

**Deed**

**Kmart Settlement City Precinct  
Planning Agreement**

Under s93F of the *Environmental Planning and Assessment Act 1979*

**Port Macquarie-Hastings Council  
Kmart Australia Limited**

27 march 2014

## **Kmart Settlement City Precinct Planning Agreement**

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## **Kmart Settlement City Precinct Planning Agreement**

### **Summary Sheet**

#### **Council:**

**Name:** Port Macquarie-Hastings Council

**Address:** Cnr Lord & Burrawan Streets Port Macquarie NSW 2444

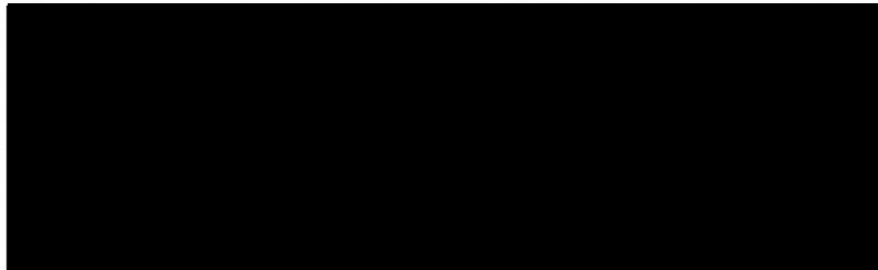
**Telephone:** (02) 6581 8111

**Facsimile:** (02) 6581 8123

**Email:** [council@pmhc.nsw.gov.au](mailto:council@pmhc.nsw.gov.au)

**Representative:** Tim Molloy

#### **Developer:**



#### **Land:**

See definition of *Land* in clause 1.1.

#### **Development:**

See definition of *Development* in clause 1.1.

#### **Development Contributions:**

See Part 2.

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**Application of s94, s94A and s94EF of the Act:**

See clauses 10 & 11.

**Security:**

See Part 5.

**Registration:**

See Part 6.

**Restriction on dealings:**

See Part 6.

**Dispute Resolution:**

See Part 4.

## **Kmart Settlement City Precinct Planning Agreement**

Under s93F of the *Environmental Planning and Assessment Act 1979*

### **Parties**

**Port Macquarie-Hastings Council** ABN 11 236 901 601 of Corner Lord and  
Burrawan Streets, Port Macquarie, New South Wales 2444 (**Council**)  
and

### **Background**

- A The Developer is the owner of the Land.
- B The Developer has sought amendments to the LEP in so far as it relates to the Land in order to facilitate the lodgement of a Development Application for consent to carry out retail development on the Land.
- C The Developer has offered to make Development Contributions in accordance with this Deed in connection with the development of the Land for retail purposes.
- D The Developer has offered to enter into this Deed in connection with the amendments to the LEP and the Development.

### **Operative provisions**

#### **Part 1 - Preliminary**

##### **1 Interpretation**

- 1.1 In this Deed the following definitions apply:

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

**Approval** includes approval, consent, licence, permission or the like.

**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

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the *Local Government Act 1993*, or a person or body exercising functions under any Act including a commission, panel, court, tribunal and the like.

**Bank Guarantee** means an irrevocable and unconditional undertaking without any expiry or end date in favour of the Council to pay an amount or amounts of money to the Council on demand issued by:

- (a) one of the following trading banks:
  - (i) Australia and New Zealand Banking Group Limited,
  - (ii) Commonwealth Bank of Australia,
  - (iii) Macquarie Bank Limited,
  - (iv) National Australia Bank Limited,
  - (iv) St George Bank Limited,
  - (v) Westpac Banking Corporation, or
- (b) any other financial institution approved by the Council in its absolute discretion.

**Claim** includes a claim, demand, remedy, suit, injury, damage, loss, Cost, liability, action, proceeding or right of action.

**Contribution Amount** means the \$ amount of monetary Development Contributions payable under s94 of the Act for local roads in respect of the Development.

**Contribution Credit** means the difference, being a positive number, between the Contribution Reduction and the Contribution Amount reduced from time to time in accordance with clause 11.2 or 11.4.

**Contribution Reduction** means the \$ value approved by the Council of the following:

- (a) the Intersection Works, and
- (b) the Warlters Street Upgrade Works, and
- (c) 60% of the Pedestrian Crossing Works, and
- (d) the Warlters Street Dedication Land Value.

**Cost** means a cost, charge, expense, outgoing, payment, fee and other expenditure of any nature.

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

**Defect** means anything that adversely affects, or is likely to adversely affect, the appearance, structural integrity, functionality or use or enjoyment of a Work or any part of a Work.

**Defects Liability Period** means the period of 1 year commencing on the day immediately after a Work is completed by the Developer in accordance with clause 27 of this Deed.

**Development** means the development of the Land for retail purposes generally in accordance with the concept plan shown in Map 1 and Development Application No. 2013/0300.

**Development Application** has the same meaning as in the Act.

**Development Consent** has the same meaning as in the Act.



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**Development Contribution** means:

- (a) a monetary contribution,
- (b) the dedication of land free or partially of cost,
- (c) the carrying out of a Work, or
- (d) the provision of any other material public benefit,

or any combination of them, to be used for, or applied towards, a public purpose, but does not include any Security or similar benefit provided by a Party to the Council under this Deed for the purposes of s93F(3)(g) of the Act.

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

**East-West Pedestrian Connection** means, subject to clause 12, an at grade pedestrian thoroughfare through the Land between Main Street and the Western boundary of the Land generally in the location shown on Map 1.

**Equipment** means any equipment, apparatus, vehicle or other equipment or thing to be used by or on behalf of the Developer in connection with the performance of its obligations under this Deed.

**Future Development** means the development of the Land the subject of a Development Application that is lodged with the Council after the date of this Deed, other than for the Development.

**GST** has the same meaning as in the GST Law.

**GST Law** has the same meaning as 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.

**Intersection Works** means works required to upgrade the intersection of Park Street and Warlters Street generally in the location shown on Map 1 to a standard suitable for the installation of traffic signals, and the installation of traffic signals at the upgraded intersection to a design and specification approved by Roads and Maritime Services NSW.

**Just Terms Act** means the *Land Acquisition (Just Terms Compensation) Act 1991*.

**Land** means the land comprising Lot 2 in DP 1163062.

**LEP** means *Port Macquarie-Hastings Local Environmental Plan 2011*.

**Main Street** means, subject to clause 13, an at grade vehicular and pedestrian thoroughfare through the Land between Warlters Street and Park Street in the location and of the dimensions shown on Map 1 and Map 2.

**Map 1** means the map contained in Schedule 1 and marked Map No. 1.

**Map 2** means the map contained in Schedule 1 and marked Map No. 2.

**Map 3** means the map contained in Schedule 1 and marked Map No. 3.

**Map 4** means the map contained in Schedule 1 and marked Map No. 4.

**Map 5** means the map contained in Schedule 1 and marked Map No. 5.

**Occupation Certificate** has the same meaning as in the Act.

**Party** means a party to this Deed.

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**Pedestrian Crossing Works** means works comprising the provision of a pedestrian crossing generally in the location shown on Map 5.

**Rectification Notice** means a notice in writing:

- (a) identifying the nature and extent of a Defect,
- (b) specifying the works or actions that are required to Rectify the Defect,
- (c) specifying the date by which or the period within which the Defect is to be rectified.

**Rectify** means rectify, remedy or correct.

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

**Security** means a Bank Guarantee, or a bond or other form of security to the satisfaction of the Council.

**Settlement City Precinct** means the area shown edged in red and marked 'Settlement City Precinct' in Figure 1 of the document titled 'Port-Macquarie Hastings Council, Settlement City Precinct Structure Plan' dated January 2009.

