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Policy Statement/Objectives

A planning agreement is a voluntary agreement between a planning authority and a developer, under which the developer is required to provide a monetary contribution, the dedication of land or another material public benefit, to be used for or applied towards a public purpose.

Kiama Municipal Council is committed to ensuring that Planning Agreements are negotiated, executed, and implemented in accordance with relevant legislation and best practice guidelines.

The objectives of this Policy are:

- To establish a framework for the use of planning agreements.
- To set out the policy and framework relating to the use of planning agreements.
- To establish a general test for determining the acceptability of a planning agreement.
- To protect the public interest and prevent misuse of planning agreements.
- To provide for effective formalised public participation.
- To allow for innovate approaches to the delivery of local infrastructure.

Scope

This Planning Agreements Policy sets out Council's approach to the use of planning agreements through negotiation when considering Planning Proposal requests (land re-zonings) or Development Applications in the Kiama Municipal Council Local Government Area.

References

- Environmental Planning and Assessment Act 1979
- Environmental Planning and Assessment Regulation 2021
- Practice Note - Local Planning Agreements (NSW Planning, 2023)

Consultations

- Internal Development Contributions Coordination Group

Definitions

Term	Definition
Act	means the Environmental Planning and Assessment Act 1979.
Application	Is the Planning Proposal or Development Application to which the planning agreement is associated.
Contribution Plan	is a plan adopted by a council under s7.11 or 7.12 of the Act.
Council	means Kiama Municipal Council.
Developer	means a person who has sought a change to an environmental planning instrument or who has made, or proposes to make, an application for development consent.

Development application	has the same meaning as in the Act.
Development contribution	means the payment of a monetary contribution, the dedication of land, the carrying out of works, the provision of a material public benefit or any combination of the above, under Division 7.1 of the Act.
Development consent	has the same meaning as in the Act.
Explanatory note	means a written statement associated with a draft planning agreement in accordance with clause 205 of the Regulation.
Local infrastructure	Includes, but is not limited to: <ul style="list-style-type: none"> • local open space and recreation including parks and sporting facilities. • local community facilities including libraries and community centers. • local transport including roads, intersections, bridges, and car parks. • local active transport including shared use pathways. • local public transport including bus facilities. • local drainage and stormwater management.
Notification Policy	means the Council’s Community Participation Plan.
Planning agreement	means an agreement referred to in section 7.4 of the Act.
Planning authority	means a council or other planning authority defined in the Act.
Planning benefit	means a development contribution that confers a net public benefit being a benefit that exceeds anything required to be done to address the impacts of a particular development on surrounding land or the wider community.
Planning Proposal	means a change to an environmental planning instrument as referred to in the Act.
Public	Includes the general public or a section of the public.
Public benefit	is the benefit enjoyed by the public as a consequence of a development contribution.
Public purpose	has the same meaning as section 7.4(2) of the Act.
Regulation	means the Environmental Planning and Assessment Regulation 2021.
Works in kind	means the provision of an infrastructure item that is already nominated in the works schedule of a section 7.11 contributions plan.

Variation and review

Council reserves the right to review, vary or revoke this Policy.

Review History

Date endorsed by Council	Date effective	Brief detail of amendments
16 February 2010	24 February 2010	Original policy
21 May 2024	28 June 2024	Minor review including legislative updates.

POLICY

1. Introduction

1.1. Name and commencement of this Policy

This Policy is the Kiama Municipal Council Planning Agreements Policy (the Policy). This Policy commenced on 24 February 2010 and this review is effective on 28 June 2024.

1.2. Purpose of this Policy

The purpose of this Policy is to:

- provide a mechanism for the Council and developers to negotiate flexible outcomes in respect of development contributions.
- enhance the range and extent of development contributions made by development towards the provision of public infrastructure in the Council's area.
- establish a framework addressing the Council's use of planning agreements affecting land in the Kiama LGA that is fair, transparent, and accountable.
- set out Council's policies and procedures on the scope, negotiation, and administration of planning agreements.
- facilitate public participation and to allow the community to gain an understanding of the benefits of appropriate planning agreements for the provision of public benefits.

1.3. Legal context for planning agreements

The content of, and process and procedures for negotiating, exhibiting, and entering into planning agreements are set out in the relevant legislation. All planning agreements must meet these requirements.

This Policy has been prepared in accordance with the *Environmental Planning and Assessment Act 1979* (the Act) and the *Environmental Planning and Assessment Regulation 2021* (the Regulation).

The Regulation requires the NSW Department of Planning's practice note to be considered when negotiating and entering into a planning agreement. To ensure this occurs, the principles in the practice note have been incorporated into this policy.

2. Key principles and requirements

2.1. The circumstances in which Council would consider entering into a planning agreement

Circumstances in which the Council will consider entering into a planning agreement with a developer would include:

- a developer voluntarily offers to be a party to such an agreement.
- a planning agreement is part of a statement of commitments under Part 3A.
- there is a clear public interest in pursuing a planning agreement; and
- the planning agreement would meet the acceptability test and fundamental principles identified in clauses 2.2 and 2.3 of this Policy.

2.2. Acceptability test to be applied to all planning agreements

Council will apply the following acceptability test to determine whether it will enter into a planning agreement.

Where the Council, in its opinion, determines that any of the following questions cannot be answered 'yes', it will not enter into the agreement.

- Is the infrastructure in the proposed planning agreement categorised as 'local infrastructure' that is not wholly unrelated to the development?
- Is the proposed planning agreement directed towards proper or legitimate planning purposes, having regard to the planning controls and policies applying to development in the Kiama LGA?
- Will the proposed planning agreement likely produce outcomes that meet the values and expectations of the wider Kiama community and protect the overall public interest?
- Does the proposed planning agreement provide for a reasonable means of achieving the relevant purposes and outcomes and securing the public benefits?
- Does the proposed planning agreement conform to the principles contained in clause 2.3 of this Policy?

2.3. Principles governing the use of planning agreements

The Council's use of planning agreements will be governed by the following principles:

- Development that is unacceptable on planning grounds will not be permitted because of planning benefits offered by developers that do not make the development acceptable in planning terms.
- The Council will not allow planning agreements to improperly fetter the exercise of its functions under the Act, Regulation or any other Act or law.
- The Council will not use planning agreements for any purpose other than a proper planning purpose.
- The Council will not seek benefits under planning agreements that are unrelated to particular development, nor will the Council give undue weight to a proposed planning agreement when considering a proposed planning agreement.
- Council will not allow the interests of individuals or interest groups to outweigh the wider public interest when considering a proposed planning agreement.
- Council will not improperly rely on its statutory position in order to extract unreasonable public benefits from developers under planning agreements; and
- 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 interest in the development.

3. Scope of planning agreements

3.1. Matters covered by planning agreements

A planning agreement must provide for the following (minimum inclusions):

- a description of the land to which the agreement applies,
- a description of the change to or the making or revocation of the environmental planning instrument, or the development, to which the agreement applies.
- 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.
- whether the agreement excludes (wholly or in part) or does not exclude the application of Section 7.11 and Section 7.12 contributions to the development.
- if the agreement does not exclude the application of Section 7.11 and Section 7.12 contributions to the development, whether benefits under the agreement are or are not to be taken into consideration in connection with requiring such a contribution.
- a mechanism for the resolution of disputes under the agreement.
- 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.

A planning agreement may also require the inclusion of additional details such as:

- the date or circumstances at which time a planning agreement may come into effect and when the developer's obligations under a planning agreement arise.
- whether money contributed under a planning agreement may be pooled with other money from planning agreements and/or monetary development contributions and paid progressively towards for the purposes for which the money has been levied.
- the times or thresholds at which and, if relevant, the period during which, the developer is to make provision for the works, land, money or other public benefits described in the planning agreement.
- the timing and manner in which a work, land or other public benefit is to be made available for the provision of public infrastructure and handed over to the Council.
- the design, technical specification and standard of any work required by the planning agreement to be undertaken by the developer.
- the procedure for indexing any monetary contributions required to be paid by the developer.
- the circumstances in which a planning agreement may be modified may include:
 - changes to the associated development relating to the planning agreement.
 - a revised offer is provided to council which will achieve a greater public benefit.
 - the lapsing of a development consent that has not been acted on.
 - other changes affecting the operation of the planning agreement.
- conditions under which developers may assign their rights and obligations under a planning agreement to another person or entity not party to the original agreement.
- the circumstances in which a developer's obligations shall be considered to be discharged.
- the mechanism under which the performance and milestones contained under the planning agreement are periodically reviewed with the involvement of all parties.
- details to effect the administration and implementation matters identified in clause 5 of this Policy.
- any other matter relevant to securing the public interest in the achievement of the public benefits contained in the planning agreement.

3.2. Form and purpose of contributions that council could seek through a planning agreement

Planning agreements can be used for or applied towards the provision of public infrastructure or another public purpose. Contributions may be in the form of land dedication free of cost, a monetary contribution, provision of any other material public benefit, or any combination of these.

Instances where the use of a planning agreement may be relevant to the development of land in the Kiama LGA include:

- Where it is in both the Council's and the developer's interest to 'package' a range of development contributions related to a proposed development. This may include contributions otherwise required by conditions of consent under section 4.17(1)(f) or (h) of the Act, or other contributions or arrangements described below.
- As a means of providing local infrastructure required to meet the demands generated by new development.
- Where a developer proposes to provide planning benefits to the community. Planning benefits may take the form of additional or higher quality infrastructure than is the 'baseline' standard specified in Council's development control plans, contributions plans and engineering specifications. Planning benefits may also take the form of land and works that provide a public benefit enjoyed by the wider community and not just the users or occupants of the development.
- As a means of facilitating the conservation of ecologically significant lands or items of environmental heritage.
- As a means of securing recurrent funding of local infrastructure, whether the infrastructure is located within or outside of the site the subject of the instrument change or development application. Note that where the infrastructure primarily serves the development to which the planning agreement relates the arrangement for recurrent funding may be in perpetuity. Where the infrastructure or public benefit is intended to serve the wider community, Council will only seek that the developer make contributions towards the recurrent costs of the facility until a public revenue stream is established to support the on-going costs of the facility.
- As a means of managing credits, offsets, works in kind, material public benefits, valuation of non-monetary benefits, etc. on a staged development site or in relation to the provision of critical infrastructure that can be funded by one major developer but will benefit a number of other developers (for example, a link road).

4. Negotiation procedures, probity and transparency

4.1. Negotiation procedures

The process for negotiation of planning agreements must be fair, reasonable, transparent and accountable.

Council will ensure that all negotiations with a developer and their consultants are sufficiently separated and documented.

Council is required under the Act and Regulation to ensure that a planning agreement is publicly notified as part of and in the same manner as and contemporaneously with 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 a planning agreement is negotiated before lodgement of the relevant application and that it accompanies the application on lodgement. Any Draft Planning Agreement will also be reported to a Council meeting to seek endorsement of the proposal.

4.2. Participants and their roles

The parties to a planning agreement will include Council and the developer and, if the developer is not the owner of the land the subject of the planning agreement, the land owner. The parties may also include another planning authority.

The Council side of negotiations will be led by one of the following positions:

- Strategic Planner, or
- Strategic Planning Coordinator, or
- Manager Planning and Economic Development, or
- Director Planning, Environment and Communities, or
- Chief Executive Officer (if required).

A second Council officer will also be appointed to be involved in the negotiation process:

- Strategic Planner, or
- Subdivision Engineer, or
- Development Assessment Planner, or
- Other staff as appointed by the Manager Planning and Economic Development.

For probity reasons, an officer involved in the direct negotiation of a planning agreement will not be an officer involved in the assessment of the instrument change or development application the subject of the planning agreement.

Similarly, at no stage will an elected representative of the Council be involved in negotiating a planning agreement. Councillors' extent of involvement shall be limited to consideration and determination of the instrument change or development application the subject of the planning agreement.

Council may appoint third parties to assist it in the negotiation process, including specialist facilitators or advisors on particular aspects of the agreement, if this is required.

Where the Council has a commercial stake in development the subject of an agreement, appropriate steps will be taken to ensure that it avoids a conflict of interest between its role as a planning authority and its commercial interest in the development.

4.3. Negotiation process

Negotiation of a planning agreement will generally involve the following steps:

- As part of development or instrument change application pre-lodgement discussions, the parties will decide whether to commence negotiation of a planning agreement and, if negotiation is to commence, the general scope and content of the planning agreement.
- The parties will then each appoint a person or persons to represent them in the negotiations, appoint another person to record minutes of all negotiations, and decide whether to appoint an independent facilitator to conduct or assist in negotiations. The costs of an independent facilitator will generally be shared between the parties to the agreement.
- The parties will identify the issues for negotiation and undertake the negotiations. If agreement is reached, this will be known as an 'in principle' agreement. At this stage a formal Letter of Offer to enter into a Planning Agreement can be submitted by the developer.

- If the terms of the Letter of Offer are generally acceptable, a draft planning agreement shall be prepared by Council. This will be based on the template attached to this policy and will be provided to the developer for their review.
- Further negotiation and adjustment of the specific terms of the agreement may take place.
- The developer then submits the instrument change or development application to the Council, accompanied by the draft planning agreement. The application must state that the application includes an offer by the developer to enter into a planning agreement.
- The parties will jointly prepare an explanatory note relating to the proposed agreement pursuant to clause 205 of the Regulation. A template is provided at Attachment 2 of this Policy to assist in this process.
- The draft planning agreement and explanatory note will be reported to Council for endorsement and to place the documents on public exhibition.
- The proposed planning agreement will be publicly exhibited together with the proposed instrument change or development application in accordance with the requirements of the Act and Regulation. The minimum exhibition period will be 28 days. Any person may make submissions to the application.
- The proposed planning agreement may be subject to further negotiation between the parties to consider any issue arising out of the public exhibition. This may result in the proposed planning agreement being modified. Where the modification is considered by the Council to result in significant changes to the exhibited planning agreement, the modified agreement will be publicly re-notified and made available for public inspection.
- If required by the council resolution, the planning agreement will be reported back to Council.
- Council can then issue a determination of the application. Both the proposed planning agreement and public submissions made in relation to that agreement will be matters for consideration in Council's determination of the instrument change or development application.
- Where the application to which a planning agreement relates is a development application, this will be required to be entered into before a determination can be made. In limited circumstances, and at the sole discretion of council, a deferred commencement or imposition of a condition of consent requiring the planning agreement to be entered into between the parties may be considered. Only the agreement the subject of the offer by the developer can be entered into. Any modifications to a planning agreement, whether sought by the Council or other parties to the agreement, will need to be re-exhibited and re-considered by Council.
- Where the application to which a planning agreement relates is a planning proposal, this will be required to be entered into before the instrument change can be finalised.
- The planning agreement is entered into when it is signed by all the parties.
- The planning agreement comes into effect at the time stated in the agreement.

4.4. Probity issues

To maximise fairness and transparency of the planning agreements system, Council will:

- endeavour to ensure that parties to planning agreements (and their representatives) and the community understand the planning agreements system and the Council's role.
- notify proposed planning agreements in accordance with the Act and Regulation.

- avoid the potential for corrupt behaviour by creating a framework where an appropriate officer leads negotiations and a separation of responsibilities in considering development applications or planning proposals that involve planning agreements is maintained.
- ensure that Councillors and Council staff understand their varied roles, some of which have the potential to conflict.
- continue to manage conflicts of interest in line with the code of conduct requirements and take steps to ensure that both perceived and actual conflicts of interest are avoided or mitigated. Strategies that may be used to achieve this objective include engaging third parties to assess proposals where Council has a commercial interest and avoiding any contractual arrangement which purports to guarantee outcomes that are subject to separate regulatory processes.
- ensure that modifications to approved development the subject of a planning agreement be subject to the same scrutiny as the original development application.

4.5. Notification and public involvement

All draft planning agreements will be publicly notified in accordance with the requirements of the Act and Regulation. These requirements include the public exhibition of both the draft planning agreement and an explanatory note for a minimum period of 28 days.

The Council encourages the public to make submissions on all draft planning agreements, as this allows the Council to better understand local needs and ensure the outcome is reflective of the community.

The 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 significant reduction to the public benefit provided is proposed 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 in respect of the previous public notification and inspection of the agreement or the application, or their formal consideration by the Council.

Planning agreements that have commenced and the developments to which they relate may be the subject of an application to modify a development consent. Council will generally require a new or modified planning agreement to be prepared and exhibited concurrently with the application to modify the development consent where such modification materially affects the terms of the commenced agreement. A modified planning agreement will be publicly exhibited and considered by Council in the same way as a new planning agreement.

4.6. Register of planning agreements

Council will keep a register of all planning agreements applying to land within its area, including agreements that the Council is not a party to, as required by clause 206(1) of the Regulation. The register will record the date an agreement was entered into, the parties to the agreement and a short description of the agreement and proposed development. The register is available on Council's website. In addition, Council will make available for public inspection during ordinary office hours:

- the planning agreement register.
- copies of all planning agreements that apply to land within the Kiama LGA.
- copies of explanatory notes relating to those agreements or amendments.
- annual financial statement showing value of land, works and money contributed.

5. Administration and implementation of planning agreements

5.1. Standard form planning agreement

In order to streamline preparation and provide consistency, Council will use a standard form planning agreement as a basis for drafting all agreements that it is a party to.

A copy of the template planning agreement is attached as Attachment 1 to this Policy.

5.2. Councils costs of negotiating, entering into, monitoring and enforcing a planning agreement

Council will generally require all planning agreements to make provision for payment by the developer of Council's costs of and incidental to negotiating, preparing, entering into and enforcing the agreement.

However, where the Council considers that the planning agreement will deliver substantial planning benefits to the wider community and not just the users of the development, Council may remove or reduce this requirement.

5.3. Pooling of development contributions

All monetary contributions will be held in a separate external restriction and allocated in line with the relevant Planning Agreements. In some circumstances, pooling of all of development contributions funds under Council's control may be appropriate to allow public benefits to be provided in a fair, equitable and timely way.

Where a proposed planning agreement provides for a monetary contribution by the developer, the Council may seek to include a provision permitting money paid under the agreement to be pooled with money paid under other planning agreements or by other contributions plans and applied progressively for the different purposes under those agreements or plans, subject to the specific requirements of the relevant agreements or plans.

5.4. Exclusion of Section 7.11 and Section 7.12 contributions

All planning agreements shall specify whether Section 7.11 or Section 7.12 contributions are or are not excluded in respect to the development the subject of the planning agreement.

Council has no general policy on whether a proposed planning agreement should exclude the payment of monetary contributions that would be required for a proposed development under a contributions plan. However, the following requirements apply in either case:

- Where requirements for Section 7.11 or Section 7.12 contributions are excluded from consideration in the planning agreement, the total value of the public benefits contained in the planning agreement are to be greater than the value of the Section 7.11 or Section 7.12 contributions that the Council could otherwise impose on the development.
- Where the Section 7.11 or Section 7.12 contributions are not excluded by a planning agreement, the Council will not agree to a provision allowing benefits under the planning agreement to be taken into consideration when determining Section 7.11 or Section 7.12 contributions it may impose on the development.

Note: A planning agreement entered into by Council will not exclude the application of Section 7.24 of the Act.

5.5. Provision of security under a planning agreement

The 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

be an unconditional bank guarantee from an Australian Bank in favour of the Council to the full value of the developer's obligations under the Agreement and on terms otherwise acceptable to the Council. Other forms of security may also be required.

5.6. General requirements relating to the provision of works under a planning agreement

The Council will require provisions addressing the following matters be inserted in a planning agreement protecting the public interest in relation to the construction or carrying out of any works required to be carried out by the developer included in the agreement.

The developer will carry out any works obligations under a planning agreement:

- having due regard to public safety and the rights of the public.
- having due regard to the requirements of any relevant public authority or utility provider.
- without interrupting or disturbing the traffic or pedestrian flow on any road without first obtaining the written consent of the Council.
- permitting the Council or any person authorised by the Council to enter and inspect any construction work carried out or being carried out.
- in accordance with all relevant development consents and all Australian Standards applicable to works of the same nature as the Works.

If the developer fails to satisfactorily complete the works by the relevant date or threshold identified in the planning agreement, then:

- Council may call on the security established to cover the developer's obligations under the agreement, to enable Council to complete and/or rectify the works; and
- should the security be insufficient to complete and/or rectify the works, then the Council may claim the reasonable cost of completing the works as a debt in any court of competent jurisdiction. The cost shall be assessed as at the time the works are carried out.

5.7. Valuation of works, land or other material public benefits included in planning agreements

The value of any works, land or other material public benefit offered in a planning agreement will be assessed as follows.

If the offered works or land are contained in a contributions plan that has been adopted by the Council and that plan is in force, the value of the works or land will be the value identified in that plan, as indexed in accordance with the provisions of that plan.

If the offered works are not contained in a contributions plan, or the offer constitutes another type of public benefit, the value of the works or public benefit will be the value of the completed works or public benefit as assessed by a qualified quantity surveyor, civil engineer or other appropriate professional engaged by the Council as part of the planning agreement negotiation.

If the offered land is not contained in a contributions plan, the value of the land will be the value assessed by a registered land valuer engaged by the Council as part of the planning agreement negotiation.

All costs associated with the valuation of public infrastructure to be included in a planning agreement by other professionals will be met by the developer.

5.8. Indexation of monetary contributions

Monetary contributions required to be paid under a planning agreement will be subject to indexation until the date of payment. The method of indexation will be specified in the planning agreement and will be based on the provisions in this clause.

The contribution amount will be indexed quarterly using the Consumer Price Index, All Groups, Sydney (CPI) published by the Australian Bureau of Statistics.

The formula for indexing the monetary contribution amount specified in the planning agreement from the date the agreement commences to the date the contribution is paid is:

$$\text{Indexed Contribution Amount} = \$C \times (\text{CPI-1} / \text{CPI-2})$$

Where:

\$C is the base contribution amount as set out in the planning agreement.

CPI-1 is the CPI at the time of payment.

CPI-2 is the CPI at the time the planning agreement was entered into.

If CPI-1 is lower than the CPI for the previous quarter, the previous quarter will be used.

5.9. Credits and refunds

An offer to enter into a planning agreement that proposes any surplus value provided under a planning agreement being refunded to the developer or offset against development contributions required to be made by the developer in respect of other development will not be agreed to. For completeness, a planning agreement offer that provides for refunds or credits will not be accepted.

5.10. Notation on section 10.7(5) planning certificate

All planning agreements will be required to include a clause that the developer acknowledges that once a planning agreement is entered into, a notation will be included on all Planning Certificates issued under section 10.7(5) of the Act for all land titles to which the planning agreement applies, or other relevant land titles.

5.11. Registration on land title

Section 7.6 of the Act permits a planning agreement to be registered on the title of the land to which the planning agreement relates if each person with an interest in the land agrees to its registration.

In this regard, Council will require a planning agreement to contain a provision requiring the developer to procure registration of the agreement on the title of the land. The cost of the registration of the planning agreement will be borne by the developer.

Where Council requires such a provision, Council will not object to a provision allowing the notation of the planning agreement on the land title to be removed, but such provision shall only operate when the developer has satisfied all its obligations under the agreement.

5.12. Modification or discharge of developers obligations under a planning agreement

Council may agree to a provision in a planning agreement permitting the developer's obligations under that agreement to be modified or discharged where the modification or discharge is linked to one or more of the following circumstances:

- the developer's obligations have been fully carried out in accordance with the agreement.

- 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.
- the development consent to which the agreement relates has lapsed.
- the implementation of the planning agreement has been frustrated by an event beyond the control of the parties.
- other material changes affecting the operation of the planning agreement have occurred.
- 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.

A planning agreement may be modified or revoked by further agreement in writing signed by the parties to the agreement (including by means of a subsequent planning agreement).

5.13. Dispute resolution

A planning agreement will specify a procedure to be followed in the event of any dispute arising from the implementation of an agreement.

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.

5.14. Assignment and dealings by the developer

Council will require every planning agreement provide that the developer may not assign its rights or obligations under the agreement nor have any dealing in relation to the land the subject of the agreement unless:

- Council has given its consent to the proposed assignment or dealing, and
- the developer has, at no cost to the Council, first procured the execution by the person with whom it is dealing of all necessary documents in favour of the Council by which that person agrees to be bound by the agreement as if they were a party to the original agreement, and
- the developer is not in breach of the agreement.

Attachments

Attachment 1	Template Planning Agreement
Attachment 2	Template Explanatory Note

Authorisation

Name: Council Resolution Number 24/1200C

Date: Endorsed by Council 21 May 2024

Attachment 1 Template Planning Agreement

[Insert Name of Planning Agreement]

Planning Agreement

Under s7.4 of the *Environmental Planning and Assessment Act 1979*

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

[8 May 2024]

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[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

[Insert Name of Planning Agreement]

Planning Agreement

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[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

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[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

[Insert Name of Planning Agreement]

Under s7.4 of the *Environmental Planning and Assessment Act 1979*

Parties

Kiama Municipal Council ABN 22 379 679 108 of 11 Manning Street, Kiama NSW, 2433 (**Council**)

and

[Insert Name of Developer] ABN [Insert details] of [Insert Address] (**Developer**)

and

[Insert Name of Landowner] ABN [Insert details] of [Insert Address] (**Landowner**) [Drafting Note. Only required if the Developer is not the owner of land required to be dedicated or land on which works are to be carried out]

Background

- A [Drafting note: Provide a brief background to the Development/Instrument Change and this Agreement. For example:
- B The Developer owns the Land or The Developer proposes to carry out the development on the Land and the Landowner owns the Land [Drafting Note: Delete whichever is not applicable].
- C The Land is the subject of the Planning Proposal. [Drafting Note: Delete if not applicable]
- D The Developer has offered to make Development Contributions in accordance with this Agreement in connection with the Planning Proposal and the making of the LEP Amendment and the Development.

Operative provisions

Part 1 - Preliminary

1 Interpretation

- 1.1 In this Agreement the following definitions apply:

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

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

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

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

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

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

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

Bond means a documentary performance bond which must be denominated in Australian dollars and be an unconditional undertaking issued by an Australian Prudential Regulation Authority (APRA) regulated authorised deposit taking institution or an insurer authorised by APRA to conduct new or renewal insurance business in Australia that has at all times an investment grade security rating from an industry recognised rating agency.

Charge means the charge referred to in clause 26.1.

Charge Land means the land specified or described in Item 9 of Schedule 1.

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

Clearance Certificate means a clearance certificate issued by the Commissioner for Taxation under paragraph 14-220 of Schedule 1 of the *Taxation Administration Act 1953* (Cth).

Contamination has the same meaning as in the CLM Act.

Contribution Value means the \$ amount agreed between the Parties as the value of a Development Contribution made under this Agreement being the \$ amount specified in Column 4 of Schedule 2 corresponding to the Item as indexed in accordance with this Agreement.

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

CPI means the 'Consumer Price Index – Sydney All Groups' published by the Australian Bureau of Statistics.

Dedicated Land Map means the map of the land identified in the Table in Schedule 2 to be dedicated to the Council shown in Schedule 4. **[Drafting**

Note: Delete if not applicable].

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

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

Defects Liability Period means the period specified in item 8 of Schedule 1 commencing on the day immediately after the whole or any specified part of a Work is completed for the purposes of this Agreement.

Defects Liability Security means the Security set out at Item 11 of Schedule 1.

Development means the development set out in item 2 of Schedule 1 **[Drafting Note: Delete the following if not applicable]** proposed to be carried out pursuant to a Development Consent if granted as a consequence of the making of the LEP Amendment.

Development Application has the same meaning as in the Act.

Development Consent means the development consent specified or described in Item 5 of Schedule 1 or granted in respect of the Development.

Development Contribution means the dedication of land free of cost, a monetary contribution, the provision of any other material public benefit including but not limited to the provision of Works, or any combination of them, but does not include any Security or other benefit provided by a Party to the Council to secure the enforcement of that Party's obligations under this Agreement.

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

ELNO has the meaning given to that term in the Participation Rules.

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

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

- (a) that is to be dedicated or otherwise transferred to the Council, or
- (b) on which is situated a dwelling-house that was in existence on the date of this Agreement.

Foreign Resident Capital Gains Withholding Amount means the amount a purchaser is required to pay to the Commissioner for Taxation under paragraph 14-200 of the *Taxation Administration Act 1953 (Cth)*.

GST has the same meaning as in the GST Law.

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

Item means an item specified in the table of Schedule 1 or column 1 of the table in Schedule 2 as the case may be.

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

Land means the land described in item 1 of Schedule 1.

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

Land means the land described in item 1 of Schedule 1.

LEP Amendment means the change to the environmental planning instrument specified or described in Item 3 in Schedule 1.

Maintain, in relation to a Work, means keep in a good state of repair and working order, and includes repair of any damage to the Work.

Map means the map of the Land the subject of this Agreement as set out in Schedule 3. Occupation Certificate has the same meaning as in the Act.

Participation Rules means the participation rules as determined by the *Electronic Conveyancing National Law* as set out in the *Electronic Conveyancing (Adoption of National Law) Act 2012* (NSW).

Party means a party to this Agreement.

PEXA means Property Exchange Australia Ltd.

Planning Proposal means the document proposing the LEP Amendment applicable to the Land prepared by the Council dated and more fully described in Item 3 of Schedule 1 as varied pursuant to s3.35 of the Act.

Rectification Notice means a notice in writing:

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

Rectify means rectify, remedy or correct.

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

Security means a Bank Guarantee, or a bond or other form of security to the satisfaction of the Council indexed in accordance with **CPI** from the date of this Agreement.

Site Audit Statement has the same meaning as in the CLM Act.

Stage means a stage of the Development approved by a Development Consent or otherwise approved in writing by the Council for the purposes of this Agreement.

Subdivision Certificate has the same meaning as in the Act.

WHS means work health and safety.

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

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

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

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

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

- 1.2.3 If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.
- 1.2.4 A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
- 1.2.5 A reference in this Agreement to a \$ value relating to a Development Contribution is a reference to the value exclusive of GST.
- 1.2.6 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.
- 1.2.7 A reference in this Agreement to any agreement, Agreement or document is to that agreement, Agreement or document as amended, novated, supplemented or replaced.
- 1.2.8 A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
- 1.2.9 An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- 1.2.10 Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- 1.2.11 A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
- 1.2.12 References to the word 'include' or 'including' are to be construed without limitation.
- 1.2.13 A reference to this Agreement includes the agreement recorded in this Agreement.
- 1.2.14 A reference to a Party to this Agreement includes a reference to the employees, agents and contractors of the Party, the Party's successors and assigns.
- 1.2.15 A reference to 'dedicate' or 'dedication' in relation to land is a reference to dedicate or dedication free of cost.
- 1.2.16 Any schedules, appendices and attachments form part of this Agreement.
- 1.2.17 Notes appearing in this Agreement are operative provisions of this Agreement.

2 Status of this Agreement

- 2.1 This Agreement is a planning agreement within the meaning of s7.4(1) of the Act.

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

3 Commencement

- 3.1 This Agreement commences and has force and effect on and from the date when the Parties have:
- 3.1.1 both executed the same copy of this Agreement, or
 - 3.1.2 each executed separate counterparts of this Agreement and exchanged the counterparts.
- 3.2 The Parties are to insert the date when this Agreement commences on the front page and on the execution page.

4 Application of this Agreement

- 4.1 This Agreement applies to the Land and to the Development and the LEP Amendment **[Drafting Note: Delete reference to LEP Amendment if not applicable]**.

5 Warranties

- 5.1 The Parties warrant to each other that they:
- 5.1.1 have full capacity to enter into this Agreement, and
 - 5.1.2 are able to fully comply with their obligations under this Agreement.

6 Further agreements

- 6.1 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.

7 Surrender of right of appeal, etc.

- 7.1 The Developer is not to commence or maintain, or to cause or procure the commencement or maintenance, of any proceedings in any court or tribunal or similar body appealing against, or questioning:
- 7.1.1 the validity of this Agreement, or an Approval relating to the Development in so far as the subject-matter of the proceedings relates to this Agreement.
 - 7.1.2 A condition of consent imposed on a Development Consent requiring this Agreement be complied with in connection with the carrying out of the Development.

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

- 8.1 Item 6.a states if this Agreement excludes or does not exclude the application of s7.11 to the Development.

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

- 8.2 If Item 6.a of Schedule 1 states that this this Agreement does not wholly exclude the application of s7.11 of the Act to the Development, Item 7.b of Schedule 1 states whether the benefits provided by the Developer under this Agreement are to be taken into consideration when determining a Development Contribution under s7.11 relating to the Development.
- 8.3 Item 6.c of Schedule 1 states if this Agreement excludes or does not exclude the application of s7.12 to the Development.
- 8.4 This Agreement does not exclude the application of s7.24 to the Development.

Part 2 – Development Contributions

9 Provision of Development Contributions

- 9.1 The Developer is to make Development Contributions to the Council in accordance with Schedule 2, any other provision of this Agreement relating to the making of Development Contributions and otherwise to the satisfaction of the Council.
- 9.2 Any Contribution Value specified in this Agreement in relation to a Development Contribution does not serve to define the extent of the Developer's obligation to make the Development Contribution.
- 9.3 Where a Contribution Value relates to a monetary Development Contribution the Contribution Value of the monetary Development Contribution is to be indexed quarterly in accordance with CPI from the date of execution of this Agreement.
- 9.4 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.
- 9.5 Despite clause 9.4, 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.

10 Payment of monetary Development Contributions

- 10.1 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 of cleared funds into a bank account nominated by the Council.
- 10.2 If the Development Consent is modified to allow for additional **[Drafting Note. Insert relevant details e.g. dwellings/Final Lots]** after **[Drafting Note. Insert timing, which may, for example, be the issuing of the first relevant Part 4A 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.**

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

dwelling/Final Lots not later than 14 days after the Development Consent has been modified.

11 Dedication of land

- 11.1 Where a Development Contribution comprises land identified in Schedule 2, that land is dedicated for the purposes of this Agreement when:
- 11.1.1 the Council is given:
- (a) a Clearance Certificate that is valid at the time of dedication of the land identified in Schedule 2, or
 - (b) the Foreign Resident Capital Gains Withholding Amount in respect of the land identified in Schedule 2, and
- 11.1.2 One of the following has occurred:
- (a) a deposited plan is registered in the register of plans held with the Registrar-General that dedicates the land identified in Schedule 2 as a public road (including a temporary public road) under the *Roads Act 1993* (NSW) or creates a public reserve or drainage reserve under the *Local Government Act 1993* (NSW), or
 - (b) the Council is given evidence that a transfer of the land identified in Schedule 2 to the Council has been effected by means of electronic lodgement and registration through PEXA or another ELNO.
- 11.2 The Developer is to do all things reasonably necessary to enable registration of the instrument of transfer to occur.
- 11.3 The Developer is to ensure that land dedicated to the Council under this Agreement is:
- 11.3.1 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;
- 11.3.2 suitable for the purpose for which it is to be dedicated and is not subject to any Contamination or is accompanied by a Site Audit Statement.
- 11.4 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.
- 11.5 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 11 not later than 7 days after the Work is completed for the purposes of this Agreement.

12 Carrying out of Work

- 12.1 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 this Agreement, any design or specification specified or approved by the Council, any relevant Approval and any other applicable law.
- 12.2 If any Works form part of Schedule 2 and the design has not been approved by the Council prior to the execution of this Agreement, the Developer is not to commence construction unless the Council has provided its written consent to the design of the Work.
- 12.3 In determining whether to give its consent, the Council may require the Developer to make any change to the plans as drawings of the Works as the Council reasonably considers necessary or desirable and the Developer must make those changes.
- 12.4 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.
- 12.5 The Developer must comply with and ensure that all persons involved in carrying out any Work complies with all WHS Laws and procedures applicable to the carrying out of those works.
- 12.6 The Developer is to promptly inform the Council of any incident occurring in relation to any Works where a person is injured or otherwise exposed to a risk to his or her health or safety, including, but not limited to, an incident which is required to be reported to WorkCover.

13 Variation to Work

- 13.1 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.
- 13.2 Without limiting clause 13.1, 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.
- 13.3 The Council is not to unreasonably delay or withhold its approval to a request made by the Developer under clause 13.2.
- 13.4 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.
- 13.5 The Developer is to comply promptly with a direction referred to in clause 13.4 at its own cost.

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

14 Access to land by Developer

- 14.1 If Item 7 of Schedule 1 applies, the Council authorises the Developer to enter, occupy and use land specified in Item 7 of Schedule 1 for the purpose of performing its obligations under this Agreement.
- 14.2 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.
- 14.3 Nothing in this Agreement creates or gives the Developer any estate or interest in any part of the land referred to in clause 14.1 or 14.2.

15 Access to land by Council

- 15.1 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.
- 15.2 The Council is to give the Developer prior reasonable notice before it enters land under clause 15.1.

16 Council's obligations relating to Work

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

17 Protection of people, property & utilities

- 17.1 The Developer is to ensure to the fullest extent reasonably practicable in relation to the performance of its obligations under this Agreement that:
 - 17.1.1 all necessary measures are taken to protect people and property,
 - 17.1.2 unnecessary interference with the passage of people and vehicles is avoided, and
 - 17.1.3 nuisances and unreasonable noise and disturbances are prevented.
- 17.2 Without limiting clause 17.1, 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.

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

18 Repair of damage

- 18.1 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.
- 18.2 The Developer is to carry out its obligation under clause 18.1 at its own cost and to the satisfaction of the Council.

19 Completion of Work

- 19.1 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.
- 19.2 The Council is to inspect the Work the subject of the notice referred to in clause 19.1 within 14 days of the date specified in the notice for completion of the Work.
- 19.3 Work required to be carried out by the Developer under this Agreement, or a Stage, is completed for the purposes of this Agreement when the Council, acting reasonably, gives a written notice to the Developer to that effect.
- 19.4 If the Council is the owner of the land on which Work the subject of a notice referred to in clause 19.3 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.
- 19.5 Before the Council gives the Developer a notice referred to in clause 19.3, 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.
- 19.6 The Developer, at its own cost, is to promptly comply with a direction referred to in clause 19.5.

20 Rectification of defects

- 20.1 The Council may give the Developer a Rectification Notice during the Defects Liability Period.
- 20.2 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.
- 20.3 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 20.1

21 Works-As-Executed-Plan

- 21.1 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.
- 21.2 The Developer, being the copyright owner in the plan referred to in clause 21.1, gives the Council a non-exclusive licence to use the copyright in the plans for the purposes of this Agreement.

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

22 Removal of Equipment

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

Part 3 – Dispute Resolution

23 Dispute resolution – expert determination

- 23.1 This clause applies to a Dispute between any of the Parties to this Agreement concerning a matter arising in connection with this Agreement that can be determined by an appropriately qualified expert if:
- 23.1.1 the Parties to the Dispute agree that it can be so determined, or
 - 23.1.2 the Chief Executive Officer of the professional body that represents persons who appear to have the relevant expertise to determine the Dispute gives a written opinion that the Dispute can be determined by a member of that body.
- 23.2 A Dispute to which this clause applies is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 23.3 If a notice is given under clause 23.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 23.4 If the Dispute is not resolved within a further 28 days, the Dispute is to be referred to the President of the NSW Law Society to appoint an expert for expert determination.
- 23.5 The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.
- 23.6 Each Party is to bear its own costs arising from or in connection with the appointment of the expert and the expert determination.
- 23.7 The Parties are to share equally the costs of the President, the expert, and the expert determination.

24 Dispute Resolution - mediation

- 24.1 This clause applies to any Dispute arising in connection with this Agreement other than a Dispute to which clause 23 applies.
- 24.2 Such a Dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 24.3 If a notice is given under clause 24.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

- 24.4 If the Dispute is not resolved within a further 28 days, the Parties are to mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and are to request the President of the Law Society to select a mediator.
- 24.5 If the Dispute is not resolved by mediation within a further 28 days, or such longer period as may be necessary to allow any mediation process which has been commenced to be completed, then the Parties may exercise their legal rights in relation to the Dispute, including by the commencement of legal proceedings in a court of competent jurisdiction in New South Wales.
- 24.6 Each Party is to bear its own costs arising from or in connection with the appointment of a mediator and the mediation.
- 24.7 The Parties are to share equally the costs of the President, the mediator, and the mediation.

Part 4 - Enforcement

25 Security for performance of obligations

- 25.1 The Developer is to provide Security to the Council in the amount specified in Item 10 **[INSERT CLAUSE]** of Schedule 1 in relation to the performance of its obligations under this Agreement.
- 25.2 The Developer is to provide the Security to the Council before it 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.
- 25.3 The Council, in its absolute discretion and despite clause 14, 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.
- 25.4 The Council may call-up and apply the Security in accordance with clause 31 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.
- 25.5 Subject to clause 25.6, 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.
- 25.6 The Council may retain the Defects Liability Security until either the end of the Defects Liability Period if no defects are identified during that period or if a Rectification Notice has been issued to the Developer under clause 20, within 14 days of the Council confirming in writing that all Defects the subject of any Rectification Notice have been rectified to the reasonable satisfaction of the Council.

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

- 25.7 The Developer may at any time provide the Council with a replacement Security.
- 25.8 On receipt of a replacement Security, the Council is to release and return the Security that has been replaced to the Developer.
- 25.9 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.
- 25.10 The Developer is to ensure that the Security provided to the Council is at all times maintained to the full current indexed value and to this end, it must increase the Security every 12 months in accordance with Item 10.b of Schedule 1.

26 Grant of Charge

- 26.1 On the date of execution of this Agreement, the Developer grants to the Council a fixed and specific charge over the Developer's right, title and interest in the Charge Land, to secure:
 - 26.1.1 the performance of the Developer's obligation to make monetary Development Contributions under this Agreement, and
 - 26.1.2 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
- 26.2 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.
- 26.3 If the Charge Land comprises part only of a lot in a deposited plan at the time that the instrument referred to in clause 26.2 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.
- 26.4 The Developer is to do all other things necessary, including execute all other documents, to allow for the registration of the Charge.

27 Caveat and Discharge

- 27.1 The Developer agrees that:
 - 27.1.1 the Council may lodge a caveat on the title of the Land to which the Charge applies,
 - 27.1.2 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
 - 27.1.3 the Council cannot be required to have the caveat removed from the title to the Charge Land other than in accordance with clause 27.2.
- 27.2 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

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

Developer of its obligations under this Agreement to make Development Contributions in respect of the creation of the lot.

- 27.3 For the purposes of clause 27.2 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.
- 27.4 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.

28 Priority

- 28.1 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.

29 Acquisition of land required for Work

- 29.1 This clause applies if, by **[Drafting Note. Insert Date]**, the Developer is not the owner of all of the land on which the Work described in Item **[Drafting Note. Insert Item number from table in Schedule 2]** of the table in Schedule 2 will be carried out.
- 29.2 Not later than **[Drafting Note. Insert Date]**, the Developer is to notify the Council in writing that it is not the owner of all of the land on which the Work referred to in clause 29.1 will be carried out.
- 29.3 A notice under clause 29.2 is to be accompanied by the Security specified in Item 12 of Schedule 1 and is separate to the Security referred to in clause 25.
- 29.4 As soon as practicable after receipt of both the notice referred to in clause 29.2 and the Security referred to in clause 29.3, the Council is to consider a report on whether it should acquire the land not owned by the Developer on which the Work referred to in clause 29.1 will be carried out.
- 29.5 Within 14 days of receipt of a written notice from the Council, the Developer is to pay to the Council:
- 29.5.1 the Council's costs, as specified in the notice, of and incidental to an acquisition of land not owned by the Developer on which the Work referred to in clause 29.1 will be carried out, and
- 29.5.2 the amount of any compensation paid by the Council in relation to the acquisition.
- 29.6 The Developer is not to question the amounts specified in a notice referred to in clause 29.5.
- 29.7 The Council may call on the Security referred to in clause 29.3 if the Developer is in breach of clause 29.5.
- 29.8 The Council is to return the Security referred to in clause 29.3 to the Developer if and when the Developer complies with clause 29.5.
- 29.9 The Council may recover in any court of competent jurisdiction the difference between its costs of and incidental to the acquisition referred to in clause 29.5

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

together with the amount of any compensation paid by the Council in relation to that acquisition and the amount of the Security referred to in clause 29.3 as called upon under clause 29.7.

30 Acquisition of land required to be dedicated

- 30.1 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.
- 30.2 The Council is to only acquire land pursuant to clause 30.1 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.
- 30.3 Clause 30.1 constitutes an agreement for the purposes of s30 of the Just Terms Act.
- 30.4 If, as a result of the acquisition referred to in clause 30.1, 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 25.
- 30.5 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.
- 30.6 The Developer is to promptly do all things necessary, and consents to the Council doing all things necessary, to give effect to this clause 30, including without limitation:
- 30.6.1 signing any documents or forms,
 - 30.6.2 giving land owner's consent for lodgement of any Development Application,
 - 30.6.3 producing certificates of title to the Registrar-General under the *Real Property Act 1900*, and
 - 30.6.4 paying the Council's costs arising under this clause 30.

31 Breach of obligations

- 31.1 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:
- 31.1.1 specifying the nature and extent of the breach,
 - 31.1.2 requiring the Developer to:
 - (a) rectify the breach if it reasonably considers it is capable of rectification, or

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

- (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,
- 31.1.3 specifying the period within which the breach is to be rectified or compensation paid, being a period that is reasonable in the circumstances.
- 31.2 If the Developer fails to fully comply with a notice referred to in clause 31.1, 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.
- 31.3 If the Developer fails to comply with a notice given under clause 31.1 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.
- 31.4 Any costs incurred by the Council in remedying a breach in accordance with clause 31.2 or clause 31.3 may be recovered by the Council by either or a combination of the following means:
 - 31.4.1 by calling-up and applying the Security provided by the Developer under this Agreement, or
 - 31.4.2 as a debt due in a court of competent jurisdiction.
- 31.5 For the purpose of clause 31.4, the Council's costs of remedying a breach the subject of a notice given under clause 31.1 include, but are not limited to:
 - 31.5.1 the costs of the Council's employees, agents and contractors reasonably incurred for that purpose,
 - 31.5.2 all fees and charges necessarily or reasonably incurred by the Council in remedying the breach, and
 - 31.5.3 all legal costs and expenses reasonably incurred by the Council, by reason of the breach.
- 31.6 Nothing in this clause 31 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.

32 Enforcement in a court of competent jurisdiction

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

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

Part 5 – Registration & Restriction on Dealings

33 Registration of this Agreement

- 33.1 The Parties agree to register this Agreement for the purposes of s7.6(1) of the Act such registration to occur within 30 days of the date of this Agreement.
- 33.2 Not later than 14 days after the commencement of this Agreement , the Developer is to deliver to the Council in registrable form:
- 33.2.1 an instrument requesting registration of this Agreement on the title to the Land duly executed by the Developer, and
- 33.2.2 the written irrevocable consent of each person referred to in s7.6(1) of the Act to that registration.
- 33.3 The Developer is to do such other things as are reasonably necessary to enable registration of this Agreement to occur.
- 33.4 The Parties are to do such things as are reasonably necessary to remove any notation relating to this Agreement from the title to the Land:
- 33.4.1 in so far as the part of the Land concerned is a Final Lot,
- 33.4.2 in relation to any other part of the Land, once the Developer has completed its obligations under this Agreement to the reasonable satisfaction of the Council or this Agreement is terminated or otherwise comes to an end for any other reason.

34 Restriction on dealings

[Drafting Note: References to Landowner will need to be deleted and grammar corrected if the Developer and the Landowner are the same person and the landowner is not a party to this Agreement]

- 34.1 The Developer or the Landowner are not to:
- 34.1.1 sell or transfer the Land, other than a Final Lot, or
- 34.1.2 assign the Developer's rights or obligations under this Agreement, or novate this Agreement,
- to any person unless:
- 34.1.3 the Developer and the Landowner have, 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 and the Landowner's rights and obligations under this Agreement are to be assigned or novated, of a deed in favour of the Council on terms reasonably satisfactory to the Council, and
- 34.1.4 the Council has given written notice to the Developer and the Landowner stating that it reasonably considers that the purchaser, transferee, assignee or novatee, is reasonably capable of performing its obligations under this Agreement, and
- 34.1.5 the Developer is not in breach of this Agreement, and
- 34.1.6 the Council otherwise consents to the transfer, assignment or novation, such consent not to be unreasonably withheld.

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

- 34.2 Subject to clause 34.3, the Developer and Landowner acknowledge and agrees that they remain liable to fully perform their obligations under this Agreement unless and until they have complied with their obligations under clause 34.1.
- 34.3 Clause 34.1 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 6 – Indemnities & Insurance

35 Risk

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

36 Release

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

37 Indemnity

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

38 Insurance

- 38.1 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:
- 38.1.1 contract works insurance, noting the Council as an interested party, for the full replacement value of the Works (including the cost of demolition and removal of debris, consultants' fees and authorities' fees), to cover the Developer's liability in respect of damage to or destruction of the Works,
 - 38.1.2 public liability insurance for at least \$20,000,000.00 for a single occurrence, which covers the Council, the Developer and any subcontractor of the Developer, for liability to any third party,
 - 38.1.3 professional indemnity insurance
 - 38.1.4 workers compensation insurance as required by law, and
 - 38.1.5 any other insurance required by law.

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

- 38.2 If the Developer fails to comply with clause 38.1, 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:
- 38.2.1 by calling upon the Security provided by the Developer to the Council under this Agreement, or
- 38.2.2 recovery as a debt due in a court of competent jurisdiction.
- 38.3 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 38.1.

Part 7 – Other Provisions

39 Annual report by Developer

- 39.1 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.
- 39.2 The report referred is to be in such a form and to address such matters as required by the Council from time to time.

40 Review of Agreement

- 40.1 The Parties agree to review this Agreement by the end of the period specified in Item 16 of Schedule 1 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.
- 40.2 For the purposes of clause 40.1, 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.
- 40.3 For the purposes of addressing any matter arising from a review of this Agreement referred to in clause 40.1, the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Agreement.
- 40.4 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.
- 40.5 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 40.1 (but not 40.4) is not a Dispute for the purposes of this Agreement and is not a breach of this Agreement.

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

41 Notices

- 41.1 Any notice, consent, information, application or request that is to or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:
- 41.1.1 delivered or posted to that Party at its address set out in Items 13 – 16 of Schedule 1, or
 - 41.1.2 emailed to that Party at its email address set out in Items 13 – 16 of Schedule 1.
- 41.2 If a Party gives the other Party 3 business days' notice of a change of its address or email, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or emailed to the latest address.
- 41.3 Any notice, consent, information, application or request is to be treated as given or made if it is:
- 41.3.1 delivered, when it is left at the relevant address,
 - 41.3.2 sent by post, 3 business days after it is posted, or
 - 41.3.3 sent by email and the sender does not receive a delivery failure message from the sender's internet service provider within a period of 24 hours of the email being sent.
- 41.4 If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

42 Approvals and Consent

- 42.1 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.
- 42.2 A Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

43 Costs

- 43.1 The Developer is to pay to the Council the Council's costs of preparing, negotiating, executing and stamping this Agreement, and any document related to this Agreement within 7 days of a written demand by the Council for such payment.
- 43.2 The Developer is also to pay to the Council the Council's reasonable costs of enforcing this Agreement within 7 days of a written demand by the Council for such payment.

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

44 Entire Agreement

- 44.1 This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with.
- 44.2 No Party can rely on an earlier document, or anything said or done by another Party, or by a director, officer, agent or employee of that Party, before this Agreement was executed, except as permitted by law.

45 Further Acts

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

46 Governing Law and Jurisdiction

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

47 Joint and Individual Liability and Benefits

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

48 No Fetter

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

49 Illegality

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

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

50 Severability

- 50.1 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.
- 50.2 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.

51 Amendment

- 51.1 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(5) of the Regulation.

52 Waiver

- 52.1 The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another Party.
- 52.2 A waiver by a Party is only effective if it:
- 52.2.1 is in writing,
 - 52.2.2 is addressed to the Party whose obligation or breach of obligation is the subject of the waiver,
 - 52.2.3 specifies the obligation or breach of obligation the subject of the waiver and the conditions, if any, of the waiver,
 - 52.2.4 is signed and dated by the Party giving the waiver.
- 52.3 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.
- 52.4 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 or as an implied waiver of that obligation or breach in relation to any other occasion.
- 52.5 For the purposes of this Agreement, an obligation or breach of obligation the subject of a waiver is taken not to have been imposed on, or required to be complied with by, the Party to whom the waiver is given.

53 GST

- 53.1 In this clause:
- Adjustment Note, Consideration, GST, GST Group, Margin Scheme, Money, Supply and Tax Invoice** have the meaning given by the GST Law.
- GST Amount** means in relation to a Taxable Supply the amount of GST payable in respect of the Taxable Supply.

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

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

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

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

- 53.2 Subject to clause 53.4, if GST is payable on a Taxable Supply made under, by reference to or in connection with this Agreement, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.
- 53.3 Clause 53.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Agreement to be GST inclusive.
- 53.4 No additional amount shall be payable by the Council under clause 53.2 unless, and only to the extent that, the Council (acting reasonably and in accordance with the GST Law) determines that it is entitled to an Input Tax Credit for its acquisition of the Taxable Supply giving rise to the liability to pay GST.
- 53.5 If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this Agreement by one Party to the other Party that are not subject to Division 82 of the *A New Tax System (Goods and Services Tax) Act 1999*, the Parties agree:
- 53.5.1 to negotiate in good faith to agree the GST inclusive market value of those Supplies prior to issuing Tax Invoices in respect of those Supplies;
- 53.5.2 that any amounts payable by the Parties in accordance with clause 53.2 (as limited by clause 53.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 53.6 No payment of any amount pursuant to this clause 53, and no payment of the GST Amount where the Consideration for the Taxable Supply is expressly agreed to be GST inclusive, is required until the supplier has provided a Tax Invoice or Adjustment Note as the case may be to the recipient.
- 53.7 Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred by a party, must exclude the amount of any Input Tax Credit entitlement of that party in relation to the relevant cost, expense or other liability.
- 53.8 This clause continues to apply after expiration or termination of this Agreement.

54 Explanatory Note

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

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

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

DRAFT

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

8. Defects Liability Period	12 months from the date of [Insert]								
9. Charge Land	[Insert]								
10. Security: a. Security b. Indexation of Security	[Insert \$ amount] CPI								
11. Defects Liability Security	[Insert] % of Security set out in Item 11 of this Table								
12. Security for Works on land not owned by Developer	<p>This item should only be used if clause 29 applies. If clause 29 applies insert \$Amount. This amount should be based upon the value of the land on which the Works to be carried out are to take place plus the cost of acquisition so as to ensure that the Council has funds if it chooses to acquire the land].</p> <p>If clause 29 does not apply insert 'Not applicable'.</p>								
13. Council Contact for Notices	Postal Address: [Insert] Email: [Insert] Telephone: [Insert] Representative: [Insert]								
14. Developer Contact for Notices	Postal Address: [Insert] Email: [Insert] Telephone: [Insert] Representative: [Insert]								
15. Landowner Contract for Notices	<table border="1"><tr><td>Postal Address:</td><td>[Insert]</td></tr><tr><td>Telephone:</td><td>[Insert]</td></tr><tr><td>Email:</td><td>[Insert]</td></tr><tr><td>Representative:</td><td>[Insert]</td></tr></table>	Postal Address:	[Insert]	Telephone:	[Insert]	Email:	[Insert]	Representative:	[Insert]
Postal Address:	[Insert]								
Telephone:	[Insert]								
Email:	[Insert]								
Representative:	[Insert]								
16. Review Period	Each period of [Insert] years commencing on the commencement of this Agreement.								

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

Schedule 2

(Clause 9)

Development Contributions – See attached table

[Drafting Note: This schedule will need to be specifically prepared for each agreement]

DRAFT

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

Column 1	Column 2	Column 3	Column 4
Item/ Contribution	Public Purpose	Manner & Extent	Timing
A. Monetary Contributions			
1. [Insert Amount]	[Insert purpose for which contribution is to be used]	[Insert details]	[Drafting Note: Insert the following amended as appropriate: <i>Upon execution or</i> <i>[insert specific date] or</i> <i>Immediately prior to the issue of a Subdivision Works Certificate or</i> <i>Immediately prior to the issue of a Subdivision Certificate or</i> <i>Immediately prior to the issue of a Construction Certificate, or</i> <i>Immediately prior to the issue of an Occupation Certificate]</i>
B. Dedication of Land			
1. [Insert description of land]	[Insert purpose for which contribution is to be used]	[Insert details]	[Drafting Note: <i>The following are included as possible options by which land must be dedicated to Council. Amend as appropriate:</i> <ul style="list-style-type: none"><i>• Specific Date or</i><i>• Immediately prior to the issue of a Subdivision Certificate or</i><i>• Immediately prior to the issue of a Construction Certificate, or</i><i>• Immediately prior to the issue of an Occupation Certificate]</i>

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

C. Carrying out of Work			
1. [Insert description of Works]	[Insert purpose for which contribution is to be used]	[Insert details]	[Drafting Note: <i>The following are included as possible options by which Works must be carried out. Amend as appropriate:</i> <ul style="list-style-type: none">• Specific Date or• Immediately prior to the issue of a Subdivision Certificate or• Immediately prior to the issue of a Construction Certificate, or• Immediately prior to the issue of an Occupation Certificate]
D. Other material public benefits			
1.			

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

Schedule 3

(Clause 1 and Item 1 of Schedule 1)

Map of the Land

[Insert Map]

DRAFT

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

Schedule 4

(Clause 9 and Schedule 2)

[**Drafting Note:** Delete schedule 4 if not applicable otherwise insert Map of Land to be dedicated by reference to the items in Schedule 2]

DRAFT

[Insert Name of Planning Agreement]

Kiama Municipal Council

[Insert Name of Developer]

[Insert Name of Landowner]

Execution

Executed as an Agreement

Dated:

Executed on behalf of the Council pursuant to delegation of the Council dated [insert date]

Chief Executive Officer

Witness

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

Name/Position

Name/Position

Attachment 2 Template Explanatory Note

Explanatory Note – Planning Agreement: [INSERT NAME OF PLANNING AGREEMENT]

[Note: To be completed with preparation of a Draft Planning Agreement]

Introduction

The purpose of this explanatory note is to provide a plain English summary that helps the community understand how the proposed planning agreement (the **Planning Agreement**) will be of public benefit, and why it is acceptable and in the planning interest. The explanatory note is made available as part of the public exhibition, where the public can read the Planning Agreement and make comments on it. It is not a plain English version of the Planning Agreement.

Clause 205 of the Environmental Planning and Assessment Regulation 2021 (the **Regulation**) is a guideline for how explanatory notes must be written. It requires all those wanting to enter into the planning agreement to prepare the explanatory note together. Council and the Developer prepared this explanatory note together.

The Environmental Planning and Assessment Act 1979 (the **Act**) is the NSW law that must be followed when preparing a Planning Agreement. The section of the Act that relates to planning agreements is Part 7 > Division 7.1 > Subdivision 2 > Sections 7.4 to 7.10. This Planning Agreement was prepared in line with the Act and the Regulation.

Parties to the Planning Agreement

The parties (people and organisations) to this Planning Agreement are:

1. Kiama Municipal Council ABN 22 379 679 108 (the **Council**); and
2. [NAME OF DEVELOPER] [ABN OF DEVELOPER] (the **Developer**); and
3. [NAME OF LANDOWNER] [ABN OF LANDOWNER] (the **Landowner**); and

Description of the Subject Land

The Planning Agreement applies to this land:

- [DETAILS OF SUBJECT LAND] (**Subject Land**).

Description of Proposed Development

[INSERT DESCRIPTION OF THE PROPOSED DEVELOPMENT] (**Proposed Development**).

Summary of objectives, nature and effect of the proposed Planning Agreement

[INSERT SDUMMARY OF THE OBJECTIVES, NATURE AND EFFECT OF THE PROPOSED PLANNING AGREEMENT]

Assessment of the Merits of the Planning Agreement

[INSERT ASSESSMENT OF THE MERITS OF THE PLANNING AGREEMENT]

The Planning Purpose of the Planning Agreement

The Planning Agreement has the following public purpose:

(Note: Delete purposes if not required)

- the provision of (or the recoupment of the cost of providing) public amenities or public services,
- the provision of (or the recoupment of the cost of providing) affordable housing,
- the provision of (or the recoupment of the cost of providing) transport or other infrastructure relating to land,
- the funding of recurrent expenditure relating to the provision of public amenities or public services, affordable housing or transport or other infrastructure,
- the monitoring of the planning impacts of development,
- the conservation or enhancement of the natural environment.

These refer to section 7.4(2) of the Act.

How the Planning Agreement promotes the public interest and objects of the Act

The Planning Agreement promotes the objects (aims) of the Act by:

(Note: Delete objects as not required)

- to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,
- to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,
- to promote the orderly and economic use and development of land,
- to promote the delivery and maintenance of affordable housing,
- to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,
- to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),
- to promote good design and amenity of the built environment,
- to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,
- to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,
- to provide increased opportunity for community participation in environmental planning and assessment.

These refer to section 1.3 of the Act.