



# **Attachment 2 to Item 224**

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## **Draft Voluntary Planning Agreement**

Date of meeting: 23 November 2021  
Location: By audio-visual link  
Time: 6:30 p.m.





Hawkesbury City Council

A N D



Voluntary Planning  
Agreement

2 Inverary Drive,  
Kurmond.

Hawkesbury City Council



## Voluntary Planning Agreement

2 Inverary Drive, Kurmond

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THIS PLANNING AGREEMENT is made on the ..... day of ..... 2021  
BETWEEN:

HAWKESBURY CITY COUNCIL ("the Council")

AND:

██████████ (known as "the Developer")

### Introduction

- A. The Developer is the registered proprietor of the Development Land.
- B. On 12<sup>th</sup> April 2018 the Council lodged a Planning Proposal Application with the Department of Planning and Environment to amend the *Hawkesbury Local Environmental Plan 2012* Lot Size Map to facilitate subdivision of the Development Land.
- C. The Developer proposes to make Development Applications to Council for Development Approval to carry out the Proposed Development if the Lot Size Map for the Development Land is altered generally in accordance with the Planning Proposal Application.
- D. The Developer has offered to provide a Developer's Contribution in the form of a Cash Contribution on the terms and conditions contained in this agreement if Development Approval is granted to the Proposed Development.

### And it is agreed as follows

#### 1 Definitions and Interpretation

In this agreement the following words and letters have the meanings set out below.

- 1.1 "**Act**" means the *Environmental Planning and Assessment Act 1979*.
- 1.2 "**Approval**" means any approvals consents, modifications, certificates (of all types) permits, endorsements, licenses, conditions or requirements (and any variation to them) which may be required by Law for the Proposed Development including road works.
- 1.3 "**Authority**" means a government, semi-government, local government, statutory, public, ministerial, civil, administrative, fiscal or judicial body, commission, department, agency, tribunal or other authority or body.
- 1.4 "**Base CPI**" means the CPI number for the quarter ending immediately before the commencement of this Agreement.
- 1.5 "**Business Day**" means a day that is not a Saturday, Sunday or any other day which is a public holiday or a bank holiday in the place where an act and thing is to be performed or a payment is to be made.
- 1.6 "**Cash Contribution**" means, subject to clause 5 and clause 6, an amount calculated on the basis of \$30,000 per vacant Housing Lot.
- 1.7 "**Completion Certificate**" means the release of the subdivision, either in whole or in stages, to enable the lodgement to and issue of Housing Lot titles by the LPI.

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- 1.8 "CPI" means the Consumer Price Index released by the Australian Bureau of Statistics for "Sydney - All Groups" or such other consumer price index that might replace it.
- 1.9 "CPI Review Date" means each quarterly anniversary of the date of this agreement.
- 1.10 "Current CPI" means the CPI number for the quarter ending immediately before the relevant CPI Review Date.
- 1.11 "Dealing" in relation to the land means, without limitations, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with land.
- 1.12 "Contributions Plan" means a contributions plan approved under section 7.11 of the Act.
- 1.13 "Council" means Hawkesbury City Council
- 1.14 "Developer" is a person who has:
- a) Sought an instrument change
  - b) Made or proposes to make a development application, or
  - c) Entered into an agreement with or is otherwise associated with, a person to whom paragraph (a) or (b) applies
- 1.15 "Development Contribution" means the kind of provision made by a developer under a Voluntary Planning Agreement, being a monetary contribution, the dedication of land free of cost or the provision of a material public benefit.
- 1.16 "Development Application" has the same meaning as in the Act.
- 1.17 "Development Approval" means a development consent issued under the Act with respect to all or part of the Proposed Development.
- 1.18 "Development Land" means the land comprising Lot 2 DP 600414, 2 Inverary Drive, Kurmond.
- 1.19 "Dispute" in connection with this agreement means an argument, a controversy, a difference, a dispute including of opinion or interpretation.
- 1.20 "Event of Insolvency" means anyone or more of the following occurrences:
- (a) the Developer becomes bankrupt, is served with a bankruptcy notice or a bankruptcy petition, has committed an act of bankruptcy or has entered into an arrangement within and under the meaning of the *Bankruptcy Act 1976* (Cth); or
  - (b) the Developer becomes subject to any order or declaration under the *Mental Health Act 2007* (NSW) or is otherwise incapable of managing his or her own affairs.
  - (c) if the Developer is a company, if:
    - (i) a resolution is passed for the winding up or liquidation of that company
    - (ii) a liquidator, provisional liquidator, receiver, receiver manager, controller, controlling manager, administrator, voluntary administrator or official manager is appointed to the Developer or a resolution is passed for the purposes of placing that party in the control of an external administrator
    - (iii) it suspends payment of its debts or is unable to pay its debts including of money payable under this agreement or is deemed insolvent

