

# **Altitude Aspire Planning Agreement**

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

Tweed Shire Council

Metricon Qld Pty Limited

22 September 2014

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## **Altitude Aspire Planning Agreement**

### **Table of Contents**

<b>Summary Sheet</b> .....	<b>4</b>
<b>Background</b> .....	<b>6</b>
<b>Operative provisions</b> .....	<b>7</b>
Part 1 - Preliminary.....	7
1    Definitions & Interpretation .....	7
2    Status, application & effect of this Agreement.....	11
3    Commencement of this Agreement .....	11
4    Commencement of Development Contributions obligations .....	11
5    Further Agreements Relating to this Agreement .....	12
6    Surrender of right of appeal, etc. ....	12
7    Application of s94, s94A and s94EF of the Act to the Development.....	12
Part 2 – General obligation for Development Contributions.....	13
8    Provision of Development Contributions by Developer .....	13
9    Adjustment of monetary Development Contributions rates and amounts .....	13
10   Adjustment of the Credit Amount.....	14
11   Development Contributions exceeding the requirements of this Agreement .....	15
12   Acceptance of alternative Development Contributions by the Council.....	15
Part 3 – Provisions relating to wetland and habitat restoration and management .....	16
13   Obligation of Council.....	16
Part 4 – General provisions relating to Development Contributions .....	16
14   Procedures relating to payment of monetary Development Contributions .....	16
15   Procedures relating to the dedication of land .....	16
16   Security for obligation to dedicate land.....	17
17   Risk and warranties in relation to dedicated land .....	18
Part 5 – Other provisions .....	19
18   Enforcement in a court of competent jurisdiction.....	19
19   Dispute Resolution – expert determination.....	20
20   Dispute Resolution - mediation.....	21
21   Registration of this Agreement .....	21

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22	Assignment, sale of land, etc.....	21
23	Termination of this Agreement.....	23
24	Review of this Agreement.....	23
25	Notices .....	24
26	Costs .....	25
27	Entire Agreement.....	25
28	Further Acts .....	25
29	Governing Law and Jurisdiction.....	25
30	Joint and Individual Liability and Benefits .....	26
31	No Fetter .....	26
32	Representations and Warranties .....	26
33	Severability .....	27
34	Modification.....	27
35	Waiver.....	27
36	GST.....	27
37	Completion of obligations under this Agreement.....	28
38	Explanatory Note Relating to this Agreement.....	28
	<b>Schedule 1</b> .....	<b>30</b>
	<b>Schedule 2</b> .....	<b>36</b>
	Novation Deed.....	36
	<b>Schedule 3</b> .....	<b>44</b>
	<b>Sheet 1</b> .....	<b>44</b>
	<b>Land Dedication Map</b> .....	<b>44</b>
	<b>Sheet 2</b> .....	<b>45</b>
	<b>Broadwater Parkway Roundabout Works</b> .....	<b>45</b>
	<b>Execution</b> .....	<b>45</b>
	<b>Appendix</b> .....	<b>47</b>

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## Altitude Aspire Planning Agreement

### Summary Sheet

#### Council:

**Name:** Tweed Shire Council

**Address:** Tumbulgum Road, Murwillumbah NSW 2484

**Telephone:** 02 6670 2400

**Facsimile:** 02 6670 2429

**Email:** tsc@tweed.nsw.gov.au

**Representative:** Danny Rose, Planning and Infrastructure Engineer

#### Developer:

**Name:** Metricon Qld Pty Limited

**Address:** 501 Blackburn Road, Mount Waverley, Victoria 3149

**Telephone:** 07 55625634

**Facsimile:** 03 9038 4987

**Email:** stuartcampbell@newland.com.au

**Representative:** Stuart Campbell

#### Land:

See definition of *Land* in clause 1.1

#### Development:

See definition of *Development* in clause 1.1

#### Development Contributions:

See clause 8 and Schedule 1.

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

See clauses 7, 10 and 11.2.

**Security:**

See clause 16.

**Registration:**

See clause 21.

**Restriction on dealings:**

See clause 22.

**Dispute Resolution:**

See clauses 19 and 20.

**Enforcement:**

See clause 18.

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## **Altitude Aspire Planning Agreement**

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

### **Parties**

**Tweed Shire Council** ABN 90178732496 of Tumbulgum Road, Murwillumbah, New South Wales 2484 (**Council**)

and

**Metricon Qld Pty Limited** ABN 66 607 866 132 of 501 Blackburn Road, Mount Waverley Victoria 3149 (**Developer**)

### **Background**

- A The Developer proposes to carry out the Development on the Land.
- B *Tweed Local Environmental Plan 2000 (Amendment No 10)* was gazetted on 26 October 2007 and rezoned the Land for urban purposes.
- C The Development became a Part 3A Project by the Part 3A Project Declaration.
- D The Development is a transitional Part 3A project within the meaning of clause 2 of Schedule 6A of the Act and continues to be governed by Part 3A of the Act (despite its repeal) but subject to that schedule.
- E A Project Application has been made to the Minister in order to obtain the Project Approval. The Developer is the Proponent of the Project Application.
- F The Developer is prepared to make Development Contributions in connection with the carrying out of the Development in accordance with this Agreement.

## Operative provisions

### Part 1 - Preliminary

#### 1 Definitions & 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.

**Altitude Aspire** means the Development.

**Area E** means the land described in clause 3 of the *Tweed Local Environmental Plan 2000 (Amendment No 10)* as published in Gazette No 156 of 26 October 2007, page 8116.

**Broadwater Parkway Road Reserve Value** means the amount set out in column 6 of Schedule 1 in relation to Item 8.

**Broadwater Parkway Roundabout** means works generally consistent with those depicted in Sheet 2 of Schedule 3.

**Broadwater Parkway Roundabout Works Value** means the value of works undertaken in the construction of the Broadwater Parkway Roundabout that are attributable to the permanent configuration of the Broadwater Parkway. Value of works shall be determined by submission by the Developer of a bill of quantities and schedule of construction rates to the reasonable satisfaction of the Council. This submission shall be made at the same time as the applicable Construction Certificate Application is made to a certifying authority.

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

**Credit Amount** means:

- (a) if a Project Approval requires the Broadwater Parkway Roundabout (or equivalent) to be constructed - the sum of Broadwater Parkway Roundabout Works Value, the Broadwater Parkway Road Reserve Value and the Public Reserve Dedication Value; and
- (b) in other circumstances - the sum of the Broadwater Parkway Road Reserve Value and the Public Reserve Dedication Value.

**Development** means the project that may be carried out on the Land under the Project Approval.

**Detached Dwelling** means a dwelling house (within the meaning of the *Standard Instrument (Local Environmental Plans) Order 2006* as at the date of this Agreement).

**Developer** includes a person who is bound by this Agreement under section 93H(3) of the Act.

**Development Application** means an application or request made under the Act for:

- (a) Development Consent, and
- (b) approval to carry out a project under Part 3A of the Act, and
- (c) a modification of either of the above.

**Development Consent** means development consent within the meaning of section 4 of the Act.

**Development Contribution** means a monetary contribution, the dedication of land free of cost to the Council, the carrying out of work, or the provision of any other material public benefit, or any combination of them, to be used for, or applied towards, the provision of public infrastructure or another public purpose.

**Dwelling** means a dwelling (within the meaning of the *Standard Instrument (Local Environmental Plans) Order 2006* as at the date of this Agreement).

**EPA** means the NSW Environment Protection Authority.

**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.

**IPD Index** means the index titled '*Value of Work Done (Implicit Price Deflator); Chain Volume Measures; Engineering Construction*', series IDA405071T, published by the Australian Bureau of Statistics with product number 8782.0.65.001.

**Item** means a numbered Item in the table in Schedule 1.

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

**Land** means Lot 1 DP 304649, Lot 1 DP 175235, Lot 1 DP 781687, Lot 2 DP 778727, Lot 1 DP 781697, Lot 1 DP 169490, Lot 40 DP 254416 and Lot 43 DP 254416, Fraser Drive, Terranora.

**Lot Yield** means the number of Residential Lots that are suitable for a Detached Dwelling that may be created in accordance with and under the Project Approval.

**Minister** means the Minister for the time being having responsibility for administering the Act.

**Novation Deed** means the draft deed in Schedule 2.

**Part 3A Project Declaration** means the instrument relating to the Land titled '*Record of Minister's opinion for the purposes of Clause 6(1) of the State Environmental Planning Policy (Major Projects) 2005*' signed by the Minister's delegate on 15 September 2009.



