

Original

Deed

Alkira Estate, Horsley Planning Agreement

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

**Wollongong City Council
Grindley Properties Pty Ltd**

Date: 8 September 2015

Alkira Estate, Horsley Planning Agreement

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Summary Sheet

Council:

Name: Wollongong City Council
Address: Council's Administration Building, 41 Burelli Street, Wollongong
Telephone: (02) 4227 7465
Facsimile: (02) 4227 7277
Email: council@wollongong.nsw.gov.au
Representative: David Green

Developer:

Name: Grindley Properties Pty Ltd
Address: 55 Grandview Street, Pymble NSW 2073
Telephone: (02) 9988 3811
Facsimile: (02) 9988 3575
Email: alex.jorgensen@crownprojects.com.au
Representative: Alex Jorgensen

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 clause 7.

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Security:

See Part 4.

Registration:

See clause 28.

Restriction on dealings:

See clause 29.

Dispute Resolution:

See Part 3.

Alkira Estate, Horsley Planning Agreement

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

Parties

Wollongong City Council ABN 63 139 525 939 of Council's Administration Building, 41 Burelli Street, Wollongong (**Council**)

and

Grindley Properties Pty Ltd ABN 41 003 884 704 of 55 Grandview Street, Pymble NSW 2073 (**Developer**)

Background

- A A Development Consent, as modified, has been granted to the Development.
- B The Developer intends to lodge an application under s96 of the Act to modify the Development Consent for the Development to modify condition 17.
- C The Developer is willing to provide Development Contributions to the Council in accordance with this Deed.

Operative provisions

Part 1 - Preliminary

1 Interpretation

- 1.1 In this Deed the following definitions apply:

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

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

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

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

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

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

Completed means completed in accordance with the requirements of this Deed.

Compliance Certificate has the same meaning as in the Act.

Contribution Value means, in respect of an Item, the \$ amount shown in, or determined in accordance with, Column 5 of the Table to Schedule 1 corresponding to that Item, as varied in accordance with clause 9.

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

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

Defects Liability Period means the period of 14 months commencing on the day immediately after a Work is completed for the purposes of this Deed.

Development means residential subdivision of the Land into 117 residential lots of which 114 are Final Lots and associated public roads and demolition works.

Development Application has the same meaning as in the Act.

Development Consent means a development consent, within the meaning of the Act, granted by the Council to Development Application DA-2010/1350.

Development Contribution means a monetary contribution, the dedication of land free of cost, the carrying out of work, or the provision of any other material public benefit, or any combination of them, to be used for, or applied towards a public purpose, but does not include any Security or other benefit provided by a Party to the Council to secure the enforcement of that Party's obligations under this Deed for the purposes of s93F(3)(g) of the Act.

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

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

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) that was in existence on the date of this Deed.

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 Column 1 of Schedule 1.

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

Land means Lots 3, 5, 6 and 9 in DP33650, Lot N in DP103642 and Lot 4 in DP661032 otherwise known as 80, 88, 94, 104 Shone Avenue, Horsley and Lot 9 Iredell Road, Horsley.

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.

Party means a party to this Deed.

Quantity Surveyor means a suitably qualified and experienced quantity surveyor independent of the Parties and agreed to between the Parties.

Plan of Subdivision has the meaning given to it in s195 of the *Conveyancing Act 1919*

Rectify means rectify, remedy or correct.

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

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

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 Deed.

Subdivision Certificate has the same meaning as in the Act.

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

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

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

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- 1.2.4 A reference in this Deed to dollars or \$ means Australian dollars and all amounts payable under this Deed are payable in Australian dollars.
- 1.2.5 A reference in this Deed to a \$ value relating to a Development Contribution is a reference to the value exclusive of GST.
- 1.2.6 A reference in this Deed to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- 1.2.7 A reference in this Deed to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- 1.2.8 A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Deed.
- 1.2.9 An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- 1.2.10 Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- 1.2.11 A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
- 1.2.12 References to the word 'include' or 'including' are to be construed without limitation.
- 1.2.13 A reference to this Deed includes the agreement recorded in this Deed.
- 1.2.14 A reference to a Party to this Deed includes a reference to the servants, agents and contractors of the Party, the Party's successors and assigns.
- 1.2.15 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 Deed.
- 1.2.17 Notes appearing in this Deed are operative provisions of this Deed.

2 Status of this Deed

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

3 Commencement

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

4 Application of this Deed

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

5 Warranties

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

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 Deed that are not inconsistent with this Deed for the purpose of implementing this Deed.

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

- 7.1 This Deed excludes the application of s94 and s94A of the Act to the Development.
- 7.2 This Deed does not exclude the application of s94EF of the Act to the Development.

