute to which clause 18 applies.

**19.2** Such a Dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.

**19.3** If a notice is given under clause 19.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.

**19.4** If the Dispute is not resolved within a further 28 days, the Parties are to mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and are to request the President of the Law Society to select a mediator.

**19.5** 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.

**19.6** Each Party is to bear its own costs arising from or in connection with the appointment of a mediator and the mediation.

**19.7** The Parties are to share equally the costs of the President, the mediator, and the mediation.

## **20. Failure to Carry Out Works**

**20.1** Subject to clause 21, if Council considers the Developer 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 Developer a notice requiring:

- (a) the Developer to rectify the breach to the Council's satisfaction; or
- (b) the Developer to immediately cease carrying out of the Works and to rectify the breach to Council's satisfaction.

**20.2** A notice given under clause 20.1 is to allow the Developer at least 20 Business Days to rectify the breach, except in cases of emergency where the notice may require the Developer to rectify the breach immediately.

**20.3** Without limiting any other rights Council has to enforce this Agreement, the Council may, if the Developer does not comply with a notice given under clause 20.1 do one or more of the following:



- (a) call upon the Guarantee and apply it in accordance with clause 14;
- (b) carry out and complete the Works; and
- (c) recover, as a debt due and owing, any difference between the amount of the Guarantee and the costs incurred by Council in completing the Works.

**20.4** Clauses 18 and 19 do not prevent a notice being given under clause 20.1 and does not apply to such a notice or the circumstances relating to the giving of that notice, and any procedure commenced under clauses 18 and 19 cease to apply when such a notice is given.

## **21. Termination**

**21.1** If the Developer is in breach of this Agreement, the Council may, despite any other provision of this Agreement, give the Developer written notice requiring the Developer to show cause why the Council should not terminate this Agreement.

**21.2** A notice under clause 21.1 must:

- (a) state that it is a notice given under this Agreement and clause 21.1;
- (b) particularise the nature of the breach by the Developer;
- (c) require the Developer to show cause by notice to the Council why the Council should not terminate this Agreement;
- (d) specify a date by which the Developer must show cause.

**21.3** If the Developer fails to show cause to the reasonable satisfaction of the Council why the Council should not terminate this Agreement in relation to the Developer's breach, the Council may terminate this Agreement by written notice to the Developer.

**21.4** If the Council terminates this Agreement under clause 21.3 the rights and liabilities of the parties are the same as they would have been at common law had the Developer repudiated this Agreement and the Council elected to treat this Agreement at an end and recover damages.

**21.5** Clauses 18 and 19 do not prevent a notice being given under clause 21.1 and does not apply to such a notice or the circumstances relating to the giving of that notice, and any procedure commenced under clauses 18 and 19 cease to apply when such a notice is given.

**21.6** Clause 14.3 does not merge on termination of this Agreement.

## **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:

- (a) delivered or posted to that party at its address set out in **Item 12 of Schedule 1**; or

(b) faxed to that party at its fax number set out in **Item 12 of Schedule 1**.

**22.2** If a party gives the other party three 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 at the following time:

(a) If it is delivered, when it is left at the relevant address;

(a) If it is sent by post, two business days after it is posted; or

(b) If it is 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. General**

### **23.1 Approvals & Consents**

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 that party's absolute discretion and subject to any conditions determined by the party. A party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

### **23.2 Legal and Administrative Costs**

The Developer must pay all reasonable legal and administrative costs and expenses in relation to:

(a) the negotiation, preparation and execution of this Agreement and any documents related to this Agreement; and

(b) any enforcement of Council's rights under this Agreement.

### **23.3 Stamp Duty**

The Developer is liable for and must pay all stamp duty (including any fine or penalty except where it arises from default by any other Party) on or relating to this Agreement, any document executed under it or any dutiable transaction evidenced or effected by it.

**Insert Name of Works In Kind Agreement]**

**Shoalhaven City Council**

**[Insert Name of Developer]**

**[Insert Name of Party 3 / Landowner]**

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#### **23.4 Entire Agreement**

This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with. 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.

#### **23.5 Further Acts**

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

#### **23.6 Governing Law & Jurisdiction**

This Agreement is governed by the law of New South Wales. The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them. The Parties will not object to the exercise of jurisdiction by those courts on any basis.

#### **23.7 Joint & Several Liability**

An obligation on two or more persons binds them separately and together.

#### **23.8 No Fetter**

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

#### **23.9 Representations & Warranties**

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.

#### **23.10 Severability**

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. 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.

