

56 Hilddowns Road, Kalkite

DRAFT Planning Agreement No. _____

Section 7.4 of the Environmental Planning and Assessment Act 1979

(subject to ongoing discussion)

Snowy Monaro Regional Council

SACCO BUILDING GROUP

[DD MONTH YEAR]

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Summary Sheet

Dated / /

Parties

Council:

Snowy Monaro Regional Council

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council@snowymonaro.nsw.gov.au

Alexanda Adkins (Team Leader – Strategic Planning)

Developer:

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Dino Sacco

Landowner: If applicable

John Sacco Enterprise Pty Ltd

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Dino Sacco

1. Background

- A. The Landowner is the registered proprietor of the Development Land.
- B. The Council is the local authority constituted under the Local Government Act 1993 and the planning and consent authority under the Act.
- C. On 8 June 2022 the Developer made (or caused to be made) the Planning Proposal to Council and if the Planning Proposal is made, intends to make a Development Application in order to allow it to carry out the Development on the Land.
- D. The Developer has offered to provide the Development Contributions if the Development is undertaken.
- E. This is a Planning Agreement pursuant to section 7.4 of the Act.

2. Definitions

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

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

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

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

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

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

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

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

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

Contribution Value means the value of each Development Contribution (if any) specified in Schedules 1 & 2.

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

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

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

Development means the development of the Land for the purposes of residential, rural and conservation works in a manner permitted, subject to Development Consent, contemplated in the Planning Proposal

Planning Proposal means the Planning Proposal number PP-2022-2114 to rezone 74 Hectares of rural zoned land at 56 Hilldowns Rd, Kalkite to enable urban development.

Development Contributions means the monetary contributions, the dedication of land free of cost or the provision of a material public benefit (if any) required to be provided by the Developer under this Agreement.

Development Land means the land to which the Development relates, being 56 Hilldowns Road, Kalkite , legally identified as Lot 5 in Deposited Plan 529579, and Lot 190 in Deposited Plan 756727.

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

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

- a) The person, being an individual, commits an act of bankruptcy;
- b) The person becomes insolvent;
- c) The person ceases, suspends or threatens to cease or suspend the conduct of a majority of its business, or disposes of or threatens to dispose of its assets, except for the purposes of a solvent reconstruction or amalgamation previously approved by Council;
- d) The person is or states that it is, or under applicable legislation is taken to be, unable to pay its debts (other than as a result of a failure to pay a debt or claim that is the subject of a dispute in good faith), or stops or suspends, or threatens to stop or suspend, payment of all or a class of its debts;
- e) A receiver, receiver and manager, administrator, controller or similar officer of any of the assets or the whole or any part of the undertaking of the person is appointed;
- f) A resolution is passed by the person to appoint an administrator, or an administrator of the person is appointed;
- g) An order is made to appoint a liquidator or a provisional liquidator of the person;
- h) The person resolves to wind itself up or otherwise dissolve itself, or gives notice of its intention to do so, except for the purposes of a solvent reconstruction or amalgamation previously approved by the Council, or is otherwise wound up or dissolved;
- i) An order is made that the person be wound up;
- j) The person is, or makes a statement from which it may be reasonably inferred by the Council that the person is, the subject of an event described in s 459C(2) of the Corporations Act 2001 (Cth);
- k) The person assigns any of its property for the benefit of creditors or any class of them;
- l) An order is made or a resolution for the person to enter into any arrangement, compromise or composition with, or assignment for the benefit of, its creditors or any class

of them except for the purposes of a solvent reconstruction or amalgamation previously approved by the Council;

m) An Security Interest becomes enforceable or is enforced against that person; the person's interest is or under this Agreement or in the subject matter of this Agreement becomes attached or is taken, in execution or under any legal process;

n) A distress, attachment, or other execution is levied or enforced against that person in excess of \$10,000;

o) The person has a judgment or given order against it in an amount exceeding \$10,000 (or the equivalent in another currency) and that judgement or order is not satisfied or quashed or stayed within 20 Business Days after being given;

p) Any power of sale is exercised or steps are taken to take possession of any assets of the person subject to a Security Interest;

q) Any step is taken to do anything listed in the above paragraphs; and

r) Any event that is analogous or has a substantially similar effect to any of the events specified in this definition in any jurisdiction.

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

LRS means the NSW Land Registry Services.