**Splay Corner Land** means the land identified as 'Splay Corner' shown in the location on Map 4.

**Town Square** means, subject to clause 14, the area within and adjacent to the Land in the location shown on Map 1 having minimum dimensions of 19.9m x 35.2m or such alternative dimensions as are approved in writing by the Council and embellished to the reasonable satisfaction of the Council.

**Wartlers Street Dedication Land** means land along the frontage of the Land to Wartlers Street that is required for public road purposes to ensure that the public road reserve of Wartlers Street has a minimum width of 27 metres at any point along the frontage of the Development to Wartlers Street as shown on Map 4.

**Wartlers Street Dedication Land Value** means \$366,700.00.

**Wartlers Street Upgrade Works** means works comprising the upgrading of Wartlers Street generally in the location identified as 'Wartlers Street Upgrade Works' on Map 1 and generally in accordance with the 'Wartlers Street Sections' shown on Map 3 (or as otherwise approved by Council), including transition works between new work and existing work.

**Work** means the physical result of any building, engineering or construction work in, on, over or under land.

- 1.2 In the interpretation of this Deed, 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 Deed.
  - 1.2.2 A reference in this Deed to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
  - 1.2.3 If the day on which any act, matter or thing is to be done under this Deed is not a business day, the act, matter or thing must be done on the next business day.

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- 1.2.4 A reference in this Deed to dollars or \$ means Australian dollars and all amounts payable under this Deed are payable in Australian dollars.
- 1.2.5 A reference in this Deed to a \$ value relating to a Development Contribution is a reference to the value exclusive of GST.
- 1.2.6 A reference in this Deed 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.
- 1.2.7 A reference in this Deed 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 Deed.
- 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 genders.
- 1.2.12 References to the word 'include' or 'including' are to be construed without limitation.
- 1.2.13 A reference to this Deed includes the agreement recorded in this Deed.
- 1.2.14 A reference to a Party to this Deed includes a reference to the servants, agents and contractors of the Party, the Party's successors and assigns.
- 1.2.15 Any schedules, appendices and attachments form part of this Deed.
- 1.2.16 Notes appearing in this Deed are operative provisions of this Deed.

## **2 Status of this Deed**

- 2.1 This Deed is a planning agreement within the meaning of s93F(1) of the Act.

## **3 Commencement**

- 3.1 This Deed takes effect on the date when both Parties have executed one counterpart of this Deed.
- 3.2 The Party who executes this Deed last is to insert on the front page the date they did so and provide a copy of the fully executed and dated Deed to any other person who is a Party.

#### **4 Commencement of Development Contributions Obligations**

- 4.1 Except as otherwise provided by this Deed, the Developer is under no obligation to make the Development Contributions to the Council in accordance with this Deed unless Development Consent is granted to the Development or any part of it.

#### **5 Termination**

- 5.1 This Deed terminates 1 month after both the following have occurred:
- 5.1.1 the Developer has complied with all of its obligations under this Deed; and
  - 5.1.2 the Developer has no remaining Contribution Credit.

#### **6 Application of this Deed**

- 6.1 This Deed applies to the Land and to the Development.

#### **7 Warranties**

- 7.1 The Parties warrant to each other that they:
- 7.1.1 have full capacity to enter into this Deed; and
  - 7.1.2 are able to fully comply with their obligations under this Deed.

#### **8 Further agreements**

- 8.1 The Parties may, at any time and from time to time, enter into agreements relating to the subject-matter of this Deed that are not inconsistent with this Deed for the purpose of implementing this Deed.

#### **9 Surrender of right of appeal, etc.**

- 9.1 The Developer is not to commence or maintain, or to cause or procure the commencement or maintenance, of any proceedings in any court or tribunal or similar body appealing against, or questioning the validity of this Deed or an Approval relating to the Development in so far as the subject-matter of the proceedings relates to this Deed.

## **10 Application of s94, s94A and s94EF of the Act to the Development**

- 10.1 This Deed does not exclude the application of s94 to the Development except to the extent provided for in clause 11.1.
- 10.2 This Deed excludes the application of s94A to the Development.
- 10.3 This Deed does not exclude the application of s94EF to the Development.

## **11 Contribution Credits**

- 11.1 Monetary Development contributions payable under s94 of the Act in respect of the Development are to be reduced by the amount of the Contribution Reduction.
- 11.2 Any Contribution Credit is to be applied by the Council, on application by the Developer or its nominee, in satisfaction of Monetary Development contributions payable under s94 of the Act for local roads by the Developer or its nominee in respect of other development within the Settlement City Precinct.
- 11.3 Clause 11.2 only applies to development for which Development Consent is granted after the date of this Deed.
- 11.4 If, at any time:
  - (a) the Council's s94 fund for local roads relating to the Settlement City Precinct is in credit, and
  - (b) the Developer has a Contribution Credit,the Council may, on application by the Developer, pay to the Developer part or all of the Contribution Credit.

## **Part 2 – Developer's Obligations to Make Development Contributions**

### **12 East-West Pedestrian Connection**

- 12.1 The Developer is to carry out and complete the construction of the East-West Pedestrian Connection by not later than before the issuing of the first Occupation Certificate relating to the Development.
- 12.2 Upon completion, the Developer is to allow the East-West Pedestrian Connection to be used by the public as an unobstructed pedestrian thoroughfare as of right during the approved hours of operation of the Development.
- 12.3 For the avoidance of doubt, the origin or destination of, or reason for, a person's usage the East-West Pedestrian Connection has no bearing whatsoever on their right to use it as a pedestrian thoroughfare.

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- 12.4 The Developer is not to make, or cause, suffer or permit to be made, a Development Application to carry out Future Development on the land on the northern side of the East West Pedestrian Connection for retail purposes unless:
- 12.4.1 the application makes provision for the carrying out of Work to widen the East-West Pedestrian Connection so that it has a minimum width at any point of not less than 8 metres, or
- 12.4.2 the Parties have agreed in writing to another arrangement for the carrying out of Work to widen the East-West Pedestrian Connection in connection with the carrying out of the Future Development.

### **13 Main Street**

- 13.1 The Developer is to carry out and complete the construction of the Main Street by not later than before the issuing of the first Occupation Certificate relating to the Development.
- 13.2 Upon completion, the Developer is to allow the Main Street to be used by the public as an unobstructed vehicular and pedestrian thoroughfare as of right at all times.
- 13.3 Except as otherwise approved by the Council, the Developer is not to construct, or cause, suffer or permit the construction of, any building or structure (other than awnings or signage overhanging a pedestrian footpath approved by the Council) on or over any part of the land the Main Street is to be or has been constructed.
- 13.4 ~~The Developer is not to make, or cause, suffer or permit to be made, a Development Application to carry out Future Development on any part of the Land adjoining the Main Street unless:~~
- ~~13.4.1 the application makes provision for the carrying out of Work to widen the footpath to a continuous width of 4 metres along Main Street adjoining the Future Development, or~~
- ~~13.4.2 the Parties have agreed in writing to another arrangement for the carrying out of Works to widen the footpath along Main Street adjoining the Future Development in connection with the carrying out of the Future Development.~~

### **14 Town Square**

- 14.1 The Developer is to provide the Town Square by not later than completion of the construction of the Main Street.
- 14.2 The Developer is to allow the Town Square to be used by the public as an unobstructed public space as of right at all times.
- 14.3 The Developer is not to make, or cause, suffer or permit to be made, a Development Application to carry out Future Development on any part of the Land unless:
- 14.3.1 the application makes provision for the carrying out of Work to enlarge the Town Square on terms agreed in writing between the Parties, or

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14.3.2 the Parties have agreed in writing to another arrangement relating to the carrying out of Work to enlarge the Town Square in connection with the carrying out of the Future Development.

**15 Intersection Works**

15.1 The Developer is to carry out and complete the Intersection Works by not later than before the issuing of the first Occupation Certificate relating to the Development.

**16 Warlters Street Upgrade Works**

16.1 The Developer is to carry out and complete the Warlters Street Upgrade Works by not later than before the issuing of the first Occupation Certificate relating to the Development.