**Insert Name of Works In Kind Agreement]**

**Shoalhaven City Council**

**[Insert Name of Developer]**

**[Insert Name of Party 3 / Landowner]**

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### **23.11 Modification**

This Agreement may only be varied or replaced by a document in writing, which is signed by the parties.

### **23.12 Waiver**

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. A waiver by a party is only effective if it is in writing. A written waiver by a party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

### **23.13 Relationship of Parties**

This Agreement is not intended to create a partnership, joint venture or agency relationship between the parties.

### **23.14 Counterparts**

This Agreement may be signed in counterparts.

### **23.15 GST**

- (a) In this clause 23.15:
  - (i) words and expressions which are not defined in this document but which have a defined meaning in GST Law have the same meaning as in the GST Law;
  - (ii) “**GST Law**” has the meaning given to that expression in the A New Tax System (Goods and Services Tax) Act 1999; and
  - (i) any reference to GST payable or an entitlement to an input tax credit includes a reference, as appropriate, to GST payable by, or an input tax credit entitlement of, the representative member of a GST group.
- (b) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under, or in connection with, this Agreement are exclusive of GST.
- (c) If GST is payable in respect of any supply made by a supplier under, or in connection with, this Agreement, then to the extent that the consideration (or part thereof) payable by the recipient is:
  - (i) a monetary payment; or
  - (ii) a non-monetary payment which is not a taxable supply by the recipient, the recipient will pay to the supplier an additional amount equal to the GST payable by the supplier in respect of the supply (**GST Amount**).

**Insert Name of Works In Kind Agreement]**

**Shoalhaven City Council**

**[Insert Name of Developer]**

**[Insert Name of Party 3 / Landowner]**

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- (d) Subject to paragraph (g), the recipient will pay the GST Amount referred to in clause 23.15(c) in addition to and at the same time the consideration for the supply is to be provided under this Agreement.
- (e) If GST is payable in respect of any supply made by a supplier under, or in connection with, this Agreement, then to the extent that the consideration (or part thereof) payable by the recipient is a non-monetary payment which is also a taxable supply by the recipient:
  - (i) at or before the time of payment of any relevant consideration by either party, the parties agree that they will each exchange tax invoices; and
  - (ii) if the parties exchange non-monetary consideration of unequal GST-inclusive market value:
    - (A) in respect of the exchange, one party (**the First Party**) will have a GST liability on its supply (**First Party Supply**) that exceeds its entitlement to an input tax credit on its acquisition in exchange for that supply (**First Party Acquisition**);
    - (B) the other party (**Second Party**) must make a monetary payment to the First Party equal to the positive difference between the GST payable on the First Party Supply and a full input tax credit in respect of the First Party Acquisition plus any GST payable in respect of that payment (**Payment**); and
    - (C) the Payment referred to in paragraph (B) above will be made by the Second Party at the time the Second Party receives a tax invoice for the First Party Supply.
- (f) The parties will agree upon the market value of any non-monetary consideration which the recipient is required to provide under clause 23.15(e). If agreement cannot be reached prior to the time that a party becomes liable for GST, the matter in dispute is to be determined by an independent expert nominated by the President for the time being of the Institute of Chartered Accountants in Australia. The parties will each pay one half of the costs of referral and determination by the independent expert.
- (g) The supplier must deliver a tax invoice to the recipient before the supplier is entitled to payment of the GST Amount under clause 23.15(c). The recipient can withhold payment of the GST Amount until the supplier provides a tax invoice.
- (h) If an adjustment event arises in respect of a taxable supply made by a supplier under, or in connection with, this Agreement;
  - (i) any amount payable by the recipient under clause 23.15(c) will be recalculated to reflect the adjustment event, taking into account any previous adjustments under this clause, and a payment will be made by the recipient to the supplier or by the supplier to the recipient as the case requires and the supplier will issue an adjustment note to the recipient; or
  - (ii) in respect of an exchange of supplies that falls within clause 23.15(e), the principle in that clause will be applied, taking into account the adjustment

event and any previous adjustments under this clause 23.15(h), tax invoices or adjustment notes will be exchanged, and a further monetary payment made as required or appropriate.

- (i) Where a party is required under, or in connection with, this Agreement to pay or reimburse an expense or outgoing of another party, the amount to be paid or reimbursed by the first party will be the sum of the amount of the expense or outgoing less any input tax credits in respect of the expense or outgoing to which the other party is entitled.