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

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

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

Planning Legislation means the Act, the *Local Government Act 1993* (NSW) and the *Roads Act 1993* (NSW).

Public means a section of the public.

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

Regulation means the Environmental Planning and Assessment Regulation 2021.

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

Work means the works specified or described in Schedule 1 and Schedule 2 of this Agreement.

Part 1 – Preliminary

3. Interpretation

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

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

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

3.1.3. If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.

3.1.4. A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.

3.1.5. A reference in this Agreement to a \$ value relating to a Development Contribution is a reference to the value exclusive of GST.

3.1.6. A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.

3.1.7. A reference in this Agreement to any agreement or document is to that agreement, deed or document as amended, novated, supplemented or replaced.

3.1.8. A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule of or to this Agreement.

3.1.9. An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.

3.1.10. Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.

3.1.11. A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.

3.1.12. References to the word 'include' or 'including' are to be construed without limitation.

3.1.13. A reference to this Agreement includes the agreement recorded in this Agreement.

3.1.14. A reference to a Party to this Agreement includes a reference to the employees, agents and contractors of the Party, the Party's successors and assigns.

3.1.15. A reference to 'dedicate' or 'dedication' in relation to land is a reference to dedicate or dedication free of cost.

3.1.16. Any schedules, appendices and attachments form part of this Agreement.

3.1.17. Notes appearing in this Agreement are operative provisions of this Agreement.

4. Status

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

4.2. The Developer agrees that this Agreement operates as a deed poll in favour of the Council on and from the date of execution of this agreement by the Developer until the date on which this Agreement commences.

5. Application of this Agreement

This Agreement applies to the Land and to the Development .

6. Operation of Document

This Agreement operates from the date it is executed by both parties.

7. Warranties

The Parties warrant to each other that they:

7.1. have full capacity to enter into this Agreement, and

7.2. are able to fully comply with their obligations under this Agreement.

8. Further agreements

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

9. Surrender of Right of Appeal, etc.

The Developer is not to commence or maintain, or to cause or procure the commencement or maintenance, of any proceedings in any court or tribunal or similar body appealing against, or questioning the validity of this Agreement, or an Approval relating to the Development in so far as the subject-matter of the proceedings relates to the validity of this Agreement or any condition in the Approval requiring the entering into or compliance with this Agreement.

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

10.1. This Agreement does not exclude the application of s7.11 of the Act to the Development except as follows:

a) Council may not impose a condition of Development Consent in accordance with s7.11 of the Act such that monetary contributions are required to be paid with respect to **[note: Insert description of category of contributions that is being off set]**.

b) Council may not impose a condition of Development Consent in accordance with s7.11 of the Act such that monetary contributions are required to be paid with respect to **[note: Insert description of category of contributions that is being off set]**.

10.2. This Agreement does not exclude the application of s7.12 of the Act to the Development.

10.3. This Agreement does not exclude the application of s7.24 of the Act to the Development.

Part 2 – Developer Contributions

11. Provision of Development Contributions

11.1. The Developer will make Development Contributions to the Council in accordance with Schedule 1 and Schedule 2, any other provision of this Agreement relating to the making of Development Contributions.

11.2. Any Contribution Value specified in this Agreement in relation to a Development Contribution comprising dedication of land or the carrying out of a Work does not serve to define the extent of the Developer's obligation to make the Development Contribution.

11.3. The Council is to apply each Development Contribution made by the Developer under this Agreement towards the public purpose for which it is made and otherwise in accordance with this Agreement.

11.4. Despite clause 11.3, the Council may apply a Development Contribution made under this Agreement towards a public purpose other than the public purpose specified in this Agreement if the Council reasonably considers that the public interest would be better served by applying the Development Contribution towards that other purpose rather than the purpose so specified.

12. Payment of monetary Development Contributions

12.1. A monetary Development Contribution is made for the purposes of this Agreement when the Council receives the full amount of the contribution payable under this Agreement in cash or by unendorsed bank cheque or by the deposit by means of electronic funds transfer or cleared funds into a bank account nominated by the Council.

13. CPI Increases

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

- a) the relevant Contribution Value for that Development Contribution set out in this Agreement; and
- b) The amount calculated as follows:

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

Where:

A = the Monetary Contribution increased by CPI;

B = the relevant Contribution Value for that Development Contribution set out in this Agreement;

C = the Consumer Price Index last published before the payment date of the Monetary Contribution;

D = the Consumer Price Index 1 January in the year in which this Agreement is entered into.

