

# **Works In Kind Agreement**

## **Kent Lane, Huskisson**

Under s7.11(5)(b) of the *Environmental Planning and Assessment Act 1979*

**Shoalhaven City Council**

**Binah Developments Pty Ltd**

**SK Group Manufacturing Australia Pty Ltd**

**Rafid Investments Pty Ltd**

**Development Consent DA17/2574**

**Date: 18 November 2022**

## **Kent Lane, Huskisson Works In Kind Agreement**

**This Agreement** is made on the date set out in **Item 1** of **Schedule 1**.

### **Parties**

- (1) **The Council of the City of Shoalhaven** of Bridge Road, Nowra, NSW 2541 (**Council**), and
- (2) **The parties set out Item 2 of Schedule 1 (Developer and Landowner)**.

### **Background**

- A. The Developer has been granted the Development Consent or is otherwise entitled to act upon the Development Consent.
- B. The Development Consent contains the Condition which requires the Developer to pay the Contributions in respect to the development.
- C. The Developer has offered to carry out the Works in lieu of paying the Contributions.
- D. The Developer has paid the Contributions.
- E. The Developer and Council wish to enter into this Agreement to make provision for the carrying out of the Works by the Developer in satisfaction of the Developer's obligation to pay the Contributions.
- F. Section 7.11(5)(b) of the Act authorises Council and the Developer to enter into this Agreement.

### **Agreed Terms**

1. **Scope and design of Works**
  - 1.1 The Developer and Council agree that the scope of Works to be carried out and completed by the Developer under this Agreement is set out in **Schedule 2**.
  - 1.2 The Developer must prepare any detailed design or construction drawings for the Works in accordance with the standards set out in **Schedule 2**.
2. **Variation to design**
  - 2.1 The design or specification of the Works that is required to be carried out by the Developer under this Agreement may only be varied by agreement in writing between the Parties, acting reasonably.
  - 2.2 Without limiting clause 2.1, the Developer may make a written request to the Council to approve a variation to the design or specification of the Works in order to enable it to comply

**Kent Lane, Huskisson Works In Kind Agreement**

**Shoalhaven City Council**

**Rafid Investments Pty Ltd, Binah Developments Pty Limited, SK Group Manufacturing Australia Pty Limited**

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with the requirements of any Authority imposed in connection with any approval relating to the carrying out of the work.

2.3 The Council is not to unreasonably delay or withhold its approval to a request made by the Developer under clause 2.2.

2.4 Clause 2.1 does not apply to a variation that is trivial or inconsequential.

**3. Obligation to Carry out Work**

3.1 The Developer is to carry out and complete each of the Works and must ensure that the Works reach Practical Completion on or before the Date for Practical Completion and are Handed-Over in accordance with the terms of this Agreement.

3.2 The Developer's obligation under clause 3.1 exists irrespective of whether the Developer:

- (a) carries out the Works itself; or
- (b) enters into an agreement with another person under which the other person carries out the Works on the Developer's behalf.

3.3 The Developer must (at its cost):

- (a) obtain all relevant approvals and consents for the carrying out of the Works whether from the Council or any other relevant Authority; and
- (b) before commencing the Works, give to the Council copies of all approvals and consents for the Works (except those granted by Council); and
- (c) from time to time, give to Council such information as requested by the Council relating to the carrying out of the Works.

3.4 The Developer must carry out and complete the Works in a good and workmanlike manner having regard to the intended purpose of the Works and otherwise to the satisfaction of Council in accordance with:

- (a) the Development Consent;
- (b) any approvals and consents relating to the Works;
- (c) all applicable laws, including those relating to the environment and occupational health and safety;
- (d) this Agreement to the extent that it is not inconsistent with the Development Consent, any other approval or consent, or applicable law; and
- (e) any reasonable directions given by Council about the Works.

3.5 The Developer must ensure, in relation to the carrying out of the Works, that it:

## **Kent Lane, Huskisson Works In Kind Agreement**

### **Shoalhaven City Council**

### **Rafid Investments Pty Ltd, Binah Developments Pty Limited, SK Group Manufacturing Australia Pty Limited**

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- (a) takes all necessary measures to protect people and property;
- (b) avoids unnecessary interference with the passage of people and vehicles; and
- (c) prevents any nuisance or unreasonable noise and disturbance; and
- (d) complies with the Council's work health & safety management systems as applicable to the Works.

3.6 The Developer, at its own cost, must repair and make good to the satisfaction of Council any loss or damage to the Works from any cause whatsoever which occurs before the date on which the Works are Handed-Over.

3.7 The Council as a party to this Agreement and not as a consent authority may (but is not obliged) at reasonable times and on reasonable notice inspect the Works during the course of construction.

#### **4. Ownership of Works**

4.1 Nothing in, or done under, this Agreement gives the Developer or Landowner:

- (a) any right, title or interest in the Works; or
- (b) any estate or interest in the Site,

whether at law or in equity.

#### **5. Effect of Developer's Compliance with this Agreement**

5.1 Subject to the issue of a Notice of Practical Completion for the Works, in accordance with clause 9.3 of this Agreement, the Council agrees to repay to the Developer the Contributions.

5.2 The Council is to pay the Contributions to the Developer within 28 days:

- (a) once the Council has issued a Notice of Practical Completion in respect to the Works, pursuant to clause 9.3 of this Agreement; and
- (b) in accordance with clause 5.3.

5.3 Once the Developer considers that it is entitled to payment of the Contributions Amount, the Developer is to submit a document to the Council ('**Contributions Amount Claim**') identifying the amount of Contributions Amount claimed, which must be equal to the amount of Contributions payable under the Development Consent as set out in **Item 6 of Schedule 1**.

#### **6. Value of Works**

6.1 For the purposes of this Agreement, the Council and Developer agree that the value of an

**Kent Lane, Huskisson Works In Kind Agreement**  
**Shoalhaven City Council**  
**Rafid Investments Pty Ltd, Binah Developments Pty Limited, SK Group Manufacturing**  
**Australia Pty Limited**

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item of the Works is the Works Value for that item as set out in **Schedule 2**.

