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Deed

Caddens Knoll Planning Agreement

Under s93F of the *Environmental Planning and Assessment Act 1979*

Penrith City Council Landcom (t/a UrbanGrowth NSW)

Date:

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Caddens Knoll Planning Agreement

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Caddens Knoll Planning Agreement

Summary Sheet

Council:

Name: Penrith City Council
Address: 601 High St, Penrith NSW 2750
Telephone: 02 4732 7777
Facsimile: 02 4732 7958

Developer:

Name: Landcom (t/as UrbanGrowth NSW)
Address: Level 14, 60 Station Street Parramatta, NSW 2150
Telephone: (02) 9841 8600
Facsimile: (02) 9841 8688
Email: smccowan@urbangrowth.nsw.gov.au
Representative: Stuart McCowan

Land:

See definition of *Land* in clause 1.1.

Development:

See definition of *Development* in clause 1.1.

Development Contributions:

See Clause 9 and Schedule 1.

Application of s94, s94A and s94EF of the Act:

See clause 8.

Security:

See Part 4.

Registration:

No. See clause 31.

Restriction on dealings:

See clause 32

Dispute Resolution:

See Part 3.



Caddens Knoll Planning Agreement

Under s93F of the *Environmental Planning and Assessment Act 1979*

Parties

Penrith City Council ABN 43 794 422 563 of 601 High St, Penrith NSW 2750
(**Council**)

and

Landcom (t/a UrbanGrowth NSW) ABN 79 268 260 688 of Level 14, 60
Station Street Parramatta, NSW 2150 (**Developer**)

Background

- A The Developer is established as a corporation under s5(1) of the *Landcom Corporation Act 2001* with the corporate name of Landcom.
- B The Developer trades under the name of *UrbanGrowth NSW*.
- C The Developer is the owner of the Land.
- D The Developer has sought the making of the LEP which will make the Development permissible on the Land.
- E The Developer proposes to make Development Contributions in connection with carrying out of the Development in accordance with this Deed.

Operative provisions

Part 1 - Preliminary

1 Interpretation

1.1 In this Deed the following definitions apply:

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

Deed means this Deed and includes any schedules, annexures and appendices to this Deed.

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



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

Caddens Road West Works means the upgrade of Caddens Road West from Angophora Avenue to Cadda Ridge Drive in accordance with the suite of plans titled '*Caddens Collector Roads, Kingswood, Caddens Road (West), Detail Design*', Revision B, prepared by Cardno Young dated 18 October 2010,

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

Concept Plan means the plan in Schedule 2.

Construction Certificate has the same meaning as in the Act.

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

CPI means the Consumer Price Index (All Groups – Sydney) published by the Australian Bureau of Statistics.

Cultural Facilities CP means the contributions plan approved by the Council under s94EA of the Act titled '*Development Contributions Plan, Cultural facilities*' dated May 2003.

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

Defects Liability Period means the period of 1 year commencing on the day immediately after a Work is completed for the purposes of this Deed.

Development means residential subdivision of the Land to create a minimum of 45 Final Lots generally in accordance with the Concept Plan that is only permissible by reason of the taking effect of the LEP.

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, the carrying out of work, or the provision of any other material public benefit, or any combination of them, to be used for, or applied towards a public purpose.

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

District Open Space CP means the contributions plan approved by the Council under s94EA of the Act titled '*Penrith City District Open Space Facilities Development Contributions Plan*' dated December 2007.

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



Footpath Construction CP means the contributions plan approved by the Council under s94EA of the Act titled '*Penrith City Council Section 94 Plan, Footpath Construction*' dated May 2001.

Final Lot means a lot created in the Development for separate residential occupation and disposition or a lot of a kind or created for a purpose that is otherwise agreed by the Parties, not being a lot created by a subdivision of the Land:

- (a) that is to be dedicated or otherwise transferred to the Council, or
- (b) on which is situated a dwelling-house that was in existence on the date of this Deed.

GST has the same meaning as in the GST Law.

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

Item means specified in Column 1 of Schedule 1.

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

Kingswood Neighbourhood Centre CP means the contributions plan approved by the Council under s94EA of the Act titled '*Penrith City Council Section 94 Plan, Kingswood Neighbourhood Centre*' dated May 2001.

Land means Lot 21 DP 1151724 otherwise known as 17-53 Caddens Road, Kingswood.

LEP means the local environmental plan that operates to amend the *Penrith Local Environmental Plan 2010* to rezone the Land for residential purposes.

Local Open Space CP means the contributions plan approved by the Council under s94EA of the Act titled '*Penrith City Local Open Space Development Contributions Plan*' dated June 2007.

Party means a party to this Deed.

Rectification Notice means a notice in writing:

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

Rectify means rectify, remedy or correct.

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

Subdivision Certificate has the same meaning as in the Act but also includes a strata certificate.

Work means the physical result of any building, engineering or construction work in, on, over or under land.

- 1.2 In the interpretation of this Deed, the following provisions apply unless the context otherwise requires:

- 1.2.1 Headings are inserted for convenience only and do not affect the interpretation of this Deed.
- 1.2.2 A reference in this Deed to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- 1.2.3 If the day on which any act, matter or thing is to be done under this Deed is not a business day, the act, matter or thing must be done on the next business day.
- 1.2.4 A reference in this Deed to dollars or \$ means Australian dollars and all amounts payable under this Deed are payable in Australian dollars.
- 1.2.5 A reference in this Deed to a \$ value relating to a Development Contribution is a reference to the value exclusive of GST.
- 1.2.6 A reference in this Deed to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- 1.2.7 A reference in this Deed to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- 1.2.8 A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Deed.
- 1.2.9 An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- 1.2.10 Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- 1.2.11 A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
- 1.2.12 References to the word 'include' or 'including' are to be construed without limitation.
- 1.2.13 A reference to this Deed includes the agreement recorded in this Deed.
- 1.2.14 A reference to a Party to this Deed includes a reference to the servants, agents and contractors of the party, the party's successors and assigns and a person against whom this Deed is enforceable under s93H(3) of the Act.
- 1.2.15 Any schedules, appendices and attachments form part of this Deed.
- 1.2.16 Notes appearing in this Deed are operative provisions of this Deed.

2 Status of this Deed

- 2.1 This Deed is a planning agreement within the meaning of s93F(1) of the Act.

3 Commencement

- 3.1 This Deed takes effect on the later of:
- 3.1.1 the date when all Parties have executed this Deed; and
 - 3.1.2 the date on which the LEP commences operation..
- 3.2 The Party who executes this Deed last is to insert on the front page the date they did so and provide a copy of the fully executed and dated Deed to any other person who is a Party.

4 Application of this Deed

- 4.1 This Deed applies to the Land and to the Development.

5 Warranties

- 5.1 The Parties warrant to each other that they:
- 5.1.1 have full capacity to enter into this Deed, and
 - 5.1.2 are able to fully comply with their obligations under this Deed.

6 Further agreements

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

7 Surrender of right of appeal, etc.

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

8 Application of s94, s94A and s94EF of the Act to the Development

- 8.1 This Deed excludes the application of s94 and s94A to the Development.
- 8.2 This Deed does not exclude the application of s94EF to the Development.

Part 2 – Development Contributions

9 Provision of Development Contributions

- 9.1 The Developer is to make Development Contributions to the Council in accordance with Schedule 1, any other provision of this Deed relating to the making of Development Contributions and otherwise to the satisfaction of the Council.
- 9.2 The Council is to apply each Development Contribution made by the Developer under this Deed towards the public purpose for which it is made and otherwise in accordance with this Deed.
- 9.3 Development Contributions in Part A of the table to Schedule 1 are to be indexed in accordance with the following formula:

$$A = B \times C/D$$

where:

- A is the indexed amount of the Development Contribution;
- B is the amount of the Development Contribution listed in Column 3 of the table to Schedule 1;
- C is the CPI published for the quarter immediately before the date that the Development Contribution is due to be made; and
- D is the CPI published for the June 2013 quarter.

10 Payment of monetary Development Contributions

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

11 Dedication of land

- 11.1 A Development Contribution comprising the dedication of land is made for the purposes of this Deed when:
- 11.1.1 a deposited plan is registered in the register of plans held with the Registrar-General that dedicates land as a public road (including a temporary public road) under the *Roads Act 1993* or creates a public reserve or drainage reserve under the *Local Government Act 1993*, or
- 11.1.2 the Council is given:
- (a) an instrument in registrable form under the *Real Property Act 1900* duly executed by the Developer as transferor that is effective to transfer the title to the land to the Council when executed by the Council as transferee and registered,

- (b) the written consent to the registration of the transfer of any person whose consent is required to that registration, and
 - (c) a written undertaking from any person holding the certificate of title to the production of the certificate of title for the purposes of registration of the transfer.
- 11.2 The Developer is to do all things reasonably necessary to enable registration of the instrument of transfer to occur.
- 11.3 The Developer is to ensure that land dedicated to the Council under this Deed is free of all encumbrances and affectations (whether registered or unregistered and including without limitation any charge or liability for rates, taxes and charges) except as agreed in writing by the Council, agreement not to be unreasonably withheld.
- 11.4 If, having used all reasonable endeavours, the Developer cannot ensure that land to be dedicated to the Council under this Deed is free from all encumbrances and affectations, the Developer may request that Council agree to accept the land subject to those encumbrances and affectations, and:
 - 11.4.1 Council cannot withhold its agreement unreasonably if:
 - (a) the encumbrance or affectation does not prevent the future use of the Land for the public purpose for which it is to be dedicated under this Deed, unless the encumbrance or affectation is a charge arising as a result of unpaid taxes or charges, and
 - (b) the Developer has disclosed fully to Council the nature, extent and consequence of the encumbrance or affectation; and
 - 11.4.2 in all other cases, the Council may withhold its agreement in its absolute discretion.
- 11.5 Despite any other provision of this Deed, if the Developer is required to dedicate land to the Council on which the Developer is also required to carry out a Work under this Deed, the Developer is to comply with clause 11.1.2 not later than 21 days after the Work is completed for the purposes of this Deed.

12 Carrying out of Work

- 12.1 Without limiting any other provision of this Deed, any Work that is required to be carried out by the Developer under this Deed is to be carried out in accordance with any design or specification specified or approved by the Council, any relevant Approval and any other applicable law.
- 12.2 The Developer, at its own cost, is to comply with any reasonable direction given to it by the Council to prepare or modify a design or specification relating to a Work that the Developer is required to carry out under this Deed.

13 Provision relating to Caddens Road West Works

- 13.1 At any time before the issue of the first Subdivision Certificate that creates a Final Lot in the Development, the Developer is to notify the Council in writing whether it will:
- 13.1.1 carry out the Caddens Road West Works, or
 - 13.1.2 pay a monetary Development Contribution of \$1,400,000.00 indexed in accordance with the following formula, to the Council to be applied towards completion by the Council of the Caddens Road West Works (**CRWW Contribution**):
$$A = \$1,400,000.00 \times B/C$$
where:
 - A** is the indexed amount of the CRWW Contribution;
 - B** is the CPI published for the quarter immediately before the date that the CRWW Contribution is due to be made; and
 - C** is the CPI published for the March 2012 quarter.
- 13.2 If the Developer notifies Council that it will carry out the Caddens Road West Works, the Developer:
- 13.2.1 is to obtain any approval required under the *Roads Act 1993* in respect of the Caddens Road West Works; and
 - 13.2.2 is to carry out and complete those Works in accordance with any approval granted under the *Roads Act 1993*, before the issue of the first Subdivision Certificate that creates a Final Lot in the Development.
- 13.3 If the Developer notifies Council that it will pay the CRWW Contribution:
- 13.3.1 the Developer is to pay the CRWW Contribution before the issue of the first Subdivision Certificate that creates a Final Lot in the Development,
 - 13.3.2 the Council is to commence the Caddens Road West Works within 2 years of receiving the CRWW Contribution, and
 - 13.3.3 the Council is to complete the Caddens Roads West Works within 1 year of the date it commences the Works.
- 13.4 If the Council fails to comply with clause 13.3.2, then before the commencement of the Caddens Road West Works, the Developer may issue Council with a notice requiring the Council to return the CRWW Contribution, together with interest calculated at the rate being the cash rate most recently published by the Reserve Bank of Australia to the Developer within 28 days of the date of the Developer's notice and the Council must comply with that notice.
- 13.5 On the return of the CRWW Contribution to the Developer pursuant to clause 13.4 the Developer is to carry out the Caddens Road West Works and complete those Works within 18 months of the date of return of the CRWW Contribution to the Developer.



14 Deferral of Work

- 14.1 Notwithstanding any other provision of this Deed, if the Developer reasonably considers, at any time, that it is unable to make a Development Contribution comprising a Work by the time the Work is required to be completed under this Deed, then:
- 14.1.1 the Developer is to provide written notice to the Council to that effect,
 - 14.1.2 the Developer is to provide the Council with Security in an amount equal to the cost of construction of the uncompleted part of the Work, determined by a suitably qualified expert agreed between the Parties, before the date on which the Work is required to be completed under this Deed,
 - 14.1.3 the Developer is to provide to the Council a revised completion date for the Work,
 - 14.1.4 the time for completion of the Work under this Deed is the revised completion date referred to in clause 14.1.3.
- 14.2 If the Developer complies with clause 14.1 in relation to a Work, then it is not in breach of this Deed as a result of a failure to complete the Work by the time for completion of the Work specified in Column 4 of the Table to Schedule 1, and the Council will not be able to withhold the issue of the relevant Subdivision Certificate if the revised time for Completion of the Work is after the issue of that Subdivision Certificate.
- 14.3 Subject to clause 29, if the Work is not completed by the revised date for completion of the Work referred to in clause 14.1.3, the Council may call on the Security to meet any of its costs incurred under this Deed in respect of enforcing or rectifying the Developer's failure to complete the Work by the revised date for completion.
- 14.4 If the Council calls on the Security, the Council may, by notice in writing to the Developer, require it to provide a further or replacement Security in an amount that, when added to any unused portion of the Security held by the Council, equals, but does not exceed the amount of the Security the Council is entitled to hold under this Deed.
- 14.5 The Council is to return the Security or any remaining part of it to the Developer, within 28 days of the completion by the Developer of its obligations relating to the Work to which the Security applies to the satisfaction of the Council.
- 14.6 At any time following the provision of the Security, the Developer may provide the Council with a replacement Security in the amount of the Security required to be provided under this Deed.
- 14.7 On receipt of a replacement Security, the Council is to release and return the Security it holds which has been replaced to the Developer or at the Developer's direction.
- 14.8 In this clause:
- 14.8.1 **Security** means a Treasury Guarantee, bank guarantee, bond or other form of security to the satisfaction of the Council.

14.8.2 **Treasury Guarantee** means a written guarantee issued by or on behalf of New South Wales Government that is materially similar to a bank guarantee.

15 Variation to Work

- 15.1 The design or specification of any Work that is required to be carried out by the Developer under this Deed may be varied by agreement in writing between the Parties, acting reasonably.
- 15.2 Without limiting clause 15.1, the Developer may make a written request to the Council to approve a variation to the design or specification of a Work in order to enable it to comply with the requirements of any Authority imposed in connection with any Approval relating to the carrying out of the Work.
- 15.3 The Council is not to unreasonably delay or withhold its approval to a request made by the Developer under clause 15.2.
- 15.4 The Council, acting reasonably, may from time to time give a written direction to the Developer requiring it to vary the design or specification of a Work in a specified manner and submit the variation to the Council for approval.
- 15.5 The Developer is to comply promptly with a direction referred to in clause 15.4 at its own cost unless the direction:
- 15.5.1 is given after a Construction Certificate has been issued for the Work (or if no Construction Certificate is required for the Work, after the date on which an approval under the Roads Act is given for the Work) in which case the Council shall be liable to pay to the Developer an amount equal to the increase in the costs of completing the Work, which results from the variation directed by the Council, or
 - 15.5.2 is given before a Construction Certificate has been issued for the Work (or if no Construction Certificate is required for the Work, before the date on which an approval under the Roads Act is given for the Work) and causes the cost of construction of the Work to exceed the amount specified in Column 3 of the Table to Schedule 1 corresponding to that Work, in which case the Council shall be liable to pay to the Developer an amount equal to the costs of completing the Work that is over and above the amount specified.

16 Access to land by Developer

- 16.1 The Council authorises the Developer to enter, occupy and use any land owned or controlled by the Council adjoining, adjacent to, or in the immediate vicinity of the Development for the purpose of performing its obligations under this Deed.
- 16.2 The Council is to permit the Developer, upon receiving reasonable prior notice from the Developer, to enter any other Council owned or controlled land adjoining, adjacent to, or in the immediate vicinity of the Development in order to enable the Developer to properly perform its obligations under this Deed.
- 16.3 Nothing in this Deed creates or gives the Developer any estate or interest in any part of the land referred to in clause 16.1 or 16.2.



17 Access to land by Council

- 17.1 The Council may enter any land on which Work is being carried out by the Developer under this Deed in order to inspect, examine or test the Work, or to remedy any breach by the Developer of its obligations under this Deed relating to the Work.
- 17.2 The Council is to give the Developer prior reasonable notice before it enters land under clause 17.1.

18 Council's obligations relating to Work

- 18.1 The Council is not to unreasonably delay, hinder or otherwise interfere with the performance by the Developer of its obligations under this Deed, and is to use its reasonable endeavours to ensure third parties unrelated to the Developer do not unreasonably delay, hinder or otherwise interfere with the performance of those obligations.

19 Protection of people, property & utilities

- 19.1 The Developer is to ensure to the fullest extent reasonably practicable in relation to the performance of its obligations under this Deed that:
- 19.1.1 all necessary measures are taken to protect people and property,
 - 19.1.2 unnecessary interference with the passage of people and vehicles is avoided, and
 - 19.1.3 nuisances and unreasonable noise and disturbances are prevented.
- 19.2 Without limiting clause 19.1, the Developer is not to obstruct, interfere with, impair or damage any public road, public footpath, public cycleway or other public thoroughfare, or any pipe, conduit, drain, watercourse or other public utility or service on any land except as authorised in writing by the Council or any relevant Authority.

20 Repair of damage

- 20.1 The Developer, at its own cost, is to repair and make good to the satisfaction of the Council any damage to a Work required to be carried out by the Developer under this Deed resulting from any cause whatsoever that occurs before the date on which the Work is completed for the purposes of this Deed.

21 Completion of Work

- 21.1 The Developer is to give the Council written notice of the date on which it will complete Work required to be carried out under this Deed or any Stage.
- 21.2 The Council is to inspect the Work the subject of the notice referred to in clause 21.1 within 21 days of the date specified in the notice for completion of the Work.



- 21.3 Work required to be carried out by the Developer under this Deed, or a Stage, is completed for the purposes of this Deed when the Council, acting reasonably, gives a written notice to the Developer to that effect.
- 21.4 Upon the giving of a notice referred to in clause 21.3, the Council assumes responsibility for the Work the subject of the notice.
- 21.5 Before the Council gives the Developer a notice referred to in clause 21.3, it may give the Developer a written direction to complete, rectify or repair any specified part of the Work to the reasonable satisfaction of the Council.
- 21.6 The Developer, at its own cost, is to promptly comply with a direction referred to in clause 21.5.

22 Rectification of defects

- 22.1 The Council may give the Developer a Rectification Notice during the Defects Liability Period.
- 22.2 The Developer, at its own cost, is to comply with a Rectification Notice according to its terms and to the reasonable satisfaction of the Council.
- 22.3 The Council is to do such things as are reasonably necessary to enable the Developer to comply with a Rectification Notice that has been given to it under clause 22.1

23 Works-As-Executed-Plan

- 23.1 No later than 14 days after Work is completed for the purposes of this Deed, the Developer is to submit to the Council a full works-as-executed-plan in respect of the Work.

24 Removal of Equipment

- 24.1 When Work on any Council owned or controlled land is completed for the purposes of this Deed, the Developer, without delay, is to:
 - 24.1.1 remove any Equipment from that land and make good any damage or disturbance to the land as a result of the Developer's occupation of that land, and
 - 24.1.2 leave the land in a neat and tidy state, clean and free of rubbish.

Part 3 – Dispute Resolution

25 Dispute resolution – expert determination

- 25.1 This clause applies to a Dispute between any of the Parties to this Deed concerning a matter arising in connection with this Deed that can be determined by an appropriately qualified expert if:
- 25.1.1 the Parties to the Dispute agree that it can be so determined, or
 - 25.1.2 the Chief Executive Officer of the professional body that represents persons who appear to have the relevant expertise to determine the Dispute gives a written opinion that the Dispute can be determined by a member of that body.
- 25.2 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.
- 25.3 If a notice is given under clause 25.2, the Parties are to meet within 14 days of the notice, or such other period agreed in writing between the Parties, in an attempt to resolve the Dispute.
- 25.4 If the Dispute is not resolved within a further 28 days, the Dispute is to be referred to the President of the NSW Law Society to appoint an expert for expert determination.
- 25.5 The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.
- 25.6 Each Party is to bear its own costs arising from or in connection with the appointment of the expert and the expert determination together with the relevant proportion of the expert's fees and hearing allocation costs.

26 Dispute Resolution - mediation

- 26.1 This clause applies to any Dispute arising in connection with this Deed other than a Dispute to which clause 25 applies.
- 26.2 Such a Dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 26.3 If a notice is given under clause 26.2, the Parties are to meet within 14 days of the notice, or such other period agreed in writing between the Parties, in an attempt to resolve the Dispute.
- 26.4 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, or the President's nominee, to select a mediator.
- 26.5 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.

Part 4 - Enforcement

27 Acquisition of land required to be dedicated

- 27.1 Subject to clause 29, if the Developer does not dedicate land required to be dedicated under this Deed at the time at which it is required to be dedicated, the Developer consents to the Council compulsorily acquiring the land for compensation in the amount of \$1 without having to follow the pre-acquisition procedure under the Just Terms Act.
- 27.2 The Council is to only acquire land pursuant to clause 27.1 if it considers it reasonable to do so having regard to the circumstances surrounding the failure by the Developer to dedicate the land required to be dedicated under this Deed.
- 27.3 Clause 27.1 constitutes an agreement for the purposes of s30 of the Just Terms Act.
- 27.4 If, as a result of the acquisition referred to in clause 27.1, the Council is required to pay compensation to any person other than the Developer, the Developer is to reimburse the Council that amount, upon a written request being made by the Council.
- 27.5 The Developer indemnifies and keeps indemnified the Council against all Claims made against the Council as a result of any acquisition by the Council of the whole or any part of the land concerned except if, and to the extent that, the Claim arises because of the Council's negligence or default.
- 27.6 The Developer is to promptly do all things necessary, and consents to the Council doing all things necessary, to give effect to this clause 27, including without limitation:
- 27.6.1 signing any documents or forms,
 - 27.6.2 giving land owner's consent for lodgement of any Development Application,
 - 27.6.3 producing certificates of title to the Registrar-General under the *Real Property Act 1900*, and
 - 27.6.4 paying the Council's costs arising under this clause 27.

28 Breach of obligations

- 28.1 If the Council reasonably considers that the Developer is in breach of any obligation under this Deed, it may, subject to clause 29, give a written notice to the Developer:
- 28.1.1 specifying the nature and extent of the breach,
 - 28.1.2 requiring the Developer to:
 - (a) rectify the breach if it reasonably considers it is capable of rectification, or



- (b) pay compensation to the reasonable satisfaction of the Council in lieu of rectifying the breach if it reasonably considers the breach is not capable of rectification,
- 28.1.3 specifying the period within which the breach is to be rectified or compensation paid, being a period that is reasonable in the circumstances.
- 28.2 If the Developer fails to comply with a notice given under clause 28.1 relating to the carrying out of Work under this Deed, the Council may step-in and remedy the breach and may enter, occupy and use any land owned or controlled by the Developer and any Equipment on such land for that purpose.
- 28.3 Any costs incurred by the Council in remedying a breach in accordance with clause 28.2 may be recovered by the Council as a debt due in a court of competent jurisdiction.
- 28.4 For the purpose of clause 28.3, the Council's costs of remedying a breach the subject of a notice given under clause 28.1 include, but are not limited to:
 - 28.4.1 the costs of the Council's servants, agents and contractors reasonably incurred for that purpose,
 - 28.4.2 all fees and charges necessarily or reasonably incurred by the Council in remedying the breach, and
 - 28.4.3 all legal costs and expenses reasonably incurred by the Council, by reason of the breach.
- 28.5 Nothing in this clause 28, other than it being subject to clause 29, prevents the Council from exercising any rights it may have at law or in equity in relation to a breach of this Deed by the Developer, including but not limited to seeking relief in an appropriate court.

29 Council to consult before enforcing this Deed

- 29.1 This clause applies to any of the Developer's obligations under this Deed.
- 29.2 If the Council reasonably forms the opinion that the Developer has failed to comply with an obligation to which this clause applies, it is not to enforce this Deed against the Developer unless it has first notified the Developer in writing of its intention to do so and has consulted with the Developer as to:
 - 29.2.1 the reason for the non-compliance,
 - 29.2.2 the likely effects of the non-compliance, and
 - 29.2.3 the Developer's capacity in all of the circumstances to reasonably rectify the non-compliance.
- 29.3 The Council is not to enforce this Deed against the Developer unless, after having consulted with the Developer:
 - 29.3.1 it has reasonably formed the opinion the Developer has no reasonable excuse for the non-compliance,
 - 29.3.2 it has notified the Developer in writing that it intends to enforce the Deed not earlier than 14 days from the date of the notice, and
 - 29.3.3 the notice specifies the enforcement action it intends to take.

- 29.4 At any time between the date of the notice referred to in clause 29.3 and the time when the Council takes action to enforce this Deed, the Developer may notify the Council of a dispute under clause 25 or 26.
- 29.5 If the Developer notifies the Council in accordance with in clause 29.4, the Council is not to enforce this Deed against the Developer in relation to the relevant non-compliance unless and until the dispute resolution process under clause 25 or 26 has been exhausted without resolution between the parties.

30 Enforcement in a court of competent jurisdiction

- 30.1 Subject to clause 29, the Parties may enforce this Deed in any court of competent jurisdiction.
- 30.2 For the avoidance of doubt, nothing in this Deed prevents:
- 30.2.1 a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Deed or any matter to which this Deed relates, or
- 30.2.2 the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Deed or any matter to which this Deed relates.

Part 5 – Registration & Restriction on Dealings

31 Registration of this Deed

- 31.1 The Parties agree not to register this Deed for the purposes of s93H(1) of the Act.

32 Restriction on dealings

- 32.1 The Developer is not to:
- 32.1.1 sell or transfer the Land, other than a Final Lot, or
- 32.1.2 assign the Developer's rights or obligations under this Deed, or novate this Deed,
- to any person unless:
- 32.1.3 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 or transferred 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
- 32.1.4 the Council has given written notice to the Developer stating that it reasonably considers that the purchaser, transferee, assignee or novatee, is reasonably capable of performing its obligations under this Deed, and



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

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

Part 6 – Indemnities & Insurance

33 Release

33.1 Each Party releases the other Party from any Claim it may have against the other Party arising in connection with the performance of their obligations under this Deed except if, and to the extent that, the Claim arises because of the other Party's negligence or default.

34 Indemnity

34.1 Each Party indemnifies the other Party from and against all Claims that may be sustained, suffered, recovered or made against the other Party arising in connection with the performance of their obligations under this Deed except if, and to the extent that, the Claim arises because of the other Party's negligence or default.

35 Insurance

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

35.1.1 contract works insurance, noting the Council as an interested party, for the full replacement value of the Works (including the cost of demolition and removal of debris, consultants' fees and authorities' fees), to cover the Developer's liability in respect of damage to or destruction of the Works,

35.1.2 public liability insurance for at least \$20,000,000.00 for a single occurrence, which covers the Council, the Developer and any subcontractor of the Developer, for liability to any third party,

35.1.3 workers compensation insurance as required by law, and

35.1.4 any other insurance required by law.

35.2 If the Developer fails to comply with clause 35.1, the Council may effect and keep in force such insurances and pay such premiums as may be necessary for that purpose and the amount so paid shall be a debt due from the Developer to the Council and may be recovered by the Council as it deems appropriate including by recovery as a debt due in a court of competent jurisdiction.



- 35.3 The Developer is not to commence to carry out any Work unless it has first provided to the Council satisfactory written evidence of all of the insurances specified in clause 35.1.

Part 7 – Other Provisions

36 Annual report by Developer

- 36.1 The Developer is to provide to the Council by not later than each anniversary of the date on which this Deed is entered into a report detailing the performance of its obligations under this Deed.
- 36.2 The report referred to is to be in such a form and to address such matters as required by the Council from time to time.

37 Review of Deed

- 37.1 The Parties agree to review this Deed every 5 years, and otherwise if either party is of the opinion that any change of circumstance has occurred, or is imminent, that materially affects the operation of this Deed.
- 37.2 For the purposes of clause 37.1, the relevant changes include (but are not limited to) any change to a law that restricts or prohibits or enables the Council or any other planning authority to restrict or prohibit any aspect of the Development.
- 37.3 For the purposes of addressing any matter arising from a review of this Deed referred to in clause 37.1, the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Deed.
- 37.4 If this Deed becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties agree to do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Deed is entered into.
- 37.5 A failure by a Party to agree to take action requested by the other Party as a consequence of a review referred to in clause 37.1 (but not 37.4) is not a Dispute for the purposes of this Deed and is not a breach of this Deed.

38 Notices

- 38.1 Any notice, consent, information, application or request that is to or may be given or made to a Party under this Deed is only given or made if it is in writing and sent in one of the following ways:
- 38.1.1 delivered or posted to that Party at its address set out in the Summary Sheet,
- 38.1.2 faxed to that Party at its fax number set out in the Summary Sheet, or

- 38.1.3 emailed to that Party at its email address set out in the Summary Sheet, if an email address is set out for that Party in the Summary Sheet.
- 38.2 If a Party gives the other Party 3 business days notice of a change of its address, fax number or email, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted, faxed or emailed to the latest address or fax number.
- 38.3 Any notice, consent, information, application or request is to be treated as given or made if it is:
- 38.3.1 delivered, when it is left at the relevant address,
- 38.3.2 sent by post, 2 business days after it is posted,
- 38.3.3 sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number, or
- 38.3.4 sent by email (if an email address is contained in the Summary Sheet for the receiving Party) and the sender does not receive a delivery failure message from the sender's internet service provider within a period of 24 hours of the email being sent.
- 38.4 If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

39 Approvals and Consent

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

40 Costs

- 40.1 Each Party is to pay its own costs of preparing, negotiating, executing and stamping this Deed, and any document related to this Deed.
- 40.2 The Developer is also to pay to the Council the Council's reasonable costs of enforcing this Deed within 7 days of a written demand by the Council for such payment.

41 Entire Deed

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

- 41.2 No Party can rely on an earlier document, or anything said or done by another Party, or by a director, officer, agent or employee of that Party, before this Deed was executed, except as permitted by law.

42 Further Acts

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

43 Governing Law and Jurisdiction

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

44 Joint and Individual Liability and Benefits

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

45 No Fetter

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

46 Illegality

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



47 Severability

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

48 Amendment

- 48.1 No amendment of this Deed will be of any force or effect unless it is in writing and signed by the Parties to this Deed in accordance with clause 25D of the Regulation.

49 Waiver

- 49.1 The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Deed, does not amount to a waiver of any obligation of, or breach of obligation by, another Party.
- 49.2 A waiver by a Party is only effective if it is in writing.
- 49.3 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.

50 GST

- 50.1 In this clause:

Adjustment Note, Consideration, GST, GST Group, Margin Scheme, Money, Supply and Tax Invoice have the meaning given by the GST Law.

GST Amount means in relation to a Taxable Supply the amount of GST payable in respect of the Taxable Supply.

GST Law has the meaning given by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Input Tax Credit has the meaning given by the GST Law and a reference to an Input Tax Credit entitlement of a party includes an Input Tax Credit for an acquisition made by that party but to which another member of the same GST Group is entitled under the GST Law.

Taxable Supply has the meaning given by the GST Law excluding (except where expressly agreed otherwise) a supply in respect of which the supplier chooses to apply the Margin Scheme in working out the amount of GST on that supply.

- 50.2 Subject to clause 50.4, if GST is payable on a Taxable Supply made under, by reference to or in connection with this Deed, the Party providing the

Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.

- 50.3 Clause 50.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Deed to be GST inclusive.
- 50.4 No additional amount shall be payable by the Council under clause 50.2 unless, and only to the extent that, the Council (acting reasonably and in accordance with the GST Law) determines that it is entitled to an Input Tax Credit for its acquisition of the Taxable Supply giving rise to the liability to pay GST.
- 50.5 If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this Deed by one Party to the other Party that are not subject to Division 82 of the *A New Tax System (Goods and Services Tax) Act 1999*, the Parties agree:
- 50.5.1 to negotiate in good faith to agree the GST inclusive market value of those Supplies prior to issuing Tax Invoices in respect of those Supplies;
- 50.5.2 that any amounts payable by the Parties in accordance with clause 50.2 (as limited by clause 50.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 50.6 No payment of any amount pursuant to this clause 50, and no payment of the GST Amount where the Consideration for the Taxable Supply is expressly agreed to be GST inclusive, is required until the supplier has provided a Tax Invoice or Adjustment Note as the case may be to the recipient.
- 50.7 Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred by a party, must exclude the amount of any Input Tax Credit entitlement of that party in relation to the relevant cost, expense or other liability.
- 50.8 This clause continues to apply after expiration or termination of this Deed.

51 Explanatory Note

- 51.1 The Appendix contains the Explanatory Note relating to this Deed required by clause 25E of the Regulation.
- 51.2 Pursuant to clause 25E(7) of the Regulation, the Parties agree that the Explanatory Note is not to be used to assist in construing this Deed.



Schedule 1

(Clause 9)

Development Contributions

Column 1	Column 2	Column 3	Column 4
Item/ Contribution	Public Purpose	Manner & Extent	Timing
A. Monetary Contributions			
1. Contributions payable under Local Open Space CP	Local open space	An amount equal to the amount of monetary contributions that would have been payable for the Development under the Local Open Space CP if it applied to the Development, which, at the date of this Deed is in the order of \$88,720.00, and is to be indexed from the date of this Deed to the date of payment in accordance with clause 9.3	Prior to the issue of the first Subdivision Certificate that creates a Final Lot on the Land.
2. Contributions payable under the District Open Space CP	District open space	An amount equal to the amount of monetary contributions that would have been payable for the Development under the District Open Space CP if it applied to the Development, which, at the date of this Deed is in the order of \$245,241.00, and is to be indexed from the date of this Deed to the date of payment in accordance with clause 9.3	Prior to the issue of the first Subdivision Certificate that creates a Final Lot on the Land.
3. Contributions payable under the Cultural Facilities CP	Community facilities	An amount equal to the amount of monetary contributions that would have been payable for the Development under the Cultural Facilities CP if it applied to the Development, which, at the date of this Deed is in the order of \$17,280.00, and is to be indexed from the date of this Deed to the date of payment in accordance with clause 9.3	Prior to the issue of the first Subdivision Certificate that creates a Final Lot on the Land.



4. Contributions payable under the Footpath Construction CP	Footpath	An amount equal to the amount of monetary contributions that would have been payable for the Development under the Footpath Construction CP if it applied to the Development, which, at the date of this Deed is in the order of \$11,070.00, and is to be indexed from the date of this Deed to the date of payment in accordance with clause 9.3	Prior to the issue of the first Subdivision Certificate that creates a Final Lot on the Land.
5. Contributions payable under the Kingswood Neighbourhood Centre CP	Community facilities	An amount equal to the amount of monetary contributions that would have been payable for the Development under the Kingswood Neighbourhood Centre CP if it applied to the Development, which, at the date of this Deed is in the order of \$18,630.00, and is to be indexed from the date of this Deed to the date of payment in accordance with clause 9.3	Prior to the issue of the first Subdivision Certificate that creates a Final Lot on the Land.

B. Dedication of Land

1. Hilltop Park (approximately 2ha)	Public park	Dedication of land with an area of approximately 2ha generally shown as 'Proposed Hill Top Park' on the Concept Plan, free of cost to the Council.	On the registration of the first Subdivision Certificate that creates a Final Lot on the Land.
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C. Carrying out of Work

1. Embellishment of Hilltop Park	Embellishment	Embellishment of Hilltop Park up to a maximum construction cost of \$250,000.00, including construction of shelter, shelter concrete pad, minor landscaping, footpath works, extension of Caddens Masterplan cycleway and retaining walls	Prior to the issue of the first Subdivision Certificate that creates a Final Lot on the Land.
2. Upgrade of Caddens Road (West)	Public road	Payment of \$1,400,000.00 to the Council or carrying out of Works in accordance with clause 13.	In accordance with clause 13 and 14.



Schedule 2

(Clause 1.1)

Concept Plan

Concept Plan on the next page





Execution

Executed as a Deed

Dated:

Executed on behalf of the Council

General Manager

Witness

Mayor

Witness

Executed on behalf of the Developer by me, David Pitchford, Chief executive, as Delegate of Landcom and I hereby certify that I have no notice of revocation of such delegation:

ROBERT SULLIVAN / HEAD OF RETAIL DEVELOPMENT

Witness/Name/Position

21/2/14.

Appendix

(Clause 51)

Environmental Planning and Assessment Regulation 2000

(Clause 25E)

Explanatory Note

Draft Planning Agreement

Under s93F of the *Environmental Planning and Assessment Act 1979*

Parties

Penrith City Council ABN 43 794 422 563 of 601 High St, Penrith NSW 2750 (**Council**)

Landcom (t/a UrbanGrowth NSW) ABN 79 268 260 688 of Level 14, 60 Station Street Parramatta, NSW 2150 (**Developer**)

Description of the Land to which the Draft Planning Agreement Applies

Land means Lot 21 DP 1151724 otherwise known as 17-53 Caddens Road, Kingswood.

Description of Proposed Development

Subdivision of the Land for residential and recreational purposes made possible by the taking effect of the LEP.

Summary of Objectives, Nature and Effect of the Draft Planning Agreement

Objectives of Draft Planning Agreement

The objective of the Draft Planning Agreement is to provide land for a park and funding for public infrastructure such as roads and open space to meet the needs of the Development.

Nature of Draft Planning Agreement

The Draft Planning Agreement is a voluntary planning agreement under s93F of the *Environmental Planning and Assessment Act 1979 (Act)* under which the Developer makes Development Contributions (as defined in clause 1.1 of the Draft Planning Agreement) for various public purposes (as defined in s 93F(3) of the Act) including open space, cultural facilities and roads

Effect of the Draft Planning Agreement

The effect of the Draft Planning Agreement is to:

- relates to the carrying out by the Developer of the Development,
- excludes the application of s 94 and s 94A of the Act to the Development,
- does not exclude the application of s 94EF of the Act to the Development,
- requires dedication of land and carrying out of Works
- is not to be registered on the title to the Land,
- imposes restrictions on the Developer transferring the Land or part of the Land or assigning an interest under the Agreement,
- provides a dispute resolution method for a dispute under the agreement, being mediation and expert determination,
- provides that the agreement is governed by the law of New South Wales, and
- provides that the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* applies to the agreement.

Assessment of the Merits of the Draft Planning Agreement

The Planning Purposes Served by the Draft Planning Agreement

The Draft Planning Agreement:

- ensures adequate public infrastructure is provided to meet the needs of the Development; and

promotes and co-ordinates the orderly and economic use and development of the Land to which the Agreement applies **How the Draft Planning Agreement Promotes the Public Interest**

The Draft Planning Agreement promotes the public interest by ensuring adequate public infrastructure is provided to meet the needs of new development and that additional pressure is not placed on existing public facilities.

For Planning Authorities:

Development Corporations - How the Draft Planning Agreement Promotes its Statutory Responsibilities

N/A

Other Public Authorities – How the Draft Planning Agreement Promotes the Objects (if any) of the Act under which it is Constituted

N/A

Councils – How the Draft Planning Agreement Promotes the Elements of the Council’s Charter

The Draft Planning Agreement promotes the elements of the Council’s charter by:

- providing community services and facilities required to support new development and communities, and
- ensuring that the public facilities provided by the Developer under the agreement are transferred to and managed by the Council or are otherwise subject to the Council’s control.

All Planning Authorities – Whether the Draft Planning Agreement Conforms with the Authority’s Capital Works Program

The Draft Planning Agreement provides capital works, conforms with the Local Open Space, District Open Space, Cultural Facilities and WELL Precinct Development Contributions Plans and the annual Capital Works Program.

All Planning Authorities – Whether the Draft Planning Agreement specifies that certain requirements must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued

Yes. Monetary Development Contributions are required to be paid and some Works are required to be completed prior to the issuing of a subdivision certificate.