16.2 The Developer is to dedicate to the Council for public road purposes:

16.2.1 the Warlters Street Dedication Land, and

16.2.2 the Splay Corner Land,

within 6 weeks of completion of the Warlters Street Upgrade Works in accordance with clause 27 of this Deed.

**17 Pedestrian Crossing Works**

17.1 The Developer is to carry out and complete the Pedestrian Crossing Works by not later than before the issuing of the first Occupation Certificate relating to the Development.

**Part 3 – Other Provisions Relating to Development Contributions**

**18 Provision of Development Contributions**

18.1 The Developer is to make Development Contributions at its own cost in accordance with this Deed.

18.2 The Council is to apply each Development Contribution provided to it by the Developer under this Deed towards the public purpose for which it is made and otherwise in accordance with this Deed.

18.3 Despite clause 18.2, the Council may apply a Development Contribution made to it under this Deed towards a public purpose within the Settlement City Precinct other than the public purpose specified in this Deed if the Council reasonably considers that the public interest would be better served by applying the Development Contribution towards that other purpose.

## **19 Dedication of land**

- 19.1 A Development Contribution comprising the dedication of land is made for the purposes of this Deed when:
- 19.1.1 a deposited plan is registered in the register of plans held with the Registrar-General that dedicates land as a public road (including a temporary public road) under the *Roads Act 1993* or creates a public reserve or drainage reserve under the *Local Government Act 1993*, or
- 19.1.2 the Council is given:
- (a) an instrument in registrable form under the *Real Property Act 1900* duly executed by the Developer as transferor that is effective to transfer the title to the land to the Council when executed by the Council as transferee and registered,
  - (b) the written consent to the registration of the transfer of any person whose consent is required to that registration, and
  - (c) a written undertaking from any person holding the certificate of title to the production of the certificate of title for the purposes of registration of the transfer.
- 19.2 The Developer is to do all things reasonably necessary to enable registration of the instrument of transfer to occur.
- 19.3 The Developer is to ensure that land dedicated to the Council under this Deed is free of all encumbrances and affectations (whether registered or unregistered and including without limitation any charge or liability for rates, **taxes and charges**) **except as otherwise agreed in writing by the Council.**
- 19.4 If, having used all reasonable endeavours, the Developer cannot ensure that land to be dedicated to the Council under this Deed is free from all encumbrances and affectations, the Developer may request that Council agree to accept the land subject to those encumbrances and affectations, but the Council may withhold its agreement in its absolute discretion.

## **20 Carrying out of Work**

- 20.1 Without limiting any other provision of this Deed, any Work that is required to be carried out by the Developer under this Deed is to be carried out and completed in accordance with any design or specification specified or approved by the Council (acting reasonably), any relevant Approval, any applicable law, and to the reasonable satisfaction of the Council.
- 20.2 The Landowner, at its own cost, is to comply with any reasonable direction given to it by the Council to prepare or modify a design or specification relating to a Work that the Developer is required to carry out under this Deed.

## **21 Variation to Work**

- 21.1 The design or specification of any Work that is required to be carried out by the Developer under this Deed may be varied by agreement in writing



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- between the Parties, acting reasonably, without the necessity for an amendment to this Deed
- 21.2 Without limiting clause 21.1, the Developer may make a written request to the Council to approve a variation to the design or specification of a Work 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.
- 21.3 The Council is not to unreasonably delay or withhold its approval to a request made by the Developer under clause 21.2.
- 21.4 The Council, acting reasonably, may from time to time give a written direction to the Developer requiring it to vary the design or specification of a Work before the Work is carried out in a specified manner and submit the variation to the Council for approval.
- 21.5 The Developer is to comply promptly with a direction referred to in clause 21.4 at its own cost.

## **22 Access to land by Developer**

- 22.1 The Council authorises the Developer to enter, occupy and use land owned or controlled by the Council for the purpose of performing its obligations under this Deed.
- 22.2 The Council is to permit the Developer, upon receiving reasonable prior notice from the Developer, to enter any other Council owned or controlled land in order to enable the Developer to properly perform its obligations under this Deed.
- 22.3 Nothing in this Deed creates or gives the Developer any estate or interest in any part of the land referred to in clause 22.1 or 22.2.

## **23 Access to land by Council**

- 23.1 The Council may enter any land on which Work is being carried out by the Developer under this Deed in order to inspect, examine or test the Work, or to remedy any breach by the Developer of its obligations under this Deed relating to the Work.
- 23.2 The Council is to give the Developer prior reasonable notice before it enters land under clause 23.1.

## **24 Council's obligations relating to Work**

- 24.1 The Council is not to unreasonably delay, hinder or otherwise interfere with the performance by the Developer of its obligations under this Deed, and is to use its reasonable endeavours to ensure third parties unrelated to the Developer do not unreasonably delay, hinder or otherwise interfere with the performance of those obligations.

## **25 Protection of people, property & utilities**

- 25.1 The Developer is to ensure to the fullest extent reasonably practicable in relation to the performance of its obligations under this Deed that:
- 25.1.1 all necessary measures are taken to protect people and property,
  - 25.1.2 unnecessary interference with the passage of people and vehicles is avoided, and
  - 25.1.3 nuisances and unreasonable noise and disturbances are prevented.
- 25.2 Without limiting clause 25.1, the Developer is not to obstruct, interfere with, impair or damage any public road, public footpath, public cycleway or other public thoroughfare, or any pipe, conduit, drain, watercourse or other public utility or service on any land except as authorised in writing by the Council or any relevant Authority.

## **26 Repair of damage**

- 26.1 The Developer, at its own cost, is to repair and make good to the satisfaction of the Council any damage to a Work required to be carried out by the Developer under this Deed resulting from any cause whatsoever that occurs before the date on which the Work is completed in accordance with clause 27 of this Deed.

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## **27 Completion of Work**

- 27.1 The Developer is to give the Council written notice of the date on which it will complete Work required to be carried out under this Deed or any Stage.
- 27.2 The Council is to inspect the Work the subject of the notice referred to in clause 27.1 within 14 days of the date specified in the notice for completion of the Work.
- 27.3 Work required to be carried out by the Developer under this Deed is completed for the purposes of this Deed when the Council, acting reasonably, gives a written notice to the Developer to that effect.
- 27.4 For the purposes of clause 27.3, if the Council considers that a Work is completed for the purposes of this Deed, the notice referred to in that clause is to be given within 14 days of the inspection referred to in clause 27.2.
- 27.5 If the Council is the owner of the land on which Work the subject of a notice referred to in clause 27.1 is issued, the Council assumes responsibility for the Work upon the issuing of the notice, but if it is not the owner at that time, it assumes that responsibility when it later becomes the owner.
- 27.6 Before the Council gives the Developer a notice referred to in clause 27.3, it may, acting reasonably, give the Developer a written direction to complete, rectify or repair any specified part of the Work to the reasonable satisfaction of the Council.
- 27.7 The Developer, at its own cost, is to promptly comply with a direction referred to in clause 27.6.

## **28 Rectification of defects**

- 28.1 The Council may, acting reasonably, give the Developer a Rectification Notice during the Defects Liability Period with respect to a Work which the Developer is required to carry out under this Deed.
- 28.2 The Developer, at its own cost, is to comply with a Rectification Notice according to its terms and to the reasonable satisfaction of the Council.
- 28.3 The Council is to do such things as are reasonably necessary to enable the Developer to comply with a Rectification Notice that has been given to it under clause 28.1

## **29 Works-As-Executed-Plan**

- 29.1 No later than 60 days after Work is completed for the purposes of this Deed, the Developer is to submit to the Council a full works-as-executed-plan in respect of the Work.
- 29.2 The Developer, being the copyright owner in the plan referred to in clause 29.1, gives the Council a non-exclusive licence to use the copyright in the plans for the purposes of this Deed.