- 6.2 The Developer expressly acknowledges and agrees that:
- (a) the Works Value as set out in **Schedule 2** is based on the value of the Works as specified in the Contributions Plan or as otherwise agreed by the Council; and
  - (b) if the Developer's actual cost of carrying out and completing the Works, including any costs incurred under this Agreement, determined at the date on which the Works reach Completion, differs from the Works Value, then:
    - (i) no party to this Agreement will be entitled to claim any credit or reimbursement, as the case may be, for the difference; and
    - (ii) the Developer is not entitled to change or reduce the scope of the Works by reason only that the costs actually incurred are greater than the Works Value.

**7. Payment of Council Works Contribution Amount**

- 7.1 Subject to clauses 7.2 – 7.4, the Council is to pay the Council Works Contribution Amount to the Developer.
- 7.2 The Council and the Developer agree that the Council Works Contribution Amount, or any part thereof, is only to be paid by the Council to the Developer:
- (c) once the Council has issued a Notice of Practical Completion in respect to the Works, pursuant to clause 9.3 of this Agreement; and
  - (d) in accordance with clause 7.3.
- 7.3 Once the Developer considers that it is entitled to payment of the Council Works Contribution Amount, the Developer is to submit a document to the Council ('**Council Works Contribution Amount Claim**') identifying the amount of Council Works Contribution Amount claimed, which must be equal to the amount by which the Works at the date of the Council Works Contribution Amount Claim exceed the amount of Contributions payable under the Development Consent.
- 7.4 The Council is to consider a Council Works Contribution Amount Claim made by the Developer under clause 7.3 and:
- (a) if the Council accepts the Council Works Contribution Amount Claim, the Council is to make payment of the claim within 28 business days; or
  - (b) if the Council does not accept the Council Works Contribution Amount Claim, the Council is to notify the Developer, in writing, within 14 days of the date of the claim. In doing so the Council is to provide particulars of the Council's reasons for rejecting the claim.
- 7.5 If the Council gives the Developer a notice under clause 7.4 (b), the Developer may:
- (a) provide further information or supporting documents to the Council, after which clause 7.3 is to apply again; or

## **Kent Lane, Huskisson Works In Kind Agreement**

### **Shoalhaven City Council**

### **Rafid Investments Pty Ltd, Binah Developments Pty Limited, SK Group Manufacturing Australia Pty Limited**

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- (b) notify the Council that a dispute exists, which dispute is to be dealt with pursuant to clause 20 of this Agreement.

7.6 Despite any other provision of this Agreement:

- (a) the Developer may only make a claim for payment of the Council Works Contribution Amount to the extent of the amount by which the value of the Works under this Agreement exceeds the amount of the Contributions; and
- (b) the maximum sum of all Council Works Contribution Amount Claims made by the Developer may not exceed the Council Works Contribution Amount.

7.7 The Developer may make one, or more than one, Council Works Contribution Amount Claim under this Agreement.

## **8. Access to the Works on the Site**

8.1 If the Council owns the Site and subject to clause 8.2, the Council authorises the Developer to enter the Site in order to enable the Developer to properly perform its obligations under this Deed.

8.2 Council may, by notice in writing, require the Developer to enter into a separate occupation licence in respect to the occupation and use of the Site and upon giving such notice, the Developer may not enter the Site except in accordance with such an occupation licence.

8.3 The Council may enter the Site in order to inspect, examine or test the Works, or to remedy any breach by the Developer of its obligations under this Deed relating to the Works.

8.4 The Council is to give the Developer prior reasonable notice before it enters the Site under clause 8.3.

8.5 To the extent necessary to execute this Agreement, the Developer warrants that it has:

- (a) obtained any necessary approval or consent from the Landowner:
  - a. to enter the land for the purposes of carrying out the Works; and
  - b. for Council to enter the land for the purposes of this Agreement; and
- (b) if requested, provide Council with written evidence of such approval or consent.

## **9. Practical Completion of Works**

9.1 When, in the opinion of the Developer, an item of the Works have reached a state of Practical Completion, the Developer must notify Council in writing. This notice must include:

- (a) a statement from the person with direct responsibility for completion of the item of the Works that in that person's opinion the item has reached Practical Completion;

**Kent Lane, Huskisson Works In Kind Agreement**

**Shoalhaven City Council**

**Rafid Investments Pty Ltd, Binah Developments Pty Limited, SK Group Manufacturing Australia Pty Limited**

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- (b) copies of any warranties, guarantees, maintenance information or other material reasonably required for the ongoing maintenance or management of the item of Works;
- (c) a complete set of works-as-executed-plans for the item of Works including one set in electronic format.

9.2 Within 10 Business Days of receipt of a notice under clause 9.1, Council will inspect the Works the subject of the notice.

9.3 Within 10 business days of the inspection pursuant to clause 9.2, the Council must by written notice to the Developer:

- (a) issue a Notice of Practical Completion for an item of the Works if it is satisfied, acting reasonably, that Practical Completion of that item has been achieved; or
- (b) disagree that Practical Completion has been achieved, identify the errors or omissions in the item of the Works which in the opinion of Council prevent Practical Completion and direct the Developer to complete, rectify or repair the Works.

9.4 Nothing in clause 9.3, or in any notice issued under clause 9.3, will be construed to reduce or waive in any manner the Developer's responsibilities to complete the Works and to correct minor defects or omissions, whether or not these are identified by Council.

9.5 The Developer must comply with a direction given under clause 9.3(b) according to its terms and at the Developer's own cost. The Developer may then give Council further written notice in accordance with clause 9.1.

9.6 An item of the Works is taken to have reached Practical Completion when Council acting reasonably gives the Developer a Notice of Practical Completion for that item.

**10. Maintenance of Works**

10.1 The Developer is to Maintain each of the Work during the Maintenance Period to the satisfaction of the Council.

**11. Defects Liability Period**

11.1 During the Defects Liability Period, Council may give to the Developer written notice in relation to the Works specifying:

- (a) the Works requiring rectification;
- (b) the action to be undertaken by the Developer to rectify those Works; and
- (c) the date on which those Works must be rectified.