**Party** means a party to this agreement, including their successors and assigns and a person bound by the Agreement under section 93H(3) of the Act.

**Project Application** means Project Application No. \_09\_0166 made by the Proponent to the Minister.

**Project Approval** means an approval by the Minister of the carrying out of a project, given as a consequence of the Project Application and in accordance with the Act and includes any modifications made to that approval.

**Public Reserve Dedication Value** means the amount set out in column 6 of Schedule 1 in relation to Item 9.

**Real Property Act** means the *Real Property Act 1900*.

**Registrar-General** has the same meaning as in the Real Property Act.

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

**Residential Lot** means a lot created for separate occupation and disposition which is not intended to be further subdivided (by any means including strata subdivision) for the purposes of the Development, but does not include a Service Lot.

**Schedule 1** means the table in Schedule 1 to this Agreement.

**Service Lot** means a lot that is created for one or more of the following purposes:

- (a) to be dedicated or otherwise transferred to the Council;
- (b) for any public utility undertaking (within the meaning of the *Standard Instrument (Local Environmental Plans) Order 2006* as at the date of this Agreement);
- (c) for roads, open space, recreation, environmental conservation, water cycle management or riparian land management,

but does not include a lot which is intended to be further subdivided by or on behalf of the Developer but does include association property within the meaning of the *Community Land Development Act 1989* used for a purpose mentioned in (c) above.

**Subdivision Certificate** has the same meaning as in the Act and includes a strata certificate.

**Tweed Land Index** means the index titled '*Tweed Shire Council Land Cost Index*' published from year to year by the Council and calculated in accordance with *Tweed Shire Council Revenue Policy and Statement 2012/2013* as at the date of this Agreement. .

**Unit** means a Dwelling in a residential flat building (within the meaning of the *Standard Instrument (Local Environmental Plans) Order 2006* as at the date of this Agreement).

**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:

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- 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.
  - 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, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
  - 1.2.8 A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this 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 servants, agents and contractors of the party, and the party's successors and assigns.
  - 1.2.15 Any schedules, appendices and attachments form part of this Agreement.
  - 1.2.16 Notes appearing in this Agreement are operative provisions of this Agreement.
- 1.3 Unless otherwise stated:

- 1.3.1 nothing in this deed creates a joint venture, partnership, or the relationship of principal and agent, or employee and employer between the parties; and
- 1.3.2 no party has the authority to bind any other party by any representation, declaration or admission, or to make any contract or commitment on behalf of any other party or to pledge any other party's credit.

## **2 Status, application & effect of this Agreement**

- 2.1 This Agreement is a planning agreement for the purposes of s93F of the Act.
- 2.2 This Agreement applies to the Land and to the Development.

## **3 Commencement of this Agreement**

- 3.1 This Agreement commences when it has been executed by all of the Parties after it has been publicly notified in accordance with the Act.
- 3.2 The Party who executes this Agreement last is to notify the other Parties once it has done so and promptly provide them with a copy of the fully executed version of this Agreement.

## **4 Commencement of Development Contributions obligations**

- 4.1 The Development Contributions required to be made by the Developer under this Agreement are consequent upon the increased demand for public facilities caused by the carrying out of the Development.
- 4.2 The Developer is under no obligation to make Development Contributions in accordance with this Agreement unless:
  - 4.2.1 the Project Approval has been given, and
  - 4.2.2 a Construction Certificate has been issued under that Project Approval, and
  - 4.2.3 the Development has been physically commenced (within the meaning of the Act) in reliance on the Project Approval, and
  - 4.2.4 the relevant requirements of this Agreement as to when the Development Contributions are to be made have occurred or been satisfied.
- 4.3 For the avoidance of doubt, nothing in this Agreement shall be taken to require the Developer:
  - 4.3.1 if the Development has not been physically commenced - to carry out all or part of the Development; and

4.3.2 if the Development has been physically commenced - to produce any particular number of Residential Lots.

4.4 However, nothing in this clause 4 exempts the Developer from the obligation to comply with the provisions of this Agreement that impose obligations other than the making of Development Contributions including without limitation, any that require:

4.4.1 the submission of plans, reports and the like; and

4.4.2 other facilitation of the implementation of the Agreement including for registration of this Agreement.

## **5 Further Agreements Relating to this Agreement**

5.1 The Parties may, at any time and from time to time, for the purpose of implementing this Agreement, enter into an agreement that provides more detail relating to the subject-matter of this Agreement than is contained in this Agreement.

5.2 Any such agreement is not to be inconsistent with this Agreement.

5.3 Nothing in this clause 5 precludes an amendment or revocation of this Agreement by further agreement in writing signed by the Parties.

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

6.1 No Party is to commence or maintain, or cause to be commenced or maintained, any proceedings in the Land and Environment Court concerning:

6.1.1 the validity of this Agreement, or

6.1.2 the granting or modification of any Development Consent or Project Approval to the Development to the extent that the Development Consent or Project Approval was granted or modified having regard to the existence of this Agreement.

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

7.1 This Agreement excludes the application of s94A of the Act to the Development.

7.2 This Agreement does not exclude the application of s94 or s94EF of the Act to the Development.

7.3 Benefits under this Agreement are to be taken into consideration in determining a development contribution under s94 of the Act, but only to the extent provided for in clause 11.2.

- 7.4 For avoidance of doubt, clause 7.1 does not cease to apply merely because this Agreement is not registered on the title of a Residential Lot or because the owner of a Residential Lot is not a Party to this Agreement.

## **Part 2 – General obligation for Development Contributions**

### **8 Provision of Development Contributions by Developer**

- 8.1 The Developer must make Development Contributions set out in Schedule 1 in accordance with this Agreement to the reasonable satisfaction of the Council, and at no cost to the Council.
- 8.2 The sum of the monetary Development Contributions payable under this Agreement is reduced by the Credit Amount, indexed under clause 10.
- 8.3 If only one Subdivision Certificate is applied for in respect of the Development, then the Credit Amount is deducted from the amount of monetary Development Contributions payable before that Subdivision Certificate can be issued.
- 8.4 If more than one Subdivision Certificate is applied for in respect of the Development, and the Credit Amount exceeds the monetary Development Contribution payable prior to the issue of the first Subdivision Certificate which is applied for, then the Developer will have no obligation to pay any monetary Development Contribution prior to the issue of the first Subdivision Certificate, the Credit Amount will be reduced by the amount of monetary Development Contributions which would otherwise have been payable prior to the issue of the first Subdivision Certificate, and the balance of the Credit Amount will be applied to reduce the monetary Development Contributions payable prior to the issue of subsequent Subdivision Certificates until the Credit Amount is exhausted.
- 8.5 Nothing in Schedule 1 prevents the Developer from electing to make a Development Contribution prior to the time it is required to do so.
- 8.6 The Council is to apply each Development Contribution made under this Agreement towards the purpose for which it is made and otherwise in accordance with this Agreement.
- 8.7 Despite clause 8.6, the Council may apply a Development Contribution specified in Items 2, 3 and 4 towards a public purpose other than the public purpose specified in column 2 of Schedule 1 if the Council considers that the public interest would be better served by applying the Development Contribution towards that other purpose rather than the purpose so specified.

### **9 Adjustment of monetary Development Contributions rates and amounts**

- 9.1 Monetary Development Contributions are to be indexed in accordance with this clause 9.

- 9.2 The monetary Development Contribution at the time of payment is determined by the following formula:

$$\frac{\$C_C \times I_P}{I_C}$$

$I_C$

Where:

- 9.2.1  $\$C_C$  is the relevant contribution value shown in column 6 of Schedule 1

- 9.2.2  $I_P$  is:

- (a) in respect of Items that relate to land acquisition (as per column 3 of Schedule 1) – the last published Tweed Land Index at the time of the payment of the contribution, and
- (b) in respect of other Items – the last published IPD Index at the time of the payment of the contribution,

- 9.2.3  $I_C$  is:

- (a) in respect of Items that relate to land acquisition (as per column 3 of Schedule 1) - the last published Tweed Land Index at the date of this Agreement, and
- (b) in respect of other Items – the last published IPD Index at the date of this Agreement,

## 10 Adjustment of the Credit Amount

- 10.1 Each component of the Credit Amount (that is, the Broadwater Parkway Road Reserve Value component, the Public Reserve Dedication Value component and, if applicable, the Broadwater Parkway Roundabout Works Value component) is to be indexed as follows:

$$\frac{\$R_C \times I_P}{I_C}$$

$I_C$

Where:

- 10.1.1  $\$R_C$  is the Broadwater Parkway Road Reserve Value, the Public Reserve Dedication Value or the Broadwater Parkway Roundabout Works Value, as applicable.