## **30 Removal of Equipment**

- 30.1 When Work on any Council owned or controlled land is completed for the purposes of this Deed, the Developer, without delay, is to:
  - 30.1.1 remove any Equipment from Land and make good any damage or disturbance to the land as a result of that removal, and
  - 30.1.2 leave the land in a neat and tidy state, clean and free of rubbish.

## **Part 4 – Dispute Resolution**

### **31 Dispute resolution – expert determination**

- 31.1 This clause applies to a Dispute between any of the Parties to this Deed concerning a matter arising in connection with this Deed that can be determined by an appropriately qualified expert if:
  - 31.1.1 the Parties to the Dispute agree that it can be so determined, or
  - 31.1.2 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.
- 31.2 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.
- 31.3 If a notice is given under clause 31.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.

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- 31.4 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.
- 31.5 The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.
- 31.6 Each Party is to bear its own costs arising from or in connection with the appointment of the expert and the expert determination.
- 31.7 The Parties are to share equally the costs of the President, the expert, and the expert determination.

### **32 Dispute Resolution - mediation**

- 32.1 This clause applies to any Dispute arising in connection with this Deed other than a Dispute to which clause 31 applies.
- 32.2 Such a Dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 32.3 If a notice is given under clause 32.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 32.4 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.
- 32.5 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.
- 32.6 Each Party is to bear its own costs arising from or in connection with the appointment of a mediator and the mediation.
- 32.7 The Parties are to share equally the costs of the President, the mediator, and the mediation.

## **Part 5 - Enforcement**

### **33 Security for performance of obligations**

- 33.1 This clause applies to the following Work:
  - 33.1.1 the Intersection Works;
  - 33.1.2 the Warlters Street Upgrade Works; and
  - 33.1.3 the Pedestrian Crossing Works.
- 33.2 The Developer is not to carry out any Work, unless, before it commences the Work, the Developer provides the Council with Security to secure the

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performance of the Developer's obligations relating to the Work on such terms and conditions required by the Council acting reasonably.

- 33.3 For the purposes of clause 33.2, the Council is to have regard to any policy or practice of the Council, current at the time the Security is provided, relating to the provision of security to the Council for the construction of public infrastructure by land owners.
- 33.4 The Council, in its absolute discretion and despite any other provision of this Deed, may refuse to allow the Developer to enter, occupy or use any land owned or controlled by the Council or refuse to provide the Developer with any plant, equipment, facilities or assistance relating to the carrying out the Development if the Developer has not provided the Security to the Council in accordance with this Deed.
- 33.5 The Council is to release and return the Security or any unused part of it to the Developer within 14 days of completion of the obligation to which the Security relates.
- 33.6 The Developer may at any time provide the Council with a replacement Security.
- 33.7 On receipt of a replacement Security, the Council is to release and return the Security that has been replaced to the Developer.
- 33.8 If the Council calls-up the Security or any portion of it, it may, by written notice to the Developer, require the Developer to provide a further or replacement Security to ensure that the amount of Security held by the Council equals the amount it is entitled to hold under this Deed.
- 33.9 The Developer is to ensure that the Security provided to the Council is at all times maintained to the full current indexed value.

#### **34 Acquisition of land required to be dedicated**

- 34.1 If the Developer does not dedicate land required to be dedicated under this Deed at the time at which it is required to be dedicated, the Developer consents to the Council compulsorily acquiring the land for compensation in the amount of \$1 without having to follow the pre-acquisition procedure under the Just Terms Act.
- 34.2 The Council is to only acquire land pursuant to clause 34.1 if it considers it reasonable to do so having regard to the circumstances surrounding the failure by the Developer to dedicate the land required to be dedicated under this Deed.
- 34.3 Clause 34.1 constitutes an agreement for the purposes of s30 of the Just Terms Act.
- 34.4 If, as a result of the acquisition referred to in clause 34.1, the Council is required to pay compensation to any person other than the Developer, the Developer is to reimburse the Council that amount, upon a written request being made by the Council, or the Council can call on any Security provided under this Deed.
- 34.5 The Developer indemnifies and keeps indemnified the Council against all Claims made against the Council as a result of any acquisition by the Council of the whole or any part of the land concerned except if, and to the extent that, the Claim arises because of the Council's negligence or default.

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- 34.6 The Developer is to promptly do all things necessary, and consents to the Council doing all things necessary, to give effect to this clause 34, including without limitation:
- 34.6.1 signing any documents or forms,
  - 34.6.2 giving land owner's consent for lodgement of any Development Application,
  - 34.6.3 producing certificates of title to the Registrar-General under the *Real Property Act 1900*, and
  - 34.6.4 paying the Council's costs arising under this clause 34.
- 34.7 For the avoidance of doubt, clause 11 of this Deed will apply if land is acquired by Council pursuant to clause 34.1.

### **35 Breach of obligations**

- 35.1 If the Council reasonably considers that the Developer is in breach of any obligation under this Deed, it may give a written notice to the Developer:
- 35.1.1 specifying the nature and extent of the breach,
  - 35.1.2 requiring the Developer to:
    - (a) rectify the breach if it reasonably considers it is capable of rectification, or
    - (b) pay compensation to the reasonable satisfaction of the Council in lieu of rectifying the breach if it reasonably considers the breach is not capable of rectification,
  - 35.1.3 specifying the period within which the breach is to be rectified or compensation paid, being a period that is reasonable in the circumstances.
- 35.2 If the Developer fails to comply with a notice given under clause 35.1 relating to the carrying out of Work under this Deed, the Council may step-in and remedy the breach and may enter, occupy and use any land owned or controlled by the Developer and any Equipment on such land for that purpose.
- 35.3 Any costs incurred by the Council in remedying a breach in accordance with clause 35.2 may be recovered by the Council by calling up the Security provided by the Developer under this Deed or as a debt due in a court of competent jurisdiction.
- 35.4 For the purpose of clause 35.3, the Council's costs of remedying a breach the subject of a notice given under clause 35.1 include, but are not limited to:
- 35.4.1 the costs of the Council's servants, agents and contractors reasonably incurred for that purpose,
  - 35.4.2 all fees and charges necessarily or reasonably incurred by the Council in remedying the breach, and
  - 35.4.3 all legal costs and expenses reasonably incurred by the Council, by reason of the breach.

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- 35.5 Nothing in this clause 35 prevents the Council from exercising any rights it may have at law or in equity in relation to a breach of this Deed by the Developer, including but not limited to seeking relief in an appropriate court.

**36 Enforcement in a court of competent jurisdiction**

- 36.1 Without limiting any other provision of this Deed, the Parties may enforce this Deed in any court of competent jurisdiction.
- 36.2 For the avoidance of doubt, nothing in this Deed prevents:
- 36.2.1 a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Deed or any matter to which this Deed relates, or
- 36.2.2 the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Deed or any matter to which this Deed relates.

**Part 6 – Registration & Restriction on Dealings**

**37 Registration of this Agreement**

- 37.1 The Parties agree to register this Deed for the purposes of s93H(1) of the Act.
- 37.2 Not later than 10 days after the commencement of this Deed, the Developer is to deliver to the Council in registrable form:
- 37.2.1 an instrument requesting registration of this Deed on the title to the Land duly executed by the Developer, and
- 37.2.2 the written irrevocable consent of each person referred to in s93H(1) of the Act to that registration.
- 37.3 The Developer is to do such other things as are reasonably necessary to enable registration of this Deed to occur.
- 37.4 The Parties are to do such things as are reasonably necessary to remove any notation relating to this Deed from the title to the Land once the Developer has completed its obligations under this Deed to the reasonable satisfaction of the Council or this Deed is terminated or otherwise comes to an end for any other reason.