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

14. Dedication of Land

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

14.1.1. The Council is provided with a Clearance Certificate that is valid and at the time of dedication of land, and

14.1.2. One of the following has occurred:

a) A deposited plan is registered in the register of plans held with the Registrar General that dedicates land as a public road (including a temporary public road) under the Roads Act 1993 or creates a public reserve or drainage reserve under the Local Government Act 1993, or

b) The Council is given:

i) an instrument in registrable form under the Real Property Act 1900 duly executed by the Developer as transferor that is effective to transfer the title to the land to the Council when executed by the Council as transferee and registered,

ii) the written consent to the registration of the transfer of any person whose consent is required to that registration, and

iii) a written undertaking from any person holding the certificate of title to the production of the certificate of title for the purposes of registration of the transfer, or

c) the Council is given evidence that a transfer has been effected by means of electronic lodgement through Property Exchange Australia Ltd or another ELNO.

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

14.3. The Developer must ensure that land dedicated to the Council under this Agreement is free of all encumbrances and affectations (whether registered or unregistered and including without limitation any charge or liability for rates, taxes and charges) except as otherwise agreed in writing by the Council.

14.4. If, having used all reasonable endeavours, the Developer cannot ensure that land to be dedicated to the Council under this Agreement is free from all encumbrances and affectations, the Developer may request that Council agree to accept the land subject to those encumbrances and affectations, but the Council may withhold its agreement in its absolute discretion.

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

16. Carrying out of Work

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

17. Variation to Work

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

17.2. Without limiting clause 17.1, the Developer may make a written request to the Council to approve a variation to the design or specification of a Work in order to enable it to comply with the requirements of any Authority imposed in connection with any Approval relating to the carrying out of the Work.

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

18. Access to land by Developer

18.1. The Council authorises the Developer, upon receiving reasonable prior notice from the Developer, to enter, occupy and use [any land owned or controlled by the Council and which is necessary for the Developer to enter, use and occupy purpose of performing its obligations under this Agreement.

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

19. Access to Land by Council

19.1. The Council may enter any land on which Work is being carried out by the Developer under this Agreement in order to inspect, examine or test the Work, or to remedy any breach by the Developer of its obligations under this Agreement relating to the Work.

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

20. Protection of People, Property & Utilities

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

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

20.2. Without limiting clause 20.1, the Developer must not obstruct, interfere with, impair or damage any public road, public footpath, public cycleway or other public thoroughfare, or any pipe, conduit, drain, watercourse or other public utility or service on any land except as authorised in writing by the Council or any relevant Authority.

21. Repair of Damage

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

21.2. The Developer will carry out its obligation under clause 21.1 at its own cost.

22. Works-As-Executed Plan

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

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

23. Completion of Work

23.1. The Developer will give the Council written notice of the date on which it will complete Work required to be carried out under this Agreement.

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

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

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

23.4. If the Council is the owner of the land on which Work the subject of a notice referred to in clause 23.3 is issued, the Council assumes responsibility for the Work upon the issuing of the notice, but if it is not the owner at that time, it assumes that responsibility when it later becomes the owner.

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

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

24. Rectification of Defects

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

24.2. The Developer, at its own cost, must comply with a Rectification Notice according to its terms.

24.3. The Council is to do such things as are reasonably necessary to enable the Developer to comply with a Rectification Notice that has been given to it under clause 24.1

25. Removal of Equipment

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

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

Part 3 – Position of Council

26. Consent Authority

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

27. Document does not Fetter Discretion

This Agreement is not intended to operate to fetter:

27.1. the power of Council to make any Law; or

27.2. the exercise by Council of any statutory power or discretion,

(Discretion).

28. Severance of Provisions

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

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

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

29. No Obligations

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

Part 4 – Dispute Resolution

30. Notice of Dispute

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

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

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

31. Conduct Pending Resolution

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

32. Further Steps Required Before Proceedings

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

33. Disputes for Mediation on Expert Determination

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

34. Disputes for Mediation

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

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

35. Choice for Expert

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

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

a) agreed between and appointed jointly by the parties; or

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

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

35.4. The expert appointed to determine a Dispute:

a) must have a technical understanding of the issues in dispute;

b) must not have a significantly greater understanding of one party's business, functions or operations which might allow the other side to construe this greater understanding as a bias; and

c) must inform the parties before being appointed of the extent of the expert's understanding of each party's business or operations and, if that information indicates a possible bias, then that expert must not be appointed except with the written approval of the parties.