Part 2 – Development Contributions

8 Provision of Development Contributions

- 8.1 The Developer is to make Development Contributions to the Council in accordance with Schedule 1, any other provision of this Deed relating to the making of Development Contributions and otherwise to the satisfaction of the Council.
- 8.2 Any Contribution Value specified in Part C of the Table in Schedule 1 in relation to the carrying out of Work does not serve to define the extent of the Developer's obligation to carry out the Work.
- 8.3 The Council is to apply each Development Contribution made by the Developer under this Deed towards services and facilities within the West Dapto Release Area identified in Figure 1.1 of the document titled '*West Dapto Release Area Section 94 Contributions Plan*' dated 29 November 2011.
- 8.4 Despite clause 8.3, the Council may apply a Development Contribution made under this Deed towards a public purpose other than the public purpose specified in this Deed if the Council reasonably considers that the public interest would be better served by applying the Development Contribution towards that other purpose rather than the purpose so specified.

9 Contribution Value of Work

- 9.1 Despite clause 8.1, the Contribution Value of a Work specified in Column 5 of Part C of the Table in Schedule 1 can be varied where the terms of this clause are followed.
- 9.2 Prior to Completion of a Work, the Developer may submit a cost variation request in writing to Council in respect of that Work. Any cost variation request submitted to Council must be accompanied by documentation evidencing the cost variation.
- 9.3 Council is to review the request, and advise the Developer, within 14 days, as to whether the costs variation request is accepted.
- 9.4 Where Council advises in writing the request has been accepted, the Contribution Value of the relevant Item of Work becomes the amount identified in the cost variation request.
- 9.5 Where, within the 14 days referred to in clause 9.3:
- 9.5.1 the Council advises the amount is not accepted and the parties are unable to otherwise reach agreement on an acceptable amount, or
- 9.5.2 the Council fails to respond,
- the parties are to agree and appoint a Quantity Surveyor who shall consider the Developer's cost variation request and determine whether the amount identified in the request is a reasonable cost for completion of the Work.
- 9.6 The determination by the Quantity Surveyor of the cost variation request is final and binding on the parties except in the case of fraud or misfeasance by the Quantity Surveyor and the amount determined becomes the Contribution Value for the purposes of this Deed.
- 9.7 The costs associated with the engagement of a Quantity Surveyor are to be borne by the Developer.

10 Payment of monetary Development Contributions

- 10.1 A monetary Development Contribution is made for the purposes of this Deed when the Council receives the full amount of the contribution payable under this Deed 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.

11 Reduction in monetary Development Contributions

- 11.1 Despite any other provision in this Deed, the amount of monetary Development Contributions required to be paid per Final Lot is to be calculated as follows:

$$\text{\$MC} = \$30,000.00 - (\text{SCV}/114)$$

Where:

\\$MC is the amount of monetary Development Contributions per Final Lot

SCV is the sum of all the Contribution Values of Works and Contribution Values of land to be dedicated under this Deed.

- 11.2 For the avoidance of doubt, the parties agree that Council is not required to refund, pay or transfer any amount to the Developer, irrespective of the amount or amounts determined as SCV referred to in clause 11.1.

12 Dedication of land

- 12.1 A Development Contribution comprising the dedication of land is made for the purposes of this Deed when:
- 12.1.1 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
- 12.1.2 the Council is given, free of charge or cost:
- (a) an instrument in registrable form under the Real Property Act 1900 duly executed by the Developer as transferor that is effective to transfer the title to the land to the Council when executed by the Council as transferee and registered,
 - (b) the written consent to the registration of the transfer of any person whose consent is required to that registration, and
 - (c) a written undertaking from any person holding the certificate of title to the production of the certificate of title for the purposes of registration of the transfer.
- 12.2 The Developer is to do all things reasonably necessary to enable registration of the instrument of transfer to occur.
- 12.3 The Developer is to ensure that land dedicated to the Council under this Deed is free of all encumbrances and affectations (whether registered or unregistered and including without limitation any charge or liability for rates, taxes and charges) except as otherwise agreed in writing by the Council acting reasonably.
- 12.4 Despite any other provision of this Deed, 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 Deed, the Developer is to comply with clause 12.1.2 not later than 7 days after the Work is completed for the purposes of this Deed.

13 Works

- 13.1 The Developer, at its cost, must:
- 13.1.1 if necessary, obtain any consents, approvals or permits required by a relevant Authority for the conduct of the Works;
- 13.1.2 carry out and Complete each Item of Work by the time specified Column 4 of Schedule 1;
- 13.1.3 carry out and Complete the Works:
- (a) in accordance with the requirements of Council and any applicable Approval; and

- (b) in a proper and workmanlike manner, complying with current industry practice and applicable Australian standards, as well as any design or specification approved by Council.