- 10.1.2  $I_P$  is:

- (a) in respect of the Broadwater Parkway Road Reserve Value and the Public Reserve Dedication Value - the last published Tweed Land Index at the time of the payment of the contribution, and

- (b) in respect of the Broadwater Parkway Roundabout Works Value – the last published IPD Index at the time of the payment of the contribution,

10.1.3 *lc* is:

- (a) in respect of the Broadwater Parkway Road Reserve Value and the Public Reserve Dedication Value - the last published Tweed Land Index as at August 2013, and
- (b) in respect of the Broadwater Parkway Roundabout Works Value - the last published IPD Index as at August 2013,

## **11 Development Contributions exceeding the requirements of this Agreement**

- 11.1 This clause applies to any Development Contribution made by the Developer to the Council that, with the prior written consent of the Council, exceeds the requirements of this Agreement by a value agreed to by the Council when giving that consent.
- 11.2 To the extent permitted by law and reasonable in the circumstances, the value referred to in clause 11.1 is to be taken into consideration by the consent authority when determining Development Contributions that the Developer (or its nominee) should make to the Council in respect of development on land within Area E other than the Land.

## **12 Acceptance of alternative Development Contributions by the Council**

- 12.1 The Council may, in its absolute discretion, but only on the written request of the Developer, agree to accept from the Developer a Development Contribution that is not specified in this Agreement in part or full satisfaction of a Development Contribution for which the Developer would otherwise be liable under this Agreement, other than a Development Contribution which the Council advises the Developer is infrastructure essential to the servicing of the Development.
- 12.2 The Developer may make a written request that the Council approve in writing, a variation to the scope or the timing for the provision of Development Contributions for which the Developer would otherwise be liable, and the Council may determine, in its absolute discretion, whether to approve the variation.
- 12.3 If a variation is made to the Development Contributions or the scope or timing for provision of a Development Contribution pursuant to this clause, then:
  - 12.3.1 the Schedule 1 does not apply to the extent that is inconsistent with the agreed variation to the Development Contributions and/or scope of timing for the provision of Development Contributions, and
  - 12.3.2 the agreed variation applies as if it formed part of Schedule 1; and

12.3.3 the Developer who made the request is to bear all of the Council's reasonable costs of and incidental to agreeing to and approving the variation.

12.4 A variation to the Development Contributions or the scope or timing for the provision of a Development Contribution under this clause does not require an amendment to this Agreement.

## **Part 3 – Provisions relating to wetland and habitat restoration and management**

### **13 Obligation of Council**

13.1 The monetary Development Contributions paid by the Developer to the Council in accordance with clause 8 and Item 5 in Schedule 1 are to be applied by the Council towards restoration and management Works on land comprising Lot 227 DP755740, and other lands identified within Area E, in accordance with a Wetland Restoration Plan and Habitat Restoration Plan endorsed by the Council after:

13.1.1 that land has been purchased by the Council, and

13.1.2 the Council has accumulated sufficient funds to undertake the Works.

## **Part 4 – General provisions relating to Development Contributions**

### **14 Procedures relating to payment of monetary Development Contributions**

14.1 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 at the relevant time 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.

### **15 Procedures relating to the dedication of land**

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

15.1.1 a deposited plan is registered in the register of plans held with the Registrar-General that dedicates land as a public road (including a



- 
- temporary public road) under the *Roads Act 1993* or creates a public reserve or drainage reserve under the *Local Government Act 1993*, or
- 15.1.2 the Council is given an instrument in registrable form under the *Real Property Act 1900* that is effective to transfer the title to the land to the Council when registered.
- 15.2 For the purposes of clause 15.1.2:
- 15.2.1 the Developer is to give the Council, for execution by the Council as transferee, an instrument of transfer under the *Real Property Act 1900* relating to the land to be dedicated, and
- 15.2.2 the Council is to execute the instrument of transfer and return it to Developer within 14 days of receiving it from the Developer, and
- 15.2.3 the Developer is to lodge the instrument of transfer for registration with the Registrar-General within 7 days of receiving it from the Council duly executed, and
- 15.2.4 the Developer and the Council are to do all things reasonably necessary to enable registration of the instrument of transfer to occur.

## **16 Security for obligation to dedicate land**

- 16.1 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.
- 16.2 Council is to only acquire land pursuant to clause 16.1 if to do so is reasonable having regard to the circumstances surrounding the failure by the Developer to dedicate the land required to be dedicated under this Agreement.
- 16.3 Clause 16.1 constitutes an agreement for the purposes of s30 of the Just Terms Act.
- 16.4 If, as a result of the acquisition referred to in clause 16.1, the Council must pay compensation to any person other than the Developer, the Developer must reimburse the Council for that amount, upon a written request being made by the Council, or the Council can call on any Security.
- 16.5 Except as otherwise agreed between the Parties, the Developer must ensure that the land to be dedicated under this Agreement is free of all encumbrances and affectations (whether registered or unregistered and including without limitation any charge or liability for rates, taxes and charges), on both the date that the Developer is liable to transfer that land to the Council under this Agreement, and the date on which the Council compulsorily acquires the whole or any part of that land in accordance with the Just Terms Act.
- 16.6 The Developer indemnifies and keeps indemnified the Council against all claims made against the Council under the Just Terms Act as a result of any acquisition by the Council of the whole or any part of the Land under clause 16.1.

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- 16.7 The Developer is to promptly do all things necessary, and consents to the Council doing all things necessary, to give effect to this clause 16 including without limitation:
- 16.7.1 signing any documents or forms;
  - 16.7.2 giving land owner's consent for lodgement of any Development Application;
  - 16.7.3 producing certificates of title to the Registrar-General under the Real Property Act; and
  - 16.7.4 paying the Council's reasonable costs arising under this clause 16.
- 16.8 Notwithstanding clause 16.5, if, despite having used its best endeavours, the Developer cannot ensure that the land to be dedicated is free from all encumbrances and affectations, then the Developer may request that Council agree to accept the land subject to those encumbrances and affectations, and:
- 16.8.1 Council cannot withhold its agreement unreasonably if the encumbrance or affectation does not prevent the future use of the land for the public purpose for which it is to be dedicated under this Agreement, unless the encumbrance or affectation is a charge arising as a result of unpaid taxes or charges; and
  - 16.8.2 Council cannot withhold its agreement unreasonably if the encumbrance or affectation does not prevent the future use of the land for the public purpose for which it is to be dedicated under this Agreement, unless the encumbrance or affectation is a charge arising as a result of unpaid taxes or charges; and
  - 16.8.3 in all other cases, Council may withhold its agreement in its absolute discretion.

## **17 Risk and warranties in relation to dedicated land**

- 17.1 The Parties are not bound by any warranty, representation, collateral agreement or implied term under the general law or imposed by legislation in relation to the land required to be dedicated to Council under this Agreement (**Dedicated Land**) unless:
- 17.1.1 that warranty, representation, agreement or term is contained in the express terms of this Agreement, or
  - 17.1.2 it is an implied term or warranty imposed by statute which is mandatory and cannot be excluded by the parties' agreement.
- 17.2 Subject to clause 17.3, the Council warrants that it has inspected the Dedicated Land and acknowledges that no representations, inducements or warranties have been made by the Developer or its agents or representatives relating to:
- 17.2.1 the present state or condition of the Dedicated Land,
  - 17.2.2 its suitability for the Council's purposes, or
  - 17.2.3 the improvements erected on the property.

The Council accepts the Dedicated Land in its condition as at the date of this Agreement in its then condition and state of repair, subject to all defects whether latent or patent.

