[Insert Name of Works-in-Kind Agreement]

**Works-in-Kind Agreement**

**Cessnock City Council**

**[Insert name of Developer]**

Dated: [Insert date]

[Insert Name of WIK Agreement]

Works-in-Kind Agreement

**Table of Contents**

Background 4

Operative provisions 4

1 Definitions and Interpretation 4

2 Obligation to Carry Out Works 8

3 Variation to Works 8

4 Ownership of Works, etc 9

5 Effect of Developer’s Compliance with this Agreement 9

6 Determination of Value 9

7 Access to land by Developer 10

8 Access to land by Council 10

9 Protection of People and Property 10

10 Damage and Repairs to the Works 10

11 Hand-Over of Works 11

12 Works-As-Executed-Plan 11

13 Rectification of Defects 11

14 Cost of Works carried out by the Council 12

15 Release 12

16 Indemnity and Insurance 12

17 Provision of Security 13

18 Assignment, etc. 14

19 Dispute Resolution – Expert Determination 14

20 Dispute Resolution - Mediation 15

21 Arbitration Excluded 15

22 Failure to Carry out Works 15

23 Termination 17

24 Governing Law & Enforcement 17

25 Notices 18

26 Approvals and Consent 18

27 Costs 18

28 Entire Agreement 19

29 Further Acts 19

30 Joint and Individual Liability and Benefits 19

31 No Fetter 19

32 Representations and Warranties 19

33 Severability 20

34 Illegality 20

35 Modification 20

36 Waiver 20

37 GST 20

Schedule 1 22

Schedule 2 23

Schedule 3 24

Schedule 4 25

**[Insert name] Works-in-Kind Agreement**

Parties

Cessnock City Council ABN 60 919 148 928 of 62-78 Vincent Street, Cessnock, NSW 2325, Australia (**Council**)

[Insert name of Developer] ABN [Insert number] of [Insert address] (**Developer**)

Background

1. The Developer has been granted the Development Consent or is otherwise entitled to act upon the Development Consent.
2. Condition [Insert details] of the Development Consent requires the Developer to make the Monetary Contributions.
3. The Developer has offered to enter into this Agreement by letter to the Council dated [Insert date].
4. The Council and the Developer wish to enter into this Agreement to make provision for the carrying out of Work by the Developer in [full/partial] satisfaction of the Developer’s obligation to pay the Monetary Contributions.
5. Section 94(5) of the Act authorises the Council and the Developer to enter into this Agreement to make provision for the carrying out of the Work by the Developer in [full/partial] satisfaction of the Monetary Contributions.

Operative provisions

1. Definitions and Interpretation
   1. In this Agreement the following definitions apply:

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

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

**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 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.

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

**Contributions Plan** means the [Insert name of relevant contributions plan] made by the Council under s94EA of the Act, and adopted by the Council on [Insert date] as amended.

**Contribution Value** means the amount specified in Column 3 of Schedule 3. [**Drafting Note.** If a work is listed in the Contributions Plan, then the value of that work as set out in the Contributions Plan should be used.]

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

**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** in relation to a Workmeans the period specified in Column 2 of Schedule 3 for that Work, commencing on the date of the notice for that Work referred to in clause 14.3.

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

**Development Application** means development application DA [Insert DA number] made by the Developer to the Council on [Insert date].

**Development Consent** meansthe development consent granted by the Council under s80 of the Act to the Development Application on [Insert date] as notified by the Council to the Developer in accordance with s81 of the Act on [Insert date].

**Development Contribution** means a monetary contribution, the dedication of land free of cost, the carrying out of work, or 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 other assurance provided by a Party to the Council to secure the enforcement of that Party’s obligations under this Agreement.