11.2 The Developer must comply with a notice given under clause 11.1 according to its terms and

## **Kent Lane, Huskisson Works In Kind Agreement**

### **Shoalhaven City Council**

### **Rafid Investments Pty Ltd, Binah Developments Pty Limited, SK Group Manufacturing Australia Pty Limited**

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at the Developer's own cost.

- 11.3 The Works is taken to be rectified when Council gives the Developer written notice to that effect.
- 11.4 Without limiting any other rights the Council has to enforce this Agreement, the Council may, if the Developer does not comply with a notice given under clause 11.1 do one or more of the following:
- (a) call upon the Guarantee Amount and apply it in accordance with clause 16; and
  - (b) do such things as are necessary to rectify the defect; and
  - (c) recover, as a debt due and owing, any difference between the amount of the Council Works Contribution Amount and the costs incurred by Council in rectifying the defect.
- 11.5 Clause 11.1 does not limit any other right, power or privilege of the Council whether arising under this Agreement or otherwise at law.

## **12. Hand-Over of Works**

- 12.1 Not later than 10 Business Days before the end of the Defects Liability Period or Maintenance Period for an item of Works (whichever is later), the Developer is to give the Council written notice of the end of the Defects Liability Period and Maintenance Period.
- 12.2 Within 10 Business Days of receipt of a notice under clause 12.1, Council will inspect the Works the subject of the notice.
- 12.3 The Council must by written notice to the Developer:
- (a) issue a Final Certificate for the item of the Works if it is satisfied, acting reasonably, that any notice issued by the Council under clause 11.1 has been complied with and the Developer has Maintained the Works in accordance with this Agreement; or
  - (b) disagree that all notices issued by the Council under clause 11.1 have been complied with or that the Works have been Maintained in accordance with this Agreement and identify the errors or omissions in the item of the Works which in the opinion of Council prevent completion and direct the Developer to complete, rectify or repair the Works.
- 12.4 The Developer must comply with a direction given under clause 12.3(b) according to its terms and at the Developer's own cost. The Developer may then give Council further written notice in accordance with clause 12.1.
- 12.5 An item of the Works is Handed-Over for the purposes of this Agreement when the Council acting reasonably gives the Developer a Final Certificate for that item.
- 12.6 If the Council is the owner of the land on which an item of the Works the subject of a notice referred to in clause 12.5 is given, the Council assumes responsibility for that item upon the issuing of the Final Certificate for the Works, but if it is not the owner at that time, it assumes



**Kent Lane, Huskisson Works In Kind Agreement**

**Shoalhaven City Council**

**Rafid Investments Pty Ltd, Binah Developments Pty Limited, SK Group Manufacturing Australia Pty Limited**

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that responsibility when it later becomes the owner or is granted an easement on terms satisfactory to the Council in respect of the Works.

12.7 Before an item of the Works is Handed-Over to the Council, the Developer is to:

(a) remove from the Site:

(i) any rubbish or surplus material, and

(ii) any temporary works, and

(iii) any construction plant and equipment,

relating to the carrying out of the work as the case requires, and

(b) assign to the Council all of the Developer's contractor's warranties under any building or construction contract entered into by the Developer in respect of the Works.

**13. Easements, covenants etc. relating to Works**

13.1 The Developer must create, or procure the creation of, any easement or covenant or any other instrument benefitting the Council that is reasonably required by the Council in relation to the Works.

13.2 The costs required to be incurred by the Developer in doing so include, unless otherwise agreed in writing between the Parties, the payment of compensation to any person.

**14. Delay**

14.1 When it becomes evident to the Developer that anything, including:

(a) any act or omission of Council;

(b) delay or disruption caused by Council, or a breach of this Agreement by Council;

(c) a change in legislative requirements;

(d) an event of force majeure,

may delay the performance of any obligation under this Agreement, the Developer may within 20 Business Days of becoming aware of the delay, notify Council in writing with details of the possible delay, the cause and request an extension of time to perform the relevant obligation.

14.2 If the Developer is delayed by any of the causes referred to in clause 14.1 and Council considers that such cause:

(a) could not be reasonably avoided; and

## **Kent Lane, Huskisson Works In Kind Agreement**

### **Shoalhaven City Council**

### **Rafid Investments Pty Ltd, Binah Developments Pty Limited, SK Group Manufacturing Australia Pty Limited**

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(b) affects an activity critical for completion or performance of the relevant obligation,

then the Developer will be entitled to an extension of time for the relevant obligation as determined by the Council acting reasonably.

14.3 In any other case, the Council may approve or reject a request for extension of time in its absolute discretion.

## **15. Security and right of entry**

15.1 Where the Developer fails to comply with a notice given under clauses 9.3(b), 11.1 or 12.3(b), the Council may:

(a) give the Developer a termination notice under clause 22; or

(b) enter onto the Site and carry out, or cause to be carried out, such works as the Council reasonably considers to be required in order to comply with the relevant notice.

15.2 Where the Council incurs costs in carrying out any action taken pursuant to clause 15.1(b), the Council may deduct those costs from the Guarantee Amount.

## **16. Guarantee**

16.1 Within 5 Business Days of the date of this Agreement, the Developer must provide the Council with the Guarantee for the Guarantee Amount.

16.2 If the Guarantee is provided by way of a bond in the form of cash or unendorsed bank cheque, the Council must hold the Guarantee in an interest bearing account on behalf of the Developer, and any interest earned by the Council on the investment of the Guarantee forms part of the Guarantee.

16.3 The Council is to hold the Guarantee until it is required to be released in accordance with this clause 16.

16.4 The Council may call upon the Guarantee if:

(a) the Developer fails to comply with a notice given under clause 11 or clause 21; or

(b) Council gives the Developer a termination notice under clause 23.

