

Policy

SMRC Voluntary Planning Agreements and Land Dedication Policy

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Aim	<p>This policy establishes a framework to guide the preparation of Planning Agreements entered into with Snowy Monaro Regional Council in a manner that is efficient, fair, transparent and accountable.</p>		

Terminology

The following terminology will be used throughout this policy:

Act means the *Environmental Planning and Assessment Act 1979*;

associated development means the development that is associated with a planning agreement;

Council means Snowy Monaro Regional Council;

developer is a person who has sought a change to an environmental planning instrument (which includes the making, amendment or repeal of an instrument (s7.4(11)), or who has made or proposes to make a development application, or who has entered into an agreement with or is otherwise associated with such a person;

development application has the same meaning as in the Act;

development contribution means the kind of provision made by a developer under a Planning Agreement, being a monetary contribution, the dedication of land free of cost or the provision of a material Public Benefit;

explanatory note means a written statement that provides details of the objectives, nature, effect and merits of a planning agreement, or an amendment to or revocation of a planning agreement;

functional purpose means land that is accessible and fairly level, centrally located and landscaped to an approved plan, identified within Council's strategic documents or other purposes as identified within this policy;

instrument change means a change to an environmental planning instrument to enable a development application to be made to carry out development the subject of a Planning Agreement;

planning agreement has the same meaning as in the Act. They have also been referred to as Voluntary Planning Agreements or VPA's;

planning benefit means a development contribution that confers a net public benefit, that is, a benefit that exceeds the benefit derived from measures that would address the impacts of particular development on surrounding land or to the wider community;

planning obligation means an obligation imposed by a planning agreement on a development requiring the developer to make a development contribution;

public means a section of the public;

public benefit means a development contribution that provides amenity or services to the broader community;

public facilities means public infrastructure, facilities, amenities and services;

Regulation means the *Environmental Planning and Assessment Regulation 2021*; and

surplus value means the value of the developer's provision under a Planning Agreement less the sum of the value of public works required to be carried out by the developer under a condition imposed under s4.17 of the Act and the value of Development Contributions that are or could have been required to be made under s7.11 or s7.12 of the Act in respect of the development the subject of the Planning Agreement.

Work in Kind means the construction or provision of the whole or part of an infrastructure item that is identified in a works schedule in a contributions plan in lieu (wholly or partially) of a monetary payment.

1 Introduction

1.1 Application of This Policy and Commencement

This Policy applies to development applications lodged pursuant to the Bombala, Cooma-Monaro and Snowy River Local Environment Plans (LEPs) and planning proposals seeking a change to the

LEPs for land and development within the local government area of Snowy Monaro Council ("Council").

This Policy has been prepared for public exhibition.

1.2 Objectives of This Policy

The objectives of this Policy are:

- a) To establish a framework governing the use of planning agreements by Council.
- b) To ensure that the framework established is efficient, fair, transparent and accountable.
- c) To enhance planning flexibility in Snowy Monaro local government area (LGA) through the use of planning agreements.
- d) To enhance the range and extent of development contributions made by development towards public facilities in the LGA.
- e) To set out Council's specific objectives and procedures relating to the use of planning agreements within the LGA.
- f) To give all stakeholders to the development greater involvement in determining the type, standard and location of public facilities and other public benefits.
- g) To facilitate public participation and to consult with the community in regards to the benefits of appropriate planning agreements for the provision of public infrastructure.
- h) To provide a framework for Council's consideration of land dedication.

1.3 Statutory Framework

The current legal and procedural framework for planning agreements is set in Subdivision 2 of Division 7.1 of the *Environmental Planning and Assessment Act 1979*. Council is also bound by the provisions of Division 1 of Part 9 of the *Environmental Planning and Assessment Regulation 2021*.

Section 7.4(1) of the Act sets out the circumstances under which a planning agreement may be entered into. It provides a planning agreement may be made between a planning authority (or two or more planning authorities) and a person (the developer):

- a) Who has sought a change to an environmental planning instrument, or
- b) Who has made, or proposes to make, a development application or application for a complying development certificate, or
- c) Who has entered into an agreement with, or is otherwise associated with, a person to whom paragraph (a) or (b) applies,

Under which the developer is required to dedicate land free of cost, pay a monetary contribution, or provide any other material public benefit, or any combination of them, to be used for applied towards a public purpose.

1.4 Mandatory Requirements of a Planning Assessment

Section 7.4(3) of the Act requires planning agreements to provide for the following:

- a) A description of the land to which the agreement applies,
- b) A description of:
 - i) The change to the environmental planning instrument to which the agreement applies, or
 - ii) The development to which the agreement applies,

- c) The nature and extent of the provision to be made by the developer under the agreement, the time or times by which the provision is to be made and the manner by which the provision is to be made,
- d) In the case of development, whether the agreement excludes (wholly or in part) or does not exclude the application of section 7.11, 7.12 or 7.24 to the development,
- e) If the agreement does not exclude the application of section 7.12 to the development, whether benefits under the agreement are or are not to be taken into consideration in determining a development contribution under section 7.12
- f) A mechanism for the resolution of disputes under the agreement,
- g) The enforcement of the agreement by a suitable means, such as the provision of a bond or guarantee, in the event of a breach of the agreement by the developer.

Clause 205(1) of the Regulation requires that Council, as a planning authority, proposing to enter into a planning agreement, or an agreement that revokes or amends a planning agreement, must prepare a written statement (referred to as an explanatory note):

- a) That summarises the objectives, nature and effect of the proposed agreement, amendment or revocation, and
- b) That contains an assessment of the merits of the proposed agreement, amendment or revocation, including the impact (positive or negative) on the public or any relevant section of the public.

From 1 July 2022, Council under the Act will be required to publish the following information on their individual website and on the NSW Planning Portal:

- a) Copies of all planning agreements (including amendments and variations to the agreements).
- b) Copies of the explanatory notes relating to those agreements or amendments.
- c) Planning agreement registers with additional information required in amending Regulation.
- d) Annual financial statements for planning agreements showing aggregate totals of money, land, and works received.

1.5 Disclaimer

Any advice given by Council at any stage when negotiating or submitting a Planning Agreement is considered to be provided without prejudice. Council accepts no responsibility for the misinterpretation or inaccuracy of any advice given. It is the applicant's sole responsibility to seek clarification.

This Policy is not legally binding. However, it is intended that the Council and all persons dealing with the Council, in relation to planning agreements, will follow this Policy to the fullest extent possible.

Section 7.4(9) of the Act states that a planning agreement cannot impose an obligation on Council as a planning authority:

- a) To grant development consent, or
- b) To exercise any function under this Act in relation to a change to an environmental planning instrument.

1.6 Periodical Updates

It is intended that this Policy will be periodically updated. The updates may cover additional matters to those covered in this Policy or provide more detailed information of guidance on specific matters covered in this Policy.

2 General Requirements

2.1 Fundamental Principles

The Practice Note for planning agreements sets out guidelines and safeguards in the application of planning agreements that ensure transparency, fairness and flexibility of planning decisions. A planning agreement cannot and should not purport to fetter any authority's exercise of statutory functions, in particular the function of a relevant planning proposal authority in relation to a planning proposal, a local plan-making authority in relation to the local environmental plan that gives effect to a planning proposal or the consent authority for a development application.

Council's use of planning agreements will be guided by these fundamental principles:

- a) Planning authorities should always consider a development proposal on its merits, not on the basis of a planning agreement.
- b) Planning agreements must be underpinned by proper strategic land use and infrastructure planning carried out on a regular basis and must address expected growth and the associated infrastructure demand.
- c) Strategic planning should ensure that development is supported by the infrastructure needed to meet the needs of the growing population.
- d) A consent authority cannot refuse to grant development consent on the grounds that a planning agreement has not been entered into in relation to the proposed development of that the developer has not offered to enter into such an agreement.
- e) Planning agreements should not be used as a means of general revenue raising or to overcome revenue shortfalls.
- f) Planning agreements must not include public benefits wholly unrelated to the particular development.
- g) Value capture should not be the primary purpose of a planning agreement.

2.2 Circumstances in Which Council will Consider Negotiating a Planning Agreement

Council, at its complete discretion, may negotiate a planning agreement with a developer in connection with any application by the developer for an instrument change or for development consent relating to any land in the Council's area.

A planning agreement is entered into when it is signed by all parties after the agreement is publicly notified in accordance with the Act and Regulation.

2.3 Strategic Planning Context

An important role for planning agreements is achieving specific land use planning outcomes with strategic and/or site-specific merit. A planning agreement should facilitate the provision of public facilities and amenity outcomes that advance the delivery of Council's corporate and strategic planning objectives and deliver valuable community benefits where appropriate. Long-term strategies including Snowy Monaro Local Strategic Planning Statement (LSPS) and Snowy Monaro Community Strategic Plan (CSP) and the delivery program are based on the outcomes of engagement with the community. The implementation of key aspects of some of these goals, the broader strategic directions and the delivery of key infrastructure areas can be directly or indirectly achieved through planning agreements.

The vision and goals established within Council's long-term strategic plans such as the CSP and LSPS flow through to supporting plans that guide Council's medium and short-term priorities:

- a) Long Term Financial Plan (10 years)

- b) Delivery Program (4 years)
- c) Operational Plan (Annual)

Council's Local Strategic Planning Statement, supported by a number of environmental studies and considers planning for growth in Snowy Monaro, including relevant supporting strategies which seek to identify the community's needs for infrastructure such as community facilities, transport, open space, public domain, recreation infrastructure, utility services and capital works.

Alignment with relevant regional strategic plans including the South East and Tablelands Regional Plan should also be considered.

