

Planning Agreement

Burwood Council (Council)

**ARM Holdings Pty Ltd ATF The Albert Metledge Family Trust ACN [056 604 070]
(Developer)**

Contents

1.	Planning agreement under the Act	2
2.	Application of this Agreement	2
3.	Operation of this Agreement	2
4.	Application of section 94 and section 94a of the Act to the Development	2
5.	Definitions and interpretation	2
5.1	Definitions.....	2
5.2	Interpretation	4
6.	Development Contributions to be made under this Agreement	5
7.	Application of the Development Contributions	5
7.1	Use of Contribution by Council	5
7.2	Public Facilities.....	5
8.	Registration on Title	5
8.1	Land ownership / Mortgagees consent.....	5
8.2	Registration of Agreement	6
8.3	Release and discharge of Agreement	6
8.4	Registration of Caveat by the Council	6
9.	Assignment and dealing with Land	7
10.	Acknowledgements	7
10.1	Planning Certificates	7
10.2	Consent Authority.....	7
11.	Dispute Resolution	7
11.1	Not commence	7
11.2	Written notice of dispute.....	7
11.3	Representatives of Parties to Meet.....	8
11.4	Mediation	8
11.5	Court proceedings	8
11.6	Not use information	8
11.7	No prejudice	8
12.	Enforcement	8
12.1	Enforcement in Court	8
13.	Notices	9
13.1	Written Notice.....	9
13.2	Change of Address	9
13.3	Time for Service of Notice.....	9
13.4	Service after hours, on Weekends and Holidays.....	10
14.	Approvals and consent	10
15.	Assignment and Dealings	10
16.	Costs	10
17.	Entire agreement	10

18.	Further acts	10
19.	Governing law and jurisdiction.....	10
20.	Joint and individual liability and benefits	11
21.	No fetter	11
22.	Representations and warranties.....	11
23.	Severability	11
24.	Modification	11
25.	Waiver	11
26.	Explanatory Note.....	11
27.	GST.....	11
27.1	Words	11
27.2	Supply	12
28.	Confidentiality	12
Schedule 1	Explanatory Note	2

Details

Date

Parties

Name	Burwood Council	
Description	Council	
Notice Details	Address	Suite 1, Level 2, 1-17 Elsie Street Burwood NSW

Name	ARM Holdings Pty Ltd ATF The Albert Metledge Family Trust	
ACN	056 604 070	
Description	Developer	
Notice Details	Address	c/o Ernst & Young, Level 42, 680 George St Sydney NSW 2000

Background

- A. The Developer is the registered proprietor of the Land,
- B. On 14 January 2016, the Developer made a Development Application to the Council for Development Consent to carry out the Development construction of a 9 storey mixed use development comprising commercial tenancies on ground level and 51 residential units above basement car parking on the Land.
- C. On 12 May 2017, the Developer made the Modification Application to the Council for Development Consent to amend Development Consent 7/2016 by introducing an additional level of residential units for a total of 58 residential units, as well as rooftop communal open space on the Land.
- D. The Developer has offered to enter into this agreement to make a Development Contribution towards Public Facilities if Development Consent is granted to the Development

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Operative Provisions

1. Planning agreement under the Act

The Parties agree that this Agreement is a planning agreement within the meaning of s93F of the Act.

2. Application of this Agreement

This Agreement applies to:

- (a) the Land, and
- (b) the Development, and
- (c) the Modification Application.

3. Operation of this Agreement

The Parties agree that this Agreement:

- (a) is effective and binding on the Parties upon execution by both Parties of this Agreement;
- (b) will operate from the date of the grant by the Council of the Modification Application for the Development;
- (c) will remain in force and effect until the earlier of:
 - (i) termination by operation of the Law;
 - (ii) satisfaction of all the obligations under this Agreement; or
 - (iii) termination in accordance with the terms of this Agreement.

4. Application of section 94 and section 94a of the Act to the Development

(a) This Agreement does not exclude the application of:

- (i) section 94 or section 94A of the Act;
- (ii) any Affordable Housing Levy;
- (iii) any other monetary contributions;

in connection with Development Consent 2016.179 or the Modification Application for the Development.

(b) Benefits under this Agreement are not to be taken into account in determining a development contribution under section 94 or section 94A.

5. Definitions and interpretation

5.1 Definitions

In this Agreement the following definitions apply:

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

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Version Control: 14 December 2017

Approval means any approvals, consents, section 96 modifications, Part 4A certificates or approvals under the Act, certificates, construction certificates, occupation certificates, complying development certificates, permits, endorsements, licences, conditions or requirements (and any variation to them) which may be required by this Agreement or the Development Consent.

Authority means any government, local government, statutory, public, ministerial, administrative, fiscal or other authority or body, and includes the Sydney Planning Panel or such other consent authority as may be lawfully appointed and authorised to grant an Approval, including an accredited certifier defined under the Act.

Business Day means any day except Saturday or Sunday or a day which is a public holiday in Sydney.

Construction Certificate means a certificate issued under Part 4A of the Act approving building work to be carried out on the Land for the whole or part of the work for the Development granted Development Consent.

Dealing means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the Land.

Development means the development of the Land in accordance with the Development Consent 2016.179 lodged with the Council on 14 January 2016 and the Modification Application.

Development Application has the same meaning as in the Act.

Development Consent has the same meaning as in the Act.

Development Contribution means a monetary contribution, the dedication of land free of cost or the provision of a material public benefit identified in this Agreement.

Explanatory Note means the note set out in Schedule 1 of this Agreement

FSR means the floor space ratio as defined in the Burwood Local Environmental Plan 2012.

GST has the same meaning as in the GST Law.

GST Law has the meaning given to that term in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any other Act or regulation relating to the imposition or administration of the GST.


Land means the allotments described in the table below:

Address	Legal description
8 Lyons Street	SP53871
10-12 Lyons Street	Lot 39 Section 1 DP555
14 Lyons Street	Lot B DP 391206

Modification Application means the application under s96(2) of the Act lodged with the Council by the Developer on 12 May 2017 seeking to modify Development Consent 7/2016 relating to the Land.

Monetary Contribution means the sum of \$778,800.00 (seven hundred and seventy eight thousand eight hundred dollars).

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

Developer 1: Initial Here  Attorney: Initial Here 

Public Benefit means the Monetary Contribution.

Public Facilities means the augmentation or improving of public open space, community facilities, or other public facilities as determined by the Council.

Regulation means the *Environmental Planning and Assessment Regulation 2000* (NSW).

5.2 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.
- (b) A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- (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 in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- (g) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
- (h) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (i) 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.
- (j) 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.
- (k) References to the word 'include' or 'including' are to be construed without limitation.
- (l) A reference to this Agreement includes the agreement recorded in this Agreement.
- (m) 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.
- (n) Any schedules and attachments form part of this Agreement.

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6. Development Contributions to be made under this Agreement

- (a) Subject to clause 6(e) the Developer must pay to the Council the Monetary Contribution prior to the issue of the first Construction Certificate for the Development.
- (b) The Developer covenants and agrees not to make an application for the issue of any Construction Certificate until the Monetary Contribution required to be made to the Council hereunder has been paid.
- (c) The payment of the Monetary Contribution must be by way of delivery of a bank cheque to the Council which must be:
 - (i) made payable to the Council; and
 - (ii) in a form acceptable to the Council.
- (d) The Monetary Contribution will be taken to have been made when the Council notifies the Developer in writing that the bank cheque has been received and cleared funds have been deposited in the Council's bank account.
- (e) If the Developer determines not to take up the Development Consent for the Development, the Developer must provide written notice to the Council of the Developer's:
 - (i) intention to not take up the Development Consent and
 - (ii) surrender of the Development Consent for the Development in accordance with section 104A of the Act.

7. Application of the Development Contributions

7.1 Use of Contribution by Council

The Monetary Contribution paid by the Developer under this Agreement will be used by the Council to develop Public Facilities.

7.2 Public Facilities

The Public Facilities will:


- (a) not be provided to coincide with the conduct or completion of the Development;
- (b) be constructed at a time determined by the Council at its absolute discretion;
- (c) be available for use by the general public and will not be restricted for use by patrons of the Development.

8. Registration on Title

8.1 Land ownership / Mortgagees consent

The Developer represents and warrants that:

- (a) it is the registered proprietor of the Land; and

Developer I: Initial Here  Attorney: Initial Here 

- (b) it has obtained the consent of all persons that have an interest in the Land prior to executing this Agreement.

8.2 Registration of Agreement

- (a) The Developer agrees it will procure the registration of this Agreement under the *Real Property Act 1900 (NSW)* in the relevant folios of the register for the Land in accordance with section 93H of the Act.
- (b) The Developer at its own expense will, prior to the execution of this Agreement, take all practical steps and otherwise do anything that Council reasonably requires, to procure:
 - (i) the consent of each person who:
 - (A) has an estate or interest in the Land registered in the Land; and
 - (B) is seized or possessed of an estate or interest in the Land; and
 - (ii) the execution of any documents; and
 - (iii) an acceptance of the terms of this agreement and an acknowledgement in writing from any existing mortgagee in relation to the Land that the mortgagee will adhere to the provisions of this Agreement if it takes possession of the Land as Mortgagee in possession; and
 - (iv) the production of the relevant duplicate certificates of titleto enable the registration of this Agreement under the *Real Property Act 1900 (NSW)* in the relevant folios of the register for the Land in accordance with section 93H of the Act.
- (c) The Developer, at its own expense, will take all practical steps, and otherwise do anything that the Council reasonably requires:
 - (i) to procure the lodgement of this Agreement with the Registrar-General as soon as reasonably practicable after the Agreement is entered into by the Parties but in any event, no later than 20 Business Days after that date;
 - (ii) to procure the registration of this Agreement by the Registrar-General either in relevant folios of the register for the Land; or in the General Register of Deed if this Agreement relates to land not under the *Real Property Act 1900 (NSW)* as soon as reasonably practicable after the Agreement is lodged for registration but, in any event, no later than 20 Business Days after the date on which the Developer lodges this Agreement with the Registrar-General.

8.3 Release and discharge of Agreement

The Council agrees to do all things reasonably required by the Developer to release and discharge this Agreement with respect to any part of the Land upon the Developer satisfying all of its obligations under this Agreement in respect of the Land, and is not otherwise in default of any of the obligations under this Agreement.

8.4 Registration of Caveat by the Council

- (a) Until such time as registration of this Agreement on the Certificates of Title to the Land, the Developer agrees that the Council may lodge any caveat reasonably

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necessary to prevent any dealing with the Land or any part of it in a manner which is inconsistent with this Agreement.

- (b) If the Council lodges a caveat in accordance with this clause, then the Council will do all things reasonably required to ensure that the caveat does not prevent or delay either the registration of this Agreement or any related Dealing with the Land. The Council will promptly, following registration of this Agreement, do all things reasonably required to remove the caveat from the title to the Land.

9. Assignment and dealing with Land

- (a) Subject to paragraph (b), the Developer must not transfer its interest in any of the whole or any part of the Land unless the proposed transferee accepts the obligations of this Agreement.
- (b) For the purpose of giving effect to paragraph (a) the Council, the Developer and any transferee must enter into a novation agreement where the transferee agrees to carry out the obligations of the Developer under this Agreement and the Developer is released, from the date of execution of the novation agreement, from the obligations contained in this Agreement to the extent that they:
 - (i) are novated to the transferee; and
 - (ii) remain to be performed.

10. Acknowledgements

10.1 Planning Certificates

The Developer acknowledges that the Council may include a notation on Planning Certificates under section 149(5) of the Act in relation to this Agreement.

10.2 Consent Authority

The Parties acknowledge that the Council is a consent authority with statutory rights and obligations pursuant to the terms of the Act and other legislation.

11. Dispute Resolution

11.1 Not commence

If a dispute arises between the parties in relation to this agreement, the parties must not commence any court proceedings relating to the dispute unless the parties have complied with this clause.

11.2 Written notice of dispute

If a party believes that there is a dispute in respect of the Agreement then:

- (a) the party must give notice in writing to the other party stating that there is a dispute (the Dispute Notice); and
- (b) the Dispute Notice must outline:
 - (i) the nature of the dispute:
 - (ii) the alleged basis of the dispute; and

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- (iii) the position which the party issuing the Notice of Dispute believes to be correct.

11.3 Representatives of Parties to Meet

Within 10 Business Days after a Dispute Notice being served, the representatives of each of the parties must meet in order to resolve the notified dispute..

11.4 Mediation

If the notified dispute is not resolved within 10 Business Days after the nominated representatives have met, (or any further period agreed in writing by them) and the parties do not agree as to:

- (a) the dispute resolution technique and procedures to be adopted;
- (b) the timetable for all steps in those procedures; or
- (c) the selection and compensation of any independent person required for such technique,

the parties must mediate the dispute in accordance with the Mediation Rules of the Law Society of NSW. The parties must request the president of the Law Society of NSW or the president's nominee to select the mediator and determine the mediator's remuneration.

11.5 Court proceedings

If the dispute is not resolved within 42 days after a Dispute Notice is served then any party which has complied with the provisions of this clause, including participation in a mediation pursuant to clause 11.4, may in writing terminate any dispute resolution process undertaken under this clause and may then commence court proceedings in relation to the dispute.

11.6 Not use information

The parties acknowledge the purpose of any exchange of information or documents or the making of any offer of settlement under this clause is to attempt to settle the dispute. No party may use any information or documents obtained through any dispute resolution process undertaken under this clause for any purpose other than in an attempt to settle the dispute.

11.7 No prejudice

This clause does not prejudice the right of a party to institute court proceedings for urgent injunctive or declaratory relief in relation to any matter arising out of or relating to this Agreement.

12. Enforcement

12.1 Enforcement in Court

- (a) This Agreement may be otherwise enforced by either party in any court of competent jurisdiction.
- (b) For the avoidance of doubt, nothing in this Agreement prevents:

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- (i) a party from bringing proceedings in the Land Environment Court to enforce any aspect of this Agreement or any matter to which this Agreement relates; and
- (ii) the Council from exercising any function under the Act or law relating to the enforcement of any aspect of this Agreement or any matter to which this Agreement relates.

13. Notices

13.1 Written Notice

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 below.
- (b) Faxed to that Party at its fax number set out below.
- (c) Emailed to that Party at its email address set out below.

Council

Attention: The General Manager
 Address: Suite 1, Level 2, 1-17 Elsie Street Burwood 2134
 Post: PO Box 240, Burwood NSW 1805
 Fax Number: (02) 9911 9900
 Email: council@burwood.nsw.gov.au

Developer

Attention: Antony Metledge
 Address: c/o Ernst & Young, Level 42, 680 George St, Sydney NSW 2000
 Post: PO Box 1235, Strathfield NSW 2135
 Fax Number: 02 9746 6715
 Email: antony@armholdings.com.au

13.2 Change of Address

If a Party gives the other Party three (3) business days' notice of a change of its address or fax number, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.

13.3 Time for Service of Notice

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

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- (a) delivered, when it is left at the relevant address.
- (b) sent by post, two (2) business days after it is posted.
- (c) sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.

13.4 Service after hours, on Weekends and Holidays

If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

14. Approvals and consent

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.

15. Assignment and Dealings

The Developer agrees that this Agreement shall be binding upon the Developer and upon their respective transferees, assignees or successors.

16. Costs

The Developer agrees to pay its own costs directly related and incidental to negotiation, preparing, executing, stamping and registering the Agreement, including any costs of lodging / removing caveats on the title to the Land. The Developer will also pay the Council's reasonable legal costs and disbursements in connection with the negotiation, preparation, execution, carrying into effect of this agreement.

17. Entire agreement

- (a) This Agreement constitutes the entire agreement between the Parties regarding the matters set out on it and superseded any prior representations, understandings or arrangements made between the Parties, whether orally or in writing.
- (b) 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.

18. 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.

19. Governing law and 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.

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20. Joint and individual liability and benefits

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

21. No fetter

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

22. Representations and 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.

23. 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.

24. Modification

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

25. 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.

26. Explanatory Note

The explanatory note put on exhibition with this Agreement is not to be used in construing the terms of this Agreement.

27. GST

27.1 Words

All words in this clause which are also defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ("the GST Act") have a corresponding meaning to that in the GST Act.

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27.2 Supply

- (a) The consideration for any supply under this Agreement excludes GST.
- (b) Where a party to this Agreement is taken to have made a supply to another party, the recipient of that supply must, in addition to the consideration payable for the supply and when paying the consideration for the supply, also pay to the maker of the supply an amount equal to the GST payable in respect of that supply. The recipient of a supply must also pay the GST payable in respect of a supply for which no monetary consideration is payable when the maker of the supply demands payment.
- (c) The maker of a supply must give the recipient a tax invoice in the form required by the GST Act at the same time it receives payment from the recipient of the GST payable for that supply.
- (d) Despite any other provision of this Agreement, any amount payable under this Agreement, which is calculated by reference to an amount paid or incurred by a party to this Agreement, is reduced by the amount of any input tax credit to which that party or a member of its GST Group is entitled in respect of that amount.

28. Confidentiality

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

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Signing page

EXECUTED AS AN AGREEMENT

Signed for and on behalf of **Burwood Council** by its attorney, **Bruce Gordon Macdonnell** under power of attorney dated 14 Nov 2017 registered book 4736 number 451 in the presence of:



Signature of Witness

Veta Katpowicz

(Print) Name of Witness



Signature of Attorney

Bruce Gordon Macdonnell

(Print) Full Name of Attorney

Level 2, 1 – 17 Elsie Street, Burwood, New South Wales, 2134

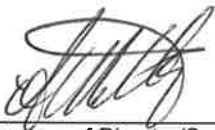
(Print) Address

By executing this document, the attorney certifies that he has not received notification of revocation of the power of attorney.

Date 24 May 2018

On behalf of ARM Holdings Pty Ltd ATF The Albert Metledge Family Trust

ACN 056 604 070 executed this agreement pursuant to section 127 of the Corporations Act by:



Signature of Director/Secretary

ALBERT METLEDGE

Print Full Name of Director/Secretary



Signature of ~~Director~~ WITNESS

ADRIAN KENNOLL

Print Name of ~~Director~~ WITNESS

Date 24.5.18

Schedule 1

Explanatory Note

Environmental Planning and Assessment Regulation 2000 (NSW)

(Clause 25E)

Agreement

Under s93F of the Environmental Planning and Assessment Act 1979 (NSW)

1. Parties

Burwood Council (**Council**)

Address: Suite 1 Level 2, 1-17 Elsie Street Burwood NSW 2134.

and

ARM Holdings Pty Ltd ATF The Albert Metledge Family Trust (**Developer**)

ACN 056 604 070.

Address: c/o Ernst & Young, Level 42, 680 George St, Sydney NSW 2000.

2. Description of the Land to which the Agreement Applies

The Land comprises allotments described in the table below:

Address	Legal description
8 Lyons Street	SP53871
10-12 Lyons Street	Lot 39 Section 1 DP555
14 Lyons Street	Lot B DP 391206

The Developer is the registered proprietor of the Land.

3. Description of Proposed Development

The construction of a 10 storey mixed use development comprising commercial tenancies on ground level and 58 residential units above basement car parking on the Land.

4. Summary of Objectives, Nature and Effect of the Agreement

4.1 Summary of Objectives

The objective of the Agreement is for the Developer to make a development contribution to the Council upon the grant of Development Consent for the Development.

The Agreement is a planning Agreement under s93F of the *Environmental Planning and Assessment Act 1979 (Act)*. The Agreement is a voluntary Agreement under which Monetary Contribution (as defined in clause 5.1 of the Agreement) are made by the Developer for various public purposes (as defined in s93F(2) of the Act).

4.2 Effect of the Agreement

The Agreement:

The Agreement promotes the above purposes of the Act in the same way that is set out in section 5.1 above.

6.2 How Agreement Promotes the Elements of the Council's Charter

The Agreement promotes Council's Charter(now Guiding Principles) under section 8A of the *Local Government Act 1993* (NSW) by:

- (a) providing strong and effective representation, leadership, planning and decision-making; and
- (b) planning strategically, using the integrated planning and reporting framework, for the provision of effective and efficient services and regulations to meet the diverse needs of the local community..

It does this through the means set out in section 5.1 above.

6.3 Whether the Agreement Conforms with the Council's Capital Works Program

The Agreement conforms with Council's Capital Works Program to the extent that it will supplement the Program by providing the Monetary Contribution and s94 Development Contributions to provide public facilities.

6.4 Whether the Agreement specifies that certain requirements must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued

The Agreement contains requirements that must be complied with prior to the issue of the first Construction Certificate for the Development.

The Agreement does not specify that certain requirements must be complied with before a Construction Certificate or Subdivision Certificate is issued.

7. The Impact of the Agreement on the Public or Any Section of the Public

The Agreement has a positive impact on the public, and in particular, the residents of the local community. This is because the Agreement provides an opportunity to improve the range and quality of services available to the local community and contributes to an improved public domain.

8. Other Matters

None.