**38 Restriction on dealings**

- 38.1 The Developer is not to:
- 38.1.1 sell or transfer the Land, or
- 38.1.2 assign the Developer's rights or obligations under this Deed, or novate this Deed,
- to any person unless:

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- 38.1.3 the Developer has, at no cost to the Council, first procured the execution by the person to whom the Land or part is to be sold or transferred or the Developer's rights or obligations under this Deed are to be assigned or novated, of a deed in favour of the Council on terms reasonably satisfactory to the Council, and
  - 38.1.4 the Council has given written notice to the Developer stating that it reasonably considers that the purchaser, transferee, assignee or novatee, is reasonably capable of performing its obligations under this Deed, and
  - 38.1.5 the Developer is not in breach of this Deed, and
  - 38.1.6 the Council otherwise consents to the transfer, assignment or novation, such consent not to be unreasonably withheld.
- 38.2 Clause 38.1 does not apply in relation to any sale or transfer of the Land if this Deed is registered on the title to the Land at the time of the sale.

## **Part 7 – Indemnities & Insurance**

### **39 Risk**

- 39.1 The Developer performs this Deed at its own risk and its own cost.

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### **40 Release**

- 40.1 The Developer releases the Council from any Claim it may have against the Council arising in connection with the performance of the Developer's obligations under this Deed except if, and to the extent that, the Claim arises because of the Council's negligence or default.

### **41 Indemnity**

- 41.1 The Developer indemnifies the Council from and against all Claims that may be sustained, suffered, recovered or made against the Council arising in connection with the performance of the Developer's obligations under this Deed except if, and to the extent that, the Claim arises because of the Council's negligence or default.

### **42 Insurance**

- 42.1 The Developer is to take out and keep current or ensure that its contractors take out and keep current, to the reasonable satisfaction of the Council, the following insurances in relation to Work required to be carried out by the Developer under this Deed up until the Work is taken to have been completed in accordance with clause 27 of this Deed:
  - 42.1.1 contract works insurance, noting the Council as an interested party, for the full replacement value of the Works (including the cost of



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- demolition and removal of debris, consultants' fees and authorities' fees), to cover the Developer's liability in respect of damage to or destruction of the Works,
- 42.1.2 public liability insurance for at least \$20,000,000.00 for a single occurrence, which covers the Council, the Developer and any subcontractor of the Developer, for liability to any third party,
  - 42.1.3 workers compensation insurance as required by law, and
  - 42.1.4 any other insurance required by law.
- 42.2 Subject to clause 35, if the Developer fails to comply with clause 42.1, 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 Developer to the Council and may be recovered by the Council as it deems appropriate including:
- 42.2.1 by calling upon the Security provided by the Developer to the Council under this Deed, or
  - 42.2.2 recovery as a debt due in a court of competent jurisdiction.
- 42.3 The Developer is not to commence to carry out any Work unless it has first provided to the Council satisfactory written evidence of all of the insurances specified in clause 42.1.

## **Part 8 – Other Provisions**

### **43 Review of Deed**

- 43.1 The Parties agree to review this Deed if either party is of the opinion that any change of circumstance has occurred, or is imminent, that materially affects the operation of this Deed.
- 43.2 For the purposes of clause 43.1, the relevant changes include (but are not limited to) any change to a law that restricts or prohibits or enables the Council or any other planning authority to restrict or prohibit any aspect of the Development.
- 43.3 For the purposes of addressing any matter arising from a review of this Deed referred to in clause 43.1, the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Deed.
- 43.4 If this Deed becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties agree to do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Deed is entered into.
- 43.5 A failure by a Party to agree to take action requested by the other Party as a consequence of a review referred to in clause 43.1 (but not 43.4) is not a Dispute for the purposes of this Deed and is not a breach of this Deed.

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## **44 Notices**

- 44.1 Any notice, consent, information, application or request that is to 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:
- 44.1.1 delivered or posted to that Party at its address set out in the Summary Sheet,
  - 44.1.2 faxed to that Party at its fax number set out in the Summary Sheet, or
  - 44.1.3 emailed to that Party at its email address set out in the Summary Sheet.
- 44.2 If a Party gives the other Party 3 business days notice of a change of its address, fax number or email, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted, faxed or emailed to the latest address or fax number.
- 44.3 Any notice, consent, information, application or request is to be treated as given or made if it is:
- 44.3.1 delivered, when it is left at the relevant address,
  - 44.3.2 sent by post, 2 business days after it is posted,
  - 44.3.3 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, or
  - 44.3.4 sent by email and the sender does not receive a delivery failure message from the sender's internet service provider within a period of 24 hours of the email being sent.
- 44.4 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.

## **45 Approvals and Consent**

- 45.1 Except as otherwise set out in this Deed, and subject to any statutory obligations, a Party may give or withhold an approval or consent to be given under this Deed in that Party's absolute discretion and subject to any conditions determined by the Party.
- 45.2 A Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

## **46 Costs**

- 46.1 The Developer is to pay to the Council the Council's costs not exceeding \$14,000.00 of preparing, negotiating, executing and stamping this Deed, and any document related to this Deed within 7 days of a written demand by the Council for such payment.

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- 46.2 The Developer is also to pay to the Council the Council's reasonable costs of enforcing this Deed within 7 days of a written demand by the Council for such payment.

**47 Entire Deed**

- 47.1 This Deed contains everything to which the Parties have agreed in relation to the matters it deals with.
- 47.2 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 Deed was executed, except as permitted by law.

**48 Further Acts**

- 48.1 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 Deed and all transactions incidental to it.

**49 Governing Law and Jurisdiction**

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

**50 Joint and Individual Liability and Benefits**

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

**51 No Fetter**

- 51.1 Nothing in this Deed 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.

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## **52 Illegality**

- 52.1 If this Deed or any part of it becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties are to co-operate and do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Deed is entered into.

## **53 Severability**

- 53.1 If a clause or part of a clause of this Deed 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.
- 53.2 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 Deed, but the rest of this Deed is not affected.

## **54 Amendment**

- 54.1 No amendment of this Deed will be of any force or effect unless it is in writing and signed by the Parties to this Deed in accordance with clause 25C of the Regulation.

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## **55 Waiver**

- 55.1 The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Deed, does not amount to a waiver of any obligation of, or breach of obligation by, another Party.
- 55.2 A waiver by a Party is only effective if it is in writing.
- 55.3 A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given. 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.

## **56 GST**

- 56.1 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

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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..

- 56.2 Subject to clause 56.4., 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.
- 56.3 Clause 56.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Deed to be GST inclusive.
- 56.4 No additional amount shall be payable by the Council under clause 56.2 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.
- 56.5 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 Act, the Parties agree:
- 56.5.1 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;
- 56.5.2 that any amounts payable by the Parties in accordance with clause 56.2 (as limited by clause 56.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 56.6 No payment of any amount pursuant to this clause 56, 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.
- 56.7 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.
- 56.8 This clause continues to apply after expiration or termination of this Deed.

## **57 Explanatory Note**

- 57.1 The Appendix contains the Explanatory Note relating to this Deed required by clause 25E of the Regulation.
- 57.2 Pursuant to clause 25E(7) of the Regulation, the Parties agree that the Explanatory Note is not to be used to assist in construing this Planning Deed.