- 17.3 The Developer warrants that the Dedicated Land shall be remediated and validated in accordance with the requirements of the *Remediation Action Plan Altitude Aspire Terranora New South Wales, October 2013*, prepared by Gilbert & Sutherland, prior to the dedication of the Dedicated Land to the Council, and shall submit to Council a Site Audit Statement and a Site Audit Report, prepared by an EPA accredited Site Auditor to that effect.
- 17.4 The Developer warrants that the remediation and validation activities required under clause 17.3 have taken into account a full site history for the Dedicated Land to confirm to the best endeavours of the Developer that there is no latent contamination of the Dedicated Land that would preclude road construction without further remediation works.
- 17.5 The Council acknowledges that the Developer does not have any obligation to remove any fixtures or chattels, rubbish of any description or any debris affixed or present on the Dedicated Land prior to the date of this Agreement. From the time that the Council assumes ownership of the Dedicated Land, any rubbish, improvements, abandoned chattels and/or debris on the Dedicated Land (as at the Inspection Date) are the sole responsibility of the Council.
- 17.6 In this clause 17:
- 17.6.1 **Inspection Date** means:
- (a) the date, prior to the date of this Agreement, in which a joint inspection involving representatives of both the Council and the Developer takes place on the Dedicated Land for the purposes of this clause; or
  - (b) if no such joint inspection takes place, the date of this Agreement.
- 17.6.2 The terms **Site Audit Report**, **Site Auditor** and **Site Audit Statement** have the same meaning as in the *Contaminated Land Management Act 1997*.
- 17.7 The Developer warrants that it owns all of the Dedicated Land at the date of the Agreement and indemnifies Council and will keep Council indemnified against all claims made against Council in respect of the transfer of the Dedicated Land to Council by any person claiming an interest in the whole or part of the Dedicated Land.

## Part 5 – Other provisions

### 18 Enforcement in a court of competent jurisdiction

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

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- 18.2 For the avoidance of doubt, nothing in this Agreement prevents:
- 18.2.1 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,
  - 18.2.2 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.
- 18.3 Where there has been a breach of this Agreement by the Developer, the Developer is 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.

## **19 Dispute Resolution – expert determination**

- 19.1 This clause 19 applies to:
- 19.1.1 a dispute under this Agreement which relates to a matter that can be determined by an appropriately qualified expert; and
  - 19.1.2 any dispute as to whether the dispute referred to in clause 19.1.1 can be determined by an appropriate qualified expert.
- 19.2 A dispute referred to in clause 19.1.2 is to be determined in accordance clauses 19.3 to 19.10 prior to any attempt to determine the substantive issue under this clause.
- 19.3 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.
- 19.4 If a notice is given under clause 19.3, the Parties are to meet within 14 days of the notice, or resolution of dispute under clause 19.2, in an attempt to resolve the dispute.
- 19.5 If the dispute is not resolved within a further 28 days, the dispute must be determined by expert determination.
- 19.6 the expert determination shall be performed by an independent and appropriately qualified expert agreed by the Parties. If an expert is not agreed and appointed within five days from the date of referral of the dispute to expert determination, the expert shall be appointed by the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter).
- 19.7 The Parties agree that the expert determination will be conducted in accordance with and subject to The Institute of Arbitrators & Mediators Australia Expert Determination Rules. Any variation or amendment to those rules must be agreed in writing by the Parties
- 19.8 Unless otherwise determined by the expert, each Party will pay its own costs incurred in connection with the expert determination together with the relevant proportion of the expert's fees and hearing allocation costs.
- 19.9 The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.

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## **20 Dispute Resolution - mediation**

- 20.1 This clause applies to any dispute under this Agreement other than a dispute to which clause 19 applies.
- 20.2 Such a dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the dispute.
- 20.3 If a notice is given under clause 20.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the dispute.
- 20.4 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, or the President's nominee, to select a mediator.
- 20.5 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.

## **21 Registration of this Agreement**

- 21.1 The Parties agree to register this Agreement for the purposes of s93H(1) of the Act.
- 21.2 Within 60 days of the commencement of this Agreement, the Developer is to provide the Council with the following documents to enable registration of this Agreement:
  - 21.2.1 an instrument requesting registration of this Agreement on the title to the Land in registrable form duly executed by the relevant party, and
  - 21.2.2 the written irrevocable consent of each person referred to in s93H(1) of the Act to that registration.
- 21.3 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:
  - 21.3.1 in so far as the part of the Land concerned is a Residential Lot,
  - 21.3.2 in relation to any other part of the Land, once the relevant party 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 reason whatsoever.

## **22 Assignment, sale of land, etc**

- 22.1 Unless the matters specified in clause 22.2 are satisfied:
  - 22.1.1 the Developer is not to transfer Land or any part of the Land, other than a Residential Lot or a Service Lot, to any person,

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- 22.1.2 the Developer is not to assign or novate to any person its rights or obligations under this Agreement.
- 22.2 The matters required to be satisfied for the purposes of clause 22.1 are as follows:
- 22.2.1 the Developer has, at no cost to the Council, first procured the execution by the person to whom the Land will be transferred or the rights or obligations under this Agreement are to be assigned or novated, of a deed generally in accordance with the Novation Deed reasonably satisfactory to the Council, and
- 22.2.2 the Council, by notice in writing to the Developer has stated that evidence satisfactory to the Council has been produced to show that the transferee, assignee or novatee is reasonably capable of performing its obligations under the Agreement (and Council is not to unreasonably withhold such a notice), and
- 22.2.3 the Developer is not in breach of this Agreement, and
- 22.2.4 the Council otherwise consents to the transfer, assignment or novation, such consent not to be unreasonably withheld.
- 22.3 Clause 22.1 and clause 22.2 do not apply in relation to any transfer of the Land or any part of the Land if this Agreement is registered on the title to the Land at the time of the sale.
- 22.4 If the whole or any part of the Land is transferred without a Novation Deed being entered into (**Transferred Land**), and this Agreement is registered on the title to the Land, then this Agreement is deemed to include the provisions of the Novation Deed as if it had been entered into:
- 22.4.1 by the person who has ceased to own the Transferred Land (who is taken to be the Original Developer in the Novation Deed);
- 22.4.2 by the person who has become the owner the Transferred Land (who is taken to be the New Developer in the Novation Deed); and
- 22.4.3 by the Council,
- on the basis that:
- 22.4.4 the Effective Date is either:
- (a) if the New Developer was not a Party to the Agreement until the transfer of the Transferred Land, the date that the New Developer become a Party under section 93H(3) of the Act; or
- (b) if the New Developer was a Party prior to the transfer of the Transferred Land, the date that the Original Developer provides the New Developer with an instrument, in registrable form, that (when registered) will effect the transfer of the title to the Transferred Land from the Original Developer to the New Developer;
- 22.4.5 the clause that appears as clause 2 in the Novation Deed only applies if:
- (a) part of the Land has been transferred; and

- (b) on completion of the transfer, the Original Developer still owns part of the Land;
- 22.4.6 the clause that appears as clause 3 in the Novation Deed only applies if either:
  - (a) all of the Land has been transferred; or
  - (b) part of the Land has been transferred and, on completion of the transfer, the Original Developer no longer owns any part of the Land;
- 22.4.7 the clause that appears as clause 5 in the Novation Deed does not apply.

## **23 Termination of this Agreement**

- 23.1 The Developer may terminate this Agreement by giving written notice to the Council if:
  - 23.1.1 the Minister disapproves of the carrying out of the project that is the subject of the Project Application; or
  - 23.1.2 this Agreement is executed prior to the giving of a Project Approval and Project Approval has not been given within 12 months of the date of this Agreement and the Developer, acting reasonably, is of the opinion that the Project Approval is unlikely to be given in the future, or
  - 23.1.3 Project Approval is surrendered or otherwise ceases to have effect (provided that no Residential Lots have or will be created as a consequence of the Project Approval), or
  - 23.1.4 the Developer has fulfilled its obligations under this Agreement.
- 23.2 Subject to clause 23.3 and clause 23.4, the Parties are released and discharged from their obligations under this Agreement if the Agreement is terminated under clause 23.1.
- 23.3 The Council agrees to do all things reasonably required by the Developer to release and discharge this Agreement with respect to any part of the Land (such that the deed is no longer registered by the Registrar-General under section 93H of the Act in relation to that part of the Land) if the Agreement is terminated under clause 23.1.
- 23.4 Any right or obligation of any party that is expressed to operate or have effect on or after the completion, expiration or termination of Agreement for any reason, will not merge on the occurrence of that event but will remain in full force and effect.