16.5 The amount appropriated by the Council under clause 16.1 must be applied towards:

(a) the reasonable costs and expenses incurred by the Council in rectifying any default by the Developer under this Agreement; or

(b) carrying out the Works; or

(c) carrying out any works at the Site necessary for the protection of persons or property.

## **Kent Lane, Huskisson Works In Kind Agreement**

### **Shoalhaven City Council**

### **Rafid Investments Pty Ltd, Binah Developments Pty Limited, SK Group Manufacturing Australia Pty Limited**

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16.6 The Developer acknowledges and agrees that:

- (a) where the Council may call on the Guarantee under this Agreement, the Council may claim, and the bank will be entitled to make, payment under the Guarantee without reference to the Developer and despite any objection, claim or direction by the Developer to the contrary; and
- (b) the rights of the Council under this Agreement are without derogation from the other rights and remedies available to the Council under this Agreement, at law or in equity in relation to the default of the Developer.

16.7 If the Council calls on the Guarantee before it is required to be released, the Developer must, within 5 working days of the Council having done so, provide the Council with a further guarantee, which, together with any unused portion of the Guarantee, is equal to the Guarantee Amount.

16.8 Nothing in this clause 16 requires the Council to release any part of the Guarantee which will result in Council holding a Guarantee in an amount less than 10% of the Works Value.

16.9 The Council is required to release the Guarantee or any unused portion of it to the Developer within 10 Business Days of the end of the Defects Liability Period or the Maintenance Period, whichever is later.

## **17. Insurance**

17.1 The Developer must:

- (a) take out and maintain public liability insurance, with an insurer approved by Council, with Council nominated as an interested party, for an amount not less than the amount set out in **Item 9 of Schedule 1** for a single occurrence covering all aspects of the Works;
- (b) take out and maintain all other necessary insurance policies in respect of the Works and the carrying out of the Works including, but not limited to, contract works insurance (noting the Council as an interested party, for the full replacement value of the Works), insurance against death or injury to persons employed in relation to the undertaking of the Works, professional indemnity insurance, comprehensive motor vehicle insurance, and any other insurances required at law;
- (c) submit a copy of the certificate of currency for each insurance to Council before commencement of the Works and when otherwise required by the Council;
- (d) maintain the insurance in clauses 17.1(a) and (b) until all of the Works have been Handed-Over for the purposes of this Agreement.

## **18. Indemnity**

**Kent Lane, Huskisson Works In Kind Agreement**

**Shoalhaven City Council**

**Rafid Investments Pty Ltd, Binah Developments Pty Limited, SK Group Manufacturing Australia Pty Limited**

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18.1 Except to the extent that the Council has by act or omission contributed to its loss, the Developer indemnifies and releases the Council against all damage, expense, loss or liability of any nature suffered or incurred by the Council arising from any act or omission by the Developer (or any person engaged by it) in connection with the carrying out of the Works.

**19. Assignments & Dealings**

19.1 This Agreement is intended by the parties to bind successors in title to the Land.

19.2 The Developer must not have any Dealings with the Land or assign its rights or obligations under this Agreement to another person unless the Developer:

- (a) first informs the proposed assignee, purchaser or other party (the **Incoming Party**) of this Agreement;
- (b) provides the Incoming Party with a copy of this Agreement;
- (c) enters into a novation deed with the Incoming Party and the Council on terms satisfactory to the Council, whereby the Incoming Party agrees to perform the obligations of the Developer under this Agreement;
- (d) remedies any default by the Developer, unless such default has been waived by the Council; and
- (e) pays the Council's reasonable costs in relation to the assignment and novation.

19.3 The Developer acknowledges and agrees that it remains liable to fully perform its obligations under this Agreement unless and until it has complied with its obligations under clause 19.2.

**20. Dispute Resolution – expert determination**

20.1 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:

- (a) the Parties to the Dispute agree that it can be so determined, or
- (b) 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.

20.2 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.

20.3 If a notice is given under clause 20.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.

20.4 If the Dispute is not resolved within a further 28 days, the Dispute is to be referred to the

**Kent Lane, Huskisson Works In Kind Agreement**

**Shoalhaven City Council**

**Rafid Investments Pty Ltd, Binah Developments Pty Limited, SK Group Manufacturing Australia Pty Limited**

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President of the NSW Law Society to appoint an expert for expert determination.

- 20.5 The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.
- 20.6 Each Party is to bear its own costs arising from or in connection with the appointment of the expert and the expert determination.
- 20.7 The Parties are to share equally the costs of the President, the expert, and the expert determination.

**21. Dispute Resolution – mediation**

- 21.1 This clause applies to any Dispute arising in connection with this Agreement other than a Dispute to which clause 19 applies.
- 21.2 Such a Dispute 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 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.
- 21.5 If the Dispute is not resolved by mediation within a further 28 days, or such longer period as may be necessary to allow any mediation process which has been commenced to be completed, then the Parties may exercise their legal rights in relation to the Dispute, including by the commencement of legal proceedings in a court of competent jurisdiction in New South Wales.
- 21.6 Each Party is to bear its own costs arising from or in connection with the appointment of a mediator and the mediation.
- 21.7 The Parties are to share equally the costs of the President, the mediator, and the mediation.

**22. Failure to Carry Out Works**

- 22.1 Subject to clause 23, if Council considers the Developer is in breach of any obligation under this Agreement relating to the carrying out of the Works, the Council may but is not obliged to give the Developer a notice requiring:
- (a) the Developer to rectify the breach to the Council's satisfaction; or
  - (b) the Developer to immediately cease carrying out of the Works and to rectify the breach to Council's satisfaction.
- 22.2 A notice given under clause 22.1 is to allow the Developer at least 20 Business Days to rectify

**Kent Lane, Huskisson Works In Kind Agreement**

**Shoalhaven City Council**

**Rafid Investments Pty Ltd, Binah Developments Pty Limited, SK Group Manufacturing Australia Pty Limited**

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the breach, except in cases of emergency where the notice may require the Developer to rectify the breach immediately.