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

36. Directions for Expert

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

36.2. The expert must:

a) act as an expert and not as an arbitrator;

b) not accept verbal submissions unless both parties are present;

c) on receipt of a written submission from one party, ensure that a copy of that submission is given promptly to the other party;

d) take into consideration all documents, information and other material which the parties give the expert which the expert in its absolute discretion considers relevant to the determination of the Dispute;

- e) not be expected or required to obtain or refer to any other documents, information or material (but may do so if the expert so wishes);
- f) issue a draft certificate stating the expert's intended determination (together with written reasons), giving each party ten (10) Business Days to make further submissions;
- g) issue a final certificate stating the expert's determination (together with written reasons); and h) act with expedition with a view to issuing the final certificate as soon as practicable.

36.3. The parties must comply with all directions given by the expert in relation to the resolution of the Dispute and must within the time period specified by the expert, give the expert:

- a) a short statement of facts;
- b) a description of the Dispute; and
- c) any other documents, records or information which the expert requests.

37. Expert may Convene Meetings

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

38. Other Courses of Action

If:

38.1. the parties cannot agree in accordance with clause 32 to refer the matter to mediation or determination by an expert; or

38.2. the mediation referred to in clause 34 has not resulted in settlement of the dispute, the mediation has been terminated and the parties have not agreed to refer the matter to expert determination within five (5) Business Days after termination of the mediation; then either party may take whatever course of action it deems appropriate for the purpose of resolving the Dispute.

39. Final Determination of Expert

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

40. Costs

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

41. Remedies Available Under the Act

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

42. Urgent Relief

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

Part 5 – Enforcement

43. Security for Performance of Obligations

43.1. The Developer must provide Security to the Council in the amount of [Drafting Note: Insert \$ amount.] in relation to the performance of its obligations under this Agreement.

43.2. The Developer must provide the Security to the Council prior to the issue of a Construction Certificate or Subdivision Works Certificate under a Development Consent for the construction of the relevant Development Contribution.

43.4. The Council may call-up and apply the Security in accordance with clause 52 to remedy any breach of this Agreement notwithstanding any other remedy it may have under this Agreement, under any Act or otherwise at law or in equity.

43.5. The Council must release and return the Security or any unused part of it to the Developer within 14 days of completion of the obligation to which the Security relates.

43.6. The Developer may at any time provide the Council with a replacement Security.

43.7. On receipt of a replacement Security, the Council is to release and return the Security that has been replaced to the Developer.

43.8. If the Council calls-up the Security or any portion of it, it may, by written notice to the Developer, require the Developer to provide a further or replacement Security to ensure that the amount of Security held by the Council equals the amount it is entitled to hold under this Agreement.

43.9. The Developer is to ensure that the Security provided to the Council is at all times maintained to the full current indexed value.

51. Acquisition of Land Required to be Dedicated

51.1. If the Landowner does not dedicated land required to be dedicated under this Agreement at the time at which it is required to be dedicated, the Developer consents to the Council compulsorily acquiring the land for compensation in the amount of \$1 without having to follow the pre-acquisition procedure under the Just Terms Act.

51.2. The Council is to only acquire land pursuant to clause 51.1 if it considers it reasonable to do so having regard to the circumstances surrounding the failure by the Developer to dedicate the land required to be dedicated under this Agreement.

51.3. Clause 51.1 constitutes an agreement for the purposes of s30 of the Just Terms Act.

51.4. If, as a result of the acquisition referred to in clause 51.1, the Council is required to pay compensation to any person other than the Developer, the Developer is to reimburse the Council that amount, upon a written request being made by the Council, or the Council can call on any Security provided under clause 43.

51.5. The Developer indemnifies and keeps indemnified the Council against all Claims made against the Council as a result of any acquisition by the Council of the whole or any part of the land concerned except if, and to the extent that, the Claim arises because of the Council's negligence or default.

51.6. The Developer is to promptly do all things necessary, and consents to the Council doing all things necessary, to give effect to this clause 51, including without limitation:

- a) signing any documents or forms,
- b) giving land owner's consent for lodgement of any Development Application,
- c) producing certificates of title to the Registrar-General under the Real Property Act 1900, and paying the Council's costs arising under this clause 51.
- d) paying the Council's costs arising under this clause 51.