## **24 Review of this Agreement**

- 24.1 Subject to this clause, the Developer is to provide the Council with an annual report detailing the performance of its obligations under this Agreement.
- 24.2 The report is to be:

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- 24.2.1 given no later than each anniversary of the date on which this Agreement is entered into, and
- 24.2.2 in the form and addressing the matters the Council notifies to the Developer, acting reasonably, from time to time.
- 24.3 A report does not need to be submitted under clause 24.1 and clause 24.2 before the Development is physically commenced on the Land.
- 24.4 The Parties are to review this Agreement every 3 years, and otherwise if either Party considers that any change of circumstance has occurred, or is imminent, that materially affects the operation of this Agreement.
- 24.5 For the purposes of clause 24.4, the relevant changes include:
- 24.5.1 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, or
- 24.5.2 any Alternative Funding has been obtained by any Party.
- 24.6 For the purposes of addressing any matter arising from a review of this Agreement referred to in clause 24.4, the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Agreement.
- 24.7 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.
- 24.8 A Party's failure to agree to take action requested by the other Party as a consequence of a review referred to in clause 24.4 is not a dispute for the purposes of clauses 19 and 20, and is not a breach of this Agreement.
- 24.9 In this clause, **Alternative Funding** means any funding obtained by any Party from persons not a party to this Agreement that may be applied towards the cost of the Works.

## **25 Notices**

- 25.1 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:
- 25.1.1 delivered or posted to that Party at its address set out in the Summary Sheet, or
- 25.1.2 faxed to that Party at its fax number set out in the Summary Sheet, or
- 25.1.3 emailed to that Party at its email address set out in the Summary Sheet.
- 25.2 If a Party gives the other Party 3 business days' notice of a change of its address, fax number or email address, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted, faxed or emailed to the latest address or fax number.



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- 25.3 Any notice, consent, information, application or request is to be treated as given or made if it is:
- 25.3.1 delivered, when it is left at the relevant address,
  - 25.3.2 sent by post, 2 business days after it is posted,
  - 25.3.3 sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number, or
  - 25.3.4 sent by email and the sender does not receive a delivery failure message from the sender's internet service provider within a period of 24 hours of the email being sent.
- 25.4 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.

## **26 Costs**

- 26.1 The Developer is to pay to the Council the Council's reasonable costs not exceeding \$30,000 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. All costs that have been disclosed in writing by the Council to the Developer prior to execution of this Agreement by the Developer are deemed to be reasonable for the purposes of this clause 26.1.

## **27 Entire Agreement**

- 27.1 This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with.
- 27.2 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.

## **28 Further Acts**

- 28.1 Each Party is to 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.

## **29 Governing Law and Jurisdiction**

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

- 29.2 The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them.
- 29.3 The Parties are not to object to the exercise of jurisdiction by those courts on any basis.

### **30 Joint and Individual Liability and Benefits**

- 30.1 Except as otherwise set out in this Agreement:
- 30.1.1 any agreement, covenant, representation or warranty under this Agreement by 2 or more persons binds them jointly and each of them individually, and
- 30.1.2 any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.
- 30.2 Where more than one person is bound by this Agreement as the Developer any right that is capable of being exercised by the Developer under this Agreement may only be exercised by those persons jointly and each person who is a Developer may, at its absolute discretion, decline to exercise such a right.
- 30.3 Clause 30.2 does not apply to a right that may be exercised by:
- 30.3.1 a Developer, or
- 30.3.2 two or more persons who are each a Developer (but not all persons who are a Developer) acting jointly,
- without any prejudice to the other persons who are a Developer.
- 30.4 The provisions of clause 30.2 and clause 30.3 have effect subject to:
- 30.4.1 any written agreement between the parties concerned (which may be in the form of a deed under clause 22.2.1), and
- 30.4.2 clause 19, clause 20 and clause 21.
- 30.5 Clauses 30.2, 30.3 and 30.4 do not limit in any way the operation of clause 30.1, and do not prevent the Council from taking action against any person who is a Developer under this Agreement in respect of any breach of this Agreement.

### **31 No Fetter**

- 31.1 Nothing in this Agreement is to 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 is to be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

### **32 Representations and Warranties**

- 32.1 The Parties represent and warrant that they have power to enter into this Agreement and comply with their obligations under the Agreement and that entry into this Agreement will not result in the breach of any law.

### 33 Severability

- 33.1 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 is to be read in the latter way.
- 33.2 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.

### 34 Modification

- 34.1 No modification of this Agreement will be of any force or effect unless it is in writing and signed by the Parties to this Agreement.

### 35 Waiver

- 35.1 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.
- 35.2 A waiver by a Party is only effective if it is in writing and only in relation to the particular obligation or breach in respect of which it is given.

### 36 GST

- 36.1 In this clause:
- Adjustment Note, Consideration, GST, GST Group, Margin Scheme, Money, Supply and Tax Invoice** have the meaning given by the GST Law.
- GST Amount** means in relation to a Taxable Supply the amount of GST payable in respect of the Taxable Supply.
- GST Law** has the meaning given by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
- Input Tax Credit** has the meaning given by the GST Law and a reference to an Input Tax Credit entitlement of a party includes an Input Tax Credit for an acquisition made by that party but to which another member of the same GST Group is entitled under the GST Law.
- Taxable Supply** has the meaning given by the GST Law excluding (except where expressly agreed otherwise) a supply in respect of which the supplier chooses to apply the Margin Scheme in working out the amount of GST on that supply.

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- 36.2 Subject to clause 36.4, 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 is to also pay the GST Amount as additional Consideration.
- 36.3 Clause 36.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Agreement to be GST inclusive.
- 36.4 No additional amount is to be payable by the Council under clause 36.2 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.
- 36.5 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:
- 36.5.1 to negotiate in good faith to agree the GST inclusive market value of those Supplies before issuing Tax Invoices in respect of those Supplies;
- 36.5.2 that any amounts payable by the Parties in accordance with clause 36.2 (as limited by clause 36.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 36.6 No payment of any amount pursuant to this clause 36, 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.
- 36.7 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, is to exclude the amount of any Input Tax Credit entitlement of that party in relation to the relevant cost, expense or other liability.
- 36.8 This clause continues to apply after expiration or termination of this Agreement.

## **37 Completion of obligations under this Agreement**

- 37.1 This clause applies where the Developer has completed all of its obligations under this Agreement to the reasonable satisfaction of the Council.
- 37.2 The Developer may make an application to the Council in writing requesting the Council to certify in writing that it has completed all of its obligations under this Agreement to the satisfaction of the Council.
- 37.3 The Council is to issue the certificate referred to in clause 37.2 within 28 days of receiving the application referred to in that clause. The Council must not unreasonably withhold such a certificate.

## **38 Explanatory Note Relating to this Agreement**

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

**Schedule 1**

(Clause 1.1 and Clause 8)

**Table**

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
Item Number and Public Facility	Public Purpose	Land acquisition or other	Scope of Obligation	When Required	Contribution Value \$
<b>PART A – Monetary Contributions</b>					
1. Road Construction	The construction of Broadwater Parkway and Mahers Lane within Area E	Other	Monetary Development Contribution for each Residential Lot.-	Immediately prior to the issue of each Subdivision Certificate for Residential Lots, but only for the Residential Lots that are to be the subject of the relevant Subdivision Certificate.-	\$19,738.20 per Residential Lot that is suitable for a Detached Dwelling and (for avoidance of doubt) does not comprise a Unit
					\$10,182.69 per Residential Lot comprising a one bedroom Unit
					\$13,315.83 per Residential Lot comprising a two bedroom Unit
					\$16,448.96 per Residential Lot comprising a three bedroom Unit

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
Item Number and Public Facility	Public Purpose	Land acquisition or other	Scope of Obligation	When Required	Contribution Value \$
					\$19,738.20 per Residential Lot comprising a four bedroom Unit
2. Flood mitigation works	Flood mitigation for Area E	Other	Monetary Development Contribution for each Residential Lot.-	Immediately prior to the issue of each Subdivision Certificate for Residential Lots, but only for the Residential Lots that are to be the subject of the relevant Subdivision Certificate.-	\$331.30 per Residential Lot that is suitable for a Detached Dwelling and (for avoidance of doubt) does not comprise a Unit
					\$170.92 per Residential Lot comprising a one bedroom Unit
					\$223.50 per Residential Lot comprising a two bedroom Unit
					\$276.09 per Residential Lot comprising a three bedroom Unit
					\$331.30 per Residential Lot comprising a four bedroom Unit
3. Flood mitigation – land	Purchase of easement over Lot 227 DP 755740 for flood levee	Land acquisition	Monetary Development Contribution for each Residential Lot.-	Immediately prior to the issue of each Subdivision Certificate for Residential Lots, but only for the Residential Lots that are to be the subject of the relevant Subdivision Certificate.-	\$30.00 per Residential Lot that is suitable for a Detached Dwelling and (for avoidance of doubt) does not comprise a Unit
					\$15.48 per Residential Lot comprising a one bedroom Unit
					\$20.24 per Residential Lot comprising a two bedroom Unit
					\$25.00 per Residential Lot comprising a three bedroom Unit
					\$30.00per Residential Lot comprising a four bedroom Unit
4. Environmental land	Purchase of Lot 227 DP 755740, buffer	Land acquisition	Monetary Development	Immediately prior to the issue of each	\$1502.32 per Residential Lot that is suitable for a Detached Dwelling and (for avoidance of doubt) does not comprise a Unit