22.3 Without limiting any other rights Council has to enforce this Agreement, the Council may, if the Developer does not comply with a notice given under clause 22.1 do one or more of the following:

- (a) call upon the Guarantee Amount and apply it in accordance with clause 16;
- (b) carry out and complete the Works; and
- (c) recover, as a debt due and owing, any difference between the amount of the Council Works Contribution Amount and the costs incurred by Council in completing the Works.

22.4 Clauses 20 and 21 do not prevent a notice being given under clause 22.1 and does not apply to such a notice or the circumstances relating to the giving of that notice, and any procedure commenced under clauses 20 or 21 cease to apply when such a notice is given.

**23. Termination**

23.1 If the Developer is in breach of this Agreement, the Council may, despite any other provision of this Agreement, give the Developer written notice requiring the Developer to show cause why the Council should not terminate this Agreement.

23.2 A notice under clause 23.1 must:

- (a) state that it is a notice given under this Agreement and clause 23.1;
- (b) particularise the nature of the breach by the Developer;
- (c) require the Developer to show cause by notice to the Council why the Council should not terminate this Agreement;
- (d) specify a date by which the Developer must show cause.

23.3 If the Developer fails to show cause to the reasonable satisfaction of the Council why the Council should not terminate this Agreement in relation to the Developer's breach, the Council may terminate this Agreement by written notice to the Developer.

23.4 If the Council terminates this Agreement under clause 23.3 the rights and liabilities of the parties are the same as they would have been at common law had the Developer repudiated this Agreement and the Council elected to treat this Agreement at an end and recover damages.

23.5 Clauses 20 and 21 do not prevent a notice being given under clause 23.1 and does not apply to such a notice or the circumstances relating to the giving of that notice, and any procedure commenced under clauses 20 or 21 cease to apply when such a notice is given.

## **Kent Lane, Huskisson Works In Kind Agreement**

### **Shoalhaven City Council**

### **Rafid Investments Pty Ltd, Binah Developments Pty Limited, SK Group Manufacturing Australia Pty Limited**

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23.6 Clauses 15 and 16 do not merge on termination of this Agreement.

## **24. Notices**

24.1 Any notice, consent, information, application or request that must 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:

- (a) delivered or posted to that party at its address set out in **Item 11 of Schedule 1**; or
- (b) emailed to that party at its email address set out in **Item 11 of Schedule 1**.

24.2 If a party gives the other party three business days notice of a change of its address or email address, any notice, consent, information, application or request is only given or made by that other party if it is delivered, posted or emailed to the latest address or email address.

24.3 Any notice, consent, information, application or request is to be treated as given or made at the following time:

- (a) if it is delivered, when it is left at the relevant address;
- (b) if it is sent by post, two business days after it is posted; or
- (c) if it is sent by email, as soon as it is sent.

24.4 If any notice, consent, information, application or request is delivered 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.

## **25. General**

### **25.1 Approvals & Consents**

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. A party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

### **25.2 Legal and Administrative Costs**

The Developer must pay the Council's reasonable legal and other external costs and expenses in relation to:

- (a) the negotiation, preparation and execution of this Agreement and any documents related to this Agreement; and

(b) any enforcement of Council's rights under this Agreement.

### **25.3 Stamp Duty**

The Developer is liable for and must pay all stamp duty (including any fine or penalty except where it arises from default by any other Party) on or relating to this Agreement, any document executed under it or any dutiable transaction evidenced or effected by it.

### **25.4 Entire Agreement**

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

### **25.5 Further Acts**

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

### **25.6 Governing Law & Jurisdiction**

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

### **25.7 Joint & Several Liability**

An obligation on two or more persons binds them separately and together.

### **25.8 No Fetter**

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

### **25.9 Representations & Warranties**

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

### **25.10 Severability**

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. 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.

#### 25.11 **Modification**

This Agreement may only be varied or replaced by a document in writing, which is signed by the parties.

#### 25.12 **Waiver**

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. A waiver by a party is only effective if it is in writing. A written waiver by a party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

#### 25.13 **Relationship of Parties**

This Agreement is not intended to create a partnership, joint venture or agency relationship between the parties.

#### 25.14 **Counterparts**

This Agreement may be signed in counterparts.

#### 25.15 **GST**

- (a) In this clause 25.15:
  - (i) words and expressions which are not defined in this document but which have a defined meaning in GST Law have the same meaning as in the GST Law;
  - (ii) “**GST Law**” has the meaning given to that expression in the A New Tax System (Goods and Services Tax) Act 1999; and
  - (i) any reference to GST payable or an entitlement to an input tax credit includes a reference, as appropriate, to GST payable by, or an input tax credit entitlement of, the representative member of a GST group.
- (b) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under, or in connection with, this Agreement are exclusive of GST.
- (c) If GST is payable in respect of any supply made by a supplier under, or in connection with, this Agreement, then to the extent that the consideration (or part thereof) payable by the recipient is:
  - (i) a monetary payment; or