- 13.2 The Developer, at its own cost, is to comply with any reasonable direction given to it by the Council to prepare or modify a design or specification relating to a Work that the Developer is required to carry out under this Deed.

14 Variation to Work

- 14.1 The design or specification of any Work that is required to be carried out by the Developer under this Deed may be varied by agreement in writing between the Parties, acting reasonably, without the necessity for an amendment to this Deed

15 Access to land by Developer

- 15.1 This clause applies if the Developer accesses, uses or occupies any land owned by Council in performing the obligations or exercising the rights of the Developer under this Deed (**Necessary Access**).
- 15.2 The terms of any Necessary Access are to be agreed between the Parties.

16 Access to land by Council

- 16.1 The Council may enter any land on which Work is being carried out by the Developer under this Deed in order to inspect, examine or test the Work, or to remedy any breach by the Developer of its obligations under this Deed relating to the Work.
- 16.2 The Council is to give the Developer prior reasonable notice before it enters land under clause 16.1.

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 Deed 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.

18 Repair of damage

- 18.1 The Developer is to Maintain any Work required to be carried out by the Developer under this Deed until the Work is Completed for the purposes of this Deed 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 Works

- 19.1 If the Developer considers an Item of Work is Complete it must serve a notice on Council within 14 days of completion of that Item (**Completion Notice**) which:
 - 19.1.1 is in writing; and
 - 19.1.2 specifies the date on which the Developer believes the Work was Completed.
- 19.2 Within the earlier of:
 - 19.2.1 14 days of inspecting the Item of Work set out in a Completion Notice; and
 - 19.2.2 21 days from receipt of the Completion Notice,Council must provide notice in writing to the Developer that the relevant Item of Work:
 - 19.2.3 has been Completed; or
 - 19.2.4 has not been Completed, in which case the notice must detail:
 - (a) those aspects of the Item of Work which have not been Completed; and
 - (b) the work Council requires the Developer to carry out in order to rectify those deficiencies.
- 19.3 If Council does not provide the Developer with notice within the time specified in clause 19.2, the Item of Work the subject of a completion notice will be deemed to have been Completed on the date nominated in the Completion Notice.
- 19.4 Where Council serves notice on the Developer pursuant to clause 19.2.4, the Developer must:
 - 19.4.1 Rectify the deficiencies in that Item in accordance with that notice within a reasonable time (not been less than 14 days from the date it was issued by Council); or
 - 19.4.2 serve a notice on Council that it disputes the matters set out in the notice.
- 19.5 Where the Developer:
 - 19.5.1 serves notice on Council in accordance with clause 19.4.2, the dispute resolution provisions of this Deed apply; or
 - 19.5.2 Rectifies the Work in accordance with clause 19.4.1, it must serve upon Council a new Completion Notice for the Work it has rectified (**New Completion Notice**).

- 19.6 The provisions of clauses 19.1-19.5 (inclusive) apply to any New Completion Notice issued by the Developer.

20 Rectification of defects

- 20.1 Where the work is Complete, but contains a defect (**Defect**) which:
- 20.1.1 adversely affects the ordinary use and/or enjoyment of the work; or
 - 20.1.2 will require maintenance or rectification works to be performed on it at some time in the future as a result of the existence of the defect,
- Council may issue a notice to the Developer (**Defects Notice**) concerning the work but only during the Defects Liability Period.
- 20.2 A Defects Notice must contain the following information:
- 20.2.1 the nature and extent of the Defect;
 - 20.2.2 the work Council requires the Developer to carry out in order to rectify the Defect; and
 - 20.2.3 the time within which the Defect must be rectified by the Developer (which must be a reasonable time and not less than twenty-one (21) days.

Developer to rectify Defects

- 20.3 The Developer must rectify the Defects identified in a Defects Notice prior to the date specified in that notice.
- 20.4 The Developer must follow the procedure set out in clause 19 in respect of the completion of the rectification of any Defect as if a reference in that clause to an Item of Work is a reference to a Defect or Defects.

Right of Council to step-in

- 20.5 Council may, at its absolute discretion, rectify a Defect set out in a Defects Notice where the Developer has failed to comply with a Defects Notice, but only after giving the Developer thirty (30) days written notice of its intention to do so.

Consequence of step-in

- 20.6 If Council elects to exercise the step-in rights granted to it under clause 20.5 then it may claim any costs incurred by it as a liquidated debt.
- 20.7 Where Council exercises its step-in rights, it may:
- 20.7.1 call upon and utilise a part or portion of the Bank Guarantee to meet any costs for which the Developer is liable under clause 20.6; and
 - 20.7.2 recover as a debt due in a court of competent jurisdiction any difference between the amount referred to in clause 20.7.1 and the costs incurred by Council in rectifying

21 Works-As-Executed-Plan

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

- 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 Deed, and any purpose relating to its role as an Authority.