2.4 Acceptability Test

When considering entering into a planning agreement, Council will apply the following test in order to assess the desirability of the possible outcome of a proposed planning agreements:

- a) Is the proposed planning agreement directed towards a proper and legitimate planning purpose, having regard to its statutory planning controls and other adopted planning policies applying to the development?
- b) Does the planning agreement align with Council's other plans and policies or address a shortfall or deficiency in Council's plans and policies?
- c) Does the planning agreement promote Council's strategic objectives in relation to Council's strategic plans?
- d) Does the planning agreement provide for the delivery of infrastructure or result in a public benefit related to the development?
- e) Does the planning agreement provide for a reasonable means of achieving the desired outcomes and secure the benefits?
- f) Can the planning agreement be taken into consideration in the assessment of the relevant planning proposal or development application?
- g) Does the planning agreement produce outcomes that meet the general values and expectations of the public and protect the overall public interest?
- h) Does the planning agreement conform to the fundamental principles governing the Council's use of planning agreements?
- i) Are there any relevant circumstances that may operate to preclude Council from entering into the proposed planning agreement?

The matters that Council may consider in any negotiations for a planning agreement include whether:

- a) Whether the planning agreement(s) meets the demands created by the development for new public infrastructure, amenities and services.
- b) If inclusions in the development meet specific planning objectives of the Council.
- c) If compensation is required for the loss of, or damage to, a public amenity, service, resource or asset caused by the development through its replacement, substitution, repair or regeneration.
- d) Rectification of an existing deficiency in the existing provision of public facilities in the Council's area is made.
- e) Whether recurrent funding of public facilities and/or public benefit is required or provided.
- f) The extent to which the Council needs to monitor the planning impacts of development.

- g) Whether planning benefits for the wider community accrue from the planning agreement.

Factors such as the size of development, the location or the resulting type of development may be relevant. These will establish core information such as likely increases in population and demand for particular public services.

This information will help Council with the determination of the development application/planning proposal and to prepare the planning agreement.

2.5 Standard Planning Agreement Template

Council has prepared a Standard Planning Agreement Template (Appendix 2). This template is to assist developers in preparing a planning agreement and contains clauses that Council considers to be mandatory inclusion in all planning agreements. Any variation to the clauses contained within it will need to be agreed upon by Council.

3 Contributions

3.1 Relation to Existing Contributions Schemes

Planning agreements do not necessarily exclude the application of Development Contributions under Council's Contributions Plans. The level to which these contributions apply will be discussed as part of the negotiation process. Council will insist these contributions apply if the proposed planning agreement is not considered to provide the equivalent public benefit or are not considered to produce a surplus value. Developers will not be compensated for dedicated land when the estimated value exceeds works identified in a Contribution Plan.

Section 7.4(3A) of the Act sets out that a planning agreement cannot exclude the application of section 7.11 or 7.12 in respect of development unless Council as the consent authority for the development or the Minister is a party to the agreement.

Section 7.4(5) of the Act sets out that if a planning agreement excludes the application of section 7.11 or 7.12 to a particular development, a consent authority cannot impose a condition of development consent in respect of that development under either of those sections (except in respect of the application of any part of those sections that is not excluded by the agreement).

3.2 Calculation of Contributions

Council will insist that the calculation of all contributions are consistent with the calculations used in the Contributions Plan, and agreed upon by Council.

3.3 Collection and Distribution of Monetary Contributions

The following items relate to the collection and distribution of monetary contributions:

- a) Council does not support deferred payments for contributions that can be implemented immediately,
- b) Council may seek to include a provision permitting any money paid under the agreement to be pooled with money paid under other planning agreements or developer contributions. Pooling may be appropriate to stage expenditure and allow public benefits, particularly essential infrastructure, to be provided in a fair, equitable and timely way, and
- c) Council may request the inclusion of a provision to make regular development contributions towards the recurrent costs of public facilities if provided for in the planning agreement.

Council is required to hold any monetary contribution or levy paid in accordance with a planning agreement (together with any additional amount earned from its investment) for the purpose for which the payment was required, and apply it towards that purpose within a reasonable time. A similar requirement in respect of land dedicated in accordance with a planning agreement applies.

3.4 Credits and Refunds

Council will not consider giving any additional credit, refunds or offset against development contributions required to be made by the developer in respect of other development in the LGA for any contributions considered to have a surplus value under a planning agreement. Surplus value being when compared to what could have been attained under the conditions of development consent or Council's other development contribution plans.

3.5 Provision of Financial Security

Council will generally require a planning agreement to make provision for security to cover the developer's obligations under the agreement. The form of security will generally require the developer to furnish Council with an unconditional Australian Bank Guarantee with no maturity date or cash deposit, with an amount to be determined by Council. This will depend on the nature and scale of capital works being proposed. The bank guarantee must also state the development application number for the associated development where possible. An insurance bond may also be deemed acceptable. Other security will generally be required.

3.6 Fees and Charges

Council may require a planning agreement to make provision for payment by the developer of part or all of the Council's costs of and incidental to:

- a) Negotiating, preparing and entering into the agreement,
- b) Enforcing the agreement

The amount to be paid by the developer will be determined by negotiation in each case. In particular cases, Council may require the planning agreement to make provision for a development contribution by the developer towards the on-going administration of the agreement.

Lodgement, processing, legal fees and any fees associated with maintaining the planning agreement may be applicable under Council's fees and charges. Where not already provided for under Council's fees and charges, Council reserves the right to seek full cost recovery for any planning agreement.

3.7 Recurrent Charges

The Council may request developers, through a planning agreement, to make development contributions towards the recurrent costs of public facilities. Where the public facility primarily serves the development to which the planning agreement relates or neighbouring development, the arrangement for recurrent funding may be in perpetuity.

Where the public facility of public benefit is intended to serve the wider community, the planning agreement may, where appropriate, only require the developer to make contributions towards the recurrent costs of the facility for a set period which will be negotiated according to the impact of the development and/or until a public revenue stream is established to support the on-going costs of the facility.

3.8 Types of Public Benefits to be Delivered under Planning Agreements

Public benefits received through Planning Agreements contribute to Council's ability to deliver:

- a) Infrastructure identified with existing development contributions plans,
- b) Infrastructure identified within Council's strategic plans, e.g. commercial floor space in village centres, affordable housing, and open space acquisition,
- c) Infrastructure required directly as a result of density increases experienced or expected from the redevelopment of a site, e.g. due to changes in development controls arising from a planning proposal, and

- d) Land identified in a strategic plan, policy, planning instrument, development control plan or contributions plan for a public purpose, dedication or acquisition.

A matrix of public benefit to cost criteria has been produced in Appendix 1.

3.9 Methodology for Valuing Public Benefits under a Planning Agreement

Subject to clause 2.3 Strategic Planning Context of this policy, unless otherwise agreed in a particular case, public benefits will be valued as follows:

3.9.1 Provision of Land for a Public Purpose

Where the benefit under a planning agreement is the provision of land for a public purpose, the value of the benefit will be determined by an independent valuer who is experienced in valuing land in regional New South Wales and who is acceptable to Council, on the basis of a scope of work which is prepared by Council. All costs of the independent valuer in carrying out such a valuation will be borne by the developer.

3.9.2 Carrying out of Works for a Public Purpose

Where the benefit under a planning agreement is the carrying out of works for a public purpose, the value of the benefit will be determined by an independent quantity surveyor who is acceptable to Council, on the basis of the estimated value of the completed works being determined using the method that would ordinarily be adopted by a quantity surveyor. Council will prepare the scope of work for the independent quantity surveyor. All costs of the independent quantity surveyor in carrying out the work will be borne by the developer.

3.9.3 Other Public Benefit

Where the benefit under a planning agreement is the provision of public benefit other than under 3.9.1 or 3.9.2, Council and the developer will negotiate the manner in which the benefit is to be valued for the purposes of the agreement.

4 Land Dedication

4.1 Relation to Development

Land dedicated must have demonstrated need or requirement from a Development Control Plan and must have a functional relationship with the proposed development. Council will not accept land that serves no functional purpose, including land that adjoins land that does not serve a functional purpose.

The dedication of land does not satisfy monetary contributions unless the provision of infrastructure, embellishments or other Work in Kind are also included within the planning agreement that the land prior to dedication to Council is fit for purpose as per s7.4(1) of the Act.

Land must not be dedicated outside of a VPA.

4.2 Relation to Recreation Strategy

Council will generally not accept any dedication of land for the purpose of open or recreational space unless it can be considered to fulfil a need or recommendation identified in a Recreational Strategy adopted by Council.

4.3 Asset Protection Zone Land

Council will not accept the dedication of land that serves no other purpose than as an asset protection zone against natural hazards.

4.4 Stormwater Treatment Facilities

The following items relate to the dedication of stormwater treatment facilities and drainage reserves:

- a) Council will generally seek full cost recovery for the dedication of all drainage reserves and stormwater treatment facilities based on the values of land determined under clause 3.2 Calculation of Contributions of this policy,
- b) The dedication of drainage reserves or stormwater treatment facilities will not be considered unless they cannot reasonably be vested in private ownership in the opinion of Council, and
- c) Any land to be dedicated as drainage reserve or stormwater treatment facility is to be restricted to the minimum amount of land that is reasonably required in order to perform its function as a drainage reserve, stormwater treatment facility or any other functional use in accordance with this policy and in the opinion of Council.

4.5 Sewer Pumping Stations

Council is supportive of the dedication of the land on which sewer pumping stations are located and would prefer this land to be dedicated in all instances. This land dedicated must be restricted to no more than the minimum amount of land required to carry out maintenance works and provide direct vehicular access, as determined by Council's Water and Waste Water staff. Sewerage pump stations must be constructed in accordance with *Council's Development Engineering Specifications C402* and hand over subject to the discretion of Council's Water and Waste Water staff.

4.6 Right to refuse

Land dedicated to Council through a planning agreement must be for public benefit that is, to be quality open space, accessible and fairly level, centrally located and landscaped to an approved plan, or other purposes as identified within this policy. Council will not accept land which is steep, hard to maintain, isolated from the proposed urban area or otherwise of limited value to residents, unless it is in addition to the above and Council specifically accepts the maintenance burden of such lands for documented reason (e.g. because it is part of a planned or recognised wildlife corridor; there are trade-offs negotiated with the developer for community benefit).

