

Section 94 Works in Kind Policy 2016

Policy Name: Section 94 Works in Kind Policy 2016	Policy Number: POL-0094-V03
Date Adopted: 28 September 2016	Review Date: 28 September 2019
Policy Owner: Group Manager City Planning	

1. Policy Statement/Objective(s)

Shellharbour City Council is committed to ensuring a fair, transparent and accountable process for a Developer seeking to enter into a Works in Kind Agreement.

This policy establishes a framework for Works in Kind Agreements including:

- Procedures for making an application and entering into a Works in Kind Agreement; and
- How Council will assess applications and determine whether it will enter into a Works in Kind Agreement.

2. Scope

This policy applies when a Developer seeks to construct an infrastructure item in full or partial satisfaction of requirements imposed by a condition of Development Consent to pay Section 94 monetary contributions in accordance with the provisions of the EP&A Act and Council's Section 94 Contributions Plan.

As Council is ultimately responsible for any infrastructure constructed under a Works in Kind Agreement, approval needs to be obtained from Council prior to the works being carried out. This Section 94 Works in Kind Policy 2016 (the Policy) sets out the procedures that must be complied with when seeking approval.

This policy does not apply to Planning Agreements (also known as Voluntary Planning Agreements and VPA's).

3. References

Shellharbour City Council Section 94 Contributions Plan (as updated)
 Environmental Planning and Assessment Act NSW 1979
 Environmental Planning and Assessment Regulation NSW 2000
 Local Government Act 1993
 Local Government (General) Regulation 2005
 Tendering Guidelines for NSW Local Government

4. Definitions

Certifying Authority	has the same meaning as in the EP&A Act.
Construction Certificate	has the same meaning as in the EP&A Act.
Contributions Plan	is a document that has been publicly exhibited and adopted by the Council pursuant to Section 94EA of the EP&A Act that authorises the imposition of a condition under Section 94 of that Act, as amended from time to time.
Contribution Value means:	(a) in relation to an Infrastructure Item that is identified in the Contributions Plan, the estimated cost for the Infrastructure Item, as specified in the Contributions Plan, which may differ from the final actual cost of construction of the item, (b) in relation to any other Infrastructure Item approved by the Council, the agreed value of that Infrastructure Item.
Council	means Shellharbour City Council.
Defects Liability Period	means the period stipulated in a Works in Kind Agreement during which Council may give the Developer a rectification notice stating the works to be rectified at the Developers cost.
Developer	is a person or entity who proposes to carry out development the subject of a Development Consent.
Development Application	has the same meaning as in the EP&A Act being an application for consent under Part 4 to carry out development but does not include an application for a complying development.
Development Consent	means consent under Part 4 of the EP&A Act to carry out development and includes, unless expressly excluded, a complying development certificate.
Development Contribution	means a monetary contribution required by a condition of Development Consent imposed under Section 94 of the EP&A Act.
EP&A Act	means the Environmental Planning and Assessment Act 1979.
EP&A Regulation	means the Environmental Planning and Assessment Regulation 2000.
Hand over	means the handover of the works to Council (care and control).
Infrastructure Item	means an item identified in the Contributions Plan or such other public infrastructure item approved by the Council.

Maintenance Period	means the period stipulated in the Works in Kind Agreement during which the Developer must maintain an Infrastructure Item.
Works in Kind (WIK)	means the construction or provision of the whole or part of an Infrastructure Item.
Works in Kind Agreement (WIKA)	means the formal agreement between Council and a Developer for the provision of Works in Kind.

5. Variation and Review

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

Review History

This policy supersedes the Shellharbour City Council's *Section 94 Works-in-Kind Policy 2005*.

Date Policy first adopted – version 1	February 1998
Date amendment adopted - version 2	June 2005
Date amendment adopted - version 3	28 September 2016

6. Policy

See attachment to this document.

7. Related Forms

NIL

8. Attachments:

Attachment 1: Section 94 Works in Kind Policy 2016

Attachment 2: Template Works in Kind Agreement

Policy Authorised by:

Name: Council Resolution No. 234

Date: 28 September 2016



**Section 94
Works in Kind
Policy**

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PART 1

1. INTRODUCTION / BACKGROUND

Section 94 of the Environmental Planning and Assessment Act 1979 (the EP&A Act) enables Council to impose a condition of development consent requiring:

- the payment of a monetary contribution or dedication of land free of cost in respect of any development that will, or is likely to, require the provision of or increase the demand for public amenities or public services within the area, or
- the payment of a monetary contribution towards recoupment of the Council's costs of providing public amenities or public services in the area for which the development will benefit from.

Council may only impose a condition under Section 94 of the EP&A Act in accordance with an adopted Contributions Plan.

Under Section 94(5)(b) of the EP&A Act, Council may accept the provision of a material public benefit (other than land or money) in part or full satisfaction of a condition of Development Consent requiring Development Contributions. The most common form of a 'material public benefit' is the construction of works that have been identified in the Contributions Plan's Infrastructure Works Plan. This is known as 'Works in Kind'.

2. WHEN A WORKS IN KIND APPLICATION IS REQUIRED

If a Developer would like to construct an Infrastructure Item in either full or part satisfaction of a condition of Development Consent requiring payment of monetary Development Contributions, then the Developer will need to enter into a Works in Kind Agreement with the Council.

An application for a Works in Kind Agreement should be made after the granting of a Development Consent that contains a condition of Development Consent requiring payment of monetary Development Contributions.

A Works in Kind Agreement must be approved and entered into before any Works in Kind are undertaken, or if a Construction Certificate is required for the Works in Kind, before an application is made for a Construction Certificate for the Works in Kind.

The approval of Works in Kind applications is at Council's discretion. This policy is intended as a guide only and compliance with its requirements does not guarantee that the Works in Kind application will be approved.

The information that needs to be provided with the application will vary depending on the nature and scale of the work being proposed. This policy establishes two classifications of Works in Kind; minor works and major works:

2.1 Category 1 – Minor Works

Minor works have the following characteristics:

- They are valued at less than \$150,000; and
- They will not require contributions from Council or other developers; and

- They will not involve works on land not owned by the developer; and
- They will be of a routine nature with established standards.

The Group Manager City Strategy can generally approve a Works in Kind Agreement for minor works under delegated authority.