52. Breach of Obligations

52.1. If the Developer is in breach of any obligation under this Agreement, it may give a written notice to the Developer:

52.1.1. specifying the nature and extent of the breach,

52.1.2. requiring the Developer to:

- a) rectify the breach if it reasonably considers it is capable of rectification, or
- b) pay compensation to the reasonable satisfaction of the Council in lieu of rectifying the breach if it reasonably considers the breach is not capable of rectification,

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

52.2. If the Developer fails to fully comply with a notice referred to in clause 52.1, the Council may, without further notice to the Developer, call-up the Security provided by the Developer under this Agreement and apply it to remedy the Developer's breach.

52.3. If the Developer fails to comply with a notice given under clause 52.1 relating to the carrying out of Work under this Agreement, the Council may step-in and remedy the breach and may enter, occupy and use any land owned or controlled by the Developer and any equipment on such land for that purpose.

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

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

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

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

52.6. Nothing in this clause 52 prevents the Council from exercising any rights it may have at law or in equity in relation to a breach of this Agreement by the Developer, including but not limited to seeking relief in an appropriate court.

53. Enforcement in a Court of Competent Jurisdiction

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

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

- a) a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Agreement or any matter to which this Agreement relates, or
- b) the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Agreement or any matter to which this Agreement relates.

Part 6 – Registration and Restriction on Dealings

54. Registration of VPA on Title

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

54.2. The Developer must:

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

55. Removal from Title of the Land

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

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

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

Part 7 – Indemnities & Insurance

57. Risk

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

58. Release

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

59. Indemnity

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

60. Insurance

60.1. The Developer is to take out and keep current to the satisfaction of the Council the following insurances in relation to Work required to be carried out by the Developer under this Agreement up until the Work is taken to have been completed in accordance with this Agreement:

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

60.2. If the Developer fails to comply with clause 60.1, the Council may effect and keep in force such insurances and pay such premiums as may be necessary for that purpose and the amount so paid shall be a debt due from the Developer to the Council and may be recovered by the Council as it deems appropriate including:

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

60.3. The Developer is not to commence to carry out any Work unless it has first provided to the Council satisfactory written evidence of all of the insurances specified in clause 60.1.

Part 8- GST

61. Definitions

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

62. Non-monetary Supplies

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

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

a) The party making the Taxable Supply will issue a Tax Invoice to the other as soon as practicable after agreeing to the GST inclusive market value and will disclose the amount of GST included in the GST inclusive market value.

b) The recipient of the Taxable Supply will pay to the other party the amount of the included GST within fifteen (15) days of receiving the Tax Invoice.

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

63. Supply Expressed in Terms of Money

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

a) the recipient of the supply must pay an amount equal to the GST on that supply to the other party;

b) the party making the supply will issue a Tax Invoice to the other party; and

c) the recipient of the supply will pay the amount of the GST to the supplier within fifteen (15) days of receiving the Tax Invoice.

64. Expenses and Costs Incurred

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

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

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

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

65. Survival of Clause

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

Part 9 – General

66. Legal Costs and Expenses

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

68. Counterparts

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

69. Liability

Except as otherwise set out in this Agreement:

69.1. any agreement, covenant, representation or warranty under this Agreement by 2 or more persons binds them jointly and each of them individually, and

69.2. any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually

70. Entire Agreement and No Reliance

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

71. Severability

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

71.2. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Agreement, but the rest of this Agreement is not affected.

72. Waiver

72.1. The non-exercise of or delay in exercising any power or right of a party does not operate as a waiver of that power or right, nor does any single exercise of a power or right preclude any other or further exercise of it or the exercise of any other power or right. A power or right may only be waived in writing, signed by the parties to be bound by the waiver.

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

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

73. Further Assurance

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

74. Survival and Enforcement of Indemnities

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

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

75. No Merger

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

76. Business Day

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

Part 10- Other Provisions

77. Notices

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

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

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

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

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

80. Approvals and Consent

80.1. Except as otherwise set out in this Agreement, and subject to any statutory obligations, a Party may give or withhold an approval or consent to be given under this Agreement in that Party's absolute discretion and subject to any conditions determined by the Party.