## Kent Lane, Huskisson Works In Kind Agreement

### Shoalhaven City Council

### Rafid Investments Pty Ltd, Binah Developments Pty Limited, SK Group Manufacturing Australia Pty Limited

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- (ii) a non-monetary payment which is not a taxable supply by the recipient, the recipient will pay to the supplier an additional amount equal to the GST payable by the supplier in respect of the supply (**GST Amount**).
- (d) Subject to paragraph (g), the recipient will pay the GST Amount referred to in clause 25.15(c) in addition to and at the same time the consideration for the supply is to be provided under this Agreement.
- (e) If GST is payable in respect of any supply made by a supplier under, or in connection with, this Agreement, then to the extent that the consideration (or part thereof) payable by the recipient is a non-monetary payment which is also a taxable supply by the recipient:
  - (i) at or before the time of payment of any relevant consideration by either party, the parties agree that they will each exchange tax invoices; and
  - (ii) if the parties exchange non-monetary consideration of unequal GST-inclusive market value:
    - (A) in respect of the exchange, one party (**the First Party**) will have a GST liability on its supply (**First Party Supply**) that exceeds its entitlement to an input tax credit on its acquisition in exchange for that supply (**First Party Acquisition**);
    - (B) the other party (**Second Party**) must make a monetary payment to the First Party equal to the positive difference between the GST payable on the First Party Supply and a full input tax credit in respect of the First Party Acquisition plus any GST payable in respect of that payment (**Payment**); and
    - (C) the Payment referred to in paragraph (B) above will be made by the Second Party at the time the Second Party receives a tax invoice for the First Party Supply.
- (c) The parties will agree upon the market value of any non-monetary consideration which the recipient is required to provide under clause 25.15(e). If agreement cannot be reached prior to the time that a party becomes liable for GST, the matter in dispute is to be determined by an independent expert nominated by the President for the time being of the Institute of Chartered Accountants in Australia. The parties will each pay one half of the costs of referral and determination by the independent expert.
- (d) The supplier must deliver a tax invoice to the recipient before the supplier is entitled to payment of the GST Amount under clause 25.15(c). The recipient can withhold payment of the GST Amount until the supplier provides a tax invoice.
- (e) If an adjustment event arises in respect of a taxable supply made by a supplier under, or in connection with, this Agreement;
  - (i) any amount payable by the recipient under clause 25.15(c) will be recalculated to reflect the adjustment event, taking into account any previous adjustments under this clause, and a payment will be made by the recipient to the supplier

## Kent Lane, Huskisson Works In Kind Agreement

### Shoalhaven City Council

### Rafid Investments Pty Ltd, Binah Developments Pty Limited, SK Group Manufacturing Australia Pty Limited

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or by the supplier to the recipient as the case requires and the supplier will issue an adjustment note to the recipient; or

- (ii) in respect of an exchange of supplies that falls within clause 25.15(e), the principle in that clause will be applied, taking into account the adjustment event and any previous adjustments under this clause 25.15(h), tax invoices or adjustment notes will be exchanged, and a further monetary payment made as required or appropriate.
- (f) Where a party is required under, or in connection with, this Agreement to pay or reimburse an expense or outgoing of another party, the amount to be paid or reimbursed by the first party will be the sum of the amount of the expense or outgoing less any input tax credits in respect of the expense or outgoing to which the other party is entitled.

## 26. Interpretation

### 26.1 Definitions

In this Agreement the following definitions apply:

**Act** means the *Environmental Planning and Assessment Act 1979* (NSW) as amended from time to time.

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

**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.

**Contributions Plan** means the section 7.11 contributions plan made by Council under section 7.18 of the Act as set out in **Item 7 of Schedule 1**.

**Condition** means the condition of the Development Consent which requires the payment of the Contribution as set out in **Item 5 of Schedule 1**.

**Contributions** means the section 7.11 contributions payable by the Developer under the Development Consent at the date of this Agreement as set out in **Item 6 of Schedule 1**.

**Council Works Contribution Amount** means the amount Council agrees to pay to the Developer pursuant to this Agreement as set out in **Item 8 of Schedule 1**, being the amount by which the sum all Works Value for Works exceeds the amount of the Contributions.

**Date for Practical Completion** in respect of an item of the Works means the date that item of the Works must reach Practical Completion as set out in **Column 5 of Schedule 2** corresponding to that item.

**Kent Lane, Huskisson Works In Kind Agreement**

**Shoalhaven City Council**

**Rafid Investments Pty Ltd, Binah Developments Pty Limited, SK Group Manufacturing Australia Pty Limited**

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**Dealing**, in relation to the Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the land.

**Defects Liability Period** means in respect of an item of the Works, the period of 12 months commencing on the date the Council's gives a Notice of Practical Completion for the item under clause 9.3.

**Developer** means the parties listed at **Item 2(b)** and **2(c)** of **Schedule 1**.

**Development** means the development the subject of the Development Consent.

**Development Application** means the development application set out in **Item 4** of **Schedule 1** submitted to the relevant consent authority.

**Development Consent** means the development consent granted by Council in respect to the Development Application as set out in **Item 4** of **Schedule 1**.

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

**Final Certificate** means a certificate in relation to an item of the Works issued by the Council to the effect that, in the reasonable opinion of the Council:

- (a) any notice issued by the Council under clause 11.1 has been complied with, and
- (b) the Developer has Maintained the item of the Works in accordance with this Agreement.

**Guarantee** means:

- (a) a deposit by cash or unendorsed bank cheque with the Council; or
- (b) an irrevocable and unconditional bank guarantee, unlimited in time, issued by a bank licensed to carry on business in Australia that is:
  - (i) in favour of the Council;
  - (ii) for the Guarantee Amount to be paid to the Council on demand; and
  - (iii) on such other terms the Council may approve from time to time.

**Guarantee Amount** means the amount of the Guarantee in respect to the Works as set out in **Item 10** of **Schedule 1**.

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

**Land** means the land the subject of the Development Consent as set out in **Item 3** of **Schedule 1**.

**Landowner** means the party listed at **Item 2(a)** of **Schedule 1**.

**Maintain** means, in relation to an item of the Works, keep in a good state of repair and working order, and includes repair of any damage to the work.

**Maintenance Period** in respect of an item of the Works means the period specified in **Column 6** of **Schedule 2** corresponding to that item of the Works commencing on the date of the Council's Notice of Practical Completion given under clause 9.3.

**Notice of Practical Completion** means a written notice in relation to the Works or an item of the Works issued by the Council to the effect that, in the reasonable opinion of Council the Works are complete except for minor omissions and minor defects which are non-essential and:

- (a) which do not prevent the Works from being reasonably capable of being used for their intended purposes;
- (b) which the Council determines the Developer has reasonable grounds for not promptly rectifying; and
- (c) the rectification of which will not prejudice the convenient use of the Works.

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

**Practical Completion** means the stage in the construction of the Works when the Works are complete except for minor omissions and minor defects which are non-essential and:

- (a) which do not prevent the Works from being reasonably capable of being used for their intended purposes;
- (b) which the Council determines the Developer has reasonable grounds for not promptly rectifying; and
- (c) the rectification of which will not prejudice the convenient use of the Works.