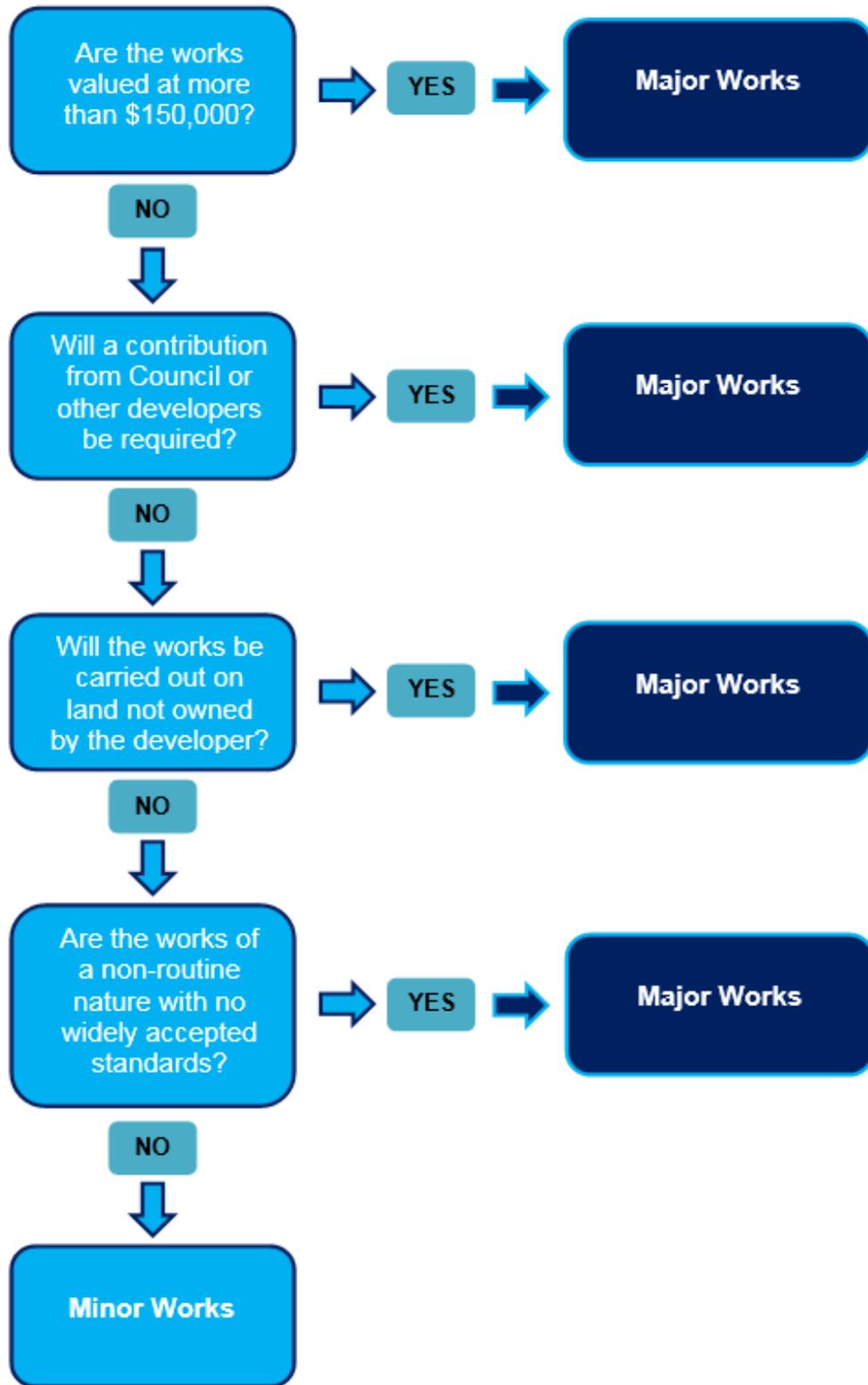
2.2 Category 2 – Major Works

Major works have the following characteristics:

- They are valued over \$150,000; or
- They require funding through contributions from other developers or Council; or
- They involve works on land other than that owned by the Developer; or
- They are of a non-routine nature with no widely accepted standards; or
- Any combination of these.

A Works in Kind Agreement for major works will be reported to Council and approval to the Works in Kind Agreement will require a formal Council Resolution.

Figure 1 – Determining if the Works in Kind are Minor or Major Works



3. PROCESS TO BE FOLLOWED

The following guidelines provide an outline of the process for entering into a Works in Kind Agreement:

Step 1 – Initial discussions with Council Officers

Prior to submitting an application for approval for a Works in Kind Agreement, a meeting should be held between the Developer and the Council to discuss what is proposed and the policies and requirements that may apply.

Generally, an application for approval for a Works in Kind Agreement where the estimated cost of the proposed Works in Kind exceeds the cost for that work specified in the Contributions Plan (indexed to current dollar values) is unlikely to be supported unless the Developer agrees to be responsible for the additional costs.

Step 2 – Submit Written Application

An application requesting approval to enter into a Works in Kind Agreement must be made to Council in writing and submitted with the application form that is available on Council's website. To allow sufficient time for your application to be assessed without impacting on the development schedule, the application should be submitted to the Council as soon as practical following the granting of a Development Consent that requires the monetary Development Contributions to be paid.

This initial written application should provide the following information:

- Details of the Works in Kind proposed to be undertaken including the location of the work;
- The Contribution Value of the Works in Kind;
- Whether the Works in Kind comprises the whole or part of an Infrastructure Item in the Contributions Plan;
- The estimated costs of construction of the Works in Kind (in the form of detailed quotations) – identifying variations, if any, between the Contribution Value of the work identified in the Contributions Plan and the estimated cost of construction of works;
- The Development Consent and the condition imposed under s94 of the EP&A Act to which the application relates,
- The amount of Development Contributions that is proposed to be satisfied by the Works in Kind;
- Any difference between the Works in Kind Contribution Value and the amount of monetary S94 contributions proposed to be satisfied by the Works in Kind;
- Whether any funding through contributions from other developers or Council is being sought for the Works in Kind;
- Identification of any components of a proposed work that is not in accordance with the Contributions Plan and distinguishing those components from components of the works that are in accordance with the Contributions Plan;
- The timeframe within which the works are proposed to commence and be completed.

Step 3 – Assessment of Written Application

The initial written application will be assessed based on the information provided, the current Contributions Plan and this Policy. At this stage of the process the Council, subject to the

submission of more detailed information may give in principle agreement, or the application may be refused.

If the application for a Works in Kind Agreement is agreed to in principle, further detailed information about the proposed works may be required including, without limitation:

- copies of all written documentation including plans and specifications for the Works in Kind proposed;
- a construction program including commencement and completion dates and relevant milestones; and
- written consent to carry out the Works in Kind from the owners of all land affected by the proposal.

Upon the Council's agreement in-principle, the Developer is to pay the Council an amount and in the manner as notified by the Council, which will be applied towards the Council's legal costs of preparing and negotiating the Works in Kind Agreement.

For the avoidance of doubt, a condition of Development Consent requiring a Development Contribution continues to have effect according to its terms unless and until an executed Works in Kind Agreement provides otherwise.

Any approval of a Works in Kind application does not in any way fetter the Council's statutory discretion in determining a Development Application for the Works in Kind or any other Development Application.

Step 4 – Preparation of Works in Kind Agreement and Council Approval

Based on the detailed information submitted for the application for a Works in Kind Agreement, a draft Works in Kind Agreement will be prepared based on the template Works in Kind Agreement provided at Attachment 1.

A Works in Kind agreement will cover, amongst other things:

- The works proposed;
- The Contribution Value of those works,
- If relevant, the estimated cost of construction of such works;
- The extent to which a condition of Development Consent requiring Development Contributions is satisfied by the provision of the Works in Kind
- Any proposed reimbursements or credits to the Developer;
- The agreed maintenance period;
- The Developer's rights and responsibilities;
- Council's rights and responsibilities.

The Works in Kind Agreement will be prepared by Council's legal representatives. All costs associated with the preparation of the Works in Kind Agreement are to be met by the Developer.

Subject to Part 3 of Chapter 12 of the Local Government Act 1993, a Works in Kind Agreement for minor works will generally be approved under delegated authority by the Group Manager City Strategy.

A Works in Kind Agreement for major works will be reported to the governing body of the Council and approval to the Works in Kind Agreement will require a formal Council Resolution.

Prior to the commencement of Works in Kind, all parties must sign the Works in Kind Agreement. Once the Works in Kind Agreement has been entered into, there should be no additions or alterations, or variations to these works without Council's prior approval and written consent.

Step 5 – Construction Phase

Once a Works in Kind Agreement is signed by all parties, an application for a Construction Certificate or any other relevant approval for the construction of the Works in Kind can be made for the Works in Kind.

When all the relevant pre-construction requirements of the Works in Kind Agreement have been met, and all relevant approvals for the construction of the Works in Kind have been obtained, the construction of the Works in Kind can commence.

For all works carried out under a Works in Kind Agreement, Council will require that it be appointed as the Certifying Authority. Inspection of the Works in Kind will be conducted throughout the construction process as outlined in the Works in Kind Agreement and in accordance with any legislative or industry requirements.

The Developer is responsible for all costs involved in constructing and completing the Works in Kind in accordance with the Works in Kind Agreement whether or not the costs exceed the Contribution Value for the Work in Kind.

Step 6 - Hand over of Works in Kind and Dedication of land to Council

Prior to completion of the Works in Kind an inspection will be carried out and Council will assess the acceptability of the works. The works (and associated documentation) will be taken to be completed to the Council's satisfaction when the Council gives written notification to the Developer to that effect in accordance with the Works in Kind Agreement.

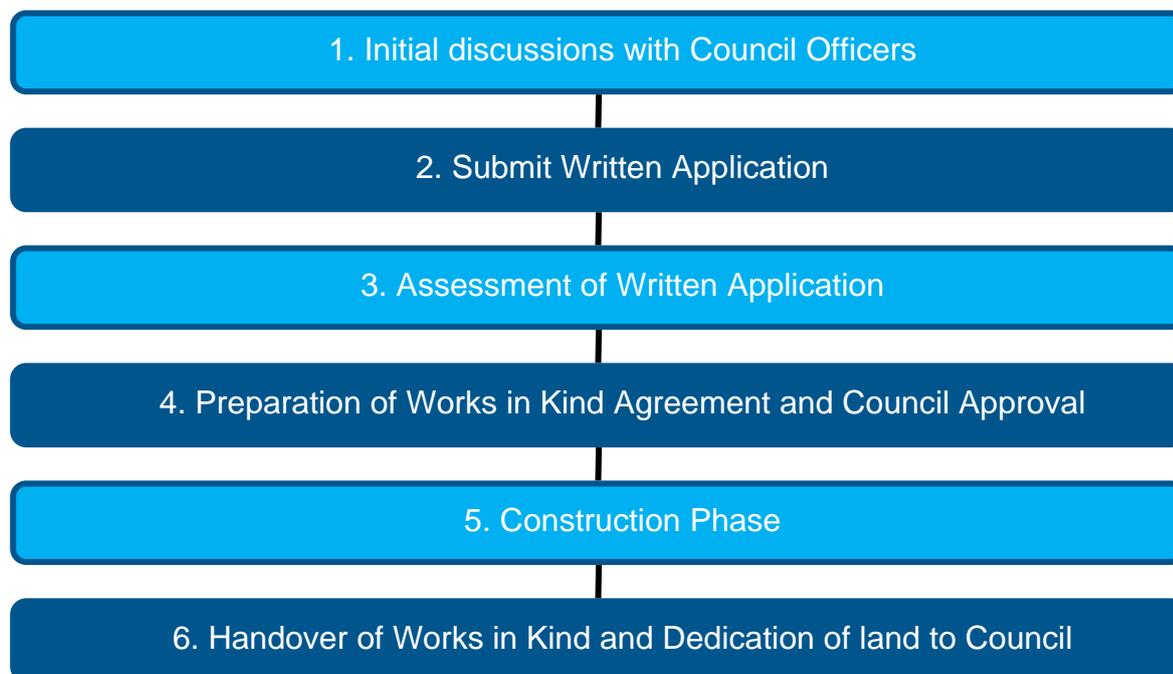
If incomplete or defective works are identified during the inspection, the Developer will be required to complete the works to Council's satisfaction.

The Defects Liability Period and Maintenance Periods will commence from the hand over date or as set out in the Works in Kind Agreement.

Where Works in Kind are located on land not owned by the Council the Council will require the land to be dedicated to it free of cost. Pursuant to s94(5)(b) of the EP&A Act, the value of the land cannot be accepted to satisfy a condition of consent imposed under s94(1) of the EP&A Act.

In limited circumstances where Works in Kind are provided on land which will not be dedicated to Council, a restriction on use, easement, covenant or other encumbrance on title to the satisfaction of the Council is to be placed on the land as the maintenance of this asset may be the responsibility of the private landowner or the Council will need access to that land to maintain the asset.

Figure 2 – Summary of Works in Kind Application Process



4. ASSESSMENT CRITERIA

When assessing an application for a Works in Kind Agreement the following will be considered:

1. Tenders, contracts or other details for the works to be provided. This information will be compared to the information within the Contributions Plan. As the works are being undertaken on behalf of Council, Council retains the right to confirm the preferred contractor.
2. If the Works in Kind is a work identified in the Contributions Plan, the Contribution Value for that work contained in the Contributions Plan. In this regard, those values are considered to be base costs. In the assessment of an application for Works in Kind this base cost will be indexed using the method identified in the Contributions Plan, to ensure the costs reflect current dollar values.
3. If the Works in Kind is not a work identified in the Contributions Plan, the agreed Contribution Value for that work.
4. The estimated costs of construction of the Works in Kind (in the form of detailed quotations) and any difference between the Contribution Value of the work and the estimated cost of construction.
5. The proposed standard, timing of delivery, and security arrangements applying to the works proposed to be undertaken.
6. The benefit of the Works in Kind to the community.
7. Council's priorities for infrastructure delivery.
8. The extent of the Development Contribution sought to be satisfied by the Works in Kind.
9. Council's capacity to deliver the works and whether Works in Kind would provide a better outcome for the community.
10. The financial and implementation implications for cash-flow and the works schedule of the Contributions Plan.

5. THE DEVELOPER'S RESPONSIBILITIES

If Council agrees to accept the proposal to provide Works in Kind, the Developer must, amongst other things:

- Work cooperatively with Council to develop a design that achieves a positive outcome for the community having regard to aesthetics, sustainability, life cycle costs and value for money;
- Comply with all statutory requirements and regulations that relate to the works;
- Where applicable comply with the requirements of the Local Government (General) Regulation 2005 and the Tendering Guidelines for NSW Local Government;
- Engage the agreed contractor to complete the works;
- Comply with all requirements set out in the Works in Kind Agreement;
- Indemnify Council against all claims relating to the works undertaken;
- Maintain an appropriate public risk insurance policy with a minimum liability of \$20,000,000 and provide a copy of this policy. Depending on the nature of the works proposed Council may choose to increase the amount of liability required;
- Not make any variations to the agreed works without written approval from Council;
- Notify Council when all inspections are required as per the Works in Kind Agreement.

Further details of these responsibilities may be included in the Works in Kind Agreement.

6. ADMINISTRATION

6.1 Section 94 Contributions

The purpose of a Works in Kind Agreement is to set out the Council's acceptance of a Works in Kind in full or part satisfaction of a condition of Development Consent requiring monetary Development Contribution under Section 94 of the EP&A Act.

The Contribution Value of a Works in Kind will generally only be applied to satisfy the monetary Development Contributions that are required for the same category of infrastructure or infrastructure item and not the total Development Contribution. Council will determine this during the Works in Kind application assessment.

For accounting purposes, the Works in Kind Agreement will operate one of three ways:

1. Where the Contribution Value of a Works in Kind undertaken is generally equal to the monetary Development Contributions required as a condition of consent for the relevant category of infrastructure or Infrastructure Item, the Works in Kind will normally be considered to fully satisfy the payment of those Development Contributions; or
2. Where the Contribution Value of the Works in Kind undertaken is less than the monetary Development Contributions required as a condition of consent for the relevant category of infrastructure or Infrastructure Item, the Works in Kind will be considered to partly satisfy the payment of those Development Contributions and the difference will be payable to the Council. This will be set out in the Work in Kind Agreement; or
3. Where the Contribution Value of the Works in Kind undertaken exceeds the monetary Development Contributions required as a condition of consent for the relevant category of infrastructure or infrastructure item, the Works in Kind will be considered to fully satisfy the

payment of those Development Contributions. The Developer may request that the surplus value (the amount by which the Contribution Value of the work exceeds the required monetary Development Contribution) be reimbursed when the Council obtains (see Section 10.3 Accounting for Works in Kind) Development Contributions for that work from other developers or a credit in the amount of the surplus value to be provided which can be applied by the Developer towards reducing its obligation to provide Development Contributions for future development by the Developer in the Council's area.

Note: Any difference to the agreed Contribution Value of the Works in Kind and the actual costs of constructing the Works in Kind in accordance with the agreement will be to the advantage or disadvantage to the developer.

6.2 Bank guarantees

As Council is agreeing to accept the Contribution Value of Works in Kind in part or full satisfaction of the requirements to pay monetary Development Contributions, satisfactory security arrangements need to be in place. The Developer will normally be required to provide a bank guarantee that will be specified in the Works in Kind Agreement. Any exceptions will be considered on a case by case basis. A bank guarantee will be for the amount of the cost of works to be undertaken and will need to be lodged before the first Subdivision Certificate or Construction Certificate is issued for the Developer's development.

The bank guarantee will be released when the Developer has completed its obligations under the Works in Kind Agreement.

6.3 Accounting for Works in Kind

In accordance with Section 35 of the EP&A Regulations, Council must maintain accounting records for all Section 94 contributions and payments. To ensure that this process is transparent and accountable, the following procedures should be followed:

- It is important that the financial information (cost of works) provided to Council distinguishes between those costs relating to the Works in Kind and those that relate to other project costs.
- Regular documentation will need to be provided as evidence of works completed to date. This may include copies of statement of accounts, receipts and/or bank statements. This requirement will be set out in the Works in Kind Agreement.
- The works will be included in Council's Works in Kind Register, which will be updated to reflect the updates provided to Council regarding the progress of construction.
- Where the Developer is to be reimbursed from contributions collected by the Council from other developers, reimbursement will occur upon completion of the Works in Kind, up to the value of funds collected from other developers. The remainder will be reimbursed as and when contributions are collected from other developers. Council does not accept the financial risk of unpaid developer contributions.
- Where Council also has a contribution to make under the Contributions Plan this payment will be made upon completion of the Works in Kind provided the Council holds funds for such purposes.
- If required under the Local Government Act 1993 or Local Government (General) Regulation 2005, Works in Kind Agreements will be reported in Council's annual financial report.

PART 2

ATTACHMENT – TEMPLATE WORKS IN KIND AGREEMENT

[Insert Name of Works in Kind Agreement]

Works in Kind Agreement

Shellharbour City Council

[Insert Name of Developer]

[Insert Name of Landowner (if not the Developer)]

Dated: **[Insert Date]**

[Insert Name of WIK Agreement]

Works in Kind Agreement

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[Insert name] Works in Kind Agreement

Shellharbour City Council

[Insert Name of Developer]

[Insert Name of Landowner]

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[Insert name] Works in Kind Agreement

Shellharbour City Council

[Insert Name of Developer]

[Insert Name of Landowner]

[Insert name] Works in Kind Agreement

Parties

Shellharbour City Council ABN 78 392 627 134 of Locked Bag 155 Shellharbour City Centre NSW 2529 (**Council**)

and

[Insert Name of Party 2] ABN [Insert Details] of [Insert Details] (**Developer**)

and

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

Background

- A The Developer has been granted the Development Consent or is otherwise entitled to act upon the Development Consent.
- B Condition [**Drafting Note.** Insert s94 condition number] of the Development Consent requires the Developer to make the Monetary Contributions.
- C The Developer has offered to enter into this Agreement by letter to the Council dated [**Drafting Note.** Insert date].
- D The Council and the Developer wish to enter into this Agreement to make provision for the carrying out of Work by the Developer in [***full/*partial**] satisfaction of the Developer's obligation to pay the Monetary Contributions.
- E Section 94(5) of the Act authorises the Council and the Developer to enter into this Agreement to make provision for the carrying out of the Work by the Developer in [***full/*partial**] satisfaction of the Monetary Contributions.

Operative provisions

Part 1 - Preliminary

1 Interpretation

- 1.1 In this Agreement the following definitions apply:

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

[Insert name] Works in Kind Agreement

Shellharbour City Council

[Insert Name of Developer]

[Insert Name of Landowner]

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

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

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

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

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

Certificate of Practical Completion means a certificate issued by the Council to the effect that a Work has reached Practical Completion.

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

Construction Certificate has the same meaning as in the Act.

Contributions Plan means the *Shellharbour City Council Section 94 Contributions Plan 2013* made by the Council under s94EA of the Act, and adopted by the Council on 18 December 2013 as amended from time to time.

Contribution Value means in relation to a Work specified in Column 1 of the table in Schedule 3, the \$ amount specified in Column 4 of the table in Schedule 3 corresponding to the Work ([to be/which has been] indexed in accordance with the Contributions Plan. **[Drafting Note.** The value of the work as set out in the Contributions Plan should be used.]

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

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

Defects Liability Period means, in relation to a Work specified in Column 1 of the table in Schedule 3, the period specified in Column 2 of the table in Schedule 3 corresponding to the Work, commencing on the day immediately after a Certificate of Practical Completion is given for the Work under clause 15.3 of this Agreement.

Development means the development the subject of the Development Consent.

[Insert name] Works in Kind Agreement

Shellharbour City Council

[Insert Name of Developer]

[Insert Name of Landowner]

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

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

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

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

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

GST has the same meaning as in the GST Law.

GST Law has the 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.

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

Item means an item of Work specified in Column 1 of the table in Schedule 3.

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

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 [Drafting Note. Insert any other requirements for maintenance of a Work].

Maintenance Period means, in relation a Work specified in Column 1 of the table in Schedule 3, the period specified in Column 3 of the table in Schedule 3 corresponding to the Work, commencing on the day immediately after a Certificate of Practical Completion is given for the Work under clause 15.3 of this Agreement.

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

[Insert name] Works in Kind Agreement

Shellharbour City Council

[Insert Name of Developer]

[Insert Name of Landowner]

Item	Condition [Drafting Note. Only insert the monetary contributions which will be fully or partly satisfied by Works in this WIK Agreement.]	Public purpose category	\$ Amount
1	Condition [Drafting Note. Insert s94 condition number]	[Drafting Note. Insert details]	\$(Drafting Note. Insert amount]
2	Condition [Drafting Note. Insert s94 condition number]	[Drafting Note. Insert details]	\$(Drafting Note. Insert amount]

Party means a party to this Agreement.

Practical Completion means when, in the reasonable opinion of Council in relation to a Work:

- (a) the Work is substantially complete and any incomplete part of the Work or Defect in the Work is of a minor nature and number, the completion or rectification of which is not practicable at the time and will not unreasonably affect occupation and use of the Work; and
- (b) any Approval required for occupation and use of the Work has been obtained from the relevant Authorities and copies of documents evidencing the approvals have been provided to the Council.

Practical Completion Date means, in relation to a Work specified in Column 1 of the table in Schedule 3, the time specified in Column 5 of the table in Schedule 3 corresponding to the Work.

Rectification Notice means a notice in writing:

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

Rectify means rectify, remedy or correct.

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

Security means a Bank Guarantee, or a bond or other form of security to the satisfaction of the Council indexed in accordance with Consumer Price Index (All Groups) Sydney from the date of this Agreement.

[Drafting Note. Use this definition of 'Surplus Value' if all the works fall within one public purpose category] **Surplus Value** means the amount (if any) by which the sum of all Contribution Values exceeds the amount of the Monetary Contributions.

[Drafting Note. Use this definition of 'Surplus Value' if the works fall within more than one public purpose category so the Contribution Value of a category of work only satisfies a like category of s94 contributions.] **Surplus Value** means the sum of the following amounts:

- (a) the amount (if any) by which the sum of all Contribution Values of Work for **[Drafting Note. Insert public purpose category]** exceeds the amount of the Monetary Contributions for **[Drafting Note. Insert public purpose category]**,
- (b) the amount (if any) by which the sum of all Contribution Values of Work for **[Drafting Note. Insert public purpose category]** exceeds the amount of the Monetary Contributions for **[Drafting Note. Insert public purpose category]**
- (c) **[Drafting note. Insert any further clauses as appropriate for other public purpose categories]**.

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.

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

Work Land means the land specified or described in Schedule 1. **[Drafting Note. Insert in Schedule 1 a description of the land on which the Works are located. This can be done by reference to title or to a map or by other means as appropriate]**

Work Location Plan means the plan contained in Schedule 2. **[Drafting Note. Insert in Schedule 2 a plan showing the location of the Works.]**

- 1.2 In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:
 - 1.2.1 Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
 - 1.2.2 A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
 - 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 a Party to this Agreement includes a reference to the servants, agents and contractors of the Party, the Party's successors and assigns.
- 1.2.14 A reference to 'dedicate' or 'dedication' in relation to land is a reference to dedicate or dedication free of cost.
- 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.

2 Commencement

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

3 Warranties

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

Part 2 – Works in Kind obligations

4 Obligation to Carry Out Work

- 4.1 The Developer is to carry out and complete each Work on the Work Land at the location shown on the Location Plan, in accordance with Schedule 3, any other provision of this Agreement relating to the carrying out of Work and otherwise to the satisfaction of the Council.

- 4.2 The Developer is to carry out and complete each Work in a good and workmanlike manner having regard to the intended purpose of the Work in accordance with:
- 4.2.1 any design or specification specified or approved by the Council,
 - 4.2.2 any relevant Approval,
 - 4.2.3 any other applicable laws, including those relating to occupational health and safety, and
 - 4.2.4 this Agreement to the extent that it is not inconsistent with an Approval or an applicable law.
- 4.3 It is the Developer's responsibility to ensure that everything necessary for the proper performance of its obligations under this Agreement is supplied or made available.
- 4.4 a Work is to be Handed-Over to the Council in accordance with this Agreement.

5 Ownership of Work, etc.

- 5.1 Nothing in, or done under, this Agreement gives the Developer:
- 5.1.1 any right, title or interest in a Work, or
 - 5.1.2 any estate or interest in the Work Land,
- whether at law or in equity.

6 Effect of Developer's Compliance with this Agreement

- 6.1 **[Drafting Note. Use this clause if all the works fall within one public purpose category]** For the purposes of condition [Insert number] of the Development Consent and s94(5) of the Act the entering into of this Agreement by the Developer satisfies the Developer's obligation under the Development Consent to make the Monetary Contributions to the extent of the sum of all Contribution Values.
- [OR]
- 6.1 **[Drafting Note. Use this clause if the works fall within more than one public purpose category and the Contribution Value of a category of work only satisfies a like category of s94 contributions.]** For the purposes of condition **[Drafting Note. Insert s94 condition number]** of the Development Consent and s94(5) of the Act the entering into of this Agreement by the Developer satisfies the Developer's obligation under the Development Consent to pay:
- 6.2.1 item **[Drafting Note. Insert item number from the table in the definition of 'Monetary Contributions']** of the Monetary Contributions to the extent of the Contribution Value of Item **[Drafting Note. Insert item number from table in Schedule 3]**,
 - 6.2.2 item **[Drafting Note. Insert item number from the table in the definition of 'Monetary Contributions']** of the Monetary Contributions to the extent of the Contribution Value of Item **[Drafting Note. Insert item number from table in Schedule 3]**.

6.2 **[Drafting Note. Delete this clause if not required.]** The Council is to pay to the Developer the Surplus Value when:

6.2.1 all notices have been given under clause 15.3 in relation to all Works, and

6.2.2 it has received payments of monetary Development Contributions towards the cost of all Works from persons other than the Developer totalling the amount of the Surplus Value.

7 Determination of Value

7.1 For the purposes of this Agreement, the Parties acknowledge that the Contribution Value in relation to a Work is the value of the Work specified by, or determined in accordance with, the Contributions Plan.

7.2 If the Developer's actual cost of carrying out the Work, including any costs incurred pursuant to this Agreement, determined at the date on which the Work is Handed-Over to the Council, differs from the Contribution Value, then no party to this Agreement shall be entitled to claim credit or reimbursement, as the case may be, for the difference.

8 Design of Work

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

8.1 The Council is to approve the design and specifications of a Work before construction or other work commences in relation to the Work.

8.2 Prior to commencing the design of a Work, the Developer is to request that the Council provide it with the Council's requirements for the design, materials and specifications for the provision of the Work.

8.3 Once the Developer receives the Council's requirements referred to in clause 8.2, the Developer is to provide the initial design for the Work to Council for the Council's approval.

8.4 The initial design for the Work is to include or be accompanied by:

8.4.1 such information as is required for the making of a development application for the Work, and

8.4.2 a report by an independent quantity surveyor of the estimated cost of constructing the Work to the initial design submitted to Council under clause 8.3.

8.5 The Council is to advise the Developer in writing whether it approves of the initial design of a Work within **[Insert time period]** of receiving the initial design from the Developer.

8.6 The Developer will make any change to the initial design for the Work required by the Council.

8.7 The Developer is not to lodge any development application for a Work unless the Council has first approved the initial design for the Work, and provided its written certification that the development application is consistent with the approved initial design of the Work.

- 8.8 The Council is to provide the written certification referred to in clause 8.7 within 14 days of being provided with a copy of the development application by the Developer, unless the Council forms the view that the development application is not consistent with the approved initial design of the Works.
- 8.9 A development application for a Work is to be accompanied by the written certification referred to in clause 8.8 when lodged with the Council, as the consent authority.
- 8.10 For the avoidance of doubt, nothing in the clause operates to fetter the Council's discretion, as consent authority, in determining any development application for a Work.
- 8.11 The Developer is to bear all costs associated with obtaining the Council's approval to the initial design of a Work under this clause.
- 8.12 Following development consent being issued for a Work, the Developer shall work with Council in the preparation of the detailed design.
- 8.13 The detailed design submitted to the Council under clause 8.12 is to be accompanied by:
- 8.13.1 a draft Plan of Management or a draft Plan of Management to amend an existing Plan of Management (as the Council requires) for the land on which the Work is to be located, if the land on which the Work will be located is or will be classified as community land within the meaning of the *Local Government Act 1993*; and
 - 8.13.2 a detailed maintenance regime for the Work, and
 - 8.13.3 detailed costings, prepared by a suitably qualified independent person, for the carrying out of the maintenance regime.
- 8.14 The Developer is not to lodge an application for a Construction Certificate for a Work unless the Council has first approved the detailed design for the Work, and provided its written certification that the application for a Construction Certificate is consistent with the approved detailed design of the Work.
- 8.15 The Council is to provide the written certification referred to in clause 8.14 within 14 days of being provided with a copy of the application for a Construction Certificate by the Developer, unless the Council forms the view that the application is not consistent with the approved detailed design of the Work.
- 8.16 An application for a Construction Certificate for a Work is to be accompanied by the written certification referred to in clause 8.15 when lodged with the Council, as the consent authority.

9 Variation to Works

- 9.1 The design or specification of a Work that is required to be carried out by the Developer under this Agreement may be varied by agreement in writing between the Parties, acting reasonably, without the necessity for an amendment to this Agreement.
- 9.2 Without limiting clause 9.1, the Developer may make a written request to the Council to approve a variation to the design or specification of a Work in order to enable it to comply with the requirements of any Authority imposed in connection with any Approval relating to the carrying out of the Work.

- 9.3 The Council is not to unreasonably delay or withhold its approval to a request made by the Developer under clause 9.2.
- 9.4 The Council, acting reasonably, may from time to time give a written direction to the Developer requiring it to vary the design or specification of a Work before the Work is carried out in a specified manner and submit the variation to the Council for approval.
- 9.5 The Developer is to comply promptly with a direction referred to in clause 9.4 at its own cost.

10 Inspection of Work

- 10.1 **[Drafting note.** Insert Council's inspection requirements during the carrying out of Work.]

11 Access to land by Developer

- 11.1 The Council authorises the Developer to enter, occupy and use **[Drafting Note.** Specify particular land owned or controlled by the Council] for the purpose of performing its obligations under this Agreement.
- 11.2 The Council is to permit the Developer, upon receiving reasonable prior notice from the Developer, to enter any other Council owned or controlled land in order to enable the Developer to properly perform its obligations under this Agreement.
- 11.3 Nothing in this Agreement creates or gives the Developer any estate or interest in any part of the land referred to in clause 11.1 or 11.2.

12 Access to land by Council

- 12.1 The Council may enter any land on which Work is being carried out by the Developer under this Agreement in order to inspect, examine or test the Work, or to remedy any breach by the Developer of its obligations under this Agreement relating to the Work.
- 12.2 The Council is to give the Developer prior reasonable notice before it enters land under clause 12.1.

13 Protection of people, property & utilities

- 13.1 The Developer is to ensure to the fullest extent reasonably practicable in relation to the performance of its obligations under this Agreement that:
 - 13.1.1 all necessary measures are taken to protect people and property,
 - 13.1.2 unnecessary interference with the passage of people and vehicles is avoided, and
 - 13.1.3 nuisances and unreasonable noise and disturbances are prevented.
- 13.2 Without limiting clause 13.1, the Developer is not to obstruct, interfere with, impair or damage any public road, public footpath, public cycleway or other public thoroughfare, or any pipe, conduit, drain, watercourse or other public

utility or service on any land except as authorised in writing by the Council or any relevant Authority.

14 Repair of damage

- 14.1 The Developer is to maintain any Work required to be carried out by the Developer under this Agreement until the Work is completed for the purposes of this Agreement or such later time as agreed between the Parties.
- 14.2 The Developer is to carry out its obligation under clause 14.1 at its own cost and to the satisfaction of the Council.

15 Practical Completion of Work

- 15.1 The Developer is to give the Council written notice of the date on which it will Practically Complete a Work required to be carried out under this Agreement which shall not be later than the Practical Completion Date in respect of the Work.
- 15.2 The Council is to inspect the Work the subject of the notice referred to in clause 15.1 within **[Drafting note. Insert number]** days of the date specified in the notice for Practical Completion of the Work.
- 15.3 Work required to be carried out by the Developer under this Agreement is Practically Complete for the purposes of this Agreement when the Council, acting reasonably, gives a Certificate of Practical Completion to the Developer.
- 15.4 Before the Council gives the Developer a Certificate of Practical Completion, it may give the Developer a written direction to complete, rectify or repair any specified part of the Works to the reasonable satisfaction of the Council.
- 15.5 The Developer, at its own cost, is to promptly comply with a direction referred to in clause 15.4.

16 Maintenance of Work

- 16.1 The Developer is to Maintain a Work during the Maintenance Period to the satisfaction of the Council.

17 Rectification of defects

- 17.1 The Council may give the Developer a Rectification Notice during the Defects Liability Period.
- 17.2 The Developer, at its own cost, is to comply with a Rectification Notice according to its terms and to the reasonable satisfaction of the Council.
- 17.3 The Council is to do such things as are reasonably necessary to enable the Developer to comply with a Rectification Notice that has been given to it under clause 17.1

18 Hand-Over of Work

- 18.1 Not later than **[Drafting Note. Insert number of days]** days before the end of the Defects Liability Period or Maintenance Period for a Work (whichever is later), the Developer is to give the Council written notice of the end of the Defects Liability Period and Maintenance Period.
- 18.2 The Council is to inspect the Work the subject of the notice referred to in clause 18.1 within **[Drafting Note. Insert number of days]** days of the end of the Defects Liability Period or Maintenance Period, as the case may be.
- 18.3 Work required to be carried out by the Developer under this Agreement is Handed-Over for the purposes of this Agreement when the Council, acting reasonably, gives a written notice to the Developer to that effect.
- 18.4 Before the Council gives the Developer a notice referred to in clause 18.3, it may give the Developer a written direction to do one or both of the following:
- 18.4.1 pay the Council's costs in obtaining a valuation for the Works in Kind from a qualified quantity surveyor,
- 18.4.2 complete, rectify or repair any specified part of the Works to the reasonable satisfaction of the Council.
- 18.5 The Developer, at its own cost, is to promptly comply with a direction referred to in clause 18.4.
- 18.6 If the Council is the owner of the land on which the Works the subject of a notice referred to in clause 18.3 is issued, the Council assumes responsibility for the Works upon the issuing of the notice, but if it is not the owner at that time, it assumes that responsibility when it later becomes the owner. **[Drafting Note. If the Developer will remain the owner of the land on which a Work is located, a covenant or other encumbrance to the satisfaction of the Council will need to be registered on title and this clause will need to be amended to reflect this.]**
- 18.7 Before a Work is Handed-Over to the Council, the Developer is to remove from the Work Land:
- 18.7.1 any rubbish or surplus material, and
- 18.7.2 any temporary works, and
- 18.7.3 any construction plant and Equipment,
relating to the carrying out of the Works as the case requires.

19 Works-As-Executed-Plan

- 19.1 No later than 60 days after Work is Handed-Over for the purposes of this Agreement, the Developer is to submit to the Council a full works-as-executed-plan in respect of the Work.
- 19.2 The Developer, being the copyright owner in the plan referred to in clause 19.1, gives the Council a non-exclusive licence to use the copyright in the plans for the purposes of this Agreement.

20 Dedication of Work Land in conjunction with Hand-Over of Work

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

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

[Drafting Note 3. If the Developer will remain the owner of the land on which a Work is located, a covenant or other encumbrance to the satisfaction of the Council will need to be registered on title and this clause will need to be amended to reflect this.]

- 20.1 This clause applies to the Work Land or any part of it that is not owned by the Council on which a Work is carried out by the Developer under this Agreement.
- 20.2 Subject to any Agreement between the Parties to the contrary, land to which this clause applies is to be dedicated to the Council on or before the date on which the Work is taken to have been Handed-Over to the Council.
- 20.3 Work Land to which this clause applies is taken to have been dedicated to the Council when:
- 20.3.1 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
- 20.3.2 the Council is given:
- (a) an instrument in registrable form under the *Real Property Act 1900* duly executed by the [*Developer/*Landowner] 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
- 20.3.3 a written undertaking from any person holding the certificate of title to the production of the certificate of title for the purposes of registration of the transfer.
- 20.4 The [*Developer/*Landowner] is to do all things reasonably necessary to enable registration of the instrument of transfer to occur.
- 20.5 The [*Developer/*Landowner] is to ensure that land dedicated to the Council under this Agreement is free of all encumbrances and affectations (whether registered or unregistered and including without limitation any charge or liability for rates, taxes and charges) except as otherwise agreed in writing by the Council.
- 20.6 If the [*Developer/*Landowner] does not dedicate land required to be dedicated under this Agreement at the time at which it is required to be dedicated, the [*Developer/*Landowner] consents to the Council compulsorily acquiring the land for compensation in the amount of \$1.00 without having to follow the pre-acquisition procedure under the Just Terms Act.
- 20.7 Clause 20.6 constitutes an agreement for the purposes of s30 of the Just Terms Act and the Parties acknowledge and agree that they have agreed on all relevant matters concerning the compulsory acquisition.

[Insert name] Works in Kind Agreement

Shellharbour City Council

[Insert Name of Developer]

[Insert Name of Landowner]

- 20.8 If, as a result of the acquisition referred to in clause 20.6, the Council is required to pay compensation to any person other than the [*Developer/*Landowner], the [*Developer/*Landowner] is to reimburse the Council that amount, upon a written request being made by the Council, or the Council can call on any Security provided under this Agreement.
- 20.9 The [*Developer/*Landowner] 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.
- 20.10 The [*Developer/*Landowner] is to promptly do all things necessary, and consents to the Council doing all things necessary, to give effect to this clause 20, including without limitation:
- 20.10.1 signing any documents or forms,
 - 20.10.2 giving land owner's consent for lodgement of any relevant development application,
 - 20.10.3 producing certificates of title to the Registrar-General under the *Real Property Act 1900*, and
 - 20.10.4 paying the Council's costs arising under this clause 20.

Part 3 – Dispute Resolution

21 Dispute resolution – expert determination

- 21.1 This clause applies to a Dispute between any of the Parties to this Agreement concerning a matter arising in connection with this Agreement that can be determined by an appropriately qualified expert if:
- 21.1.1 the Parties to the Dispute agree that it can be so determined, or
 - 21.1.2 the Chief Executive Officer of the professional body that represents persons who appear to have the relevant expertise to determine the Dispute gives a written opinion that the Dispute can be determined by a member of that body.
- 21.2 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.
- 21.3 If a notice is given under clause 21.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 21.4 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.
- 21.5 The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.
- 21.6 Each Party is to bear its own costs arising from or in connection with the appointment of the expert and the expert determination.
- 21.7 The Parties are to share equally the costs of the President, the expert, and the expert determination.

22 Dispute Resolution - mediation

- 22.1 This clause applies to any Dispute arising in connection with this Agreement other than a Dispute to which clause 21 applies.
- 22.2 Such a Dispute 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 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.
- 22.5 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.
- 22.6 Each Party is to bear its own costs arising from or in connection with the appointment of a mediator and the mediation.
- 22.7 The Parties are to share equally the costs of the President, the mediator, and the mediation.

23 Arbitration Excluded

- 23.1 The arbitration of any Dispute between the Parties arising under or in connection with Agreement is expressly excluded.

Part 4 - Enforcement

24 Security for performance of obligations

- 24.1 The Developer is to provide Security to the Council in the amount of **[Drafting Note. Insert \$ amount]** in relation to the performance of its obligations under this Agreement.
- 24.2 The Developer is to provide the Security to the Council before it makes an application for a Subdivision Certificate or Construction Certificate for any part of the Development unless otherwise agreed between the Parties.
- 24.3 The Council, in its absolute discretion and despite clause 11, may refuse to allow the Developer to enter, occupy or use any land owned or controlled by the Council or refuse to provide the Developer with any plant, equipment, facilities or assistance relating to the carrying out a Work if the Developer has not provided the Security to the Council in accordance with this Agreement.
- 24.4 The Council may call-up and apply the Security in accordance with clause 25 to remedy any breach of this Agreement notwithstanding any other remedy it

may have under this Agreement, under any Act or otherwise at law or in equity.

- 24.5 The Council is to release and return to the Developer the following amounts of Security at the following times:
- 24.5.1 an amount to be determined by the Council not exceeding 90% of the Security within **[Drafting Note. Insert number]** days of the Council issuing of a Certificate of Practical Completion for the final Work to be completed under this Agreement,
- 24.5.2 the remainder of the Security held by the Council or any unused part of it within **[Drafting Note. Insert number]** days of the issuing of a notice under clause 18.3 for the final Work to be completed under this Agreement.
- 24.6 The Developer may at any time provide the Council with a replacement Security.
- 24.7 On receipt of a replacement Security, the Council is to release and return the Security that has been replaced to the Developer.
- 24.8 If the Council calls-up the Security or any portion of it, it may, by written notice to the Developer, require the Developer to provide a further or replacement Security to ensure that the amount of Security held by the Council equals the amount it is entitled to hold under this Agreement.
- 24.9 The Developer is to ensure that the Security provided to the Council is at all times maintained to the full current indexed value.

25 Breach of obligations

- 25.1 If the Council reasonably considers that the Developer is in breach of any obligation under this Agreement, it may give a written notice to the Developer:
- 25.1.1 specifying the nature and extent of the breach,
- 25.1.2 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,
- 25.1.3 specifying the period within which the breach is to be rectified or compensation paid, being a period that is reasonable in the circumstances.
- 25.2 If the Developer fails to fully comply with a notice referred to in clause 25.1, the Council may, without further notice to the Developer, call-up the Security provided by the Developer under this Agreement and apply it to remedy the Developer's breach.
- 25.3 If the Developer fails to comply with a notice given under clause 25.1 relating to the carrying out of Work under this Agreement, the Council may step-in and remedy the breach and may enter, occupy and use any land owned or controlled by the Developer and any Equipment on such land for that purpose.

- 25.4 Any costs incurred by the Council in remedying a breach in accordance with clause 25.2 or clause 25.3 may be recovered by the Council by either or a combination of the following means:
- 25.4.1 by calling-up and applying the Security provided by the Developer under this Agreement, or
- 25.4.2 as a debt due in a court of competent jurisdiction.
- 25.5 For the purpose of clause 25.4, the Council's costs of remedying a breach the subject of a notice given under clause 25.1 include, but are not limited to:
- 25.5.1 the costs of the Council's servants, agents and contractors reasonably incurred for that purpose,
- 25.5.2 all fees and charges necessarily or reasonably incurred by the Council in remedying the breach, and
- 25.5.3 all legal costs and expenses reasonably incurred by the Council, by reason of the breach.
- 25.6 Nothing in this clause 25 prevents the Council from exercising any rights it may have at law or in equity in relation to a breach of this Agreement by the Developer, including but not limited to seeking relief in an appropriate court.

26 Enforcement in a court of competent jurisdiction

- 26.1 Without limiting any other provision of this Agreement, the Parties may enforce this Agreement in any court of competent jurisdiction.
- 26.2 For the avoidance of doubt, nothing in this Agreement prevents:
- 26.2.1 a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Agreement or any matter to which this Agreement relates, or
- 26.2.2 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.

27 Restriction on dealings

- 27.1 The Developer **[Drafting note. Insert 'and Landowner' if relevant]** is not to:
- 27.1.1 sell or transfer the Work Land, or
- 27.1.2 assign the Developer's rights or obligations under this Agreement, or novate this Agreement,
- to any person unless:
- 27.1.3 the Developer **[Drafting note. Insert 'and Landowner' if relevant]** has, at no cost to the Council, first procured the execution by the person to whom the Work Land or part is to be sold or transferred or the Developer's **[Drafting note. Insert 'and Landowner's' if relevant]** rights or obligations under this Agreement are to be assigned or novated, of a deed in favour of the Council on terms reasonably satisfactory to the Council, and

- 27.1.4 the Council has given written notice to the Developer **[Drafting note. Insert 'and Landowner' if relevant]** stating that it reasonably considers that the purchaser, transferee, assignee or novatee, is reasonably capable of performing its obligations under this Agreement, and
- 27.1.5 the Developer **[Drafting note. Insert 'and Landowner' if relevant]** is not in breach of this Agreement, and
- 27.1.6 the Council otherwise consents to the transfer, assignment or novation, such consent not to be unreasonably withheld.

Part 5 – Indemnities & Insurance

28 Risk

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

29 Release

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

30 Indemnity

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

31 Insurance

- 31.1 The Developer is to take out and keep current to the satisfaction of the Council the following insurances in relation to Work required to be carried out by the Developer under this Agreement up until the Work is taken to have been completed in accordance with this Agreement:
- 31.1.1 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,
- 31.1.2 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,
- 31.1.3 workers compensation insurance as required by law, and

- 31.1.4 any other insurance required by law.
- 31.2 If the Developer fails to comply with clause 31.1, 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:
- 31.2.1 by calling upon the Security provided by the Developer to the Council under this Agreement, or
- 31.2.2 recovery as a debt due in a court of competent jurisdiction.
- 31.3 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 31.1.

Part 6 – Other Provisions

32 Provision of accounting information

- 32.1 The Developer is to provide to the Council, on request, such information in respect of a Work as necessary to enable the Council to comply with its accounting obligations under the Act and Regulation and other applicable law.

33 Notices

- 33.1 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:
- 33.1.1 delivered or posted to that Party at its address set out in Schedule 4,
- 33.1.2 faxed to that Party at its fax number set out in Schedule 4, or
- 33.1.3 emailed to that Party at its email address set out in Schedule 4.
- 33.2 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.
- 33.3 Any notice, consent, information, application or request is to be treated as given or made if it is:
- 33.3.1 delivered, when it is left at the relevant address,
- 33.3.2 sent by post, 2 business days after it is posted,
- 33.3.3 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
- 33.3.4 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.

- 33.4 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.

34 Approvals and Consent

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

35 Costs

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

36 Entire Agreement

- 36.1 This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with.
- 36.2 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.

37 Further Acts

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

38 Governing Law and Jurisdiction

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

39 Joint and Individual Liability and Benefits

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

40 No Fetter

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

41 Illegality

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

42 Severability

- 42.1 If a clause or part of a clause of this Agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way.
- 42.2 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.

43 Amendment

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

44 Waiver

- 44.1 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.
- 44.2 A waiver by a Party is only effective if it:
- 44.2.1 is in writing,

44.2.2 is addressed to the Party whose obligation or breach of obligation is the subject of the waiver,

44.2.3 specifies the obligation or breach of obligation the subject of the waiver and the conditions, if any, of the waiver,

44.2.4 is signed and dated by the Party giving the waiver.

44.3 Without limitation, a waiver may be expressed to be conditional on the happening of an event, including the doing of a thing by the Party to whom the waiver is given.

44.4 A waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given, and is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

44.5 For the purposes of this Agreement, an obligation or breach of obligation the subject of a waiver is taken not to have been imposed on, or required to be complied with by, the Party to whom the waiver is given.

45 GST

45.1 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.

45.2 Subject to clause 45.4, if GST is payable on a Taxable Supply made under, by reference to or in connection with this Agreement, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.

45.3 Clause 45.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Agreement to be GST inclusive.

45.4 No additional amount shall be payable by the Council under clause 45.2 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.

45.5 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:

[Insert name] Works in Kind Agreement

Shellharbour City Council

[Insert Name of Developer]

[Insert Name of Landowner]

- 45.5.1 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;
- 45.5.2 that any amounts payable by the Parties in accordance with clause 45.2 (as limited by clause 45.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 45.6 No payment of any amount pursuant to this clause 45, 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.
- 45.7 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.
- 45.8 This clause continues to apply after expiration or termination of this Agreement.

TEMPLATE

[Insert name] Works in Kind Agreement

Shellharbour City Council

[Insert Name of Developer]

[Insert Name of Landowner]

Schedule 1

(Clause 1.1)

Work Land

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

TEMPLATE

Schedule 2

(Clause 1.1)

Work Location Plan

[Drafting Note. Insert plan showing location of each Work]

TEMPLATE

Schedule 3

(Clause 1.1)

Work

Column 1	Column 2	Column 3	Column 4	Column 5
Work	Defects Liability Period	Maintenance Period	Contribution Value	Practical Completion Date
1. [Insert details of work]	[Insert period]	[Insert period]	[\$[Insert amount]]	[Insert timing]
2. [Insert details of work]	[Insert period]	[Insert period]	[\$[Insert amount]]	[Insert timing]
3. [Insert details of work]	[Insert period]	[Insert period]	[\$[Insert amount]]	[Insert timing]

TEMP

Schedule 4

(Clause 1.1)

Contact for Notices

Council:

Name: Shellharbour City Council
Address: Locked Bag 155 Shellharbour City Centre NSW 2529
Telephone: [Insert Details]
Facsimile: (02) 4221 6016
Email: [Insert Details]
Representative: [Insert Details]

Developer:

Name: [Insert Name]
Address: [Insert Details]
Telephone: [Insert Details]
Facsimile: [Insert Details]
Email: [Insert Details]
Representative: [Insert Details]

[Drafting Note. Insert the details of the Landowner only if relevant] Landowner:

Name: [Insert Name]
Address: [Insert Details]
Telephone: [Insert Details]
Facsimile: [Insert Details]
Email: [Insert Details]
Representative: [Insert Details]

[Insert name] Works in Kind Agreement
Shellharbour City Council
[Insert Name of Developer]
[Insert Name of Landowner]

Execution

Executed as a Agreement

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

Executed on behalf of the Council

General Manager

Witness

Mayor

Witness

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

Name/Position

Name/Position

[Insert name] Works in Kind Agreement

Shellharbour City Council

[Insert Name of Developer]

[Insert Name of Landowner]

[Drafting Note. Insert the execution clause of the Landowner only if relevant] Executed on behalf of the Landowner in accordance with s127(1) of the Corporations Act (Cth) 2001

Name/Position

Name/Position

TEMPLATE