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
Item Number and Public Facility	Public Purpose	Land acquisition or other	Scope of Obligation	When Required	Contribution Value \$
purchase	areas, and habitat areas, and additional areas "outside urban footprint" in DCP B24 Area E Urban Release Development Code Figure 2.1 as per the published draft in existence as at the date of this Agreement		Contribution for each Residential Lot.-	Subdivision Certificate for Residential Lots, but only for the Residential Lots that are to be the subject of the relevant Subdivision Certificate.-	\$775.03 per Residential Lot comprising a one bedroom Unit
					\$1,013.50 per Residential Lot comprising a two bedroom Unit
					\$1,251.96 per Residential Lot comprising a three bedroom Unit
					\$1,502.32 per Residential Lot comprising a four bedroom Unit
5. Wetland and habitat restoration	Wetland and habitat restoration on lands identified in Council endorsed Wetland and Habitat Restoration Plans as at the date of this Agreement	Land acquisition	Monetary Development Contribution for each Residential Lot.-	Immediately prior to the issue of each Subdivision Certificate for Residential Lots, but only for the Residential Lots that are to be the subject of the relevant Subdivision Certificate.-	\$3,448.91 per Residential Lot that is suitable for a Detached Dwelling and (for avoidance of doubt) does not comprise a Unit
					\$1,779.25 per Residential Lot comprising a one bedroom Unit
					\$2,326.71 per Residential Lot comprising a two bedroom Unit
					\$2,874.18 per Residential Lot comprising a three bedroom Unit
					\$3,448.91 per Residential Lot comprising a four bedroom Unit
6. Structured Public Open Space -	In accordance with DCP-B24 Area E Urban Release	Other	Monetary Development Contribution for	Immediately prior to the issue of each Subdivision Certificate	\$8,867.94 per Residential Lot that is suitable for a Detached Dwelling and (for avoidance of doubt) does not comprise a Unit



Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
Item Number and Public Facility	Public Purpose	Land acquisition or other	Scope of Obligation	When Required	Contribution Value \$
works	Development Code as per the published draft in existence as at the date of this Agreement		each Residential Lot.-	for Residential Lots, but only for the Residential Lots that are to be the subject of the relevant Subdivision Certificate.	\$4,574.86 per Residential Lot comprising a one bedroom Unit \$5,982.51 per Residential Lot comprising a two bedroom Unit \$7,390.16 per Residential Lot comprising a three bedroom Unit \$8,867.94 per Residential Lot comprising a four bedroom Unit
7. Structured Public Open Space - land	In accordance with DCP-B24 Area E Urban Release Development Code as per the published draft in existence as at the date of this Agreement	Land acquisition	Monetary Development Contribution for each Residential Lot.-	Immediately prior to the issue of each Subdivision Certificate for Residential Lots, but only for the Residential Lots that are to be the subject of the relevant Subdivision Certificate.	\$1,234.33 per Residential Lot that is suitable for a Detached Dwelling and (for avoidance of doubt) does not comprise a Unit \$636.78 per Residential Lot comprising a one bedroom Unit \$832.71 per Residential Lot comprising a two bedroom Unit \$1028.64 per Residential Lot comprising a three bedroom Unit \$1,234.33 per Residential Lot comprising a four bedroom Unit

Item Number and Public Facility	Public Purpose	Land acquisition or other	Scope of Obligation	When Required	Contribution Value \$
<b>PART B – Dedication of land</b>					
8. Broadwater Parkway Road Reserve	Public road	Not applicable	Dedication of an area of land as a public road that is generally consistent with the area identified as such in Sheet 1 of Schedule 3.	<p>If the dedication is not provided for in the draft plan of subdivision that is the subject of the first Subdivision Certificate for Residential Lots - Immediately prior to the issue of that Subdivision Certificate.</p> <p>If the dedication is provided for in the draft plan of subdivision that is the subject of the first Subdivision Certificate for Residential Lots - upon the registration of that plan of subdivision</p>	\$218,124.40
9. Public Reserve	Environmental land	Not applicable	Dedication of an area of land within Lot 1 DP 304649 and Lot 1 DP 781697 as a public reserve that is generally consistent with the area within those allotments	If the dedication is not provided for in the draft plan of subdivision that is the subject of the first Subdivision Certificate for Residential Lots - Immediately prior to the issue of that Subdivision Certificate.	\$78,940.80

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
Item Number and Public Facility	Public Purpose	Land acquisition or other	Scope of Obligation	When Required	Contribution Value \$
			marked by blue hatching in Sheet 1 of Schedule 3.	If the dedication is provided for in the draft plan of subdivision that is the subject of the first Subdivision Certificate for Residential Lots - upon the registration of that plan of subdivision	

**Schedule 2**

(Clause 1.1 and Clause 26.2)

**Novation Deed**

**[Novation/Assignment] Deed**

**Tweed Shire Council**

and

**[Drafting Note: Insert name of Original Developer]**

and

**[Drafting Note: Insert name of New Developer]**

**Novation/Assignment Deed**

DATE

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## Parties

**Tweed Shire Council** ABN 90178732496 of Tumbulgum Road, Murwillumbah, New South Wales 2484 (**Council**)

and

**##** [Drafting Note. Insert name, ABN & address of Developer](**Original Developer**)

and

**##**[Drafting Note. Insert name, ABN & address of Developer] (**New Developer**)

## Background

- A The Council and the Original Developer are parties to the Original Agreement.
- B The Original Agreement relates to the whole of the Land.
- C The Original Developer wishes to transfer [*the whole of*] [*part or parts of*] the Land comprising Lot [*insert Lot number*] in DP (Transferred Land) [*insert Deposited Plan number*] to the New Developer. [*Drafting Note: to be included where all or part of the land is to be transferred to the New Developer and the Original Agreement is to be novated in relation to the Transferred Land*].

**OR**

The Original Developer wishes to novate all of its rights and obligations under the Original Agreement to the New Developer. [*Drafting Note: to be included where there is no transfer of the Land to the New Developer, the Original Developer has entered into a separate arrangement with the New Developer that requires a novation of all the Original Developer's rights and obligations under the Original Agreement to the New Developer*].

**OR**

The Original Developer wishes to assign its rights and interests under the Original Agreement to the New Developer. [*Drafting Note: to be included where the Original Developer has entered into a separate arrangement with the New Developer and the Original Developer's rights and interests in the Original Agreement are to be assigned*].

## Agreed terms

### 1 Interpretation

#### 1.1 Definitions

1.1.1 In this document:

**Effective Date** means [insert].

**Council** means Tweed Shire Council [*Drafting Note: Only to be included where the Original Agreement is assigned to the New Developer*].

**Land** has the meaning given to that term in the Original Agreement.

**Original Agreement** means the voluntary planning agreement dated [insert] and made between the Council the Original Developer and other parties.

## **1.2 Construction**

1.2.1 Unless expressed to the contrary, in this document:

- (a) words in the singular include the plural and vice versa;
- (b) any gender includes the other genders;
- (c) if a word or phrase is defined its other grammatical forms have corresponding meanings;
- (d) "includes" means includes without limitation;
- (e) no rule of construction will apply to a clause to the disadvantage of a party merely because that party put forward the clause or would otherwise benefit from it; and
- (f) a reference to:
  - (i) a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority;
  - (ii) a person includes the person's legal personal representatives, successors, assigns and persons substituted by novation;
  - (iii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified or replaced; and
  - (iv) an obligation includes a warranty or representation and a reference to a failure to comply with an obligation includes a breach of warranty or representation.