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

**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 Agreement.

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

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

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

**Item** means an item specified in Column 1 of Schedule 3.

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

**Land** means the land specified or described in Schedule 1. [**Drafting Note**. This is the land on which the Works are located]

**Location Plan** means the plan contained in Schedule 2.

**Monetary Contributions** means the monetary Development Contributions required to be paid to the Council under the following conditions of the Development Consent for the following public purposes and in the following amounts ([to be/which have been] indexed in accordance with condition [Insert number] of the Development Consent):

|  |  |  |  |
| --- | --- | --- | --- |
| **Item** | **Condition** | **Public Purpose** | **$ Amount** |
| 1 | Condition [Insert number] | [Insert details] | $[Insert amount] |
| 2 | Condition [Insert number] | [Insert details] | $[Insert amount] |

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

**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.

**Security** means a Bank Guarantee, or a bond or other form of security to the satisfaction of the Council indexed in accordance with [**Drafting Note**. Insert indexation method] from the date of this Agreement.

**Surplus Value** means the amount by which the sum of all Contribution Values exceeds the value of the Monetary Contributions [**Drafting note**. Delete this definition if not required].

**Work** means a work specified or described in Column 1 of Schedule 3 to this Agreement and includes any part of a Work.

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

* 1. In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:
     1. Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
     2. A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
     3. If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.
     4. A reference in this Agreement to dollars or $ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
     5. A reference in this Agreement to a $ value relating to a Development Contribution is a reference to the value exclusive of GST.
     6. 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.
     7. A reference to an applicable law includes a reference to anything required to be done by or under the law in relation to a Work, including anything required to be done by reason of a requirement lawfully imposed by a person or body exercising functions under the law.
     8. A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
     9. A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
     10. An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
     11. 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.
     12. A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other gender.
     13. References to the word ‘include’ or ‘including’ are to be construed without limitation.
     14. A reference to this Agreement includes the agreement recorded in this Agreement.
     15. 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.
     16. Any schedules, appendices and attachments form part of this Agreement.

1. Commencement
   1. This Agreement takes effect on the date when all Parties have executed this Agreement.
   2. The Party who executes this Agreement last is to insert on the front page the date they did so and provide a copy of the fully executed and dated Agreement to any other person who is a Party.
2. Warranties
   1. The Parties warrant to each other that they:
      1. have full capacity to enter into this Agreement, and
      2. are able to fully comply with their obligations under this Agreement.
3. Obligation to Carry Out Work
   1. The Developer is to carry out and complete each Work on the Land at the location shown on the Location Plan, in accordance with Schedule 3, any other provision of this Agreement relating to the carrying out of Work and otherwise to the satisfaction of the Council.
   2. The Developer is to carry out and complete each Work in a good and workmanlike manner having regard to the intended purpose of the Work in accordance with:
      1. any design or specification specified or approved by the Council,
      2. any relevant Approval,
      3. any other applicable laws, including those relating to occupational health and safety, and
      4. this Agreement to the extent that it is not inconsistent with an Approval or an applicable law.
   3. It is the Developer’s responsibility to ensure that everything necessary for the proper performance of its obligations under this Agreement is supplied or made available.
   4. a Work is to be Handed-Over to the Council in accordance with this Agreement.
4. Ownership of Work, etc.
   1. Nothing in, or done under, this Agreement gives the Developer:
      1. any right, title or interest in a Work, or
      2. any estate or interest in the Land,

whether at law or in equity.

1. Effect of Developer’s Compliance with this Agreement
   1. This clause 6 only applies if:
      1. the Developer has provided the Security under clause 21, or
      2. the Developer has completed and Handed-Over all Work in accordance with this Agreement.
   2. [**Drafting Note**. Use this clause if all the works fall within 1 public purpose category] For the purposes of condition [Insert number] of the Development Consent and s94(5) of the Act the entering into of this Agreement by the Developer satisfies the Developer’s obligation under the Development Consent to make the Monetary Contributions to the extent of the sum of all Contribution Values.

[OR]

* 1. [**Drafting Note**. Use this clause if the works fall within more than 1 public purpose category so the Contribution Value of a category of work only satisfies a like category of s94 contributions.] For the purposes of condition [Insert number] of the Development Consent and s94(5) of the Act the entering into of this Agreement by the Developer satisfies the Developer’s obligation under the Development Consent to pay:
     1. item [Insert number] of the Monetary Contributions to the extent of the Contribution Value of Item [insert number],
     2. item [Insert number] of the Monetary Contributions to the extent of the Contribution Value of Item [insert number].
  2. [**Drafting Note**. Delete this clause if not required] If the Council proposes to impose a condition under s94 of the Act in respect of any future development proposed to be carried out by the Developer within the Council’s area, the Council may, to the extent permitted by law, take into consideration whether an allowance should be made for the Surplus Value (if any) in determining the extent of the Developer’s obligation to make a Development Contribution under such a condition.
  3. [**Drafting Note**. Delete this clause if not required.] The Council is to pay to the Developer the Surplus Value when:
     1. all notices have been given under clause 14.3 in relation to all Works, and
     2. it has received payments of monetary Development Contributions towards the cost of all Works from persons other than the Developer totalling the amount of the Surplus Value.
  4. On request by the Developer, the Council is to reimburse the Developer an amount equal to any Monetary Contributions that have been paid by the Developer prior to the application of this clause 6, but only to the extent that those Monetary Contributions have been satisfied by clause 6.2.

1. Determination of Value
   1. For the purposes of this Agreement, the Parties acknowledge that the Contribution Value in relation to a Work is the value of the Work specified by, or determined in accordance with, the Contributions Plan or as otherwise agreed between the Parties.
   2. If the Developer’s actual cost of carrying out the Work, including any costs incurred pursuant to this Agreement, determined at the date on which the Work is Handed-Over to the Council, differs from the Contribution Value, then no party to this Agreement shall be entitled to claim credit or reimbursement, as the case may be, for the difference.
2. Design of Work

[**Drafting Note.** Include this clause only if design of the works have not been agreed.]

* 1. The Council is to approve the design and specifications of a Work before construction or other work commences in relation to the Work.
  2. Prior to commencing the design of a Work, the Developer is to request that the Council provide it with the Council’s requirements for the design, materials and specifications for the provision of the Work.
  3. Once the Developer receives the Council's requirements referred to in clause 8.2, the Developer is to provide the initial design for the Work to Council for the Council's approval.
  4. The initial design for the Work is to include or be accompanied by:
     1. such information as is required for the making of a development application for the Work, and
     2. a report by an independent quantity surveyor of the estimated cost of constructing the Work to the initial design submitted to Council under clause 8.3.
  5. The Council is to advise the Developer in writing whether it approves of the initial design of a Work within [Insert time period] of receiving the initial design from the Developer.
  6. The Developer will make any change to the initial design for the Work required by the Council.
  7. The Developer is not to lodge any development application for a Work unless the Council has first approved the initial design for the Work, and provided its written certification that the development application is consistent with the approved initial design of the Work.
  8. The Council is to provide the written certification referred to in clause 8.7 within 14 days of being provided with a copy of the development application by the Developer, unless the Council forms the view that the development application is not consistent with the approved initial design of the Works.
  9. A development application for a Work is to be accompanied by the written certification referred to in clause 8.8 when lodged with the Council, as the consent authority.
  10. For the avoidance of doubt, nothing in the clause operates to fetter the Council's discretion, as consent authority, in determining any development application for a Work.
  11. The Developer is to bear all costs associated with obtaining the Council's approval to the initial design of a Work under this clause.
  12. Following development consent being issued for a Work, the Developer shall work with Council in the preparation of the detailed design.
  13. The detailed design submitted to the Council under clause 8.12 is to be accompanied by:
      1. a draft Plan of Management or a draft Plan of Management to amend an existing Plan of Management (as the Council requires) for the land on which the Work is to be located, if the land on which the Work will be located is or will be classified as community land within the meaning of the *Local Government Act 1993*; and
      2. a detailed maintenance regime for the Work, and
      3. detailed costings, prepared by a suitably qualified independent person, for the carrying out of the maintenance regime.
  14. The Developer is not to lodge an application for a Construction Certificate for a Work unless the Council has first approved the detailed design for the Work, and provided its written certification that the application for a Construction Certificate is consistent with the approved detailed design of the Work.
  15. The Council is to provide the written certification referred to in clause 8.14 within 14 days of being provided with a copy of the application for a Construction Certificate by the Developer, unless the Council forms the view that the application is not consistent with the approved detailed design of the Work.
  16. An application for a Construction Certificate for a Work is to be accompanied by the written certification referred to in clause 8.15 when lodged with the Council, as the consent authority.

1. Variation to Works
   1. The design or specification of a Work that is required to be carried out by the Developer under this Agreement may be varied by agreement in writing between the Parties, acting reasonably, without the necessity for an amendment to this Agreement.
   2. Without limiting clause 9.1, 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.
   3. The Council is not to unreasonably delay or withhold its approval to a request made by the Developer under clause 9.2.
   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.
   5. The Developer is to comply promptly with a direction referred to in clause 9.4 at its own cost.
2. Access to land by Developer
   1. The Council authorises the Developer to enter, occupy and use [**Drafting Note**. Specify particular land owned or controlled by the Council] for the purpose of performing its obligations under this Agreement.
   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 Agreement.
   3. Nothing in this Agreement creates or gives the Developer any estate or interest in any part of the land referred to in clause 10.1 or 10.2.
3. Access to land by Council
   1. The Council may enter any land on which a Work is being carried out by the Developer under this Agreement in order to inspect, examine or test the Work, or to remedy any breach by the Developer of its obligations under this Agreement relating to the Work.
   2. The Council is to give the Developer prior reasonable notice before it enters land under clause 11.1.
4. Protection of People and Property
   1. The Developer is to ensure in relation to the carrying out of a Work that:
      1. all necessary measures are taken to protect people and property, and
      2. unnecessary interference with the passage of people and vehicles is avoided, and
      3. nuisances and unreasonable noise and disturbances are prevented.
   2. Without limiting clause 12.1 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.
5. Repair of damage
   1. The Developer is to maintain any Work required to be carried out by the Developer under this Agreement until the Work is completed and Handed-Over for the purposes of this Agreement or such later time as agreed between the Parties.
   2. The Developer is to carry out is obligation under clause 13.1 at its own cost and to the satisfaction of the Council.
6. Completion and Hand-Over of Works
   1. The Developer is to give the Council written notice of the date on which it will complete a Work required to be carried out under this Agreement which shall not be later than the time set out in Column 4 of Schedule 3 in respect of the Work.
   2. The Council is to inspect the Work the subject of the notice referred to in clause 14.1 within 14 days of the date specified in the notice for completion of the Work.
   3. Work required to be carried out by the Developer under this Agreement is completed and Handed-Over for the purposes of this Agreement when the Council, acting reasonably, gives a written notice to the Developer to that effect.
   4. If the Council is the owner of the land on which the Works the subject of a notice referred to in clause 14.3 is issued, the Council assumes responsibility for the Works 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.
   5. Before the Council gives the Developer a notice referred to in clause 14.3, it may give the Developer a written direction to complete, rectify or repair any specified part of the Works to the reasonable satisfaction of the Council.
   6. The Developer, at its own cost, is to promptly comply with a direction referred to in clause 14.5.
   7. Before a Work is Handed-Over to the Council, the Developer is to remove from the Land:
      1. any rubbish or surplus material, and
      2. any temporary works, and
      3. any construction plant and Equipment,

relating to the carrying out of the Works as the case requires.

1. Rectification of defects
   1. The Council may give the Developer a Rectification Notice during the Defects Liability Period.
   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.
   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 15.1
2. Works-As-Executed-Plan
   1. No later than 60 days after a notice is given under clause 14.3, the Developer is to submit to the Council a full Works-As-Executed-Plan in respect of the Works the subject of the notice.
   2. The Developer, being the copyright owner in the plan referred to in clause 16.1, gives the Council a non-exclusive licence to use the copyright in the plans for the purposes of this Agreement.
3. Dedication of Land in conjunction with Hand-Over of Work

[**Drafting note 1**. Delete this clause if not applicable.]

[**Drafting Note 2.** The value of any land required to be dedicated cannot be used to satisfy contributions imposed under s94(1) of the Act]

* 1. This clause applies to the Land or any part of it that is not owned by the Council on which a Work is carried out by the Developer under this Agreement.
  2. Subject to any Agreement between the Parties to the contrary, land to which this clause applies is to be dedicated to the Council on or before the date on which the Work is taken to have been Handed-Over to the Council.
  3. Land to which this clause applies is taken to have been dedicated to the Council when:
     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
     2. the Council is given:
        1. 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,
        2. the written consent to the registration of the transfer of any person whose consent is required to that registration, and
     3. 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.
  4. The Developer is to do all things reasonably necessary to enable registration of the instrument of transfer to occur.
  5. 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.
  6. 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 $1.00 without having to follow the pre‑acquisition procedure under the Just Terms Act.
  7. Clause 17.6 constitutes an agreement for the purposes of s30 of the Just Terms Act and the Parties acknowledge and agree that they have agreed on all relevant matters concerning the compulsory acquisition.
  8. If, as a result of the acquisition referred to in clause 17.6, 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 Agreement.
  9. 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.
  10. The Developer is to promptly do all things necessary, and consents to the Council doing all things necessary, to give effect to this clause 17, including without limitation:
      1. signing any documents or forms,
      2. giving land owner’s consent for lodgement of any relevant development application,
      3. producing certificates of title to the Registrar-General under the *Real Property Act 1900*, and
      4. paying the Council's costs arising under this clause 17.

1. Dispute Resolution – Expert Determination
   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:
      1. the Parties to the Dispute agree that it can be so determined, or
      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.
   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.
   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.
   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.
   5. The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.
   6. Each Party is to bear its own costs arising from or in connection with the appointment of the expert and the expert determination.
   7. The Parties are to share equally the costs of the President, the expert, and the expert determination.
2. Dispute Resolution - Mediation
   1. This clause applies to any Dispute arising in connection with this Agreement other than a Dispute to which clause 18 applies.
   2. Such a Dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
   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.
   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.
   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.
   6. Each Party is to bear its own costs arising from or in connection with the appointment of a mediator and the mediation.
   7. The Parties are to share equally the costs of the President, the mediator, and the mediation.
3. Arbitration Excluded
   1. The arbitration of any Dispute between the Parties arising under or in connection with Agreement is expressly excluded.
4. Provision of Security
   1. The Developer is to provide the Council with the Security in the amount of $[Insert amount] in relation to the performance of its obligations under this Agreement.
   2. For the purpose of clause 21.2, the Parties acknowledge that the amount referred to in clause 21.1 is determined having regard to any policy or practice of the Council, current at the time of commencement of this Agreement, relating to the provision of Security to the Council for the construction of public infrastructure by developers.
   3. The Council, in its absolute discretion and despite clause 10, 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 Agreement.
   4. The Council may call-up and apply the Security in accordance with this Agreement to remedy any breach of this Agreement notwithstanding any other remedy it may have under this Agreement, under any Act or otherwise at law or in equity.
   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.
   6. The Developer may at any time provide the Council with a replacement Security.
   7. On receipt of a replacement Security, the Council is to release and return the Security that has been replaced to the Developer.
   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 Agreement.
   9. The Developer is to ensure that the Security provided to the Council is at all times maintained to the full current indexed value.
5. Failure to Carry out Works
   1. If the Council reasonably considers that the Developer is in breach of any obligation under this Agreement, it may give a written notice to the Developer:
      1. specifying the nature and extent of the breach,
      2. requiring the Developer to:
         1. rectify the breach if it reasonably considers it is capable of rectification, or
         2. 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,
      3. specifying the period within which the breach is to be rectified or compensation paid, being a period that is reasonable in the circumstances.
   2. If the Developer fails to fully comply with a notice referred to in clause 22.1, the Council may, without further notice to the Developer, call-up the Security provided by the Developer under this Agreement and apply it to remedy the Developer’s breach.
   3. If the Developer fails to comply with a notice given under clause 22.1 relating to the carrying out of Work under this Agreement, 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.
   4. Any costs incurred by the Council in remedying a breach in accordance with clause 22.2 or clause 22.3 may be recovered by the Council by either or a combination of the following means:
      1. by calling-up and applying the Security provided by the Developer under this Agreement, or
      2. as a debt due in a court of competent jurisdiction.
   5. For the purpose of clause 21.4, the Council’s costs of remedying a breach the subject of a notice given under clause 21.1 include, but are not limited to:
      1. the costs of the Council’s servants, agents and contractors reasonably incurred for that purpose,
      2. all fees and charges necessarily or reasonably incurred by the Council in remedying the breach, and
      3. all legal costs and expenses reasonably incurred by the Council, by reason of the breach.
   6. Nothing in this clause 22 prevents the Council from exercising any rights it may have at law or in equity in relation to a breach of this Agreement by the Developer, including but not limited to seeking relief in an appropriate court.
6. Enforcement in a court of competent jurisdiction
   1. Without limiting any other provision of this Agreement, the Parties may enforce this Agreement in any court of competent jurisdiction.
   2. For the avoidance of doubt, nothing in this Agreement prevents:
      1. a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Agreement or any matter to which this Agreement relates, or
      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 Agreement or any matter to which this Agreement relates.
7. Restriction on dealings
   1. The Developer is not to:
      1. sell or transfer the Land or any part to any person, or
      2. assign the Developer’s rights or obligations under this Agreement, or novate this Agreement,