Part 3 – Dispute Resolution

22 Dispute resolution – expert determination

- 22.1 This clause applies to a Dispute between any of the Parties to this Deed concerning a matter arising in connection with this Deed that can be determined by an appropriately qualified expert if the Parties to the Dispute agree (acting reasonably and in good faith) that it can be so determined.
- 22.2 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.
- 22.3 If a notice is given under clause 22.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 22.4 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.
- 22.5 The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.
- 22.6 Each Party is to bear its own costs arising from or in connection with the appointment of the expert and the expert determination.
- 22.7 The Parties are to share equally the costs of the President, the expert, and the expert determination.

23 Dispute Resolution - mediation

- 23.1 This clause applies to any Dispute arising in connection with this Deed other than a Dispute to which clause 23 applies.
- 23.2 Such a Dispute 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 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.
- 23.5 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.

- 23.6 Each Party is to bear its own costs arising from or in connection with the appointment of a mediator and the mediation.
- 23.7 The Parties are to share equally the costs of the President, the mediator, and the mediation.
- 23.8 Nothing in clauses 22 or 23 prevent a party from seeking interlocutory injunctive or declaratory relief concerning any matter arising out of this Deed.

Part 4 - Enforcement

24 Security for obligations relating to Work

- 24.1 Subject to clause 24.2, the Developer is not to make or cause, or suffer or permit the making of an application for a Subdivision Certificate in respect of Stage 3 of the Development unless and until each Development Contribution comprising a Work has been Completed.
- 24.2 Within 14 days from the execution of this Deed, the Developer must deliver to Council the Security:
 - 24.2.1 in a form acceptable to Council;
 - 24.2.2 for an amount equal to 50% of the cost to complete any uncompleted part of the Work ; and
 - 24.2.3 without an expiry date.
- 24.3 If the Developer does not comply with the terms of this Deed with respect to the provision of the Works, Council may issue the Developer with a notice requiring the Developer to rectify the relevant default within 7 days from the date of that notice.
- 24.4 If the Developer fails to comply with a notice issued under clause 24.3 to the reasonable satisfaction of Council, Council may, without limiting any other avenues available to it, call on the relevant Security to the extent necessary to reimburse Council for any costs incurred by it in rectifying the relevant default of the Developer.
- 24.5 Within 14 days of being requested to do so by Council the Developer must ensure that the amount secured by the Security is returned to the relevant level set out at clause 24.2.2.
- 24.6 Upon the Completion of all Items of Work and the commencement of the Defects Liability Period for the last Item, Council must return the Security held by it.
- 24.7 In exchange, the Developer must provide the Council with Security in a form acceptable to Council for an amount equal to 5% of the sum of the Contribution Value of the Items of Work.
- 24.8 Council must return the remaining Security (if any) to the Developer at the expiration of the Defects Liability Period for the last Item of Work that is Completed.

25 Acquisition of land required to be dedicated

- 25.1 If the Developer does not dedicate land required to be dedicated under this Deed at the time at which it is required to be dedicated, the Developer consents to the Council compulsorily acquiring the land for compensation in the amount of \$1 without having to follow the pre acquisition procedure under the Just Terms Act.
- 25.2 The Council is to only acquire land pursuant to clause 25.1 if it considers it reasonable to do so having regard to the circumstances surrounding the failure by the Developer to dedicate the land required to be dedicated under this Deed.
- 25.3 Clause 25.1 constitutes an agreement for the purposes of s30 of the Just Terms Act.
- 25.4 If, as a result of the acquisition referred to in clause 25.1, the Council is required to pay compensation to any person other than the Developer, the Developer is to reimburse the Council that amount, upon a written request being made by the Council, or the Council can call on any Security provided under this Deed.
- 25.5 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.
- 25.6 The Developer is to promptly do all things necessary, and consents to the Council doing all things necessary, to give effect to this clause 25, including without limitation:
 - 25.6.1 signing any documents or forms,
 - 25.6.2 giving land owner's consent for lodgement of any Development Application,
 - 25.6.3 producing certificates of title to the Registrar-General under the *Real Property Act 1900*, and
 - 25.6.4 paying the Council's costs arising under this clause 25.

26 Breach of obligations

- 26.1 If the Council reasonably considers that the Developer is in breach of any obligation under this Deed, it may give a written notice to the Developer:
 - 26.1.1 specifying the nature and extent of the breach,
 - 26.1.2 requiring the Developer to:
 - (a) rectify the breach if it reasonably considers it is capable of rectification, or
 - (b) pay compensation to the reasonable satisfaction of the Council in lieu of rectifying the breach if it reasonably considers the breach is not capable of rectification,
 - 26.1.3 specifying the period within which the breach is to be rectified or compensation paid, being a period that is reasonable in the circumstances.