5 Application Process

5.1 Relationship to Lodging a Development Application

Planning agreements can be lodged during or after the lodgement of the associated development application. However it is recommended that all planning agreements be negotiated prior to this happening, as each planning agreement requires a resolution at a Council meeting and a mandatory exhibition period of minimum 28 days under the Act s7.5(1). The development application and planning agreement should be publicly exhibited together where possible.

5.2 Preparation of the Planning Agreement

The planning agreement process, from initial discussion to execution, consists of 6 key steps as outlined below. The negotiation of planning agreements can be complex, and a number of the steps below may need to be repeated, including negotiation and public exhibition.

Step 1 – Commencement

Before making a development application or submitting a planning proposal, Council and the developer will decide whether to negotiate a planning agreement. In making this decision consideration should be given to this policy, relevant practice notes, relevant legislation and any other relevant policies. The parties will consider whether other planning authorities and other persons associated with the development should be additional parties to the planning agreement, such as the landowner if the landowner is a different person to the developer.

Council and the developer will, in each case, decide who will prepare the planning agreement relating to a particular application for an instrument change or development application.

Council is not under any obligation to enter into a planning agreement.

Step 2 – Negotiation

If an agreement or arrangement is negotiated, it will be documented as a draft planning agreement with an accompanying explanatory note. The draft planning agreement will be assessed against the acceptability test outlined in this policy. Council will generally require the planning agreement to be in or to the effect of the standard planning agreement template.

The parties will consider how the draft planning agreement will be enforced and when the draft planning agreement will be executed, as this will inform the security provisions and conditions of the agreement. Legal advice should be sought in each case to ensure that the appropriate provisions are included in the planning agreement.

Step 3 – Application

When the developer makes the application or submits a planning proposal to the relevant authority, it will generally be accompanied by the draft planning agreement that has been signed by the developer and the explanatory note.

Step 4 – Notification

Relevant public authorities are consulted and the application or planning proposal, draft planning agreement and explanatory note are publicly notified in accordance with the Act and Regulation. Any amendments required to the application or planning proposal and draft agreement as a result of submissions received are made. If necessary, the amended application, draft planning agreement and explanatory note are re-notified.

Step 5 – Assessment

The draft planning agreement and public submissions are considered in the determination of the related application. The weight given to the draft planning agreement and public submissions is a matter for the relevant authority acting reasonably.

Step 6 – Execution

The draft planning agreement will be either executed before the relevant application is determined or not long after the application is determined.

5.3 Negotiation Procedures

Council is required to ensure that a planning agreement is publicly notified as part of and in the same manner as the application for the instrument change or the development application to which it relates. The planning agreement must therefore be negotiated and documented before it is publicly notified as required by the Act and Regulation.

Council prefers that planning agreement is negotiated before lodgement of the relevant application and that it accompanies the application on lodgement.

A Council officer or officers with appropriate delegated authority will negotiate a planning agreement on behalf of Council. No planning agreement shall become binding until it is approved and accepted by a resolution of Council.

The Councillors will not be involved in the face to face negotiation of the agreement.

The negotiation of a planning agreement will generally involve the following key steps:

- a) Before lodgement of the relevant application by the developer, the parties will decide whether to negotiate a planning agreement.
- b) The parties will then appoint persons to represent them in the negotiations, generally involving a minimum of 2 and maximum of 3 persons per party.
- c) The parties may appoint an additional person to attend and take minutes of all negotiations.
- d) The parties will also decide whether to appoint an independent person to facilitate or otherwise participate in the negotiations or aspects of it.

- e) The parties will also agree on a timetable for negotiations and the protocols and work practices governing their negotiations.
- f) The parties will then identify the key issues for negotiation and undertake the negotiations.
- g) If agreement is reached, the agreed party (Council or developer) will prepare the proposed planning agreement and provide a copy to the other party.
- h) The parties will undertake further negotiation on the specific terms of the proposed planning agreement.
- i) Once agreement is reached on the terms of the proposed planning agreement, the developer will be required to execute the agreement.
- j) The developer may then make the relevant application to the Council accompanied by a copy of the proposed agreement.
- k) The parties may be required to undertake further negotiations and, hence, a number of the above steps as a result of the public notification and inspection of the planning agreement or its formal consideration by the Council in connection with the relevant application.

5.4 Probity

Public probity will ensure that the negotiation of any planning agreements is fair, transparent and is directed at achieving public benefits in an appropriate manner, free of corruption.

In this regard, Council will:

- a) Inform any application about Council values and business ethics – specifically, about ethical behaviour appropriate to business dealings that conform with Council's code of conduct.
- b) Ensure that its communities understand the system and the Council's role – specifically, how the planning system operates and how Council will deal with developments/planning proposals objectively.
- c) Notify planning agreements to ensure they are open and transparent – specifically, achieving maximum public awareness of the matters contained in a planning agreement(s) and the potential benefits of an agreement.
- d) Ensure appropriate delegations and separation of responsibilities in considering development applications/planning proposals that involve planning agreements – specifically, the need to ensure processes adequately address the level of risk corruption or a process while at the same time being appropriate to the likely level of risk.
- e) Ensure that modifications to approved developments should be subject to the same scrutiny as the original development application.
- f) Ensure that Councillors and Council staff understand their varied roles, some of which have potential to conflict.
- g) Complete negotiations via written correspondence, rather than face to face meetings, to ensure the highest level of transparency, accountability and record-keeping. This also allows timely consideration and resolution of any issues raised and facilitates carefully considered decision making by all parties.
- h) Take every step to ensure that conflicts of interest are ameliorated to the greatest extent possible – specifically, independent assessment by third parties where Council has an interest and not entering into any contractual arrangement which purport to guarantee outcomes that are subject to separate regulatory processes.

Apart from the above procedures, further procedures that will be implemented to address these matters may also include, but not limited by, the following procedures:

- a) The Councillors will not be involved in the face to face negotiation of the agreement but will ultimately execute the planning agreement as part of their duties as Councillors.
- b) A Council officer with appropriate delegated authority will negotiate the planning agreement on behalf of the Council in accordance with this policy.
- c) The Council will in all cases, ensure that Council staff with key responsibility for providing advice on approvals, approving applications or ensuring compliance, do not have a role in the assessment of the commercial aspects of the agreement nor on the conditions of the planning agreement except where advice is required on matter relating to the conditions of consent for a particular proposal.
- d) The Council may involve an independent person(s) to facilitate or otherwise participate in the negotiations or aspects of it, particularly where this will lead to a better planning outcome.
- e) The Council will ensure that all negotiations with a developer and their consultants are sufficiently separated and documented.
- f) Where the Council has a commercial stake in development the subject of an agreement, it will take appropriate steps to ensure that it avoids a conflict of interest between its role as a planning authority and its commercial interest in the development.

5.5 Separation of Roles

The assessing officer of the associated development application is not permitted to also be the assessing officer of the planning agreement. This is to avoid a conflict of interest between Council's role as a statutory planning authority and Council's status as an asset owner and manager.

The governing body of Council will, in all cases, determine development applications to which planning agreements relate.

5.6 Involvement of Independent Third Parties in the Negotiation Process

Council may encourage the appointment of an independent person (the costs of the independent person will be borne by the developer) to facilitate or otherwise participate in the negotiations or aspects of it, particularly where:

- a) An independent assessment of a proposed instrument change or development application is necessary or desirable,
- b) Factual information requires validation in the course of negotiations,
- c) Sensitive financial or other confidential information must be verified or established in the course of negotiations,
- d) Facilitation of complex negotiations are required in relation to large projects or where numerous parties or stakeholders are involved,
- e) Dispute resolution is required under a planning agreement.

5.7 Dispute Resolution

Council will exhaust all means it deems necessary to ensure that disputes are resolved prior to any legal proceedings or challenges. Council will require a planning agreement to provide for mediation of disputes between the parties to the agreement before the parties may exercise any other legal rights in relation to the dispute. The standard planning agreement template contains several mandatory clauses to this effect.

5.8 Public Notification of Planning Agreements

A planning agreement must be publicly notified and be available for public inspection for a minimum period of 28 days as prescribed by the Act and Regulation.

Council is required to ensure that a planning agreement is publicly notified as part of and in the same manner as with the application for the instrument change or the development application to which it relates.

Where the application, to which a planning agreement relates, is required by the Act or Regulation to be publicly notified and available for public inspection for a period exceeding 28 days, the Council will publicly notify the planning agreement and make it available for public inspection for that longer period.

Where the application to which a planning agreement relates is permitted by the Act or Regulation to be publicly notified and available for public inspection for a period of less than 28 days, the Council will publicly notify the application and make it available for public inspection for a minimum period of 28 days.

Council will publicly re-notify and make available for public inspection a proposed planning agreement and the application to which it relates if, in the Council's opinion, a material change is made to the terms of the agreement or the application after it has been previously publicly notified and inspected. Such a change may arise as a consequence of public submissions made, or the formal consideration by the Council, or for any other reason.

5.9 Explanatory Notes

Council is required under the Regulation to prepare an explanatory note that accompanies the planning agreement for public exhibition.

The explanatory note must:

- a) Identify how the agreement promotes the public interest.
- b) Identify whether the agreement confirms with the Council's capital works program, if any.
- c) State whether the agreement specifies that certain requirements of the agreement must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued.

The explanatory will be written in layman terms for the public to readily understand the nature of the development proposed and the public benefits provided. The explanatory note will indicate timing of delivery and should include maps, diagrams and other material to help explain what is proposed.

The explanatory notes will summarise the objectives, nature and effect of the proposed agreement and contain an assessment of the merits of the proposed agreement, including the impact on the public or relevant section of the public.

5.10 Planning Agreement Register

Council is required to keep a register of planning agreements applying to land within Council's area, whether or not Council is a party to a planning agreement. Council is required to record in the register the date an agreement was entered into and a short description of the agreement (including any amendment).

Council will make the following available for public inspection (free of charge) through online publication:

- a) The planning agreement register,
- b) Copies of all planning agreements (including amendments) that apply to the area of Snowy Monaro Regional Council,
- c) Copies of the explanatory notes relation to those agreements, and

- d) Annual financial statements for planning agreements with a breakdown of money, land, and works received.