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- (iv) it fails to or is taken as having failed to comply with a statutory demand under the Corporations Act 2001 (Cth);
  - (v) if anything analogous or having substantially similar effect to any of the events specified above happens under the law of any applicable jurisdiction with respect to the Developer.
- 1.21 **"GST"** has the same meaning as the GST Act and other words or expressions used in the GST Act which have a particular defined meaning (including any applicable legislative determinations and Australian Taxation Office public rulings) have the same meaning.
- 1.22 **"GST Act"** means *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (as amended from time to time).
- 1.23 **"Housing Lot"** means a lot approved by a Development Consent comprising part of the Development Land that is intended to be used for the purposes of a single dwelling house without being further sub-divided.
- 1.24 **"Instrument change"** means a change to an environmental planning instrument whether it to be for the making, amendment or repeal of that instrument.
- 1.25 **"Housing Lot Contribution"** means subject to clause 5 cash to the value of \$30,000 per vacant Housing Lot arising from a Development Consent of the Development Land.
- 1.26 **'Law'** means:
  - a) the common law and principles of equity;
  - b) the requirements of legislation, regulations and by-laws; and
  - c) a binding order made by an Authority.
- 1.27 **"LPI"** means Land and Property Information or any other government agency replacing it.
- 1.28 **"Lot Size Map"** means the maps with a corresponding name and forming part of Hawkesbury Local Environmental Plan 2012.
- 1.29 **"Material Public Benefit"** means a benefit that is not a monetary contribution or the dedication of land, but is for a public purpose. A material public benefit does not need to be a physical work.
- 1.30 **"Party"** means a party to this agreement, including their successors and assigns.
- 1.31 **"Planning benefit"** means a development contribution that confers net public benefit, that is, a benefit that exceeds the benefit derived from measures that would address the impacts of particular development on surrounding land or the wider community.
- 1.32 **"Planning Obligation"** means an obligation imposed by a VPA on a developer requiring the developer to make a developer contribution.
- 1.33 **"Planning Proposal Application"** means the application to alter the Hawkesbury Local Environmental Plan 2012 Lot Size Map to allow the Proposed Development on the Development Land.
- 1.34 **"Practice Note"** means the Practice Note on VPA published by the Department of Planning and Environment (November 2016) or the current practice note released by the Department of Planning, Industry and Environment.

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- 1.35 **"Proposed Development"** means the alteration of the Lot Size Map and subdivision of the Development Land into housing lots and a community lot containing a new road and the existing environmental features.
- 1.36 **"Public"** includes a section of public.
- 1.37 **"Public Benefit"** is the benefit enjoyed by the public as a consequence of a development application.
- 1.38 **"Public facilities"** means public infrastructure, facilities, amenities and services.
- 1.39 **"Regulation"** means the Environmental Planning and Assessment Regulation 2000
- 1.40 **"Subdivision Certificate"** means a certificate issued under section 6.15(1)(d) of the Act with respect to the Proposed Development.
- 1.41 **"Surplus value"** means the value of the developer's provision under a VPA less the sum of the value of public works required to be carried out by the developer under a condition imposed under s.4.17(1) of the Act and the value of developer contributions that are or could have been required to be made under s7.11 or s.7.12 of the Act in respect of the subject of the agreement.
- 1.42 **"Transfer"** means to settle, assign, transfer, convey, alienate, otherwise dispose of or part with possession of.

## 2 Interpretation:

In this agreement unless the contrary intention appears:

- 2.1 One gender includes the opposite gender.
- 2.2 The singular includes the plural and the plural includes the singular.
- 2.3 A party includes that party's executors, administrators, successors, permitted assigns, permitted legal representatives and substitutes.
- 2.4 Dollars or \$ means Australia dollars and all money payable under this agreement is payable in that currency.
- 2.5 "Including" and similar expressions are not words of limitation.
- 2.6 Where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have a corresponding meaning.
- 2.7 Headings, any table of contents or index are for convenience only and do not affect interpretation of this agreement.
- 2.8 An explanatory note which relates to this agreement does not affect the interpretation of this agreement.
- 2.9 A provision of this agreement must not be construed to the disadvantage of a party merely because that party was responsible wholly or partly for the preparation of this agreement or the inclusion of a term or condition in this agreement.
- 2.10 If an act and thing must be done on a specific day which is not a business day, it must be done instead on the next business day.



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- 2.11 A person means and includes a person, a body corporate, Authority, firm, body of persons, association, trust, joint venture or other legal commercial entity or undertaking recognized by law whether or not incorporated.

### **3 Planning Agreement**

- 3.1 This agreement:
- 3.1.1 applies to the Development Land;
  - 3.1.2 is a planning agreement within the meaning set out in section 7.4 of the Act;
  - 3.1.3 is to be registered on the title of the Development Land under section 7.6 of the Act;
  - 3.1.4 is not a confidential document and may be exhibited without restriction by either party.
- 3.2 Subject to clause 3.3, this Agreement operates from the date it is executed.
- 3.3 This agreement will only operate if and when Council grants Development Approval (or Development Approvals as the case may be) to the Proposed Development on the Development Land.

### **4 Application of s7.11 and s7.12 of the Act to the Development**

- 4.1 This agreement excludes the application of section 7.11 and section 7.12 of the Act to the Proposed Development. Should this agreement be terminated section 7.11 and section 7.12 of the Act will apply to the Proposed Development.
- 4.2 Notwithstanding Clause 4.1, should a section 7.11 Plan which applies to the land come into force prior to the issue of any development consent for subdivision of the land, this Agreement shall be terminated immediately and the adopted contribution rate within such section 7.11 Plan shall be applied in place of the Developer's Contribution cited within this Agreement.
- 4.3 Clause 4.2 does not allow the Council or the Developer to retrospectively apply a section 7.11 contribution for the additional allotment for which development contributions have been paid in accordance with this Agreement.
- 4.4 Subject to Clause 16 should this Agreement be terminated in accordance with clause 17, section 7.11 or section 7.12 of the Act, whichever is applicable, will apply to the Proposed Development.

### **5 Registration of this Agreement**

- 5.1 Within 30 days from the commencement of this Agreement the Developer must take all reasonable steps to procure the registration of the Agreement, in accordance with section 7.6 of the Act on the relevant folios of the register held by the LPI pertaining to the Development Land.
- 5.2 The Council agrees:
- a) to provide a release and discharge of this Agreement with respect to the Development Land or the additional lot created on subdivision of the Development Land on satisfaction by the Developer of the obligation to provide the Developer's Contribution: and

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- b) to do all things reasonably necessary, including the execution of any documents, to enable the Developer to remove the notation of this Agreement on the relevant folios of the register, held by the LPI pertaining to the Land.

- 5.3 The Council acknowledges that the registration of this Agreement on the relevant folios of the register held by the LPI pertaining to the Development Land constitutes suitable means of enforcement of this Agreement for the purposes of s93F(3)(g) of the Act.

## **6 Developer's Contribution**

- 6.1 Subject to the terms of this Agreement, including clause 3.3, the Developer agrees to provide the Developer's Contribution, subject to clause 8, in the form of the Cash Contribution via a condition of Development Consent at the rate of \$30,000, subject to clause 9, for the creation of each additional vacant Housing Lot on the Development Land.
- 6.2 For the avoidance of doubt, the parties agree and acknowledge that the Maximum Cash Contribution is calculated on the basis of \$30,000, subject to clause 8, per additional Housing Lot created by subdivision of the Development Land. The existing Development Land allotment does not attract a Cash Contribution through this Agreement by virtue of there being on the land prior to any additional subdivision one lawfully existing dwelling.

## **7 CPI Adjustment of Developer's Contributions**

- 7.1 On each CPI Review Date the Housing Lot contribution will be calculated as follows:

$$RAC_C = RAC_B \times \frac{\text{Current CPI}}{\text{Base CPI}}$$

Where:

RAC B = The Housing Lot contribution at the commencement of this Agreement (i.e. \$30,000)

RAC C = Adjusted Housing Lot contribution at CPI review date.

## **8 Staged Provision of Subdivision**

- 8.1 The parties acknowledge that the Proposed Development can be undertaken in stages.
- 8.2 For each stage the Developer must provide a Cash Contribution in accordance with this Agreement for each vacant Housing Lot created within the particular stage.

## **9 Payment of Cash Contribution**

The Cash Contribution must be paid to Council, prior to the issue of a Subdivision Certificate, on a 'pro-rata' basis. The pro-rata payment calculation is to be based on the number of vacant Housing Lots included in the Subdivision Certificate for the relevant stage.

## **10 G.S.T**

- 10.1 Unless otherwise expressly stated all money or other sums payable or consideration to be provided under this agreement is inclusive of GST.
- 10.2 Despite Clause 6, to the extent that the Commissioner of Taxation, a Court or Tribunal determines that any supply made under or in connection with this Agreement is a taxable supply, the GST exclusive consideration otherwise to be paid or provided for that taxable supply is increased by the amount of any GST payable in respect of that taxable supply and

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that amount must be paid at the same time and in the same manner as the GST exclusive consideration is otherwise to be paid or provided and a valid Tax invoice is to be delivered to the recipient of the taxable supply and this clause will not merge on completion or termination of the Agreement.

## **11 Dispute Resolution**

### **11.1 Reference to Dispute**

If a dispute arises between the Parties in relation to this Agreement, then the Parties must in a reasonable time endeavour to resolve that dispute.

### **11.2 Notice of Dispute**

The Party wishing to commence the dispute resolution processes must notify the other Party in writing of:

- a) the intent to invoke this clause
- b) the nature or subject matter of the dispute, including a summary of any efforts made to resolve the dispute other than by way of this clause
- c) the outcomes which the notifying Party wishes to achieve (if practicable).

### **11.3 Representatives of Parties to Meet**

- a) The representatives of the Parties must promptly (and in any event within 15 Business Days of the written notice provided in accordance with clause 12.2 meet in good faith to attempt to resolve the notified dispute
- b) The Parties may, without limitation:
  - (i) resolve the dispute during the course of that meeting
  - (ii) agree that further material, expert determination in accordance with clause 12.5 or consideration is needed to effectively resolve the dispute (in which event the Parties will, in good faith, agree to a timetable for resolution)
  - (iii) agree that the Parties are unlikely to resolve the dispute and, in good faith, agree to a form of alternative dispute resolution (including expert determination, arbitration or mediation) which is appropriate for the resolution of the relevant dispute.

### **11.4 No party may constrain**

If:

- a) at least one meeting has been held in accordance with clause 12.3
- b) the Parties have been unable to reach an outcome identified in clause 12.3
- c) any of the Parties, acting in good faith, forms the view that the dispute is reasonably unlikely to be resolved in accordance with a process agreed under clause 12.3(b)(iii), then, that Party may, by 15 Business Days written notice to the other Party, terminate the dispute resolution process in respect of that dispute. The termination of the process set out in this clause does not of itself amount to a breach of this Agreement.