## **1.3 Headings**

1.3.1 Headings do not affect the interpretation of this document.

## **2 Novation in respect of Transferred Land [Drafting Note - Delete clauses 2, 3 and 4 if novation is not applicable]**

### **2.1 Original Agreement**

2.1.1 Subject to clause 3 and with effect from the Effective Date:

- (a) the New Developer is substituted for the Original Developer as a party to the Original Agreement in relation to the Transferred Land;
- (b) the New Developer will be bound by the Original Agreement, and will be entitled to the benefit of the Original Agreement, as if the New Developer was a

party to the Original Agreement instead of the Original Developer in relation to the Transferred Land; and

- (c) the Original Developer is released and discharged from all obligations and liabilities, and from all claims (whether for costs, damages, fees, expenses or otherwise), arising under the Original Agreement in relation to the Transferred Land.

## **2.2 Reference in Original Agreement**

2.2.1 All references to the Original Developer in the Original Agreement are to be construed as references to the New Developer in relation to the Transferred Land.

## **2.3 Address for notices**

2.3.1 The Council must address all notices and communications to be given or made by it in relation to the Transferred Land to the New Developer under the Original Agreement to the following address:

**New Developer: [Insert details]**

Address: [Insert details]

Fax: [Insert details]

Contact Person: [Insert details]

Email: [Insert details]

# **3 Novation [Drafting Note - Delete clauses 2, 3 and 4 if novation is not applicable]**

## **3.1 Original Agreement**

3.1.1 Subject to clause 3 and with effect from the Effective Date:

- (a) the New Developer is substituted for the Original Developer as a party to the Original Agreement;
- (b) the New Developer will be bound by the Original Agreement, and will be entitled to the benefit of the Original Agreement, as if the New Developer was a party to the Original Agreement instead of the Original Developer; and
- (c) the Original Developer is released and discharged from all obligations and liabilities, and from all claims (whether for costs, damages, fees, expenses or otherwise), arising under the Original Agreement.

## **3.2 Reference in Original Agreement**

3.2.1 All references to the Original Developer in the Original Agreement are to be construed as references to the New Developer.

## **3.3 Address for notices**

3.3.1 The Council must address all notices and communications to be given or made by it to the New Developer under the Original Agreement to the following address:

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**New Developer: [Insert details]**

**Address: [Insert details]**

**Fax: [Insert details]**

**Contact Person: [Insert details]**

**Email: [Insert details]**

## **4 Affirmation of the Original Agreement**

- 4.1 The Original Agreement will be read and construed subject to this deed, and in all other respects the provisions of the Original Agreement are ratified and confirmed, and, subject to the variation and novation contained in this deed, the Original Agreement will continue in full force and effect.

## **5 Assignment [Drafting Note - Delete if assignment is not applicable]**

### **5.1 Assignment of Rights**

5.1.1 The Original Developer assigns to the New Developer absolutely all of the Original Developer's rights (both present, future, actual and contingent) under the Original Agreement or which arise as a result of the Original Developer exercising any right under the Original Agreement.

5.1.2 The New Developer accepts the assignment of the Original Developer's rights (both present, future, actual and contingent) under the Original Agreement on the terms of this deed.

### **5.2 Assumption of obligations**

5.2.1 On and from the Effective Date, the New Developer must properly and punctually observe and perform all of the Original Developer's obligations (both present, future, actual and contingent) under the Original Agreement or which arise as a result of the Council exercising any right under the Original Agreement and which are due to be performed on or after the Effective Date.

## **6 Indemnities**

- 6.1 The New Developer indemnifies the Original Developer on demand against all liabilities, claims, damages and loss which the Original Developer suffers or incurs in relation to the Original Agreement including those which arise or relate to acts or omissions occurring on or after the Effective Date.

## **7 Warranties and representations**

### **7.1 Warranties**

7.1.1 Each party represents and warrants that, at the time of execution, and at the Effective Date:



- (a) it has capacity unconditionally to execute, deliver and comply with its obligations under this document;
- (b) it has taken all necessary action to authorise the unconditional execution and delivery of, and the compliance with, its obligations under this document;
- (c) this document is a valid and legally binding obligation and is enforceable against it by each other party in accordance with its terms; and
- (d) its unconditional execution and delivery of, and compliance with its obligations under, this document do not contravene:
  - (i) any law or directive from a government entity;
  - (ii) its constituent documents;
  - (iii) any agreement or instrument to which it is a party; or
  - (iv) any obligation of it to any other person.

## **7.2 Survival of warranties**

7.2.1 The warranties and representations in clause 7.1 survive the execution of this document and the [novation/assignment] of the Original Agreement.

## **8 GST**

8.1 Where a supply made under this deed gives rise to a liability for GST, the consideration to be provided for that supply (other than under this clause) shall be increased by an additional amount equal to the GST payable on the supply. The additional amount must be paid, and the supplier must provide a tax invoice, at the same time as the other consideration for that supply is to be provided under this deed. Terms used in this clause have the meanings in the *A New Tax System (Goods and Services Tax) Act 1999*.

## **9 Stamp duty and costs**

- 9.1 The Original Developer and the New Developer are jointly and severally responsible for the Council's legal costs incidental to the negotiation, preparation and execution of this deed. **[Drafting Note:** To be included where the Original Agreement is being assigned.]
- 9.2 The New Developer will pay all stamp duty arising directly or indirectly from this deed.

## **10 Further acts**

- 10.1 Each party will take all steps, execute all deeds and do everything reasonably required by any other party to give effect to any of the actions contemplated by this deed.
- 10.2 This deed binds each party which signs it even if other parties do not, or if the execution by other parties is defective, void or voidable.

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## **11 Amendment**

- 11.1 This document may only be varied or replaced by a document executed by the parties.

## **12 Governing law**

- 12.1 This deed is governed by the law in force in the place specified in the New South Wales and the parties submit to the non-exclusive jurisdiction of the courts of that place.

## **13 Counterparts**

- 13.1 This deed may consist of a number of counterparts and the counterparts taken together constitute one and the same instrument.

## **Execution**

### **Executed as a Deed**

**Dated:**

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**Executed on behalf of the Council by affixing the SEAL in accordance with a resolution passed at a duly convened meeting held on:**

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**General Manager**

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**Mayor**

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

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**Name/Position**

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**Name/Position**

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

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**Name/Position**

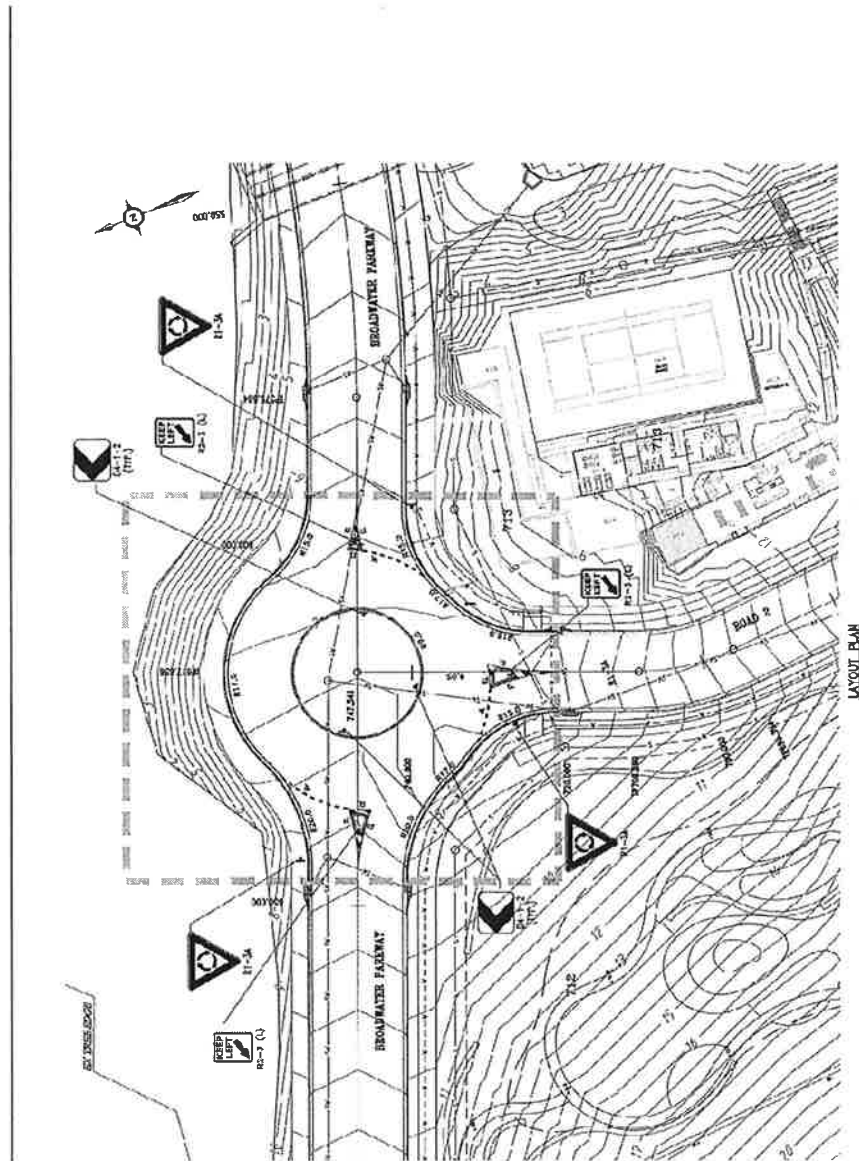
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**Name/Position**