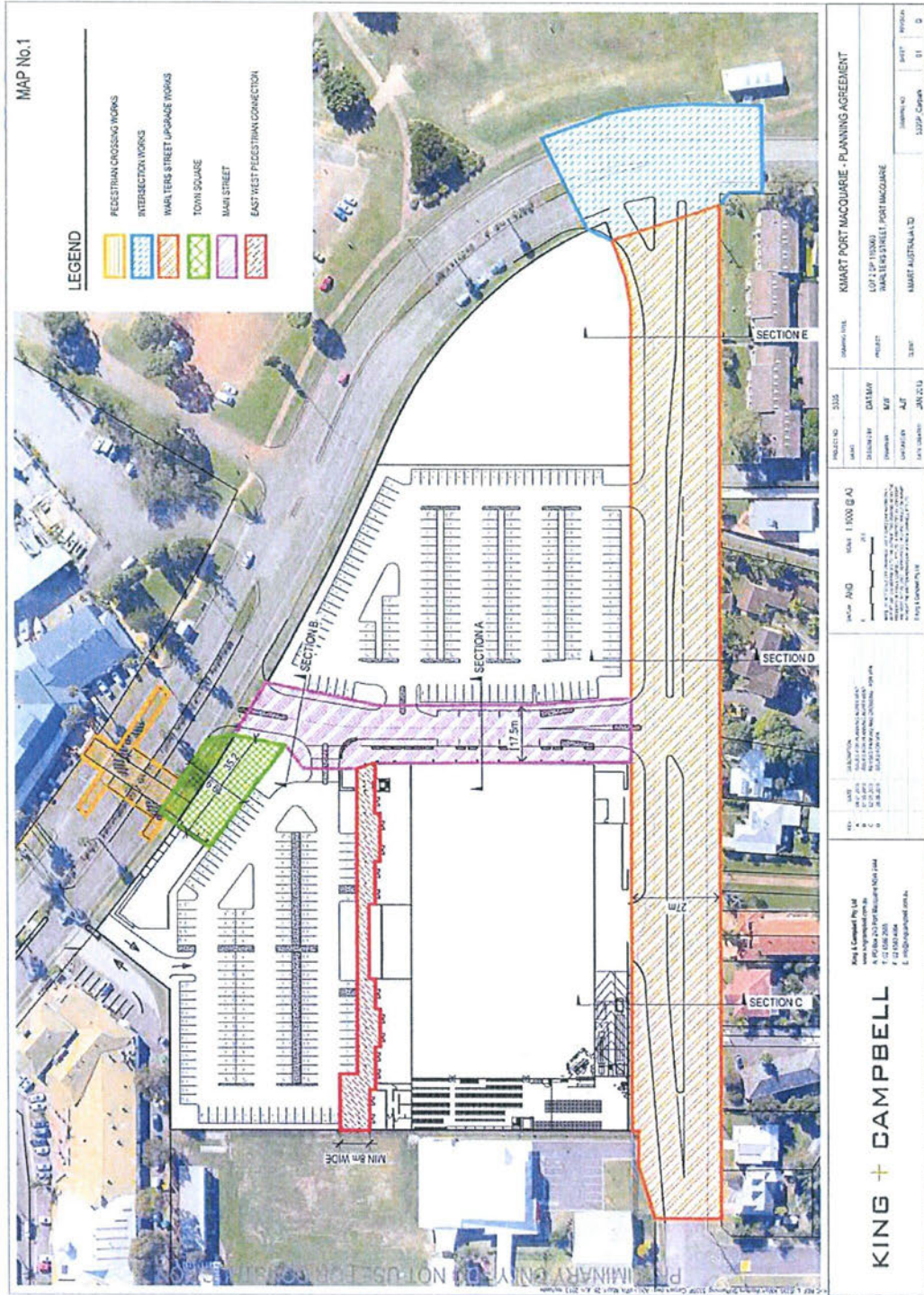
**Schedule 1**

(Clause 1.1)

**Map**

Map No.1, Map No.2, Map No.3, Map No. 4 and Map No. 5 are on the following pages.

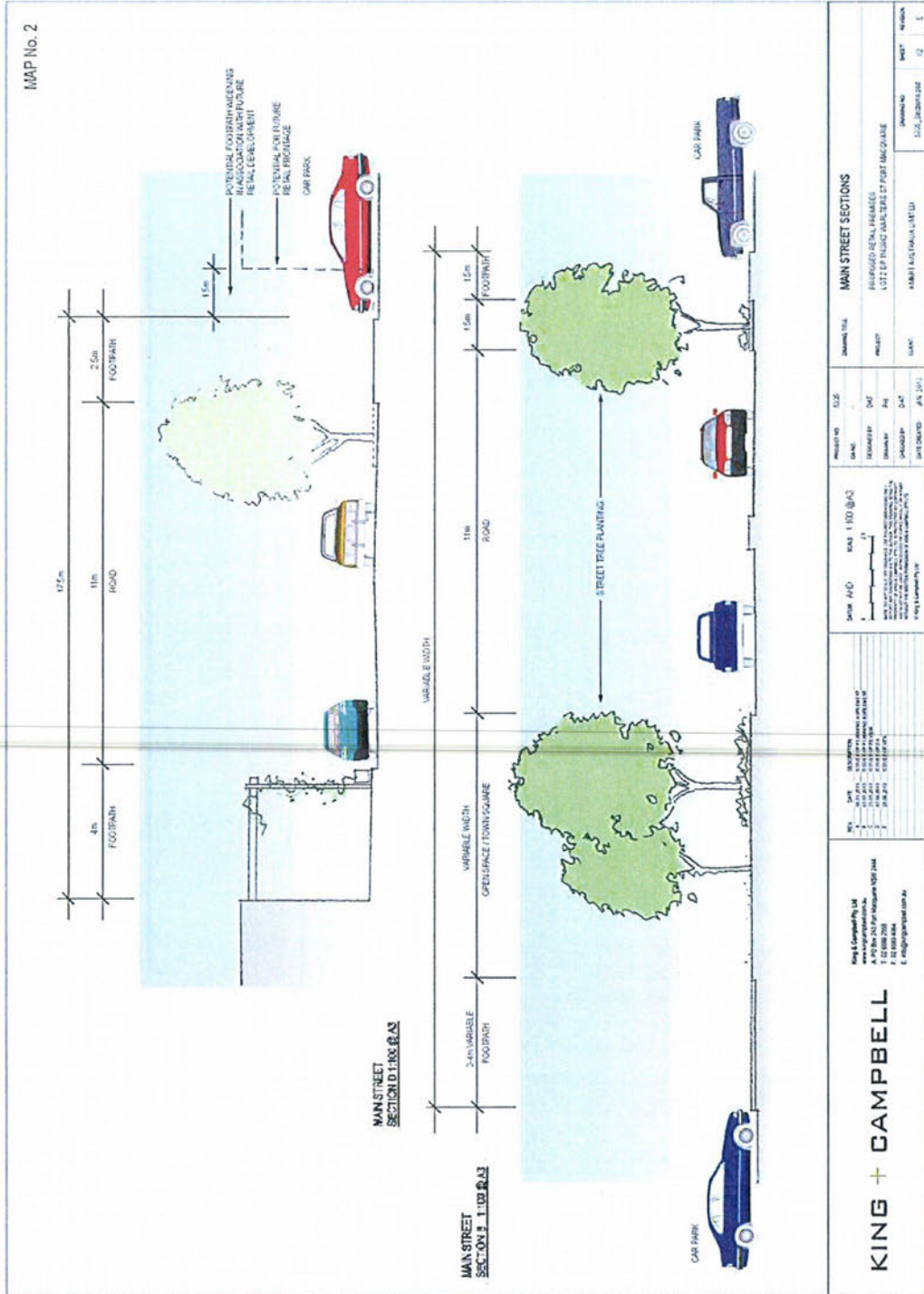
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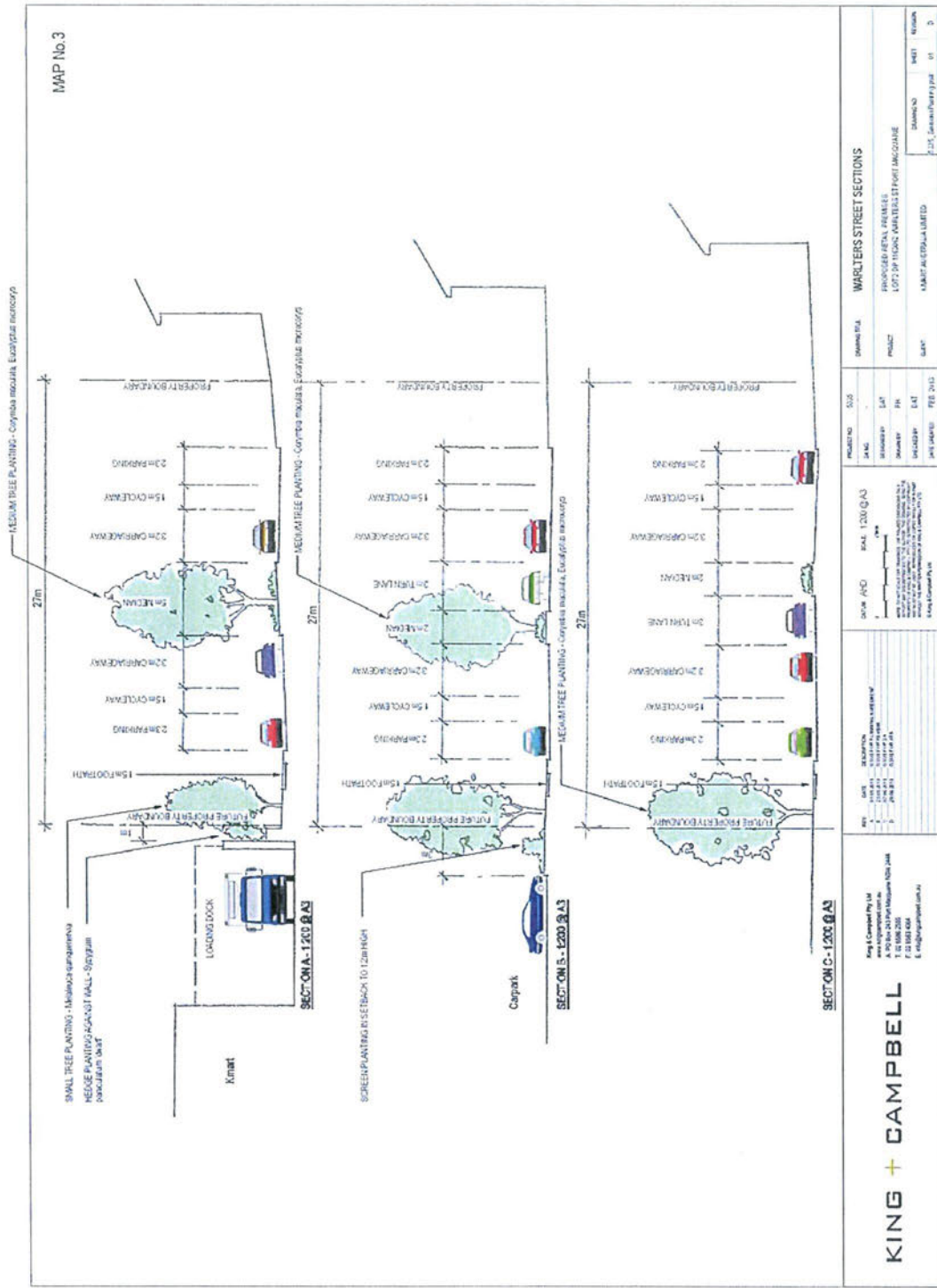
## Port Macquarie-Hastings Council