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### **11.5 Expert Determination of Dispute**

- (a) If a Dispute arises between Parties to this Agreement, the Parties may agree to refer the Dispute to expert determination in Sydney, New South Wales administered by the Australian Commercial Dispute Centre (ACDC).
- (b) The expert determination will be conducted in accordance with the ACDC Rules for Expert Determination (Rules) in force at the date of this Agreement. The Rules set out the procedures to be adopted, the process of selection of the expert and the costs involved, including the Parties' respective responsibilities for the payment of the expert's costs and other costs of the expert determination.
- (c) The expert determination will be final and binding on the Parties.
- (d) This clause survives termination of this Agreement.

### **11.6 Urgent Relief**

At any time, a Party may, without inconsistency with anything in this clause 11, seek urgent interlocutory relief in respect of a dispute under this Agreement from any Court having jurisdiction.

## **12 Agreement of the Developer**

### **12.1 The Developer warrants that it:**

12.1.1 is the legal and beneficial owner of part of the Development Land

12.1.2 will take all practicable steps and use best endeavours and do all acts and things required to procure:

12.1.2.1 the execution of any documents necessary to effect registration of this Agreement with LPI

12.1.2.2 the production of the relevant certificates of title for the Development Land and the registration of this Agreement at LPI on the title of the Development Land within 30 days of the date of the commencement of this Agreement.

12.2 Council shall not be required to seal any sub-division plan made pursuant to the Development Approval unless and until this Agreement has been registered at LPI on the title of the Development Land.

## **13 Enforcement by any party**

- (a) Without limiting any other remedies available to the Parties, this Agreement may be enforced by any Party in any court of competent jurisdiction.
- (b) Nothing in this Agreement prevents:
  - (i) a Party from bringing proceedings in a court of competent jurisdiction to enforce any aspect of this Agreement or any matter to which this Agreement relates, subject to compliance with clause 15.
  - (ii) the Council from exercising any function under the Act or any other Act or law.

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### 14 Assignment and Dealings

14.1 The Developer is not to:

14.1.1 sell, transfer, mortgage or charge the Land, or

14.1.2 assign the Developer's rights or obligations under this Deed, or novate this Deed, to any person unless:

14.1.2.1 the Developer has, at no cost to the Council, first procured the execution by the person to whom the Land or part is to be sold, transferred, mortgaged or charged or the Developer's rights or obligations under this Deed are to be assigned or novated, of a deed in favour of the Council on terms reasonably satisfactory to the Council, and

14.1.2.2 the Council has given written notice to the Developer stating that it reasonably considers that the purchaser, transferee, mortgagee, charge, assignee or novatee, is reasonably capable of performing its obligations under this Deed, and

14.1.2.3 the Developer is not in breach of this Deed, and

14.1.2.4 the Council otherwise consents to the transfer, mortgage, charge, assignment or novation, such consent not to be unreasonably withheld.

14.2 Clause 14.1 does not apply in relation to any sale, transfer, mortgage or charge of the Land if this Deed is registered on the title to the Land at the time of the sale.

14.3 Upon the commencement of this Deed, the Council is deemed to have acquired, and the Developer is deemed to have granted, an equitable estate and interest in the Land for the purposes of section 74F(1) of the *Real Property Act 1900* (NSW) and consequently the Council has a sufficient interest in the Land to lodge and maintain with the Land and Property Management Authority a caveat notifying that interest.

14.4 The Developer consents to the Council lodging a caveat on the Land where this Deed is not registered on the title to the Land due to a breach by the Developer of its obligations<sup>11.2.1</sup> Agreement to comply with this Agreement as if the transferee was the Developer with respect to that part of the Development Land transferred, including in relation to obligations which arose before the Transfer; and

### 15 Release

When the Developer has satisfied all of the obligations imposed on it under this agreement in respect of that part of the Development Land for which a Subdivision Certificate has been issued and for which the Developer's Contribution has been delivered then the Council must promptly at the request and at the reasonable expense of the Developer do all acts and things necessary to remove this agreement from the title of that part of the Development Land.