to any person unless

* + 1. 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 Agreement are to be assigned or novated, of an agreement in favour of the Council on terms satisfactory to the Council, and
    2. the Council, by notice in writing to the Developer, has stated that it reasonably considers that the purchaser, transferee, assignee or novatee, is reasonably capable of performing its obligations under the Agreement, and
    3. the Developer is not in breach of this Agreement, and
    4. the Council otherwise consents to the transfer, assignment or novation, such consent not to be unreasonably withheld.

1. Risk
   1. The Developer performs this Agreement at its own risk and its own cost.
2. Release
   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 Agreement except if, and to the extent that, the Claim arises because of the Council's negligence or default.
3. Indemnity
   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 Agreement except if, and to the extent that, the Claim arises because of the Council's negligence or default.
4. Insurance
   1. The Developer is to take out and keep current to the satisfaction of the Council the following insurances in relation to Work required to be carried out by the Developer under this Agreement up until the relevant date of Hand-Over to Council:
      1. contract works insurance, noting the Council as an interested party, for the full replacement value of the Work (including the cost of demolition and removal of debris, consultants’ fees and authorities’ fees), to cover the Developer’s liability in respect of damage to or destruction of the Work,
      2. public liability insurance for at least $[Insert amount] for a single occurrence, which covers the Council, the Developer and any subcontractor of the Developer, for liability to any third party,
      3. workers compensation insurance as required by law, and
      4. any other insurance required by law.
   2. If the Developer fails to comply with clause 28.1, 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:
      1. by calling upon the Security provided by the Developer to the Council under this Agreement, or
      2. recovery as a debt due in a court of competent jurisdiction.
   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 the insurances specified in clause 28.1.
5. Notices
   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:
      1. delivered or posted to that Party at its address set out in Schedule 4.
      2. faxed to that Party at its fax number set out in Schedule 4.
      3. emailed to that Party at its email address set out in Schedule 4.
   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.
   3. Any notice, consent, information, application or request is to be treated as given or made if it is:
      1. delivered, when it is left at the relevant address,
      2. sent by post, 2 business days after it is posted,
      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
      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.
   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.
6. Approvals and Consent
   1. Except as otherwise set out in this Agreement, and subject to any statutory obligations, a Party may give or withhold an approval or consent to be given under this Agreement in that Party’s absolute discretion and subject to any conditions determined by the Party.
   2. A Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.
7. Costs
   1. The Developer is to pay to the Council the Council’s costs of preparing, negotiating, executing and stamping this Agreement, and any document related to this Agreement within 7 days of a written demand by the Council for such payment.
   2. The Developer is also to pay to the Council the Council’s reasonable costs of enforcing this Agreement within 7 days of a written demand by the Council for such payment.
8. Entire Agreement
   1. This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with.
   2. No Party can rely on an earlier document, or anything said or done by another Party, or by a director, officer, agent or employee of that Party, before this Agreement was executed, except as permitted by law.
9. Further Acts
   1. Each Party must promptly execute all documents and do all things that another Party from time to time reasonably requests to effect, perfect or complete this Agreement and all transactions incidental to it.
10. Governing Law & Enforcement
    1. This Agreement is governed by the law of New South Wales.
    2. The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them.
    3. The Parties are not to object to the exercise of jurisdiction by those courts on any basis.
11. Joint and Individual Liability and Benefits
    1. Except as otherwise set out in this Agreement:
       1. any agreement, covenant, representation or warranty under this Agreement by 2 or more persons binds them jointly and each of them individually, and
       2. any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.
12. No Fetter
    1. Nothing in this Agreement shall be construed as requiring Council to do anything that would cause it to be in breach of any of its obligations at law, and without limitation, nothing shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.
13. Illegality
    1. If this Agreement 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 Agreement is entered into.
14. Severability
    1. If a clause or part of a clause of this Agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way.
    2. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Agreement, but the rest of this Agreement is not affected.
15. Modification
    1. No modification of this Agreement will be of any force or effect unless it is in writing and signed by the Parties to this Agreement.
16. Waiver
    1. The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another Party.
    2. A waiver by a Party is only effective if it is in writing.
    3. A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given and is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.
17. GST
    1. In this clause:

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

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

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

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

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

* 1. Subject to clause 40.4, if GST is payable on a Taxable Supply made under, by reference to or in connection with this Agreement, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.
  2. Clause 40.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Agreement to be GST inclusive.
  3. No additional amount shall be payable by the Council under clause 40.2 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.
  4. If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this Agreement by one Party to the other Party that are not subject to Division 82 of the GST Law, the Parties agree:
     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;
     2. that any amounts payable by the Parties in accordance with clause 40.2 (as limited by clause 40.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
  5. No payment of any amount pursuant to this clause 40, 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.
  6. 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.
  7. This clause continues to apply after expiration or termination of this Agreement.

**Schedule 1**

(Clause 1.1)

Land

[Insert title references or a plan of the land on which the Work will be constructed]

**Schedule 2**

(Clause 1.1)

Location Plan

[Insert plan showing location of each Work]

**Schedule 3**

(Clause 1.1)

Work

**Table**

|  |  |  |  |
| --- | --- | --- | --- |
| **Column 1** | **Column 2** | **Column 3** | **Column 4** |
| **Work** | **Defects Liability Period** | **Contribution Value** [**Drafting Note.** see my comment at definition of ‘Contribution Value’] | **Timing** |
| 1. [Insert details] | [Insert period] | $[Insert amount] | [Insert timing] |
| 2. [Insert details] | [Insert period] | $[Insert amount] | [Insert timing] |

**Schedule 4**

(Clause 29)

Contact for Notices

**Council:**

**Name**: Cessnock City Council

**Address**:62-78 Vincent Street, Cessnock, NSW 2325, Australia

**Telephone**: (02) [Insert number]

**Facsimile**: (02) [Insert number]

**Email:** [Insert email]

**Representative:** [Insert name of representative]

**Developer**

**Name**: [Insert name]

**Address**: [Insert address]

**Telephone**: (02) [Insert number]

**Facsimile**: (02) [Insert number]

**Email:** [Insert email]

**Representative:** [Insert name of representative**]**

Execution Page

**Dated:** [**Drafting Note**. Insert the date when the Agreement has been executed by all of the Parties.]

**Executed on behalf of the Council**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**General Manager Witness**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ -----------------------------------------------------**

**Mayor Witness**

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

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Name/Position**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Name/Position**