- 26.2 If the Developer fails to fully comply with a notice referred to in clause 26.1, the Council may, without further notice to the Developer, call-up any Security provided by the Developer under this Deed and apply it to remedy the Developer's breach.
- 26.3 If the Developer fails to comply with a notice given under clause 26.1 relating to the carrying out of Work under this Deed, the Council may step-in and remedy the breach and may enter, occupy and use any land owned or controlled by the Developer and any Equipment on such land for that purpose.
- 26.4 Any costs incurred by the Council in remedying a breach in accordance with clause 26.2 or clause 26.3 may be recovered by the Council by either or a combination of the following means:
 - 26.4.1 by calling-up and applying any Security provided by the Developer under this Deed, or
 - 26.4.2 as a debt due in a court of competent jurisdiction.
- 26.5 For the purpose of clause 26.4, the Council's costs of remedying a breach the subject of a notice given under clause 26.1 include, but are not limited to:
 - 26.5.1 the costs of the Council's servants, agents and contractors reasonably incurred for that purpose,
 - 26.5.2 all fees and charges necessarily or reasonably incurred by the Council in remedying the breach, and
 - 26.5.3 all legal costs and expenses reasonably incurred by the Council, by reason of the breach.
- 26.6 Nothing in this clause 26 prevents the Council from exercising any rights it may have at law or in equity in relation to a breach of this Deed by the Developer, including but not limited to seeking relief in an appropriate court.

27 Enforcement in a court of competent jurisdiction

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

Part 5 – Registration & Restriction on Dealings

28 Registration of this Deed

- 28.1 The Parties agree to register this Deed on the title of the Land, other than a Final Lot, pursuant to section 93H of the Act.
- 28.2 The Developer must:
 - 28.2.1 do all things reasonably necessary to allow the registration of this document to occur under clause 28.1, including, but not limited to, obtaining the consent of any mortgagee registered on the titles of the Land; and
 - 28.2.2 pay any reasonable costs incurred by Council in undertaking that registration.
- 28.3 If a Plan of Subdivision to create a Final Lot is lodged with the Registrar General, the Parties are to direct the Registrar General not to register this Deed on the folio identifier of any Final Lot to be created by that plan.
- 28.4 If the Developer requests Council to do so, Council is to do all things necessary to remove the registration of this Deed from the title of any other part of the Land once:
 - 28.4.1 the Developer has provided all Development Contributions which are attributable to that part of the Land; or
 - 28.4.2 the Developer has provided Security to the satisfaction of Council with respect to any Contributions which are attributable to that part of the Land but which have not been made at that time.

29 Restriction on dealings

- 29.1 The Developer is not to:
 - 29.1.1 sell or transfer the Land, other than a Final Lot, or
 - 29.1.2 assign the Developer's rights or obligations under this Deed, or novate this Deed,to any person unless:
 - 29.1.3 the Developer has, at no cost to the Council, first procured the execution by the person to whom the Land or part is to be sold or transferred or the Developer's rights or obligations under this Deed are to be assigned or novated, of a deed in favour of the Council on terms reasonably satisfactory to the Council, and
 - 29.1.4 the Developer is not in breach of this Deed.

Part 6 – Indemnities & Insurance

30 Risk

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

31 Release

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

32 Indemnity

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

33 Insurance

- 33.1 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 Deed up until the Work is taken to have been completed in accordance with this Deed:
- 33.1.1 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,
 - 33.1.2 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,
 - 33.1.3 workers compensation insurance as required by law, and
 - 33.1.4 any other insurance required by law.
- 33.2 If the Developer fails to comply with clause 33.1, 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:
- 33.2.1 by calling upon the Security provided by the Developer to the Council under this Deed, or
 - 33.2.2 recovery as a debt due in a court of competent jurisdiction.

- 33.3 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 33.1.

34 Contamination

- 34.1 For the purposes of this clause:
- 34.1.1 **Contamination** has the same meaning as in the *Contaminated Land Management Act 1997*.
 - 34.1.2 **Contaminated** in relation to land, means land subject to Contamination.
 - 34.1.3 **Site Auditor** has the same meaning as in the *Contaminated Land Management Act 1997*.
- 34.2 The Parties acknowledges and agree that:
- 34.2.1 some of the Land owned by the Developer to be dedicated to the Council was Contaminated,
 - 34.2.2 pursuant to conditions of Development Consent for the Development the Developer has remediated or is remediating the land referred to in clause 34.2.1 in accordance with the document titled '*Revised Validation Strategy- Lots 3, 5, 6 and 9 DP33650, Lot N DP103642 and Lot 4 DP 661032, Horsley, NSW*' Prepared by JBS&G (NSW & WA) Pty Ltd, dated August 2014, and as amended by the Parties (**Validation Strategy**).
 - 34.2.3 a Site Auditor has provided or will shortly provide to the Developer a written notice that the Land referred to in clause 34.2.1 has been remediated in accordance with the Validation Strategy, to the satisfaction of the Authority (**'Sign Off'**).
- 34.3 Prior to making, causing, suffering or permitting the making of an application for a Subdivision Certificate in Stage 3 of the Development, the Developer must provide the following documents to Council for its review and approval in relation to the land to be dedicated to Council, separate from and addition to any documents required to be prepared pursuant to the Development Consent:
- 34.3.1 validation report (referencing the land to be dedicated to Council only)
 - 34.3.2 site auditor's report (referencing the land to be dedicated to Council only)
 - 34.3.3 site auditor's statement (SAS) as per the *Contaminated Land Management Act 1997*, section 53B (referencing the land to be dedicated to Council only); and
 - 34.3.4 a survey of the land to be dedicated to Council, prepared by a registered surveyor.
- 34.4 The Council cannot raise any requisition or make any Claim against the Developer in respect of any Contamination of the Land the subject of the Sign Off.

Part 7 – Other Provisions

35 Review of Deed

- 35.1 The Parties agree to review this Deed if either party is of the opinion that any change of circumstance has occurred, or is imminent, that materially affects the operation of this Deed.
- 35.2 For the purposes of clause 35.1, 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.
- 35.3 For the purposes of addressing any matter arising from a review of this Deed referred to in clause 35.1, the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Deed.
- 35.4 If this Deed becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties agree to do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Deed is entered into.
- 35.5 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 35.1 (but not 35.4) is not a Dispute for the purposes of this Deed and is not a breach of this Deed.

36 Notices

- 36.1 Any notice, consent, information, application or request that is to or may be given or made to a Party under this Deed is only given or made if it is in writing and sent in one of the following ways:
 - 36.1.1 delivered or posted to that Party at its address set out in the Summary Sheet,
 - 36.1.2 faxed to that Party at its fax number set out in the Summary Sheet, or
 - 36.1.3 emailed to that Party at its email address set out in the Summary Sheet.
- 36.2 If a Party gives the other Party 3 business days notice of a change of its address, fax number or email, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted, faxed or emailed to the latest address or fax number.
- 36.3 Any notice, consent, information, application or request is to be treated as given or made if it is:
 - 36.3.1 delivered, when it is left at the relevant address,
 - 36.3.2 sent by post, 2 business days after it is posted,
 - 36.3.3 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
 - 36.3.4 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.

- 36.4 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.

37 Approvals and Consent

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

38 Costs

- 38.1 The Parties are to bear their own costs of preparing, negotiating, executing and stamping this Deed, and any document related to this Deed.

39 Entire Deed

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

40 Further Acts

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

41 Governing Law and Jurisdiction

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

42 No Fetter

- 42.1 The Parties acknowledge that Council is a consent authority with statutory rights and obligations pursuant to the Act, as well as the *Local Government Act 1993*, the *Protection of the Environment Operations Act 1997* and the *Roads Act 1993*.
- 42.2 Nothing in this Deed shall be construed as requiring Council to do anything that would cause it to be in breach of any of its obligations at law, and without limitation, nothing shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

43 Illegality

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

44 Severability

- 44.1 If a clause or part of a clause of this Deed can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way.
- 44.2 If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Deed, but the rest of this Deed is not affected.

45 Amendment

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

46 Waiver

- 46.1 The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Deed, does not amount to a waiver of any obligation of, or breach of obligation by, another Party.
- 46.2 A waiver by a Party is only effective if it is in writing.
- 46.3 A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

47 GST

47.1 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.

47.2 Subject to clause 47.4, if GST is payable on a Taxable Supply made under, by reference to or in connection with this Deed, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.

47.3 Clause 47.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Deed to be GST inclusive.

47.4 No additional amount shall be payable by the Council under clause 47.2 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.

47.5 If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this Deed by one Party to the other Party that are not subject to Division 82 of the *A New Tax System (Goods and Services Tax) Act 1999*, the Parties agree:

47.5.1 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;

47.5.2 that any amounts payable by the Parties in accordance with clause 47.2 (as limited by clause 47.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.

47.6 No payment of any amount pursuant to this clause 47, 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.

47.7 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.

47.8 This clause continues to apply after expiration or termination of this Deed.

48 Explanatory Note

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

Schedule 1

(Clause 9)

Development Contributions

Column 1	Column 2	Column 3	Column 4	Column 5
Item/ Contribution	Public Purpose	Manner & Extent	Timing	Contribution Value
A. Monetary Contributions				
1. \$30,000.00 per Final Lot	Public facilities and amenities	\$30,000.00 per Final Lot	Before the issuing of a Subdivision Certificate that creates the Final Lot	\$3,420,000.00
B. Dedication of Land				
1. Land for Shone Avenue	Roads and traffic	Dedication of approximately 0.060ha of land shown as ' <i>Item 1 – Shone Avenue Land Dedication</i> ' on the Location Plan.	Before the issuing of the Subdivision Certificate that creates the first Final Lot in Stage 3 of the Development	\$27,300.00
2. Land for Iredell Road	Roads and traffic	Dedication of approximately 0.022ha of land shown as ' <i>Item 2 – Iredell Road Land Dedication</i> ' on the Location Plan.	Before the issuing of the Subdivision Certificate that creates the first Final Lot in Stage 3 of the Development	\$10,890.00

Alkira Estate, Horsley Planning Agreement
Wollongong City Council
Grindley Properties Pty Ltd

3. Land for water/detention basin	Stormwater management	Dedication of approximately 0.299ha of land shown as ' <i>Item 3 – Detention/Water Quality Basin</i> ' on the Location Plan.	Before the issuing of the Subdivision Certificate that creates the first Final Lot in Stage 3 of the Development	\$149,500.00
C. Carrying out of Work				
1. Construction of Shone Avenue Roundabout	Roads and traffic	Carrying out of the following work in the location shown as '<i>Item 1 – Shone Avenue Roundabout on the Location Plan</i>': • Reconstruction of eastern side of Shone Avenue from chainage 120 to 222 with kerb and gutter • Widening of western side of Shone Avenue from chainage 120 to 222 with kerb and gutter and stormwater drainage • New roundabout at the intersection of Shone Ave and Horsley Drive. • Concrete encasement of water main under roundabout chainage 120 to 222	Before the issuing of the Subdivision Certificate that creates the first Final Lot in Stage 3 of the Development	\$126,126.00
2. Construction of Iredell Road	Roads and traffic	Construction of kerb and gutter and parking bays on the north side of Iredell Road in the location shown as ' <i>Item 2 – Iredell Road Construction</i> ' on the Location Plan.	Before the issuing of the Subdivision Certificate that creates the first Final Lot in Stage 3 of the Development	\$177,279.30

Alkira Estate, Horsley Planning Agreement
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Grindley Properties Pty Ltd

3. Public cycleway/Pedestrian Path	Cycleway	Construction of cycleway through the Development from Shone Avenue to the boundary of the adjacent property in the location shown as 'Item 3 – Cycleway' on the Location Plan.	Before the issuing of the Subdivision Certificate that creates the first Final Lot in Stage 3 of the Development	\$74,752.60
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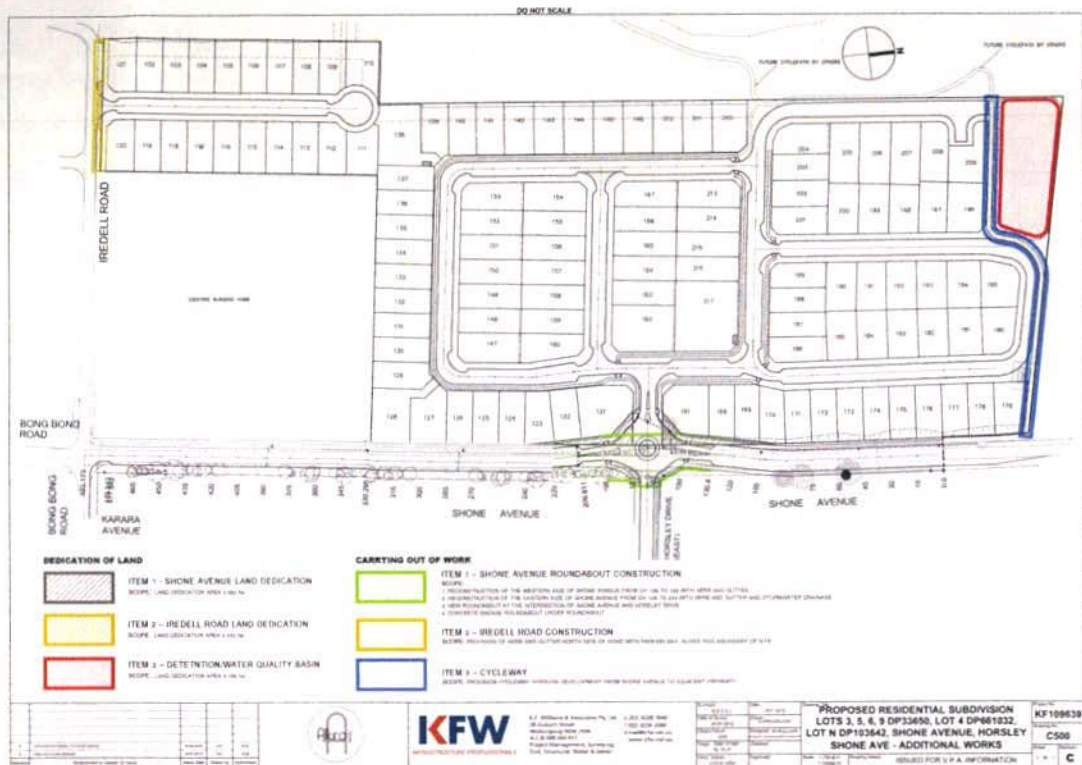
Schedule 2

(Clause 9)

Location Plan

Location Plan appears on the following page
KFW Drawing KF109639 C500 rev C 18/6/2014

Alkira Estate, Horsley Planning Agreement
Wollongong City Council
Grindley Properties Pty Ltd



Alkira Estate, Horsley Planning Agreement
Wollongong City Council
Grindley Properties Pty Ltd

Execution

Executed as a Deed

Dated: 8th September 2015

Executed on behalf of the Council


ANDREW CARFIELD
General Manager (ACTING)


Mayor


Witness ELIZABETH BORST


Witness SANDY THOMPSON

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


Name/Position ALAN A CARSTENS DIRECTOR GRINDLEY PROPERTIES PTY LTD.


Name/Position GILLIAN LEOUE TENISON SECRETARY
GRINDLEY PROPERTIES PTY LTD

Appendix

(Clause 49)

Environmental Planning and Assessment Regulation 2000

(Clause 25E)

Explanatory Note

Draft Planning Agreement

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

Parties

Wollongong City Council ABN 63 139 525 939 of Council's Administration Building, 41 Burelli Street, Wollongong (**Council**)

Grindley Properties Pty Ltd ABN 41 003 884 704 of 55 Grandview Street, Pymble NSW 2073 (**Developer**)

Description of the Land to which the Draft Planning Agreement Applies

Lots 3, 5, 6 and 9 in DP33650, Lot N in DP103642 and Lot 4 in DP661032 otherwise known as 80, 88, 94, 104 Shone Avenue, Horsley and Lot 9 Iredell Road, Horsley.

Description of Proposed Development

Residential subdivision of the Land into approximately 117 residential lots (of which 114 are Final Lots) and associated roads, detention basin, roundabout and cycleways/pedestrian path in accordance with the staging and layout included in the Development Consent DA2010/1350

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

Objectives of Draft Planning Agreement

The objective of the Draft Planning Agreement is to require the provision of land for a drainage detention basin, public roads and land for public roads, and suitable funding for the provision of public facilities to meet the Development.

Nature of Draft Planning Agreement

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

Effect of the Draft Planning Agreement

The Draft Planning Agreement:

- relates to the carrying out by the Developer of development on the Land,
- excludes the application of s94 of the Act to the Development,
- excludes the application of s94A of the Act to the Development,
- requires monetary Development Contributions, dedication of land and carrying out of works by the Developer,
- requires the developer to provide the Council with security in the event that the Council is required to enforce the terms of the agreement,
- is to be registered on the title to the Land,
- imposes restrictions on the Parties transferring the Land or part of the Land or assigning an interest under the agreement,
- provides two dispute resolution methods for a dispute under the agreement, being expert determination and mediation,
- provides that the agreement is governed by the law of New South Wales, and
- provides that the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* applies to the agreement.

Assessment of the Merits of the Draft Planning Agreement

The Planning Purposes Served by the Draft Planning Agreement

The Draft Planning Agreement:

- promotes and co-ordinates of the orderly and economic use and development of the Land to which the agreement applies,
- provides land for public purposes in connection with the development,

- provides and co-ordinates the provision of public infrastructure and facilities in connection with the Development, and
- provides increased opportunity for public involvement and participation in environmental planning and assessment of the Development.

How the Draft Planning Agreement Promotes the Public Interest

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

For Planning Authorities:

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

N/A

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

N/A

Councils - How the Draft Planning Agreement Promotes the Elements of the Council's Charter

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

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

All Planning Authorities - Whether the Draft Planning Agreement Conforms with the Authority's Capital Works Program

The Draft Planning Agreement conforms with Council's Capital Works Program by:

- conforming with the work schedule or provision of material public benefit as provided for in the West Dapto Section 94 Development Contributions Plan (2010) as adopted by Council at its meeting on 14 December 2010,
- complying with the relevant provisions of Wollongong DCP 2009 including specifically the provisions of Chapter D16 West Dapto Release Area most notably the prescribed Road network and adopted Neighbourhood Plan. Chapter D16 was adopted by Council at its meeting on December 2010,