**Site** means the land where the Developer will carry out the Works as shown on the plan attached as **Schedule 3**.

**Works** means the items of works the Developer must carry out and complete in accordance with the terms of this Agreement as set out in **Columns 2 & 4** of **Schedule 2**.

**Works Value** in respect of an item of the Works means the value of that item of the Works as set out in **Column 3** of **Schedule 2** corresponding to that item.

## 26.2 Interpretation

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

- (a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.

**Kent Lane, Huskisson Works In Kind Agreement**

**Shoalhaven City Council**

**Rafid Investments Pty Ltd, Binah Developments Pty Limited, SK Group Manufacturing Australia Pty Limited**

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- (b) A reference in this Agreement to a business day means a day other than Saturday or Sunday on which banks are open for business generally in the Shoalhaven local government area.
- (c) 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.
- (d) A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
- (e) 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.
- (f) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
- (g) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (h) 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.
- (i) 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.
- (j) References to the word 'include' or 'including' are to be construed without limitation.
- (k) A reference to this Agreement includes the agreement recorded in this Agreement.
- (l) A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.
- (m) Any schedules and attachments form part of this Agreement.

**Kent Lane, Huskisson Works In Kind Agreement**  
**Shoalhaven City Council**  
**Rafid Investments Pty Ltd, Binah Developments Pty Limited, SK Group Manufacturing**  
**Australia Pty Limited**

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Executed by the parties as an Agreement.

**Council**

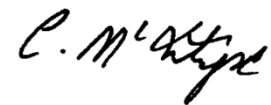
Signed for and on behalf of the )  
COUNCIL OF THE CITY OF )  
SHOALHAVEN by its duly authorised )  
officer in the presence of: )  
)

\_\_\_\_\_  
Witness:

*R. Marshall*

\_\_\_\_\_  
Name (printed): Rachel Marshall

\_\_\_\_\_



Signature:

\_\_\_\_\_  
Director City Futures: Carey McIntyre

**Landowner**

**SIGNED** by Rafid Investments Pty Ltd )  
ACN 615 284 038, in accordance with its )  
Constitution (Section 127 of the )  
Corporations Act 2001): )

\_\_\_\_\_  
Signature:

\_\_\_\_\_  
Name:

\_\_\_\_\_  
Position:

\_\_\_\_\_  
Signature:

\_\_\_\_\_  
Name:

\_\_\_\_\_  
Position:

**Kent Lane, Huskisson Works In Kind Agreement  
Shoalhaven City Council  
Rafid Investments Pty Ltd, Binah Developments Pty Limited, SK Group Manufacturing  
Australia Pty Limited**

---

Executed by the parties as an Agreement.

**Council**

Signed for and on behalf of the )  
COUNCIL OF THE CITY OF )  
SHOALHAVEN by its duly authorised )  
officer in the presence of: )  
)

\_\_\_\_\_  
Witness:

\_\_\_\_\_  
Signature:

\_\_\_\_\_  
Name (printed):

\_\_\_\_\_  
General Manager:

**Landowner**

SIGNED by Rafid Investments Pty Ltd )  
ACN 615 284 038, in accordance with its )  
Constitution (Section 127 of the )  
Corporations Act 2001): )

DocuSigned by:  
*Wassim Ahmad*  
FF5A2389696445E...

DocuSigned by:  
*Mohamad Farhat*  
919AABA6F4EB43E

\_\_\_\_\_  
Signature:  
Wassim Ahmad

\_\_\_\_\_  
Signature:  
Mohamad Farhat

\_\_\_\_\_  
Name:  
Director

\_\_\_\_\_  
Name:  
Project Manager

\_\_\_\_\_  
Position:

\_\_\_\_\_  
Position:



**Kent Lane, Huskisson Works In Kind Agreement**  
**Shoalhaven City Council**  
**Rafid Investments Pty Ltd, Binah Developments Pty Limited, SK Group Manufacturing Australia Pty Limited**

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**Developer**

**SIGNED by Binah Developments Pty )**  
**Limited ACN 621 660 624, in accordance )**  
with its Constitution (Section 127 of the )  
Corporations Act 2001): )

DocuSigned by:  
*Amen Zoabi*  
FD90BD471380424...

Signature:

Amen Zoabi

Name:

~~3/6/2022~~  
*A.Z. Director.*

Position:

DocuSigned by:  
*Khalil Hafza*  
OF19ED779AE34FA...

Signature:

Khalil Hafza

Name:

Director

Position:

**SIGNED by SK Group Manufacturing )**  
**Australia Pty Limited ACN 630 684 678, )**  
in accordance with its Constitution )  
(Section 127 of the Corporations Act )  
2001):

DocuSigned by:  
*Wassim Ahmad*  
FF5A2389696445E...

Signature:

Wassim Ahmad

Name:

Director

Position:

DocuSigned by:  
*Mohamad Farhat*  
919AABA0F4EB43E...

Signature:

Mohamad Farhat

Name:

Project Manager

Position:

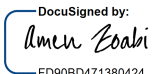
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Source Envelope:	
Document Pages: 58	Signatures: 12
Certificate Pages: 2	Initials: 0
AutoNav: Enabled	Envelope Originator:
Envelopeld Stamping: Enabled	Aris Dimos
Time Zone: (UTC+10:00) Canberra, Melbourne, Sydney	Level 8, 1 York Street
	nil
	Sydney, New South Wales 2000
	arisd@fyve.com.au
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**Record Tracking**

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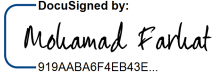
**Signer Events**

Signer Events	Signature	Timestamp
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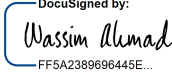
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Not Offered via DocuSign