## Kmart Australia Limited

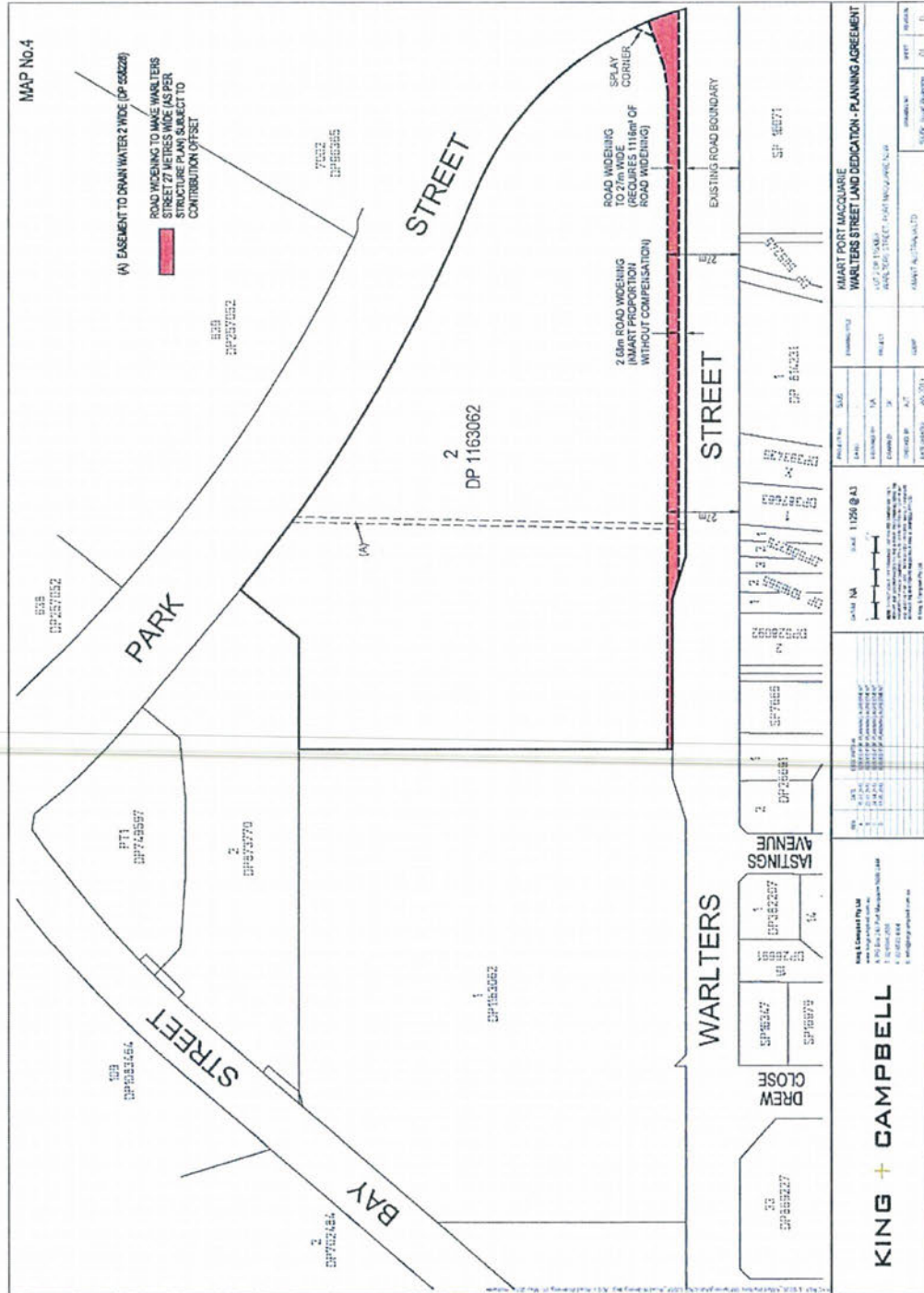




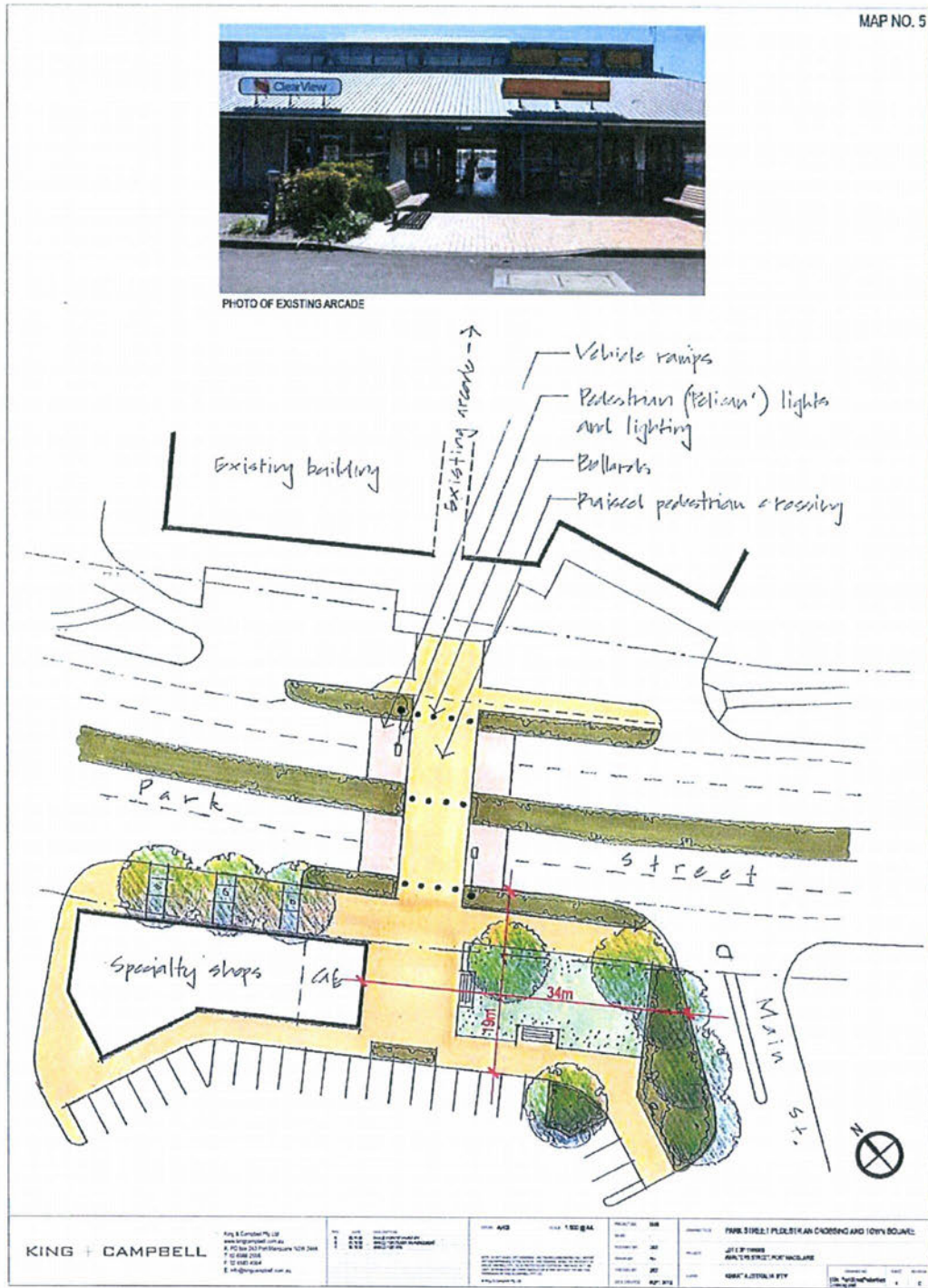
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**Execution**

**Executed as a Deed**

**Dated:** 27 March 2014

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**Executed on behalf of the Council**

[Redacted Signature]

General Manager

[Redacted Signature]

Witness

Mayor

[Redacted Signature]

Witness

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**Executed on behalf of the Developer** in accordance with s127(1) of the Corporations Act (Cth) 2001

Na

Na

## **Appendix**

(Clause 57)

*Environmental Planning and Assessment Regulation 2000*

(Clause 25E)

## **Explanatory Note**

### **Draft Planning Agreement**

Under s93F of the *Environmental Planning and Assessment Act 1979*

### **Parties**

**Port Macquarie-Hastings Council** ABN 11 236 901 601 of Corner Lord and  
Burrawan Streets, Port Macquarie, New South Wales 2444 (**Council**)

and

[REDACTED]

### **Description of the Land to which the Draft Planning Agreement Applies**

The land comprising Lot 2 in DP 1163062

### **Description of Proposed Development**

Development of the Land for retail purposes generally in accordance with the concept plan shown in Map 1 and Development Application No. 2013/0300.

## **Summary of Objectives, Nature and Effect of the Draft Planning Agreement**

### **Objectives of Draft Planning Agreement**

The objective of the Draft Planning Agreement is to provide suitable infrastructure to meet the Development.

### **Nature of Draft Planning Agreement**

The Draft Planning Agreement is a planning agreement under s93F of the *Environmental Planning and Assessment Act 1979 (Act)*. The Draft Planning Agreement is a voluntary agreement under which Development Contributions (as defined in clause 1.1 of the Draft Planning Agreement) are made by the Developer for various public purposes (as defined in s93F(3) of the Act).

### **Effect of the Draft Planning Agreement**

The Draft Planning Agreement:

- relates to the carrying out by the Developer of development on the Land
  - does not exclude the application of s 94 of the Act to the Development, except to the extent provided for in clause 11.1,
  - excludes the application of s94A of the Act to the Development.
  - requires the carrying out of specified Works,
- 
- imposes obligations on the Developer in relation to the carrying out of specified Works, the handing over of those Works to the Council and the rectification of defects in those Works.
  - requires the Developer to provide the Council with security in the event that the Council is required to enforce the terms of the agreement,
  - is to be registered on the title to the Land,
  - imposes restrictions on the Parties transferring the Land or part of the Land or assigning an interest under the agreement,
  - provides two dispute resolution methods for a dispute under the agreement, being expert determination and mediation,