5.11 Plans to be Provided

Whenever plans are to be provided with the planning agreement, these plans must:

- a) Be consistent with the plans approved for the associated development, and
- b) Be drawn and documented in such a way that at any stage or component of the planning agreement can be clearly identified and be referred to.

5.12 Implementation

In appropriate cases, Council may require a planning agreement to provide that before the development the subject of the agreement is commenced, the Parties are to enter into an implementation agreement that provides for matters such as:

- a) The times at which and, if relevant, the period during which, the developer is to make provision under the planning agreement.

Council will generally require a planning agreement to provide that the developer's obligations under the agreement take effect when the first development consent operates in respect of development that is subject of the agreement.

- b) The design, technical specification and standard of any work required by the planning agreement to be undertaken by the developer.
- c) The manner in which a work is to be handed over to Council.
- d) The manner in which public benefit is to be made available for its public purpose in accordance with the planning agreement.
- e) The management or maintenance of land or works following hand-over to Council.

Where it is inappropriate for Council to determine practical completion of works, Council will insist upon the appointment of an independent certifier at the developer's expense. This will require a clause to be created in the planning agreement.

5.13 Hand-Over of Works

Council will generally not accept the hand-over of a public work carried out under a planning agreement unless the developer furnishes to the Council a certificate to the effect that the work has been carried out and completed in accordance with the agreement and any applicable development consents (which certificate may, at the Council's discretion, be a final occupation certificate, compliance certificate or a subdivision certificate) and, following the issue of such a certificate to Council, the work is also certified as complete by a Council building surveyor or engineer.

Council will also require the agreement to provide for a defects liability period during which any defects must be rectified at the developer's expense.

5.14 Management of Land or Works after Hand-Over

If a planning agreement provides for the developer, at the developer's cost, to manage or maintain land that has been dedicated to the Council, the Council may require the parties to enter into a separate implementation agreement in that regard (see clause 5.12).

The failure of the parties to reach agreement in relation to management and maintenance of the land or works may be dealt with under the dispute resolution provisions of the planning agreement.

5.15 Operation, Monitoring and Review of a Planning Agreement

Council will continuously monitor the performance of the developer's obligations under a planning agreement.

Council will require the planning agreement to contain a provision establishing a mechanism under which the performance and milestones contained under the planning agreement are periodically reviewed with the involvement of all parties. This monitoring system will enable information about the implementation of the planning agreement to be readily available to public agencies, developers and the community.

Council may appoint an officer to supervise the implementation of the works that are subject of the planning agreement.

5.16 Modification or Discharge of Obligations

The planning agreement will not impose obligations on the developer indefinitely. The planning agreement will set out the circumstances in which the parties agree to discharge the developer's obligations under the agreement.

Council will generally only agree to a provision in a planning agreement permitting the developer's obligations under the agreement to be modified or discharged before end of terms agreed where the modification or discharge is linked to the following circumstances:

- a) The developer's obligations have been fully carried in accordance with the agreement
- b) The developer has assigned the developer's interest under the agreement in accordance with its terms and the assignee has become bound to the Council to perform the developer's obligations under the agreement
- c) The development consent to which the agreement relates has lapsed
- d) The performance of the planning agreement has been frustrated by an event beyond the control of the parties
- e) The Council and the developer otherwise agree to the modification or discharge of the agreement.

Such a provision will require the modification or revocation of the planning agreement in accordance with the Act and Regulation.

5.17 Assignment and Dealings by the Developer

Council will not generally permit the assignment of any or all of the developer's rights or obligations under the agreement, nor will Council permit any dealing in relation to any part or the whole of the land the subject of the agreement. However Council may agree to an assignment when:

- a) The developer has, at no cost to Council, first procured the execution by the person with whom it is dealing of all necessary documents in favour of Council by which that person agrees to be bound by the agreement as if they were a party to the original agreement, and
- b) If the proposed dealing involves a mortgage, charge or other encumbrance in relation to the party's right, title and interest in the land, such documents provide for an agreement by the person to the effect that they, and any receiver appointed by them, will not enjoy rights greater than those of that party, and
- c) The party is not in breach of the agreement.

This does not affect the operation of any other requirements of the agreement.

6 Related Documents

This procedure should be read in conjunction with the following documents:

Documentation

Variation

Council reserves the right to review, vary or revoke this policy and should be reviewed periodically to ensure it is relevant and appropriate.

Appendix 1 – Potential Public Benefits in Snowy Monaro

Examples of Public Benefit and Cost Analysis

Category	Type of Impact	Analysis
Productivity and economic impacts	Reliability impacts	The value of improvements in reliability for the community.
	Long term employment impacts	The value of the (indirect) sustained increase/decrease in employment caused by the operation of the Development. For example, the employment of otherwise unemployed or underemployed people by the Development.
	Travel time impacts	The value of time travel benefits/costs to the community, businesses and tourists.
	Operating cost savings	Reduced expenditure due to savings in operating, maintenance, compliance and investment costs, and the direct economic benefits of reduced operating costs.
	Capacity increase	Capacity increase that enables greater opportunity/access to infrastructure services.
	Resilience	Value of improved economic, physical and social resilience to adverse events. For example, a lower probability, or frequency, or impact of adverse events.
	Accessibility and connectivity benefits	Value of accessibility and connectivity improvements, including any induced demand.
Impacts on individuals	Service improvement impacts	The value of greater amenity from improved services.
	Health, safety and security	The value of an increase/reduction in the number of accidents, deaths and/or security incidents.
	Environmental impacts	The value of positive or negative environmental impacts of the Development.
Community impacts	Social impacts	The value of positive or negative social impacts of the Development. This may include considerations of equity or the distribution of benefits or the types of groups/individuals impacted as a result of the Project
	Network significance of Project	Value of wider 'network implications' of the Development. For example, noise, delay, disrupted services, congestion.
Network impacts	Avoided costs	Costs that would be incurred under a 'do minimum' option, such as under the contributions plan, but which are avoided in the option considered.
Other	Other	Other potential sources of benefit or costs.

Examples of Public Benefit Outcomes

- Affordable housing
- Cultural Infrastructure – music performance space / gallery / exhibition space
- Dedicated land or floor space for a public purpose
- Open space acquisition opportunities identified in the Recreation Strategy
- Publicly accessible through site links
- Publicly accessible recreation (e.g. tennis courts, indoor play, swimming) and youth facilities
- Playful spaces
- Water and Wastewater Infrastructure

Appendix 2 – Standard Planning Agreement Template

[Street Address, Suburb/City of
development]

Planning Agreement No. _____

Section 7.4 of the Environmental Planning and Assessment Act 1979

Snowy Monaro Regional Council

[Insert Developer Name]

[Insert Name of Third Party if
applicable]

[Insert Date]

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Summary Sheet

Dated / /

Parties

Council:

Name

Address

Telephone

Email

Representative

Developer:

Name

Address

Telephone

Email

Representative

Landowner: *If applicable*

Name

Address

Telephone

Email

Representative

1. Background

- A. The Developer is the registered proprietor of the Development Land.
- B. The Council is the local authority constituted under the *Local Government Act 1993* and the planning and consent authority under the Act.
- C. On [Date] the Developer made (or caused to be made) the [Planning Proposal/Development Application] to Council for Development consent to carry out the Development on the Land.
- D. The Developer has offered to provide the Contributions if the Development is undertaken.
- E. This is a Planning Agreement pursuant to section 7.4 of the Act.

2. Definitions

In this Agreement, unless expressed or implied to the contrary:

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

Agreement means this voluntary planning agreement and any schedules or annexures forming part of the agreement.

API NSW means the NSW Division of the Australian Property Institute.

Approval means any approvals consents, modifications, certificates (of all types) permits, endorsements, licenses, conditions or requirements (and any variation to them) which may be required by Law for the Proposed Development.

Bank Guarantee means an unconditional undertaking without an expiry date, by an authorised deposit taking institution under the *Banking Act 1959* (Cth), on terms and in a form acceptable to the Council, acting reasonably.

Business Day means a day that is not a Saturday, Sunday or any other day which is a public holiday or a bank holiday in the place where an act and thing is to be performed or a payment is to be made.

Claims means all or any claims, proceedings, actions, rights of action, liabilities, damages, losses, remedies, expenses, fines and penalties (including associated expenses and legal costs on a full indemnity basis).

Commencement Date means the date on which Council proposes to commence the Development.

Construction Certificate means a certificate referred to in section 6.7 of the Act.

CPI means the Consumer Price Index released by the Australian Bureau of Statistics for "Sydney – All Groups" or such other consumer price index that might replace it.

Costs include costs, charges, fees, disbursements and expenses, including those incurred in connection with advisers.

Defects Liability Period means [insert a period agreed upon by Council].

Development means the development for the purposes of a [Drafting Note: insert land use of proposed development e.g. shopping centre] on the Development Land, which is authorised by the Development Consent.

Development Consent means the development consent numbered [Drafting Note: insert DA or Planning Proposal number], dated [Drafting Note: insert date of consent], and any modification of that consent.

Development Contributions means the kind of provision made by a developer under a planning agreement, being a monetary contribution, the dedication of land free of cost or the provision of a material public benefit.

Development Land means the land to which the Development relates, being [Drafting Note: insert address of Land], legally identified as Lot [...] in Deposited Plan [.....].

Explanatory Note means the Explanatory Note attached in [insert title of attached document]].

GST has the same meaning as the GST Act and other words or expressions used in the GST Act which have a particular defined meaning (including any applicable legislative determinations and Australian Taxation Office public rulings) have the same meaning.