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

82. Notations on section 10.7(2) Planning Certificates

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

83. Governing Law and Jurisdiction

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

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

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

84. Joint and Individual Liability and Benefits

84.1. Except as otherwise set out in this Agreement:

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

87. Amendment

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

89. Document not Confidential

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

Schedule 1

Development Contributions

Item/Contribution	Public Purpose	Manner & Extent	Timing
A. Monetary Contributions			
Nil			
B. Dedication of Land			
Active Open Space (i.e. recreation) Land	Open Space – active/formal recreational activities	Dedication of approximately 2,370 sqm of un-embellished open space land. Such land is nominated as RE1 – Recreation and SP2 – Infrastructure on the draft land use zoning map prepared by United Surveyors, Drawing Reference Number 12606-4, Revision A, Dated 21 April 2023.	Within 24 months of the registration of any residential lots in order to allow time for relevant statutory approvals such as Development Application/s and lot registrations.
Informal Open Space (i.e. recreation) Land	Open Space – active/informal recreational activities	Dedication of approximately 4,356 sqm of un-embellished informal open space land. Such land is nominated as RE1 – Recreation and SP2 – Infrastructure on the draft land use zoning map prepared by United Surveyors, Drawing Reference Number 12606-4, Revision A, Dated 21 April 2023.	Within 24 months of the registration of any residential lots in order to allow time for relevant statutory approvals such as Development Application/s and lot registrations.

Public Walk Ways	Open space – pedestrian connectivity	Dedication of approximately 2,400 sqm of unembellished land which will enable pedestrian connectivity throughout residential areas, predominantly towards the foreshore.	Within 24 months of the registration of any residential lots in order to allow time for relevant statutory approvals such as Development Application/s and lot registrations.
Drainage	Drainage	Dedication of approximately 2,132 sqm of unembellished drainage land. Such land is nominated as RE1 – Recreation and SP2 – Infrastructure on the draft land use zoning map prepared by United Surveyors, Drawing Reference Number 12606-4, Revision A, Dated 21 April 2023.	Within 24 months of the registration of any residential lots in order to allow time for relevant statutory approvals such as Development Application/s and lot registrations.
Community Hall	Dual purposes being a community hall as well as shelter in the event of an emergency such as a bushfire.	Dedication of approximately 300 sqm of land to Council without embellishments. The land will generally be in the vicinity of any commercially zoned land (i.e. zone B1) within the Development.	Within 12 months of the registration of any residential lots in order to allow time for relevant statutory approvals such as Development Application/s and lot registrations.
NSW Rural Fire Service Shed	New NSW Rural Fire Service fire shed to replace and/or supplement the existing shed along Kalkite Road.	Dedication of approximately 300 sqm of land upon which a new Rural Fire Service Shed will be constructed	Within 12 months the registration of any residential lots in Precinct 1.
Slip lane	Adequate vehicular entry into Precinct 1.	Approximately 250 sqm of land will be dedicated upon which the slip lane will be constructed.	Prior to the registration of any residential lots into Precinct 1.

C. Carrying out of Work			
NSW Rural Fire Service Shed	New NSW Rural Fire Service fire shed to replace and/or supplement the existing shed along Kalkite Road.	Construction of a new shed as shown in plan prepared by Algorry Zappia & Associates, reference number P6285, Sheet A200, A300, A301, A302, and A303, dated May 2023 (shed to be approximately 18m deep by 16m wide and allow for 2 fire trucks, amenities, meeting room and store room).	Within 12 months the registration of any residential lots in Precinct 1.
Construction of a 'slip lane' and dedication of land.	Provide adequate vehicular access to land within Precinct 1	Construction of a slip lane.	Prior to the registration of any residential lots into Precinct 1.
Surface improvements	Improve the surface on the western side of the Kalkite Rd and Eucumbene Rd intersection.	Resurface the existing roadway, in accordance with relevant standards, at the intersection of Kalkite Rd and Eucumbene Rd.	With 12 months of 50% of all the residential lots within Precinct 1 being registered.
Road barriers	Improve traffic safety.	Installation of traffic safety barriers along bends of Kalkite Road.	With 12 months of 50% of all the residential lots within Precinct 1 being registered.
Upgrade of Eucumbene Rd and Kosciuszko Rd intersection (requirement for, and details of any upgrade to be determined in accordance with ongoing traffic studies.	Improve traffic safety.	Potential road widening, island installation, line marking and surface repair.	With 12 months of 25% of all the residential lots within Precinct 1 being registered.