## **24. Interpretation**

### **24.1 Definitions**

In this Agreement the following definitions apply:

**Act** means the *Environmental Planning and Assessment Act 1979* (NSW) as amended from time to time.

**Agreement** means this agreement and includes any schedules, annexures and appendices to this agreement.

**Authority** means the Commonwealth or New South Wales government, a Minister of the Crown, a government department, a public authority established by or under any Act, a council or county council constituted under the *Local Government Act 1993*, or a person or body exercising functions under any Act including a commission, panel, court, tribunal and the like.

**Contributions Plan** means the section 7.11 contributions plan made by Council under section 7.18 of the Act as set out in **Item 7 of Schedule 1**.

**Condition** means the condition of the Development Consent which requires the payment of the Contribution as set out in **Item 5 of Schedule 1**.

**Contributions** means the section 7.11 contributions payable by the Developer under the Development Consent at the date of this Agreement as set out in **Item 6 of Schedule 1**.

**Date for Practical Completion** in respect of an item of the Works means the date that item of the Works must reach Practical Completion as set out in **Column 5 of Schedule 1** corresponding to that item.

**Dealing**, in relation to the Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the land.

**Defects Liability Period** means in respect of an item of the Works, the period of 12 months commencing on the date the Council's gives a Notice of Practical Completion for the item under clause 8.3.

**Development** means the development the subject of the Development Consent.

**Development Application** means the development application set out in **Item 4 of Schedule 1** submitted to the relevant consent authority.

**Development Consent** means the development consent granted by Council in respect to the Development Application as set out in **Item 4 of Schedule 1**.

**Dispute** means a dispute or difference between the Parties under or in relation to this Agreement.

**Final Certificate** means a certificate in relation to an item of the Works issued by the Council to the effect that, in the reasonable opinion of the Council:

- (a) any notice issued by the Council under clause 10.1 has been complied with, and
- (b) the Developer has Maintained the item of the Works in accordance with this Agreement.

**Guarantee** means

- (a) a deposit by cash or unendorsed bank cheque with the Council; or
- (b) an irrevocable and unconditional bank guarantee, unlimited in time, issued by a bank licensed to carry on business in Australia that is:
  - (i) in favour of the Council;
  - (ii) for the Guarantee Amount to be paid to the Council on demand; and
  - (iii) on such other terms the Council may approve from time to time.

**Guarantee Amount** means the amount of the Guarantee to be provided by the Developer in respect to the Works as set out in **Item 10 of Schedule 1**.

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

**Land** means the land the subject of the Development Consent as set out in **Item 3 of Schedule 1**.

**Maintain** means, in relation to an item of the Works, keep in a good state of repair and working order, and includes repair of any damage to the work.

**Maintenance Period** in respect of an item of the Works means the period specified in **Column 6 of Schedule 2** corresponding to that item of the Works commencing on the date of the Council's Notice of Practical Completion given under clause 8.3.

**Notice of Practical Completion** means a written notice in relation to the Works or an item of the Works issued by the Council to the effect that, in the reasonable opinion of Council the Works are complete except for minor omissions and minor defects which are non-essential and:

- (a) which do not prevent the Works from being reasonably capable of being used for their intended purposes;



**Insert Name of Works In Kind Agreement]**

**Shoalhaven City Council**

**[Insert Name of Developer]**

**[Insert Name of Party 3 / Landowner]**

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- (b) which the Council determines the Developer has reasonable grounds for not promptly rectifying; and
- (c) the rectification of which will not prejudice the convenient use of the Works.

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

**Practical Completion** means the stage in the construction of the Works when the Works are complete except for minor omissions and minor defects which are non-essential and:

- (a) which do not prevent the Works from being reasonably capable of being used for their intended purposes;
- (b) which the Council determines the Developer has reasonable grounds for not promptly rectifying; and
- (c) the rectification of which will not prejudice the convenient use of the Works.

**Site** means the land where the Developer will carry out the Works as shown on the plan attached as **Schedule 3**.

**Surplus Value** for a category of infrastructure means the amount by which the sum all Works Value for Works for that category of infrastructure exceeds the Contributions for that category of infrastructure as set out in **Item 9** of **Schedule 1**.

**Works** means the items of works the Developer must carry out and complete in accordance with the terms of this Agreement as set out in **Columns 2 & 4** of **Schedule 2**.

**Works Value** in respect of an item of the Works means the value of that item of the Works as set out in **Column 3** of **Schedule 2** corresponding to that item.

## **24.2 Interpretation**

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

- (a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
- (b) A reference in this Agreement to a business day means a day other than Saturday or Sunday on which banks are open for business generally in the Shoalhaven local government area.
- (c) 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.
- (d) A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
- (e) 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.