  - provides that the agreement is governed by the law of New South Wales, and
  - provides that the A New Tax System (Goods and Services Tax) Act 1999 (Cth) applies to the agreement.

## **Assessment of the Merits of the Draft Planning Agreement**

### **The Planning Purposes Served by the Draft Planning Agreement**

The Draft Planning Agreement:

- promotes and co-ordinates the orderly and economic use and development of the Land to which the agreement applies,
- provides and co-ordinates community services and facilities in connection with the Development,
- provides land and access to land for public purposes, and
- provides increased opportunity for public involvement and participation in environmental planning and assessment of the Development

### **How the Draft Planning Agreement Promotes the Public Interest**

The draft Planning Agreement promotes the public interest by promoting the objects of the Act as set out in s5(a)(ii), (iv),(v) and 5(c) of the Act.

#### **For Planning Authorities:**

##### ***Development Corporations - How the Draft Planning Agreement Promotes its Statutory Responsibilities***

N/A

##### ***Other Public Authorities – How the Draft Planning Agreement Promotes the Objects (if any) of the Act under which it is Constituted***

N/A

##### ***Councils – How the Draft Planning Agreement Promotes the Elements of the Council's Charter***

The Draft Planning Agreement promotes the elements of the Council's charter by:

- providing services and facilities for the community,
- ensuring that public facilities in the form of public roads provided by the Developer under the agreement are transferred to and managed by the Council or are otherwise subject to the Council's control,
- providing a means that allows the wider community to make submissions to the Council in relation to the agreement.

***All Planning Authorities – Whether the Draft Planning Agreement Conforms with the Authority’s Capital Works Program***

The Draft Planning Agreement requires that specified Works to be carried out by the Developer for the purposes of road and intersection works. These works are not included in the Council’s relevant current capital Works program. However, the Council’s Operational Plan identifies these types of works in the relevant capital works program. Accordingly, the provision of these Works under the agreement is consistent and conforms with the capital Works envisioned by the Council’s Delivery Program.

***All Planning Authorities – Whether the Draft Planning Agreement specifies that certain requirements must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued***

This Draft Planning agreement contains requirements that must be complied with before an occupation certificate is issued, being construction of East-West Pedestrian Connection, Main Street, Intersection Works, Warlters Street Upgrade Works and Pedestrian Crossing Works.