Sheet 2

Broadwater Parkway Roundabout Works



<p>NEWLAND DEVELOPERS PTY LTD                  TERRANORA PRECINCT 1                  EXTENT OF BROADWATER                  PARKWAY ROUNDABOUT WORKS</p>	<p>09-374                  1000-311                  SK 4283                  SHEET 4</p>	<p><b>Bradlet</b>                  CIVIL CONSULTANTS</p> <p><small>Registered Civil Engineer                  No. 123456789                  No. of 2000-0000                  No. of 2000-0000                  No. of 2000-0000                  No. of 2000-0000</small></p>
<p>1:1 Scale (Full Size)</p>		



## **Appendix**

(Clause 41)

*Environmental Planning and Assessment Regulation 2000*

(Clause 25E)

## **Explanatory Note**

### **Draft Planning Agreement**

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

### **Parties**

**Tweed Shire Council** ABN 90178732496 of Tumbulgum Road, Murwillumbah, New South Wales 2484 (**Council**)

and

**Metricon Qld Pty Limited** ACN 053 189 496 of 501 Blackburn Road, Mount Waverley, Victoria 3149 (**Developer**)

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

Lot 1 DP 304649, Lot 1 DP 175235, Lot 1 DP 781687, Lot 2 DP 778727, Lot 1 DP 781697, Lot 1 DP 169490, Lot 40 DP 254416 and Lot 43 DP 254416, Fraser Drive, Terranora.

### **Description of Proposed Development**

The 'Altitude Aspire' residential subdivision and associated works carried out on the Land under an approval given as a consequence of Project Application No. 09\_0166.

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

A draft planning agreement (**the Agreement**) has been prepared. The proposed parties to the Agreement are the Tweed Shire Council (**the Council**) and Metricon Qld Pty Ltd (**the Developer**).

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## **Objectives of Draft Planning Agreement**

The objective of the Agreement is to provide a mechanism by which monetary contributions may be made by the Developer towards the cost of public amenities, services and infrastructure, such as:

- the construction of Broadwater Parkway and Mahers Lane;
- flood mitigation;
- safeguarding and restoring the environment;
- the provision of structured public open space,

The agreement also provides for the dedication of land for the future route of the Broadwater Parkway and for a public reserve.

## **Nature of Draft Planning Agreement**

The Agreement will be a voluntary agreement under section 93F of the *Environmental Planning and Assessment Act 1979 (the Act)*.

An agreement of this kind may require a developer to dedicate land free of cost, pay a monetary contribution, or provide any other material public benefit to be used for or applied towards a public purpose.

In this particular case, the Agreement involves the payment of monetary contributions (amounts are set out in the table of Schedule 1 of the Agreement) and the dedication of land (generally consistent with the area identified in Sheet 1 of Schedule 3 of the Agreement).

A planning agreement cannot impose an obligation on a planning authority to grant development consent or a project approval. A planning agreement cannot breach the provisions of an environmental planning instrument, a development consent or a project approval applying to the relevant land.

Where it is relevant to a development application, a consent authority is to take into consideration a planning agreement, or any draft planning agreement that a developer has offered to enter into.

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

The effect of the Agreement, if implemented, is that the Developer would be obliged to make monetary contributions to the Council, progressively, immediately prior to the issue of subdivision certificates for the creation of Residential Lots,

The Developer would also be obliged to dedicate a portion of land to the future route of the Broadwater Parkway and for a public reserve. The timing of the dedications are linked to the registration of the first plan of subdivision creating Residential Lots.

The agreement includes a provision allowing the Developer to receive credit (against its monetary contributions) for the value of the land to be dedicated for the future Broadwater Parkway and the public reserve. In certain circumstances the Developer may also receive a credit for works associated with the Broadwater Parkway roundabout.



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

### **Impact on the public or any relevant section of the public**

The Agreement has a positive impact on the public. This is because the Agreement provides an opportunity to fund important local civil works and contribute to the wetland and habitat restoration.

Local residents in the proximity of the Area E development area will benefit because the agreement assists in the provision of appropriate infrastructure and conservation measures, in-line with the development of part of this area.

### **Promotion of the public interest and the objects of the Act**

The Agreement promotes the following objects of the Act:

(a) Section 5(a)(i):

to encourage: ... the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment ...

(b) Section 5(a)(iv):

to encourage ... the provision of land for public purposes ...

(c) Section 5(a)(v):

to encourage ... the provision and co-ordination of community services and facilities ...

(d) Section 5(a)(vi):

to encourage ... the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats ...

(e) Section 5(a)(vii):

to encourage ... ecologically sustainable development ...

The Agreement promotes the above objects of the Act, and the public interest, by:

- setting aside land for the future Broadwater Parkway;
- providing land for a public reserve; and
- providing for a significant monetary contribution for the construction of Broadwater Parkway and Mahers Lane, flood mitigation, safeguarding and restoring the environment, the provision of structured public open space.

### **The purposes of the *Local Government Act 1993***

The Council is the planning authority that would be a party to the Agreement. The Council is a public authority constituted under the *Local Government Act 1993*.

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The Agreement promotes the following purposes of this Act:

(a) Section 7(a):

to provide the legal framework for an effective, efficient, environmentally responsible and open system of local government in New South Wales ...

(b) Section 7(d):

to give councils: ... the ability to provide goods, services and facilities, and to carry out activities, appropriate to the current and future needs of local communities and of the wider public ... to require councils, councillors and council employees to have regard to the principles of ecologically sustainable development in carrying out their responsibilities ...

(c) Section 7(e):

to require councils, councillors and council employees to have regard to the principles of ecologically sustainable development in carrying out their responsibilities ...

The Agreement promotes the above purposes of the Act in the same way that is set out in the previous section above.

### **The council's charter**

Section 8 of the *Local Government Act 1993* sets out the 'council's charter'

The Agreement promotes the following elements of the council's charter:

- [T]o provide directly or on behalf of other levels of government, after due consultation, adequate, equitable and appropriate services and facilities for the community and to ensure that those services and facilities are managed efficiently and effectively
- to exercise community leadership ...
- to properly manage, develop, protect, restore, enhance and conserve the environment of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable development
- to have regard to the long term and cumulative effects of its decisions
- to bear in mind that it is the custodian and trustee of public assets and to effectively plan for, account for and manage the assets for which it is responsible ...

The Agreement promotes the above elements of the council's charter in the same way that is set out in the previous section above.

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

The planning purpose of the Agreement is to provide for expanded public infrastructure and environmental conservation in-line with the expansion of the urban footprint.

The Agreement provides a reasonable means of achieving that purpose because the Council has carefully considered the infrastructure, flood mitigation and conservation requirements that are appropriate in the context of the development of Area E. The proposed contributions and provision for land dedication represent an appropriate response to the community's requirements.

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**The Council's Capital Works Program**

The Agreement conforms with Council's Capital Works Program as reflected in relevant Section 94 Contribution Plans and Water/Sewer Development Servicing Plans.

**Construction certificate, occupation certificate or subdivision certificate**

The Agreement does not specify any requirements that must be complied with before a construction certificate or occupation certificate is issued.

The Agreement does specify that certain requirements must be complied with before a subdivision certificate is issued. The requirements are set out in the table in Schedule 1 of the Agreement.

In brief terms, monetary contributions must be paid to the Council immediately prior to the issue of each Subdivision Certificate for Residential Lots.

Additionally, land for the Broadwater Parkway road reserve and land for a public reserve must be dedicated immediately prior to the first subdivision certificate for Residential Lots, but only if the dedication of land for the Broadwater Parkway road reserve is not provided for in the draft plan of subdivision that is the subject of that certificate.