Insolvency Event means, in relation to a person, any of the following events;

- a) The person, being an individual, commits an act of bankruptcy;
- b) The person becomes insolvent;

- c) The person ceases, suspends or threatens to cease or suspend the conduct of a majority of its business, or disposes of or threatens to dispose of its assets, except for the purposes of a solvent reconstruction or amalgamation previously approved by Council;
- d) The person is or states that it is, or under applicable legislation is taken to be, unable to pay its debts (other than as a result of a failure to pay a debt or claim that is the subject of a dispute in good faith), or stops or suspends, or threatens to stop or suspend, payment of all or a class of its debts;
- e) A receiver, receiver and manager, administrator, controller or similar officer of any of the assets or the whole or any part of the undertaking of the person is appointed;
- f) A resolution is passed by the person to appoint an administrator, or an administrator of the person is appointed;
- g) An order is made to appoint a liquidator or a provisional liquidator of the person;
- h) The person resolves to wind itself up or otherwise dissolve itself, or gives notice of its intention to do so, except for the purposes of a solvent reconstruction or amalgamation previously approved by the Council, or is otherwise wound up or dissolved;
- i) An order is made that the person be wound up;
- j) The person is, or makes a statement from which it may be reasonably inferred by the Council that the person is, the subject of an event described in s 459C(2) of the *Corporations Act 2001* (Cth);
- k) The person assigns any of its property for the benefit of creditors or any class of them;
- l) An order is made or a resolution for the person to enter into any arrangement, compromise or composition with, or assignment for the benefit of, its creditors or any class of them except for the purposes of a solvent reconstruction or amalgamation previously approved by the Council;
- m) An Security Interest becomes enforceable or is enforced against that person; the person's interest is or under this Agreement or in the subject matter of this Agreement becomes attached or is taken, in execution or under any legal process;
- n) A distress, attachment, or other execution is levied or enforced against that person in excess of \$10,000;
- o) The person has a judgment or given order against it in an amount exceeding \$10,000 (or the equivalent in another currency) and that judgement or order is not satisfied or quashed or stayed within 20 Business Days after being given;
- p) Any power of sale is exercised or steps are taken to take possession of any assets of the person subject to a Security Interest;
- q) Any step is taken to do anything listed in the above paragraphs; and
- r) Any event that is analogous or has a substantially similar effect to any of the events specified in this definition in any jurisdiction.

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

LRS means the NSW Land Registry Services.

Monetary Contribution means \$[.....] increased by CPI as provided in this Agreement, calculated as following clause 13 of this Agreement.

Notice of Dispute is defined in clause 30 of this Agreement.

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

Planning Proposal means a document that explains the intended effect of a proposed local environmental plan (LEP) and sets out the justification for making that plan.

Public means a section of the public.

Public Purpose means the provision of, or the recoupment of, or the recoupment of the cost of providing public amenities and public services (as defined in section 7.4 (11) of the EP&A Act), affordable housing, transport or other infrastructure. It also includes the funding of recurrent expenditure relating to such things as the monitoring of the planning impacts of development and the conservation or enhancement of the natural environment.

Regulation means the *Environmental Planning and Assessment Regulation 2021*.

Transfer means to settle, assign, transfer, convey, alienate, otherwise dispose of or part with possession of.

Work means the works specified or described in [insert title of attached document that lists the schedule of works and dedications relevant to this Agreement, including all relevant plans and attachments].

Part 1 - Preliminary

3. Interpretation

- 3.1. In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:
 - 3.1.1. Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
 - 3.1.2. 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 NSW.
 - 3.1.3. 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.
 - 3.1.4. A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
 - 3.1.5. A reference in this Agreement to a \$ value relating to a Development Contribution is a reference to the value exclusive of GST.
 - 3.1.6. 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.
 - 3.1.7. A reference in this Agreement to any agreement or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
 - 3.1.8. A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule of or to this Agreement.
 - 3.1.9. An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
 - 3.1.10. 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.
 - 3.1.11. 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.
 - 3.1.12. References to the word 'include' or 'including' are to be construed without limitation.
 - 3.1.13. A reference to this Agreement includes the agreement recorded in this Agreement.

- 3.1.14. A reference to a Party to this Agreement includes a reference to the employees, agents and contractors of the Party, the Party's successors and assigns.
- 3.1.15. A reference to 'dedicate' or 'dedication' in relation to land is a reference to dedicate or dedication free of cost.
- 3.1.16. Any schedules, appendices and attachments form part of this Agreement.
- 3.1.17. Notes appearing in this Agreement are operative provisions of this Agreement.

4. Status

- 4.1. This Agreement is a planning agreement within the meaning of s7.4(1) of the Act.
- 4.2. The Developer agrees that this Agreement operates as a deed poll in favour of the Council on and from the date of execution of this agreement by the Developer until the date on which this agreement commences.

5. Application of this Agreement

This Agreement applies to the Land and to the Development [Drafting Note: Include 'and the taking effect of the LEP Amendment' if relevant].

6. Operation of Document

- 6.1. Subject to clause 6.2, this document operates from the date it is executed by both parties.
- 6.2. The following clause of this document will only operate if and when Council grants Development Consent.

7. Warranties

The Parties warrant to each other that they:

- 7.1. Have full capacity to enter into this Agreement, and
- 7.2. Are able to fully comply with their obligations under this Agreement.

8. Further agreements

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

9. Surrender of Right of Appeal, etc.

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 Agreement, or an Approval relating to the Development in so far as the subject-matter of the proceedings relates to the validity of this Agreement or any condition in the Approval requiring the entering into or compliance with this Agreement.

10. Application of s7.11, s7.12 and s7.24 of the Act to the Development

- 10.1. This Agreement [excludes / does not exclude] [Drafting Note: Delete whichever is not applicable] the application of s7.11 of the Act to the Development.
- 10.2. This Agreement [excludes / does not exclude] [Drafting Note: Delete whichever is not applicable] the application of s7.12 of the Act to the Development.
- 10.3. This Agreement does not exclude the application of s7.24 of the Act to the Development.

Part 2 – Developer Contributions

11. Provision of Development Contributions

- 11.1. The Developer is to make Development Contributions to the Council in accordance with [Drafting Note: reference to relevant attachment], any other provision of this Agreement relating to the making of Development Contributions otherwise to the satisfaction of the Council.
- 11.2. Any Contribution Value specified in this Agreement in relation to a Development Contribution comprising dedication of land or the carrying out of a Work does not serve to define the extent of the Developer's obligation to make the Development Contribution.
- 11.3. The Council is to apply each Development Contribution made by the Developer under this Agreement towards the public purpose for which it is made and otherwise in accordance with this Agreement.
- 11.4. Despite clause 11.2, the Council may apply a Development Contribution made under this Agreement towards a public purpose other than the public purpose specified in this Agreement if the Council reasonably considers that the public interest would be better served by applying the Development Contribution towards that other purpose rather than the purpose so specified.

12. Payment of monetary Development Contributions

- 12.1. A monetary Development Contribution is made for the purposes of this Agreement when the Council receives the full amount of the contribution payable under this Agreement in cash or by unendorsed bank cheque or by the deposit by means of electronic funds transfer or cleared funds into a bank account nominated by the Council.
- 12.2. If the Development Consent is modified to allow for additional [Drafting Note: Insert relevant details e.g. dwelling/final lots] after [Drafting note: Insert timing, which may, for example, be the issuing of the first relevant Part 6 certificate e.g. Construction Certificate/Subdivision Certificate] for the Development, the Developer is to pay monetary Development Contributions to the Council for the additional [Drafting Note; insert relevant details e.g. dwellings/Final Lots] not later than 7 days after the Development Consent has been modified.

13. CPI Increases

- 13.1. On the date of payment of the Monetary Contribution, the Monetary Contribution will be the greater of:

- a) \$[Drafting Note: insert agreed monetary contribution]; and
- b) The amount calculated as follows:

$$A = \frac{B \times C}{D}$$

Where:

- A = the Monetary Contribution increased by CPI;
- B = \$[Drafting Note: insert agreed monetary contribution];
- C = the Consumer Price Index last published before the payment date of the Monetary Contribution;
- D = the Consumer Price Index 1 January [Drafting Note: year

agreement signed]

13.2. If at any time the Australian Bureau of Statistics changes the reference base for the Consumer Price Index, then, for the purposes of the application of this clause after the change takes place, regard shall be had only to index numbers published in terms of the new reference base.

14. Dedication of Land

14.1. A Development Contribution comprising the dedication of land is made for the purposes of this Agreement when:

14.1.1. The Council is provided with:

- a) a Clearance Certificate that is valid and at the time of dedication of land, and

14.1.2. One of the following has occurred:

- a) 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
- b) The Council is given:
 - i) 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,
 - ii) the written consent to the registration of the transfer of any person whose consent is required to that registration, and
 - iii) 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, or
- c) the Council is given evidence that a transfer has been effected by means of electronic lodgement through Property Exchange Australia Ltd or another ELNO.

14.2. The Developer is to do all things reasonably necessary to enable registration of the instrument of transfer to occur.

14.3. The Developer is to ensure that land dedicated to the Council under this Agreement 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.

14.4. If, having used all reasonable endeavours, the Developer cannot ensure that land to be dedicated to the Council under this Agreement 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.

14.5. Despite any other provision of this Agreement, if the Developer is required to dedicate land to the Council on which the Developer is also required to carry out a Work under this Agreement, the Developer is to comply with clause 14.1.2(b) not later than 7 days after the Work is completed for the purposes of this Agreement.

15. Value of Dedicated Land

15.1. The parties acknowledge and agree that the Value of the Dedicated Land as at the date of the original letter of offer, being [Drafting Note: insert date of offer] is \$[Drafting Note: insert value of offer].

15.2. The Council acknowledges and accepts that the value of the Dedicated Land may have increased since [Drafting Note: insert date of offer].

16. Carrying out of Work

16.1. Without limiting any other provision of this Agreement, any Work that is required to be carried out by the Developer under this Agreement is to be carried out in accordance with any design or specification specified or approved by the Council, any relevant Approval and any other applicable law.

16.2. The Developer, 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 Agreement.

17. Variation to Work

17.1. The design or specification of any 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

17.2. Without limiting clause 17.1, 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.

17.3. The Council is not to unreasonably delay or withhold its approval to a request made by the Developer under clause 17.2.

17.4. 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.

17.5. The Developer is to comply promptly with a direction referred to in clause 17.4 at its own cost.

18. Access to land by Developer

18.1. 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.

18.2. 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.

18.3. Nothing in this Agreement creates or gives the Developer any estate or interest in any part of the land referred to in clause 18.1 or 18.2.

19. Access to Land by Council

19.1. The Council may enter any land on which 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.

19.2. The Council is to give the Developer prior reasonable notice before it enters land under clause 19.1.

20. Protection of People, Property & Utilities

20.1. The Developer is to ensure to the fullest extent reasonably practicable in relation to the performance of its obligations under this Agreement that:

- a) all necessary measures are taken to protect people and property,
- b) unnecessary interference with the passage of people and vehicles is avoided, and
- c) nuisances and unreasonable noise and disturbances are prevented

20.2. Without limiting clause 20.1, 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.

21. Repair of Damage

21.1. The Developer is to Maintain any Work required to be carried out by the Developer under this Agreement until the Work is completed for the purposes of this Agreement or such later time as agreed between the Parties.

21.2. The Developer is to carry out its obligation under clause 21.1 at its own cost and to the satisfaction of the Council.

22. Works-As-Executed Plan

22.1. No later than 60 days after Work is completed for the purposes of this Agreement, the Developer is to submit to the Council a full works-as-executed-plan in respect of the Work.

22.2. The Developer, being the copyright owner in the plan referred to in clause 22.1, gives the Council a non-exclusive licence to use the copyright in the plans for the purposes of this Agreement.

23. Completion of Work

23.1. 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 Agreement or any Stage.

23.2. The Council is to inspect the Work that is the subject of the notice referred to in clause 23.1 within 14 days of the date specified in the notice for completion of the Work.

23.3. Work required to be carried out by the Developer under this Agreement, or a Stage, is completed for the purposes of this Agreement when:

- a) the Developer gives the Council a compliance certificate within the meaning of s6.4(e)(i) or (v) of the Act to the effect that the Work has been completed in accordance with this Agreement and any applicable Development Consent and standards and specifications, and
- b) Council, acting reasonably, gives a written notice to the Developer that the Work is complete.

23.4. If the Council is the owner of the land on which Work the subject of a notice referred to in clause 23.3 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.

23.5. Before the Council gives the Developer a notice referred to in clause 23.3, it may give the Developer a written direction to complete, rectify or repair any specified part of the Work to the reasonable satisfaction of the Council.

23.6. The Developer, at its own cost, is to promptly comply with a direction referred to in clause 23.5.

24. Rectification of Defects

24.1. The Council may give the Developer a Rectification Notice during the Defects Liability Period.

24.2. 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.

24.3. 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 24.1

25. Removal of Equipment

25.1. When Work on any Council owned or controlled land is completed for the purposes of this Agreement, the Developer, without delay, is to:

- a) remove any Equipment from Land and make good any damage or disturbance to the land as a result of that removal, and
- b) leave the land in a neat and tidy state, clean and free of rubbish.

Part 3 – Position of Council

26. Consent Authority

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

27. Document does not Fetter Discretion

This document is not intended to operate to fetter:

- 27.1. the power of Council to make any Law; or
- 27.2. the exercise by Council of any statutory power or discretion.

28. Severance of Provisions

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

- a) they will take all practical steps, including the execution of any further documents, to ensure the objective of this clause 28 is substantially satisfied;
- b) in the event that paragraph (a) cannot be achieved without giving rise to an unlawful fetter on a Discretion, the relevant provision is to be severed and the remainder of this document has full force and effect; and
- c) to endeavour to satisfy the common objectives of the parties on relation to the provision of this document which is held to be an unlawful fetter to the extent that it is possible having regard to the relevant court judgment.

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

29. No Obligations

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

Part 4 – Dispute Resolution

30. Notice of Dispute

30.1. If a dispute between the parties arises in connection with this document or its subject matter (Dispute), then either party (First Party) must give to the other (Second Party) a notice which:

- a) Is in writing;
- b) Adequately identifies and provides details of the Dispute;
- c) Stipulates what the First Party believes will resolve the Dispute; and
- d) Designates its representative (Representative) with the necessary authority to negotiate and resolve the Dispute.

30.2. The Second Party must, within five (5) Business Days of service of the notice of dispute, provide a notice to the First Party designating as its representative a person with the necessary authority to negotiate and settle the Dispute (the representatives designated by the parties being together, the Representatives).

31. Conduct Pending Resolution

31.1. The parties must continue to perform their respective obligations under this document if there is a Dispute but will not be required to complete the matter the subject of the Dispute, unless the appropriate party indemnifies the other parties against costs, damages and all losses suffered in completing the disputed matter if the Dispute is not resolved in favour of the indemnifying party.

32. Further Steps Required Before Proceedings

Subject to clause 41 and except as otherwise expressly provided in this document, any Dispute must, as a condition precedent to the commencement of litigation, mediation under clause 34 or determination by an expert under clause 35, first be referred to the Representatives. The Representatives must endeavour to resolve the dispute within five (5) Business Days of the date a notice under clause 30 is served.

33. Disputes for Mediation on Expert Determination

If the Representatives have not been able to resolve the Dispute, then the parties must agree within five (5) Business Days to either refer the matter to mediation under clause 34 or expert resolution under clause 35.

34. Disputes for Mediation

34.1. If the parties agree in accordance with clause 33 to refer the Dispute to mediation, the mediation must be conducted by a mediator agreed by the parties and, if the parties cannot agree within five (5) Business Days, then by a mediator appointed by the President of the Law Society of New South Wales for the time being.

34.2. If the mediation referred to in paragraph (a) has not resulted in settlement of the Dispute and has been terminated, the parties may agree to have the matter determined by expert determination under clause 35.

35. Choice for Expert

35.1. If the Dispute is to be determined by expert determination, this clause 35 applies.

35.2. The Dispute must be determined by an independent expert in the relevant field:

- a) agreed between and appointed jointly by the parties; or
- b) in the absence of agreement within five (5) Business Days after the date that the matter is required to be determined by expert determination, appointed by the President of the Law Society of New South Wales for the time being.

35.3. If the parties fail to agree as to the relevant field within five (5) Business Days after the date that the matter is required to be determined by expert determination, either party may refer the matter to the President of the Law Society of New South Wales for the time being whose decision as to the relevant field is final and binding on the parties.

35.4. The expert appointed to determine a Dispute:

- a) must have a technical understanding of the issues in dispute;
- b) must not have a significantly greater understanding of one party's business, functions or operations which might allow the other side to construe this greater understanding as a bias; and
- c) must inform the parties before being appointed of the extent of the expert's understanding of each party's business or operations and, if that information indicates a possible bias, then that expert must not be appointed except with the written approval of the parties.

35.5. The parties must promptly enter into an agreement with the expert appointed under this clause setting out the terms of the expert's determination and the fees payable to the expert.

36. Directions for Expert

36.1. In reaching a determination in respect of a dispute under clause 35, the independent expert must give effect to the intent of the parties entering into this document and the purposes of this document.

36.2. The expert must:

- a) act as an expert and not as an arbitrator;
- b) not accept verbal submissions unless both parties are present;
- c) on receipt of a written submission from one party, ensure that a copy of that submission is given promptly to the other party;
- d) take into consideration all documents, information and other material which the parties give the expert which the expert in its absolute discretion considers relevant to the determination of the Dispute;
- e) not be expected or required to obtain or refer to any other documents, information or material (but may do so if the expert so wishes);
- f) issue a draft certificate stating the expert's intended determination (together with written reasons), giving each party ten (10) Business Days to make further submissions;

- g) issue a final certificate stating the expert's determination (together with written reasons); and
 - h) act with expedition with a view to issuing the final certificate as soon as practicable.
- 36.3. The parties must comply with all directions given by the expert in relation to the resolution of the Dispute and must within the time period specified by the expert, give the expert:
- a) a short statement of facts;
 - b) a description of the Dispute; and
 - c) any other documents, records or information which the expert requests.

37. Expert may Convene Meetings

The expert must hold a meeting with all of the parties present to discuss the Dispute. The meeting must be conducted in a manner which the expert considers appropriate. The meeting may be adjourned to, and resumed at, a later time in the expert's discretion.

38. Other Courses of Action

If:

- 38.1. the parties cannot agree in accordance with clause 32 to refer the matter to mediation or determination by an expert; or
- 38.2. the mediation referred to in clause 34 has not resulted in settlement of the dispute, the mediation has been terminated and the parties have not agreed to refer the matter to expert determination within five (5) Business Days after termination of the mediation;

then either party may take whatever course of action it deems appropriate for the purpose of resolving the Dispute.

39. Final Determination of Expert

The parties agree that the final determination by an expert will be final and binding upon them except in the case of fraud or misfeasance by the expert.

40. Costs

If any independent expert does not award costs, each party must contribute equally to the expert's costs in making the determination.

41. Remedies Available Under the Act

Part 3 – Dispute Resolution does not operate to limit the availability of any remedies available to Council under sections 9.45 and 9.46 and Division 9.6 of the Act.

42. Urgent Relief

This clause 42 does not prevent a party from seeking urgent injunctive or declaratory relief concerning any matter arising out of this document.

Part 5 – Enforcement

43. Security for Performance of Obligations

- 43.1. The Developer is to provide Security to the Council in the amount of [Drafting Note: Insert \$ amount. This amount will normally be full value of the developer's provision under the VPA] in relation to the performance of its obligations under this Agreement.

- 43.2. The Developer is to provide the Security to the Council [Drafting Note: Insert timing for provision of Security. At the latest it should be before the developer commences any part of the Development] unless, before that time, the Council agrees in writing to apportion the Security to different Stages, in which case the Developer is to provide the portion of the Security relating to a particular Stage to the Council before it commences any part of the Development comprised in the Stage.
- 43.3. The Council, in its absolute discretion and despite clause 18, 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.
- 43.4. The Council may call-up and apply the Security in accordance with clause 52 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.
- 43.5. 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.
- 43.6. The Developer may at any time provide the Council with a replacement Security.
- 43.7. On receipt of a replacement Security, the Council is to release and return the Security that has been replaced to the Developer.
- 43.8. 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.
- 43.9. The Developer is to ensure that the Security provided to the Council is at all times maintained to the full current indexed value.

44. Provision of Bank Guarantee

- 44.1. On the date the Developer [Drafting Note: Or Landowner is a different entity] executes this Agreement, the Developer [Drafting Note: Or Landowner if the landowner is a different entity] grants to the Council a fixed and specific charge over the Developer's right, title and interest in the Charge Land to secure:
- a) the performance of the Developer's obligation to make monetary Development Contributions under this Agreement, and
 - b) any damages that may be payable to the Council, or any costs which may be incurred by the Council in the event of a breach of this Agreement by the Developer
- 44.2. Upon the execution of this Agreement, the Developer is to give to the Council an instrument in registrable form under the Real Property Act 1900 duly executed by the Developer that is effective to register the Charge on the title to the Charge Land.
- 44.3. If the Charge Land comprises part only of a lot in a deposited plan at the time that the instrument referred to in clause 44.2 is required to be given, the Developer is to give the Council an instrument that charges a greater area of the Land which includes the whole of the Charge Land.
- 44.4. The Developer is to do all other things necessary, including execute all other documents, to allow for the registration of the Charge.

45. Council's Right to Call Upon Bank Guarantee

45.1. The Council may call on the Bank Guarantee in the event that the Developer:

- a) fails to make a payment of any part of the Development Contribution in accordance with this Agreement or any other amount payable under this Agreement by its due date for payment; or
- b) breaches any other term or condition of this Agreement, and fails to remedy the relevant failure or breach within 7 days after the Council's notice.

45.2. If the Council calls on the Bank Guarantee as a result of the Developer's failure to pay any amount due under this Agreement, then the Council will apply the amount received pursuant to its claim on the Bank Guarantee towards the Developer's obligation to pay the relevant amount and will deduct that amount from the total amount payable under this Agreement. In those circumstances, the Developer will be required to pay to the Council any outstanding balance of the Development Contribution and other amounts payable under this Agreement.

46. Return of Bank Guarantee

Provided that the Developer has complied with its obligations under this Agreement, to pay the Development Contribution or any other amount payable under this Agreement, the Council must return the remaining Bank Guarantees (if any) to the bank within 30 days from the expiration of the Defects Liability Period for the last Item of Work that is Completed.

47. CPI Increases – Bank Guarantee

On each anniversary of the date of this Agreement, the Developer must provide the Council with a replacement Bank Guarantee and the amount of the replacement Bank Guarantee provided will be the amount of the Bank Guarantee provided immediately prior to that anniversary increased by the same percentage as the percentage increase, if any, in the Consumer Price Index in the 12 months prior to the relevant anniversary.

48. Grant of Charge

48.1. On the date the Developer [Drafting Note: Or Landowner if the landowner is a different entity] executes this Agreement, the Developer [Drafting Note: Or Landowner if the landowner is a different entity] grants to the Council a fixed and specific charge over the Developer's right, title and interest in the Charge Land, to secure:

- a) the performance of the Developer's obligation to make monetary Development Contributions under this Agreement, and
- b) any damages that may be payable to the Council, or any costs which may be incurred by the Council in the event of a breach of this Agreement by the Developer

48.2. Upon the execution of this Agreement, the Developer is to give to the Council an instrument in registrable form under the Real Property Act 1900 duly executed by the Developer that is effective to register the Charge on the title to the Charge Land.

48.3. If the Charge Land comprises part only of a lot in a deposited plan at the time that the instrument referred to in clause 48.2 is required to be given, the Developer is to give the Council an instrument that charges a greater area of the Land which includes the whole of the Charge Land.

48.4. The Developer is to do all other things necessary, including execute all other documents, to allow for the registration of the Charge.

49. Caveat and Discharge

49.1. The Developer agrees that:

- a) the Council may lodge a caveat on the title of the Land to which the Charge applies,
 - b) the Council is to release the caveat from any part of the Land to which the Charge applies that is not the Charge Land once that part of the Land is contained in a separate lot to the Charge Land, and
 - c) the Council cannot be required to have the caveat removed from the title to the Charge Land other than in accordance with clause 49.2.
- 49.2. In order to enable Final Lots to be sold, the Council is to release the Charge and withdraw the caveat from the title to any Final Lot on satisfaction by the Developer of its obligations under this Agreement to make Development Contributions in respect of the creation of the lot.
- 49.3. For the purposes of clause 49.2 the Council is to use its reasonable endeavours to provide any documentation necessary to enable the release of the Charge and withdrawal of the caveat from the title of a Final Lot on or immediately prior to the date for settlement of the sale of that lot.
- 49.4. Nothing in this Agreement prevents the registration of a plan of subdivision in respect of the Charge Land nor the creation of a Final Lot from the Charge Land.

50. Priority

The Developer is not to create any mortgage or charge over the Charge Land or grant any other interest in the Charge Land ranking in priority equal with or ahead of the Charge created under this Agreement without the prior written approval of the Council.

51. Acquisition of Land Required to be Dedicated

- 51.1. If the Developer does not dedicate land required to be dedicated under this Agreement 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.
- 51.2. The Council is to only acquire land pursuant to clause 51.1 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 Agreement.
- 51.3. Clause 51.1 constitutes an agreement for the purposes of s30 of the Just Terms Act.
- 51.4. If, as a result of the acquisition referred to in clause 51.1, 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 clause 43.
- 51.5. 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.
- 51.6. The Developer is to promptly do all things necessary, and consents to the Council doing all things necessary, to give effect to this clause 51, including without limitation:
- a) signing any documents or forms,
 - b) giving land owner's consent for lodgement of any Development Application,
 - c) producing certificates of title to the Registrar-General under the Real Property Act 1900, and

- d) paying the Council's costs arising under this clause 51.

52. Breach of Obligations

52.1. 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:

52.1.1. specifying the nature and extent of the breach,

52.1.2. 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,

52.1.3. specifying the period within which the breach is to be rectified or compensation paid, being a period that is reasonable in the circumstances.

52.2. If the Developer fails to fully comply with a notice referred to in clause 52.1, 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.

52.3. If the Developer fails to comply with a notice given under clause 52.1 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.

52.4. Any costs incurred by the Council in remedying a breach in accordance with clause 52.2 or clause 52.3 may be recovered by the Council by either or a combination of the following means:

- a) by calling-up and applying the Security provided by the Developer under this Agreement, or
- b) as a debt due in a court of competent jurisdiction.

52.5. For the purpose of clause 52.4, the Council's costs of remedying a breach the subject of a notice given under clause 52.1 include, but are not limited to:

- a) the costs of the Council's employees, agents and contractors reasonably incurred for that purpose,
- b) all fees and charges necessarily or reasonably incurred by the Council in remedying the breach, and
- c) all legal costs and expenses reasonably incurred by the Council, by reason of the breach.

52.6. Nothing in this clause 52 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.

53. Enforcement in a Court of Competent Jurisdiction

53.1. Without limiting any other provision of this Agreement, the Parties may enforce this Agreement in any court of competent jurisdiction.

53.2. For the avoidance of doubt, nothing in this Agreement prevents:

- a) 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

- b) 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.

Part 6 – Registration and Restriction on Dealings

54. Registration of VPA on Title

54.1. The Parties agree this Agreement is to be registered on the title of the Land by the Registrar-General pursuant to section 7.6 of the Act.

54.2. The Developer must:

- a) Do all things necessary to enable this Agreement to be registered under section 7.6 of the Act, including but not limited to obtaining the consent of any mortgagee registered on the title of the Land; and
- b) Pay any reasonable costs incurred by Council in undertaking that registration.

55. Removal from Title of the Land

55.1. Council will do all things necessary to allow the Developer to remove the registration of this document from the title of the Land where the Developer has:

- a) Provided all Monetary Contributions;
- b) Completed the Works; and
- c) Dedicated the Designated Land.

55.2. The Developer must pay any reasonable costs incurred by Council in undertaking that discharge.

56. Restriction on Dealings

56.1. The Developer is not to:

- a) sell or transfer the Land, other than a Final Lot, or
- b) assign the Developer's rights or obligations under this Agreement, or novate this Agreement,

to any person unless:

- c) 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 reasonably satisfactory to the Council, and
- d) 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 Agreement, and
- e) the Developer is not in breach of this Agreement, and
- f) the Council otherwise consents to the transfer, assignment or novation, such consent not to be unreasonably withheld.

56.2. Subject to clause 56.3, the Developer acknowledges and agrees that it remains liable to fully perform its obligations under this Agreement unless and until it has complied with its obligations under clause 56.1.

56.3. Clause 56.1 does not apply in relation to any sale or transfer of the Land if this Agreement is registered on the title to the Land at the time of the sale.

Part 7 – Indemnities & Insurance

57. Risk

The Developer performs this Agreement at its own risk and its own cost.

58. Release

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.

59. Indemnity

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.

60. Insurance

60.1. 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 Work is taken to have been completed in accordance with this Agreement:

- a) contract works insurance, noting the Council as an interested party, for the full replacement value of the Works (including the cost of demolition and removal of debris, consultants' fees and authorities' fees), to cover the Developer's liability in respect of damage to or destruction of the Works,
- b) 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,
- c) workers compensation insurance as required by law, and
- d) any other insurance required by law.

60.2. If the Developer fails to comply with clause 60.1, 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:

- a) by calling upon the Security provided by the Developer to the Council under this Agreement, or
- b) recovery as a debt due in a court of competent jurisdiction.

60.3. 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 60.1.

Part 8 - GST

61. Definitions

In this clause: Taxable Supply, GST, Tax Invoice and Input Tax Credit have the same meaning given to them in GST Law.

62. Non-monetary Supplies

62.1. The parties agree that any non-monetary supplies made by one party to the other pursuant to this agreement (including Works and the dedication of land) will be exempt from GST pursuant to Division 82 of the GST Law.

62.2. In the event that one party reasonably believes that the non-monetary supply it makes to the other is a Taxable Supply then the parties agree to negotiate in good faith to agree to the GST inclusive market value of that Taxable Supply as follows:

- a) The party making the Taxable Supply will issue a Tax Invoice to the other as soon as practicable after agreeing to the GST inclusive market value and will disclose the amount of GST included in the GST inclusive market value.
- b) The recipient of the Taxable Supply will pay to the other party the amount of the included GST within fifteen (15) days of receiving the Tax Invoice.

62.3. In the event that both parties reasonably believe that each make a non-monetary Taxable Supply to the other, any GST payable by one party to the other will be off-set against each other and any net difference will be paid by the party with the greater obligation.

63. Supply Expressed in Terms of Money

63.1. If any party reasonably believes that it is liable to pay GST on a supply expressed in terms of money (or where the consideration for the supply is expressed in terms of money) and made to the other party under this document and the supply was not expressed to include GST, then:

- a) the recipient of the supply must pay an amount equal to the GST on that supply to the other party;
- b) the party making the supply will issue a Tax Invoice to the other party; and
- c) the recipient of the supply will pay the amount of the GST to the supplier within fifteen (15) days of receiving the Tax Invoice.

64. Expenses and Costs Incurred

If any expenses or costs incurred by one party are required to be reimbursed by the other party under this document, then the amount of the reimbursement will be calculated as follows:

64.1. The amount of the cost or expense incurred by the party seeking reimbursement will be initially calculated excluding any Input Tax Credit to which that party is entitled to claim.

64.2. This amount initially calculated will be increased by the applicable rate of GST to equal a GST inclusive reimbursement amount and this amount will be paid by the party liable to make the reimbursement.

64.3. The party being reimbursed will issue a Tax Invoice to the other at the GST inclusive reimbursement amount prior to being reimbursed.

65. Survival of Clause

The clauses 60 – 65 continue to apply after the expiration or termination of this agreement.

Part 9 – General

66. Legal Costs and Expenses

Each party is responsible for its own legal costs and expenses in relation to the negotiation, preparation and execution of this Agreement and other documents referred to in it, unless expressly stated otherwise.

67. Variation

- 67.1. The design or specification of any 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
- 67.2. Without limiting clause 67.1, 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.
- 67.3. The Council is not to unreasonably delay or withhold its approval to a request made by the Developer under clause 67.2.
- 67.4. 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.
- 67.5. The Developer is to comply promptly with a direction referred to in clause 67.4 at its own cost.

68. Counterparts

This document may be executed in any number of counterparts and all of those counterparts taken together constitute one and the same instrument.

69. Liability

Except as otherwise set out in this Agreement:

- 69.1. any agreement, covenant, representation or warranty under this Agreement by 2 or more persons binds them jointly and each of them individually, and
- 69.2. any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually

70. Entire Agreement and No Reliance

This document is the entire agreement of the parties on the subject matter. All representations, communications and prior agreements in relation to the subject matter are merged in and superseded by this document.

71. Severability

- 71.1. 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.
- 71.2. 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.

72. Waiver

- 72.1. The non-exercise of or delay in exercising any power or right of a party does not operate as a waiver of that power or right, nor does any single exercise of a power or right preclude any other or further exercise of it or the exercise of any other power or right. A power or right may only be waived in writing, signed by the parties to be bound by the waiver.
- 72.2. Without limitation, a waiver may be expressed to be conditional on the happening of an event, including the doing of a thing by the Party to whom the waiver is given.

72.3. A 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 in any other circumstance or instance.

73. Further Assurance

Each party must promptly execute and deliver all documents and take all other action necessary or desirable to effect, perfect or complete the transactions contemplated by this Agreement.

74. Survival and Enforcement of Indemnities

74.1. Each indemnity in this Agreement is a continuing obligation, separate and independent from the other obligations of the parties and survives termination of this Agreement.

74.2. It is not necessary for a party to incur expense or make payment before enforcing a right of indemnity conferred by this Agreement.

75. No Merger

The warranties, undertakings, agreements and continuing obligations in this Agreement do not merge on completion of this Agreement.

76. Business Day

If a payment or other act is required by this Agreement to be made or done on a day which is not a Business Day, the payment or act must be made or done on the next following Business Day.

Part 10 - Other Provisions

77. Notices

77.1. Any notice, consent or other communication under this document must be in writing and signed by or on behalf of the person giving it, addressed to the person to whom it is to be given and:

- a) delivered to that person's address;
- b) sent by pre-paid mail to that person's address; or
- c) sent by email to that person's email address.

77.2. A notice given to a person in accordance with this clause is treated as having been given and received:

- a) if delivered to a person's address, on the day of delivery if a Business Day, otherwise on the next Business Day;
- b) if sent by pre-paid mail, on the third Business Day after posting; and
- c) if sent by email to a person's email address and a confirmation of receipt can be retrieved, on the day it was sent if a Business Day, otherwise on the next Business Day.

77.3. For the purpose of this clause the address of a person is the address set out in this document or another address of which that person may from time to time give notice to each other person.

78. Annual Report by Developer

78.1. The Developer is to provide to the Council by not later than each anniversary of the date on which this Agreement is entered into a report detailing the performance of its obligations under this Agreement.

78.2. The report referred is to be in such a form and to address such matters as required by the Council from time to time.

79. Review of Agreement

79.1. The Parties agree to review this Agreement every [Drafting Note: Insert number] years, and otherwise if either party is of the opinion that any change of circumstance has occurred, or is imminent, that materially affects the operation of this Agreement.

79.2. For purposes of clause 79.1, 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.

79.3. For the purposes of addressing any matter arising from a review of this Agreement referred to in clause 79.1, the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Agreement.

79.4. If this Agreement 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 Agreement is entered into.

79.5. 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 79.1 (but not 79.4) is not a Dispute for the purposes of this Agreement and is not a breach of this Agreement.

80. Approvals and Consent

80.1. 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.

80.2. A Party is not obligated to give its reasons for giving or withholding consent or for giving consent subject to conditions.

81. Costs

81.1. The Developer is to pay the Council the Council's costs of and incidental to 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.

81.2. The Developer is also to pay the Council the Council's costs of and incidental to enforcing this Agreement within 7 days of a written demand by the Council for such payment.

82. Notations on section 10.7(2) Planning Certificates

82.1. The Parties agree that the Council may, in its absolute discretion, make a notation under section 10.7(5) of the Act regarding this Agreement on any certificate issued under section 10.7(2) of the Act relating to the Land.

83. Governing Law and Jurisdiction

83.1. This Agreement is governed by the law of New South Wales.

83.2. The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them.

83.3. The Parties are not to object to the exercise of jurisdiction by those courts on any basis.

84. Joint and Individual Liability and Benefits

84.1. Except as otherwise set out in this Agreement:

- a) any agreement, covenant, representation or warranty under this Agreement by 2 or more persons binds them jointly and each of them individually, and
- b) any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.

85. No Fetter

Nothing in this Agreement shall be constructed 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.

86. Illegality

86.1. If this Agreement or any part of it becomes illegal, unenforceable or invalid as result of any change to 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.

87. Amendment

No amendment of this Agreement will be of any force or effect unless it is in writing and signed by the Parties to this Agreement in accordance with clause 203 of the Regulation.

88. Explanatory Note

88.1. The Appendix contains the Explanatory Note relating to this Agreement required by clause 205 of the Regulation.

88.2. Pursuant to clause 205(5) of the Regulation, the Parties agree that the Explanatory Note is not to be used to assist in construing this Planning Agreement.

89. Document not Confidential

The terms of this document are not confidential and this document may be treated as a public document and exhibited or reported without restriction by any party.

Schedule 1

Development Contributions

Item/Contribution	Public Purpose	Manner & Extent	Timing
A. Monetary Contributions			
[Drafting Note: insert description]	[Drafting Note: insert public purpose]	[Drafting Note: Insert manner in which contributions are to be provided including details of any design, technical specification and standards of work. Details can also be provided in a separate Schedule]	[Drafting Note: insert timing by which contributions are to be provided]
B. Dedication of Land			
C. Carrying out of Work			
D. Other Material Public Benefits			

Schedule 2

[insert schedule of works and dedications relevant to this Agreement, including all relevant plans and attachments].

Execution

Dated:

Executed in behalf of the Council

Chief Executive Officer

Name of Chief Executive Officer:

Witness

Name of Witness:

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

Director

Name of Director:

Director/Secretary

Name of Director/Secretary:

Appendix 3 – Explanatory Note Template

Explanatory Note

(Clause 205 of the Environmental Planning and Assessment Regulation 2021)

Draft Planning Agreement

The purpose of this explanatory note is to provide a summary of the proposed planning agreement prepared jointly between Snowy Monaro Regional Council and the Developer under s7.4 of the *Environmental Planning and Assessment Act 1979* (the Act).

This explanatory note has been prepared as required by clause 205 of the *Environmental Planning and Assessment Regulation 2021*.

1 Parties

Snowy Monaro Regional Council (“Council”) and
Developer (ACN #) of Address (“Developer”)

2 Description of Subject Land

3 Description of Development

4 Background

5 Summary of Objectives, Nature and Effect of the Draft Planning Agreement

6 Assessment of the Merits of the Draft Planning Agreement

6.1 The Planning Purposes Served by the Draft Planning Agreement

6.2 How the Draft Planning Agreement Promotes the Public Interest

6.3 How the Draft Planning Agreement Promotes the Objectives of the *Environmental Planning and Assessment Act 1979* (the Act)

6.4 How the Draft Planning Agreement Promotes Elements of the Council's Charter Under Section 8 of the *Local Government Act 1993*

6.5 Conformity with the Council's Capital Works Program

6.6 Whether the Agreement Specifies that Certain Requirements of the Agreement Must be Complied with Before a Construction Certificate, Occupation Certificate or Subdivision Certificate is Issued

This explanatory note is not to be used to assist in construing the planning agreement.