### 16 Termination

16.1 This agreement may be terminated by the Council by written notice to the Developer if:

16.1.1 the Developer commits a breach of any of the terms and conditions of this agreement and fails to remedy such a breach within fourteen (14) days of receipt of a written notice (which specifies the breach and requires the Developer to remedy the breach) whereupon the date of such termination will be effective on the 15th day from receipt of such written notice; or

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16.1.2 an Event of Insolvency occurs.

### 17 Review Procedures

The parties may agree to review this agreement in circumstances and in a manner determined by the parties. Any amendment, modification, supplement or replacement document which results from a review must be in writing, signed by the parties and registered at LPI under section 7.6 of the Act.

### 18 Notices

18.1 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 below
- b) faxed to that Party at its fax number set out below.

18.2 For the purposes of this clause the parties' contact details for service are:

#### The Developer:

[REDACTED]

Address: [REDACTED]

Email: [REDACTED]

Telephone: [REDACTED]

#### Council

Hawkesbury City Council

Attention: General Manager

Address: 366 George Street,  
WINDSOR NSW 2571

Email: council@hawkesbury.nsw.gov.au

Telephone: (02) 4560 4444

18.3 If a Party gives the other Party three 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.

18.4 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
- c) If it is 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.

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- 18.5 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.

### **19 Proper Law and Jurisdiction**

This Agreement is made and will be construed and governed in accordance with the Law of the State of NSW South Wales. Each party submits to the exclusive jurisdiction of each and every Court or Tribunal of the said State having jurisdiction to hear the matter submitted to it.

### **20 Severance**

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.

### **21 Waiver**

- 21.1 No failure on the part of a party to exercise and no delay in exercising and no cause of dealing with respect to, any condition and the rights, powers or remedies of that party under this Agreement will impair any of those rights, powers or remedies, nor constitute a waiver of any of those rights, powers or remedies.
- 21.2 No single or partial exercise by a party of any condition and rights, powers or remedies under this agreement will preclude any other or further exercise of those or exercise of any other conditions rights or remedies.
- 21.3 Any condition and the rights, powers or remedies under or relating to this agreement are cumulative and will not exclude any other rights, powers or remedies under or relating to this agreement at Law.
- 21.4 No waiver of any of the conditions of this agreement will be effective unless in writing signed by the party against whom such waiver is sought to be enforced.
- 21.5 Any waiver of the conditions of this agreement will be effective only in the specific instance and for the specific purpose given and the waiver will not be deemed a waiver of such obligations or of any subsequent breach of the same or some other obligation.

### **22 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.

### **23 Entire Agreement**

This agreement contains all the terms and conditions to which the parties have agreed on in relation to the matters which they have dealt with. No party can rely on an earlier document, anything said or done by another party, or omitted to be relied upon, said or done except as permitted by Law.

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### 24 No Fetter

24.1 Nothing in the agreement is to be construed as requiring the Council to do anything

24.1.1 that would cause it to be in breach of any of its obligations at Law

24.1.2 limiting or fettering in any way the exercise of any statutory discretion or duty; at Law

24.1.3 imposing any obligations to grant an Approval.

### 25 Representatives and Warranties

Each party agrees that it has the power and authority to enter into this Agreement and comply with its obligations and that entry into this agreement will not result in a breach of Law.

### 26 Costs

Each party must bear and pay its own costs of and incidental to the preparation and execution of this agreement.

Executed as an agreement on

2021

#### Execution by Council

THE COMMON SEAL of HAWKESBURY CITY )  
COUNCIL was hereunto affixed on the \_\_\_<sup>th</sup> day of )  
\_\_\_\_\_ 2021 pursuant to a resolution )  
passed on the \_\_\_\_\_ the )  
presence of: )

.....  
General Manager of Council

Execution by \_\_\_\_\_

Signed by:

\_\_\_\_\_  
Signature of Developer Given Name Initial and  
Last Name

\_\_\_\_\_  
Signature of Developer Given  
Initial and Last Name

\_\_\_\_\_  
Print name

\_\_\_\_\_  
Print name