**Insert Name of Works In Kind Agreement]**

**Shoalhaven City Council**

**[Insert Name of Developer]**

**[Insert Name of Party 3 / Landowner]**

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- (f) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
- (g) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (h) 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.
- (i) 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 genders.
- (j) References to the word 'include' or 'including are to be construed without limitation.
- (k) A reference to this Agreement includes the agreement recorded in this Agreement.
- (l) 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.
- (m) Any schedules and attachments form part of this Agreement.
- (n) The Explanatory Note for this Agreement is not to be used to assist in construing this Agreement.

**Insert Name of Works In Kind Agreement]**

**Shoalhaven City Council**

**[Insert Name of Developer]**

**[Insert Name of Party 3 / Landowner]**

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Executed by the parties as an Agreement:

Signed for and on behalf of the )  
COUNCIL OF THE CITY OF )  
SHOALHAVEN by its duly authorised )  
officer in the presence of: )  
)

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Witness:

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Signature:

---

Name (printed):

---

General Manager:

SIGNED by [INSERT NAME OF )  
DEVELOPER] ACN [INSERT], in )  
accordance with its Constitution (Section )  
127 of the Corporations Act 2001): )

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Signature:

---

Signature:

---

Name:

---

Name:

---

Position:

---

Position:

**Insert Name of Works In Kind Agreement]**

**Shoalhaven City Council**

**[Insert Name of Developer]**

**[Insert Name of Party 3 / Landowner]**

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## Schedule 1 Reference Schedule

Item	Name	Description
1	Date	[leave blank until agreement signed by both parties – then insert date signed by last party]
2	Developer's Name Developer's ABN Developer's Address	[insert name of developer] [insert ABN] [insert address]
3	Land	[insert land subject of the consent]
4	Development Application Development Consent	[insert details of description of development application] [insert details of consent including consent reference and description of development]
5	Condition	[insert condition of consent which requires payment of s7.11 contributions including condition number. A copy of the condition can be attached to the agreement]
6	Contributions	[insert amount of section 7.11 contributions payable under the condition which relates to the in kind works as at the date of this agreement. This should take into account any indexation under the condition. The Contributions inserted here should only be the s7.11 contributions relevant to the category of infrastructure of the works being carried out under this agreement]  <b><i>Note: The section 7.11 contributions are indexed each year in accordance with the Condition. The above figure is the amount payable under the Condition as at the date of this Agreement.</i></b>
7	Contributions Plan	[insert details of the contributions plan which was the basis for the calculation of the contributions under the consent]
9	Surplus Value	[insert amount by which the Works Value exceeds the Contributions – this will usually be “nil” unless the developer agrees to do additional works]
10	Guarantee Amount	[insert amount of guarantee to be provided by developer – usually the value of the Contributions, or the sum of the Works Value, whichever is higher]

**Insert Name of Works In Kind Agreement]**

**Shoalhaven City Council**

**[Insert Name of Developer]**

**[Insert Name of Party 3 / Landowner]**

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11	Public liability Insurance	[insert amount of public liability insurance – usually \$20 million]
12	Notices	
	<b>Council</b>	
	Attention	General Manager
	Address	Administrative Building Bridge Road Nowra NSW 2541
	Fax Number	02 4422 1816
	<b>Developer</b>	
	Attention	[insert position]
	Address	[insert address]
	Fax Number	[insert fax number]

**Insert Name of Works In Kind Agreement]**

**Shoalhaven City Council**

**[Insert Name of Developer]**

**[Insert Name of Party 3 / Landowner]**

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## **Schedule 2 Works**

<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>	<b>Column 4</b>	<b>Column 5</b>	<b>Column 6</b>
<b>Contribution Project Code</b>	<b>Item of Works</b>	<b>Works Value</b>	<b>Plans &amp; Standards</b>	<b>Date for Practical Completion</b>	<b>Maintenance Period</b>
[insert code from Contributions Plan]	[insert description of works]	[insert value of works]	[insert relevant plans & detail any applicable standards – these can be attached separately]	[insert date or trigger for practical completion of works in kind eg: release of occupation certificate or subdivision certificate under the development consent or a specific date]	[insert maintenance period for work]

**Insert Name of Works In Kind Agreement]**

**Shoalhaven City Council**

**[Insert Name of Developer]**

**[Insert Name of Party 3 / Landowner]**

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## **Schedule 3 Site**

The Developer must carry out the Works at the Site known as [insert details of land] as shown marked red in the plan below:

[insert plan showing land boundaries]

DRAFT