Khalil Hafza khafza@binah.com.au Director Binah Group Pty Ltd Security Level: Email, Account Authentication (None)	 DocuSigned by: Khalil Hafza 0F19ED779AE34FA...	Sent: 11/9/2022 4:20:48 PM Viewed: 11/10/2022 7:03:24 PM Signed: 11/10/2022 7:03:38 PM
	Signature Adoption: Pre-selected Style Using IP Address: 60.240.130.174	

**Electronic Record and Signature Disclosure:**  
Not Offered via DocuSign

Mohamad Farhat mohamad@scopejoinerygroup.com.au Project Manager Scope Joinery Group Security Level: Email, Account Authentication (None)	 DocuSigned by: Mohamad Farhat 919AAB66F4EB43E...	Sent: 11/9/2022 4:20:45 PM Viewed: 11/9/2022 4:21:33 PM Signed: 11/9/2022 4:21:58 PM
	Signature Adoption: Pre-selected Style Using IP Address: 60.242.94.194	

**Electronic Record and Signature Disclosure:**  
Not Offered via DocuSign

Wassim Ahmad wassim@skgroup.com.au Director Security Level: Email, Account Authentication (None)	 DocuSigned by: Wassim Ahmad FF5A2389696445E...	Sent: 11/9/2022 4:20:45 PM Viewed: 11/9/2022 5:34:52 PM Signed: 11/9/2022 5:35:55 PM
	Signature Adoption: Pre-selected Style Using IP Address: 1.145.125.62 Signed using mobile	

**Electronic Record and Signature Disclosure:**  
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**In Person Signer Events****Signature****Timestamp**

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<b>Agent Delivery Events</b>	<b>Status</b>	<b>Timestamp</b>
<b>Intermediary Delivery Events</b>	<b>Status</b>	<b>Timestamp</b>
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Completed	Security Checked	11/10/2022 7:03:38 PM
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**Kent Lane, Huskisson Works In Kind Agreement****Shoalhaven City Council****Rafid Investments Pty Ltd, Binah Developments Pty Limited, SK Group Manufacturing Australia Pty Limited**

## Schedule 1 Reference Schedule

Item	Name	Description
1	Date	18 November 2022
2(a)	Landowner's Name Landowner's ACN Landowner's Address	Rafid Investments Pty Ltd 615 284 038 15-17 Fegen Street, Huskisson NSW
(b)	Developer's Name Developer's ACN Developer's Address	Binah Developments Pty Limited 621 660 624 Level 3, 26 Castlereagh Street, Liverpool NSW 2170
(c)	Developer's Name Developer's ABN Developer's Address	SK Group Manufacturing Australia Pty Limited 630 684 678 Unit 4, 17 Wilfox Street, Condell Park NSW 2200
3	Land	Lot A DP DP390332 otherwise known as 15 Fegen Street, Huskisson and Lot B DP390332 otherwise known as 17 Fegen Street, Huskisson.
4	Development Application  Development Consent	Development Application DA17/2574  Development consent granted under the Act on 4 January 2019 to the Development Application for the construction of two residential flat buildings on the Land, containing 25 dwelling units and basement parking, as modified from time to time.
5	Condition	Condition 15
6	Contributions	\$162,967.80 indexed to 30 June 2021 in respect of 03ROAD5060
7	Contributions Plan	Shoalhaven Contributions Plan 2019
8	Council Works Contribution Amount	\$167,586.34
9	Public liability Insurance	\$20,000,000

**Kent Lane, Huskisson Works In Kind Agreement**

**Shoalhaven City Council**

**Rafid Investments Pty Ltd, Binah Developments Pty Limited, SK Group Manufacturing Australia Pty Limited**

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10	Guarantee Amount	\$33,055.41
11	Notices	
	<b>Council</b> Attention	Chief Executive Officer
	Address	Administrative Building Bridge Road Nowra NSW 2541
	Fax Number	02 4422 1816
	<b>Developer</b> Attention	Aris Dimos Fyve Developments Pty Ltd
	Address	Level 8, 1 York Street, Sydney NSW 2000
	Email Address	arisd@fyve.com.au

## Schedule 2 Works

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
Contribution Project Code	Item of Works	Works Value	Plans & Standards	Date for Practical Completion	Maintenance Period
03ROAD5060	Full length of Kent Lane, Huskisson between Nowra and Bowen Streets including the intersection on both ends, in accordance with the plans and standards in Column 4.	\$330,554.14	<p>Road Design Drawings (as amended) approved by Council on 4 May 2021 and specified in the letter titled '<i>Amended Engineer Design Approval – Civil Construction Works in the Road Reserve Related to DA17/2574</i>', being the following drawings prepared by MI Engineers:</p> <ul style="list-style-type: none"> <li>- drawing numbers DN170194/C00 to DN170194/C05, Revision 7 dated 14.12.20</li> <li>- drawing numbers DN170194/C06 to DN170194/C07, Revision 8 dated 19.01.21</li> <li>- drawing numbers DN170194/C08 to DN170194/C11 Revision 7 dated 14.12.20</li> <li>- drawing numbers</li> </ul>	Prior to the issuing of an Occupation Certificate for the development the subject of the Development Consent.	12 months from the date that the Council gives a Notice of Practical Completion for the item under clause 9.3

**Kent Lane, Huskisson Works In Kind Agreement**

**Shoalhaven City Council**

**Rafid Investments Pty Ltd, Binah Developments Pty Limited, SK Group Manufacturing Australia Pty Limited**

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			<p>DN170194/C15 to DN170194/C17 Revision 7 dated 14.12.20</p> <p>And the following addendum to the MI Engineers drawings, being the following drawings prepared by Xavier Knight approved by Council on 2 August 2022:</p> <ul style="list-style-type: none"><li>- drawing numbers 200514/C501 to 200514/C503 Revision C dated 1.08.22</li></ul>		
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**Kent Lane, Huskisson Works In Kind Agreement**

**Shoalhaven City Council**

**Rafid Investments Pty Ltd, Binah Developments Pty Limited, SK Group Manufacturing Australia Pty Limited**

## Schedule 3 Site

The Developer must carry out the Works at the Site known as Kent Lane, Huskisson as shown marked red in the plan below:

