

[Draft 7 June 2021]

GREATER SHEPPARTON CITY COUNCIL

Policy Number X.X

Procurement of Public Infrastructure Works

Version 2.X

(First number changes for a major rewrite, second number changes for a minor amendment)

Adopted by Council Day Month Year

Business Unit:	
Responsible Officer:	
Approved By:	Chief Executive Officer
Next Review:	

DOCUMENT REVISIONS

Version #	Summary of Changes	Date Adopted
2.X	Revision following repeal of s.186 of the <i>Local Government Act 1989</i> and commencement of the <i>Local Government Act 2020</i>	

PURPOSE

The original version of this policy was to facilitate the procurement of *Public Infrastructure Works*¹ and the purchase or acquisition of *Public Infrastructure Works Land* by Council in conjunction with developments that are subject to planning approval under the *Planning Scheme*, in compliance with the *LG Act 2020* and to comply with the *Procurement Guidelines* where applicable.

Since the adoption of the original version of this policy the *LG Act 2020* has become operative and *LG Act 1989* has been amended, amongst other things, removing section 186.

Under the *LG Act 2020* the onus is on Councils to develop internal policies in relation to procurement matters.

This policy responds to the changes to the local government legislation.

This policy is also intended to reduce risks associated with procurement identified in the *IBAC Report*.

OBJECTIVE

To provide a consistent and orderly methodology for Council and developers for the procurement of *Public Infrastructure Works* and the purchase or acquisition of *Public Infrastructure Works Land*.

To facilitate compliance with the *LG Act 2020* with regard to expenditure on *Public Infrastructure Works* and facilitate good governance in relation to procurement.

To ensure Council receives best value in relation to *Works-in-Kind*.

SCOPE

This policy applies in circumstances where *Public Infrastructure Works* are required by Council as a result of, or in association with, a new use and/or development approved by way of a planning permit or otherwise under the *Planning Scheme*.

The policy applies to public infrastructure and any associated contributions that may arise by way of an approved development contribution plan, an approved development plan, an incorporated plan, a section 173 agreement or the like.

This policy also applies to the purchase or acquisition of *Public Infrastructure Works Land*, including where that land may be used as an offset for a *Development Contribution*.

¹ Terms in italics are defined in the "Definitions" section of this policy

This policy applies to *Subdivision Permit Works* where those works are done in conjunction with *Public Infrastructure Works* and/or in conjunction with the acquisition or purchase of *Public Infrastructure Works Land*.

In this policy approval of a total net payment for *Public Infrastructure Works* and/or *Public Infrastructure Works Land* has the following thresholds:

- Director Sustainable Development, a total payment of not more than \$200,000;
- Chief Executive Officer a total payment of over \$200,000 and not more than \$5,000,000; and
- a Council resolution is required to approve a total payment of over \$5,000,000.

Administration of the implementation of the *Public Infrastructure Works* has the following thresholds with regard to who supervises the implementation of the *Public Infrastructure Works*:

- the Building, Planning and Compliance Department in consultation with Projects Department supervise the implementation where the total cash payment associated with the *Public Infrastructure Works* was not more than \$5,000,000; and
- the Project Management Office supervise the implementation where the total cash payment associated with the *Public Infrastructure Works* was more than \$5,000,000.

This policy does not apply to infrastructure works that are *Subdivision Permit Works* alone.

Compliance with this policy is deemed to be in compliance with Council's *Procurement Guidelines*.

Where it is deemed by the Director Sustainable Development that due to the unique facts or circumstances of a particular matter the application of this policy is not practical, the *Procurement Guidelines* must apply.

DEFINITIONS

Reference term	Definition
<i>Blended Works</i>	Means civil works where <i>Subdivision Permit Works</i> and <i>Public Infrastructure Works</i> are integrated as the one project for practical reasons as determined by Council. An example of <i>Blended Works</i> is where the <i>Subdivision Permit Works</i> are the construction of a subdivisional road and the <i>Public Infrastructure Works</i> are the widening of that road as part of a development contribution plan project.
<i>Developer</i>	Means the developer of land acting in reliance on a planning permit for the use

	and/or development of land where that developer is the registered proprietor of the Subject Land or is purchasing the Subject Land under a contract of sale of land
Development Contribution	Means a development contribution payable under an approved development contribution plan under the <i>Planning Scheme</i> for which the <i>Developer</i> has a liability. It also includes contributions required by way of an approved development plan, an incorporated plan, a section 173 agreement or the like.
IBAC Report	Means the <i>Special report on corruption risks associated with procurement in local government</i> , Independent Broad-based Anti-corruption Commission, September 2019
Independent Civil Contractor	Means a civil contractor that has been engaged by Council to undertake <i>Public Infrastructure Works</i> following a tender process, but is not the <i>Developer</i> or an agent or associate of the <i>Developer</i>
LG Act 1989	Means the <i>Local Government Act 1989</i>
LG Act 2020	Means the <i>Local Government Act 2020</i>
PE Act	Means the <i>Planning and Environment Act 1987</i>
Planning Scheme	Means the Greater Shepparton Planning Scheme.
Procurement Guidelines	Means any Council policy, procedure or guideline, other than this policy, including the Council's Procurement Corporate Procedure, that relates to the procurement of services.
Public Infrastructure Works	Means public infrastructure that is required pursuant to an approved development contributions plan under the <i>Planning Scheme</i> or other public infrastructure that is required by Council, but is not infrastructure for which the <i>Developer</i> can be compelled to provide under a planning permit. <i>Public Infrastructure Works</i> is infrastructure for which Council has assumed the obligation to provide.
Public Infrastructure Works Land	Means land or a legal property right that is acquired or purchased by Council for the purpose of facilitating <i>Public Infrastructure Works</i> .
Subdivision Permit Works	Means public civil works directly relating to a subdivision and specifically required as part of the planning approval for a subdivision for

	which the <i>Developer</i> is responsible to provide.
Subject Land	The land to which the planning approval applies and which is associated with the <i>Public Infrastructure Works</i> and/or the <i>Public Infrastructure Works Land</i>
Works Implementation Agreement	Means a Works Implementation Agreement as described in Section 2 of this policy. The <i>Works Implementation Agreement</i> is separate to the detailed contract for the carrying out of specific works.
Works-in-Kind	Means <i>Public Infrastructure Works</i> required by Council carried out by a <i>Developer</i> to offset an obligation to pay a <i>Development Contribution</i> .

Note: All monetary amounts specified in this policy are inclusive of GST.

POLICY

1. Procurement

- a. Procurement that falls within this policy must be undertaken having regard to the following broad principles:
 - i value for money;
 - ii open and fair competition;
 - iii accountability;
 - iv risk management;
 - v probity and transparency; and
 - vi ethical behaviour.
- b. No single Council Officer should have end-to-end control over a particular procurement.
- c. All Council Officers involved in the procurement process must be subject to appropriate supervision in accordance with Council's organisational structure and policies.
- d. Information held by Council of commercial value to potential suppliers to Council must be managed such that no single supplier is given an advantage over another and no one Council Officer has sole knowledge and control of valuable commercial information.

- e. Comprehensive and accurate records for a particular procurement must be kept on the relevant Council file.
- f. All procurement under this policy is subject to Council's *Procurement Guidelines*, except where explicitly stated in this policy.
- g. If a potential conflict of interest becomes apparent during a procurement of *Public Infrastructure Works* or the acquisition of *Public Infrastructure Works Land* this must be reported to the relevant supervising Council Officer.
- h. It is policy that an Officer's Report for a procurement that is not yet complete be kept on the relevant Council file in relation to each procurement which, amongst other things, includes:
 - i the basic facts of the procurement;
 - ii the Council Officers who are responsible for the procurement;
 - iii the amount of the Council spend;
 - iv the process followed;
 - v confirming compliance with this policy, as relevant, throughout the procurement process;
 - vi identifying any matters for which compliance with this policy was not achieved and reasons for such non-compliance; and
 - vii any other matters relevant to compliance with this policy.
- i. A suggested template for the Officer's Report is provided as Attachment 2 to this policy.

2. Offsets

- a. *Public Infrastructure Works* that are part of *Blended Works* should be given priority for *Works-in-Kind* as an offset for a *Development Contribution* liability over *Public Infrastructure Works* that are not *Blended Works*.
- b. *Public Infrastructure Works* and the acquisition of *Public Infrastructure Works Land* may be used as an offset for a *Development Contribution* liability.
- c. Where the *Public Infrastructure Works* comprise a combination of *Blended Works* and *Public Infrastructure Works* that can be implemented as one or more separate projects, the relevant decision-making Council Officers may agree in their absolute discretion to implement the *Public Infrastructure Works* that are not part of the *Blended Works* as one or more separate projects. In

other words, Council Officers have discretion to group certain projects together and to manage the sequencing of projects to achieve the optimal overall outcome for Council and the community.

3. Procurement of *Public Infrastructure Works* and *Public Infrastructure Works Land* where the total net payment is not more than \$5,000,000

- a. Where the net payment by Council for *Public Infrastructure Works* and the acquisition of *Public Infrastructure Works Land* is not more than \$5,000,000, the procurement process should be administered by the Building and Planning Department and the Projects Department in consultation.
- b. The procurement process must be administered in a manner that reasonably optimises the value to Council and the community and ensures that the works are conducted to an acceptable and reasonable engineering standard, as may be appropriate given the facts and circumstances of each project.
- c. Council will seek to prepare a detailed design for the *Public Infrastructure Works* as early in the overall infrastructure works process as is reasonably practicable, having regard to the facts and circumstances, in consultation with the *Developer* for the purpose of scoping and costing the *Public Infrastructure Works*.
- d. More than one price is not required in relation to specific works where a service authority requires design and/or works to be carried out to its infrastructure as a result of implementing *Public Infrastructure Works*, in the circumstance where the public authority controls who may carry out design and works on its infrastructure and where there is no practical ability to get multiple quotes for that design or works.
- e. The approval of a contract for the implementation of *Public Infrastructure Works* and/or the acquisition of *Public Infrastructure Works Land* that involves a cash payment of not more than \$200,000 may be by the Director Sustainable Development, the Chief Executive Officer or by way of a resolution of the Council.
- f. The approval of a contract for the implementation of *Public Infrastructure Works* and/or the acquisition of *Public Infrastructure Works Land* that involves a cash payment of more than \$200,000 but not more than \$5,000,000 may be by the Chief Executive Officer or by way of a resolution of the Council.
- g. The supervision and management of the construction and implementation of the *Public Infrastructure Works* and/or the acquisition of *Public Infrastructure*

Works Land that involves a net payment of not more than \$5,000,000 shall be by Building and Planning Department and the Projects Department in consultation

- h. Where practicable, the timing, administration and any other requirements relating to the implementation of *Public Infrastructure Works*, purchase or acquisition of any associated *Public Infrastructure Works Land* or associated *Subdivision Permit Works* should be controlled by a *Works Implementation Agreement*.
- d. The timing of the implementation of *Subdivision Permit Works* may be after the issue of a statement of compliance if the implementation of those works is pursuant to a *Works Implementation Agreement*.

4. Procurement of *Public Infrastructure Works* where the total net payment is more than \$5,000,000

- a. In circumstances where the net payment by Council for *Public Infrastructure Works* and/or the acquisition of *Public Infrastructure Works Land* is more than \$5,000,000 (including GST), the procurement should be in accordance with the procurement process under the *Procurement Guidelines* and undertaken by Council's Project Management Office.
- b. Council will seek to prepare a detailed design for the *Public Infrastructure Works* as early as is reasonably practicable in the overall infrastructure works process, having regard to the particular facts and circumstances, in consultation with the *Developer*, for the purpose of scoping and costing the *Public Infrastructure Works*.
- c. More than one price is not required in relation to specific works where a service authority requires design and/or works to be carried out to its infrastructure as a result of implementing *Public Infrastructure Works*, in the circumstance where the public authority controls who may carry out design and works on its infrastructure and where there is no practical ability to get multiple quotes for that design or works.
- d. The approval of a contract for the implementation of public Infrastructure works that involves a cash payment of more than \$5,000,000 must be by way of a resolution of the Council.
- e. The supervision and management of the construction and implementation of the *Public Infrastructure Works* and/or the acquisition of *Public Infrastructure*

Works Land that involves a net payment of more than \$5,000,000 shall be by Council's Project Management Office

- f. Where practicable, the timing, administration and any other requirements relating to the implementation of *Public Infrastructure Works*, purchase or acquisition of *any associated Public Infrastructure Works Land or Subdivision Permit Works* should be controlled by a *Works Implementation Agreement*.
- g. The timing of the implementation of *Subdivision Permit Works* may be after the issue of a statement of compliance if the implementation of those works is pursuant to a *Works Implementation Agreement*.

5. Works Implementation Agreement

- a. A *Works Implementation Agreement* should be used, where this is considered to be practicable by Council Officers, to manage matters including:
 - i the orderly sequencing of the implementation of *Public Infrastructure Works* and *Subdivision Permit Works*;
 - ii the tender process for the provision of *Public Infrastructure Works*;
 - iii the purchase or acquisition of *Public Infrastructure Works Land*;
 - iv the agreed valuation for *Public Infrastructure Works Land*;
 - v the *Development Contribution* offsets for *Public Infrastructure Works*;
 - vi the completion of *Subdivision Permit Works* after the issue of a Statement of Compliance under the *Subdivision Act 1988*;
 - vii any necessary payments by Council in relation to *Public Infrastructure Works*; and
 - viii any other matters relating to the implementation, timing, administration, payment for, and management of, *Public Infrastructure Works*, *Subdivision Permit Works*, *Public Infrastructure Works Land* or associated matters.
- b. A sample *Works Implementation Agreement* is provided as Attachment 1 to this policy. The sample agreement is provided as a guide only as an agreement will need to be drafted to address the relevant facts and circumstances of each particular matter.

6. Compliance

- a. In any circumstance in which the relevant Council Officer responsible for the procurement of *Public Infrastructure Works* and/or the purchase or acquisition of *Public Infrastructure Works Land* is concerned regarding compliance with any legislation, this policy or another Council policy relevant to the matter, legal advice should be obtained as reasonably considered appropriate.
- b. Compliance with this policy is deemed to be compliance with the *Procurement Guidelines*.

7. Summary - Application of Policy

- a. This policy applies when *Public Infrastructure Works* or *Public Infrastructure Works Land* are required by Council.
- b. Can the cost of the *Public Infrastructure Works* and/or *Public Infrastructure Works Land* be fully or partially offset by a development contribution obligation?
 - i Yes – where it is possible a DCP liability may be offset by the cost of works as works-in-kind or by land required by Council.
 - ii No – If there is no or insufficient DCP liability Council must pay for the works or land that cannot be offset.
- c. Is a net payment required by Council to the *Developer* of more than \$5,000,000?
 - i Yes –the procurement process is undertaken by Council's Project Management Office and the contract is subject to the approval by way of a Council resolution.
 - ii No – the procurement process may be undertaken by the Building and Planning Department and Projects Department in consultation and approval of the contract is subject approval of the Director Sustainable Development (not more than \$200,000), the Chief Executive Officer (not more than \$5,000,000) or by way of a resolution of the Council.
- d. A *Works Implementation Agreement* should be used, where reasonably practicable, to manage the implementation and sequencing of the works, offsets and payments.

RELATED POLICIES AND DIRECTIVES

- Council *Procurement Guidelines*

- *Victorian Local Government Best Practice Procurement Guidelines 2013 (part 3.6.10 Developer Contribution Plans)*
- *Special report on corruption risks associated with procurement in local government*, Independent Broad-based Anti-corruption Commission, September 2019

RELATED LEGISLATION

- *Local Government Act 2020*
- Part 3B of the *PE Act (Development contributions)*
- Division 2 Part 9 of the *PE Act (Section 173 agreements)*

REVIEW

Define who is to review the Policy and when this review is to occur. Generally, policies should be reviewed every four years to ensure that they remain relevant. If the Policy replaces any previously adopted Council document/s, list any documents which have been replaced.

Peter Harriott

Date

Chief Executive Officer

ATTACHMENTS

Attachment 1: Sample Template *Works Implementation Agreement*

ATTACHMENTS

Attachment 2: Sample Template for Officer's Report

Delegates Report – Procurement of Public Infrastructure Works

Application Details:

Responsible Officer:	
Planning Application Number:	
Applicant Name:	
Land/Address:	
Description of PIW	

Proposal

What is being procured?

Set out the basis facts of the procurement

Assessment

What is the amount of Council spend?

What process was followed

Confirm compliance with the Procurement of Public Infrastructure Works policy

Identify any matters for which compliance with the policy was not achieved and reasons for such non-compliance

Any other matters relevant to compliance with this policy

Conclusion

Recommendation

Responsible
Officer: _____

Team
Leader _____

Signature: _____

Signature: _____

Date: _____

Date: _____

Should this file be checked by the Manager? Yes No

Delegates Report
Page 1 of 2



Russell Kennedy
Lawyers

[SAMPLE TEMPLATE AGREEMENT]

GREATER SHEPPARTON CITY COUNCIL

and

[OWNER – WHERE DIFFERENT TO DEVELOPER]

and

[DEVELOPER – WHERE PURCHASER]

Works Implementation Agreement

**AGREEMENT MADE PURSUANT TO
SECTION 173 OF THE PLANNING AND
ENVIRONMENT ACT 1987**

[PROPERTY ADDRESS]

Russell Kennedy Pty Ltd ACN 126 792 470 ABN 14 940 129 185
Level 12, 469 La Trobe Street, Melbourne VIC 3000 PO BOX 5146, Melbourne VIC 3001 DX 494 Melbourne
T **+61 3 9609 1555** F + 61 3 9609 1600 info@rk.com.au

Liability limited by a scheme approved under Professional Standards Legislation

rk.com.au



THIS AGREEMENT is made on

2021

PARTIES

- 1 **GREATER SHEPPARTON CITY COUNCIL**
of 90 Welsford Street, Shepparton Vic 3630
("Council")
- 2 **[OWNER – WHERE DIFFERENT TO DEVELOPER]**
ACN
of [ADDRESS]
("Owner")
- 3 **[DEVELOPER – WHERE PURCHASER]**
ACN
of [ADDRESS]
("Developer")

[Note - Where the Developer is not the Owner or purchasing the Land the Developer can be a party to the Agreement but the Owner (rather than the Developer) must be bound by the Agreement]

RECITALS

- A The Council is the responsible authority under the Act for the Scheme.
- B The Land is within the [Zone] of the Scheme and is subject to the [Overlay].
- C The Developer intends to use and develop the Land for the purpose of the Proposal.
- D The Parties agree that the Subdivision Permit Works are necessarily required as part of the planning approval of the Proposal and are to be completed at the Developer's cost.
- E The Parties further agree that the Public Infrastructure Works are necessary and appropriate as a consequence of the Proposal.
- F The Developer agrees that the Public Infrastructure Works will be completed by the Developer or another entity, in accordance with the Council Procurement Requirements, at Council's expense, less any Agreed Offset, in accordance with this Agreement.
- G The Parties agree that, amongst other things, in order for the Proposal to proceed it is necessary to make provision for the Subdivision Permit Works and the Public Infrastructure Works in accordance with this Agreement.
- H This Agreement has been entered into in order to:
 - provide for the timing and sequencing of the Subdivision Permit Works;
 - provide for the timely implementation of the Public Infrastructure Works;
 - comply with relevant Council policy;
 - make provision for payments and offsets;
 - facilitate the Proposal;
 - prohibit, restrict or regulate the use or development of the Land; and

- achieve and advance the objectives of planning in Victoria or the objectives of the Scheme in relation to the Land.

I This Agreement is made under Division 2 of Part 9 of the Act.

THE PARTIES AGREE THAT:

1 DEFINITIONS

In this Agreement:

- 1.1 “**Act**” means the *Planning and Environment Act 1987*.
- 1.2 “**Agreed Offset**” means a credit given to the Developer in relation to a DCP Contribution that is offset against the cost of Public Infrastructure Works carried out by the Developer at the request of Council, in accordance with this Agreement.
- 1.3 “**Agreement**” means this Agreement, including the recitals and any annexures to this Agreement.
- 1.4 “**Business Day**” means Monday to Friday excluding public holidays in Victoria.
- 1.5 “**Completion of Works Certificate**” means written advice from Council to the Owner that the construction of the Subdivision Permit Works and/or the Public Infrastructure Works have been completed to the satisfaction of Council, as may be applicable.
- 1.6 “**Council Procurement Requirements**” means the requirements pursuant to Council’s Procurement Policy and the Procurement of Public Infrastructure Works Policy.
- 1.7 “**Defects Liability Notice**” means a written notice issued during the Defects Liability Period that identifies defects that the Council reasonably considers to be related to the construction of the Subdivision Permit Works and/or the Public Infrastructure Works as may be applicable.
- 1.8 “**Defects Liability Period**” means a period of 12 months commencing from the date of the issue of the Completion of Works Certificate.
- 1.9 “**Developer**” means the entity that proposes to use and develop the Land for the purpose of the Proposal and must be the Owner or alternatively must be the person purchasing the Land under a contract of sale of land from the Owner.
- 1.10 “**Development Contribution**” means a development contribution liability relating to the Land or Other Land for which the Developer is liable to pay to the Council.
- 1.11 “**GST Act**” means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (as amended).
- 1.12 “**GST**” means the goods and services tax as defined in the *GST Act*.
- 1.13 “**Input Tax Credit**” in relation to a supply, means a credit under the GST Act for the GST payable by the recipient in respect of the supply.
- 1.14 “**Land**” means the land within the Scheme being the land known as [address] and being the land more particularly described as [title details].

- 1.15 **“Mortgagee”** means the person or persons registered or entitled from time to time to be registered by the Registrar of Titles as mortgagee of the Land or any part of it.
- 1.16 **“Other Land”** means land other than the Land being the land known as [address] and being the land more particularly described as [title details].
- 1.17 **“Owner”** means the registered proprietor of the Land at the date of this Agreement.
- 1.18 **“Proposal”** means the proposal to use and/or develop the Land for the purpose of [specify the proposal].
- 1.19 **“Public Infrastructure Works”** means the civil works required by Council that are not Subdivision Permit Works and which Council considers are reasonably needed as a consequence of the Proposal. The Public Infrastructure Works are specified in Schedule 1 to this Agreement.
- 1.20 **“Public Infrastructure Works Land”** means the land that is required by Council for the purpose of carrying out the Public Infrastructure Works that is described as [address and/or title details and/or description as applicable].
- 1.21 **“Scheme”** means the Greater Shepparton Planning Scheme or any other planning scheme which applies to the Land from time to time.
- 1.22 **“Subdivision Permit Works”** means the civil works that must be implemented by the Developer as part of the planning approval for the Proposal. The Subdivision Permit Works are specified in Schedule 2 to this Agreement.
- 1.23 **“Tax Invoice”** in relation to a supply, means an invoice for the supply required by the GST Act to support a claim by the recipient for an Input Tax Credit for the GST on the supply.
- 1.24 **“Tender Process”** means the process to be followed by the Developer in accordance with relevant Council procurement policy and s186 exemption approval requirements and by which the Developer must carry out the Public Infrastructure Works and select sub-contractors as required by Council.

2 COMMENCEMENT

This Agreement comes into force on the date it was made as set out above.

3 TERMINATION OF AGREEMENT

3.1 Termination

This Agreement ends when the Developer has complied with its obligations under this Agreement or earlier by mutual agreement between the Parties evidenced in writing.

3.2 Cancellation of recording of Agreement

As soon as reasonably practicable after this Agreement has ended, the Council must, at the request and at the cost of the Developer, apply to the Registrar of Titles under section 183(2) of the Act to cancel the recording of this Agreement on the Register.

4 DEVELOPER’S COVENANTS

4.1 Subdivision Permit Works

The Developer covenants and agrees that:

- 4.1.1 before [specify item, etc], the following specified matters must be completed to the satisfaction of the Council as set out below:
- (a) [specify item of Subdivision Permit Works infrastructure and timing, sequence, etc];
 - (b) [...]
- 4.1.2 it is solely responsible for undertaking the Subdivision Permit Works at its risk and expense;
- 4.1.3 that Council must approve the construction plans and specifications for the Subdivision Permit Works prior to the commencement of the works [depending on whether Council or the Developer does the detailed design];
- 4.1.4 Council will undertake inspections as specified in the approved construction drawings and specifications;
- 4.1.5 it must not allow the Subdivision Permit Works to be carried beyond Council inspection hold points specified in the approved construction plans and specifications;
- 4.1.6 the Subdivision Permit Works must be carried out in accordance with any plans and specifications approved by Council to the satisfaction of the Council;
- 4.1.7 it must obtain the prior written approval of the Council prior to undertaking any works on Council land or other public land not shown in the approved construction drawings and specifications;
- 4.1.8 it must obtain all necessary approvals and comply with all necessary requirements of Council and other authorities in respect of the Subdivision Permit Works;
- 4.1.9 it must advise Council in writing when in its reasonable opinion the Subdivision Permit Works have been practically completed in accordance with the approved construction drawings and specifications; and
- 4.1.10 it is responsible for the cost of the design and construction of the Subdivision Permit Works.

4.2 Public Infrastructure Works

The Developer covenants and agrees that:

- 4.2.1 before [date, SOC, etc], the following specified matters must be completed to the satisfaction of the Council as set out below:
- (a) [specify item of Public Infrastructure Works infrastructure and timing, sequence, etc];
 - (b) [...]

- 4.2.2 it is solely responsible for undertaking the Public Works at its risk and expense in accordance with the Tender Process;
- 4.2.3 that Council will provide the construction plans and specifications for the Public Infrastructure Works, if it has not already done so at the date of this Agreement [confirm if this is applicable];
- 4.2.4 any costs associated with participating in the Tender Process for the Public Infrastructure Works is at its own expense;
- 4.2.5 prior to the commencement of the Public Infrastructure Works the Council must approve the engagement of the Developer in writing for the carrying out of the Public Infrastructure Works;
- 4.2.6 Council will undertake inspections as specified in the approved construction drawings and specifications;
- 4.2.7 it must not allow the Public Infrastructure Works to be carried beyond Council inspection hold points specified in the approved construction plans and specifications;
- 4.2.8 the Public Infrastructure Works must be carried out in accordance with any plans and specifications approved by Council and the quotation approved by Council to the satisfaction of the Council;
- 4.2.9 any civil works undertaken outside the scope of the approved plans and specifications and/or outside the scope of the tendered works are not eligible for reimbursement from Council or for use as an Approved Offset;
- 4.2.10 it must obtain the prior written approval of the Council prior to undertaking any works on Council land or other public land not shown in the approved construction drawings and specifications;
- 4.2.11 it must ensure that it (including any subcontractors) maintains a minimum of \$20 million in public liability insurance in respect of the Public Infrastructure Works;
- 4.2.12 it must obtain all necessary approvals and comply with all necessary requirements of Council and other authorities in respect of the Public Infrastructure Works;
- 4.2.13 it must advise Council in writing when in its reasonable opinion the Public Infrastructure Works have been practically completed in accordance with the approved construction drawings and specifications;
- 4.2.14 Council will reimburse the Developer for the part of the agreed cost of the Public Infrastructure Works less any Agreed Offset in accordance with this Agreement;
- 4.2.15 the reimbursement of the Developer is subject to the Developer providing a Tax Invoice to the Council for the part of the cost of the Public Infrastructure Works as approved by Council under this Agreement;

- 4.2.16 if GST is payable in relation to the Public Infrastructure Works for which a payment is required under this clause, the payment must include any additional amount for GST(if applicable);
- 4.2.17 subject to compliance with this Agreement by the Developer, the payment under this clause to the Developer must be made within 28 days of a Tax Invoice being provided to the Council;
- 4.2.18 the completion of the Public Infrastructure Works in accordance with this Agreement satisfies the Development Contribution liability in accordance with this agreement;
- 4.2.19 it is responsible for the design and construction of Public Infrastructure Works and other civil works within the Land [confirm this is applicable]; and
- 4.2.20 prior to the commencement of Public Infrastructure Works within the Land or on Other Land, the design and plans for the works and construction methodology must be approved in writing by the Council.

4.3 Defects Liability Period

The Developer covenants and agrees that it must remedy a defect identified in a Defect Liability Notice within the period as set out in the Defect Liability Notice to the satisfaction of the Council.

4.4 Provision of Public Infrastructure Works Land

The Developer covenants and agrees that:

- 4.4.1 the land identified as the Public Infrastructure Works Land described as [address and title description as may be applicable] must be transferred to Council on or before [specify date or works as applicable];
- 4.4.2 the agreed value of the Public Infrastructure Works Land is [specify \$];
- 4.4.3 Council will undertake the legal processes necessary for it to become the registered of the Public Infrastructure Works Land; and
- 4.4.4 [any other matters that may be applicable].

4.5 Agreed Offset

The Developer covenants and agrees that:

- 4.5.1 as at the date of this Agreement it has a liability to pay a DCP Contribution in relation to the Land [and/or Other Land if applicable] of \$[amount];
- 4.5.2 it has a contract with Council for the provision of the Public Infrastructure Works (reference Council Purchase Order No. [reference]), where the total cost of the works is valued at \$[amount]; and
[use only one of the following clauses as applicable]

4.5.3 Council and the Developer agree that the net amount payable by Council to the Developer for the Public Infrastructure Works is \$[amount], being the total cost of the work less the DCP Contribution liability.

4.5.4 Council and the Developer agree that the net amount payable by the Developer to Council is \$[amount], being the DCP Contribution liability less total cost of the work.

4.6 Further assurance

The Developer must do all things necessary (including signing any further agreement, acknowledgment or document) to enable the Council to record this Agreement on the folio of the Register which relates to the Land.

4.7 Developer's costs

The Developer agrees to pay its costs and expenses of and incidental to the preparation, execution, recording of and compliance with this Agreement.

4.8 Mortgagee to be bound

The Developer covenants to obtain the consent of any Mortgagee to be bound by the covenants in this Agreement if the Mortgagee becomes mortgagee in possession of the Land.

4.9 Indemnity

The Owner and the Developer covenant to indemnify and keep the Council, its officers, employees, agents, workmen and contractors indemnified from and against all costs, expenses, losses or damages which they or any of them may sustain incur or suffer or be or become liable for or in respect of any suit action proceeding judgement or claim brought by any person arising from or referable to this Agreement or any non-compliance with this Agreement.

4.10 Non-compliance

If the Developer has not complied with this Agreement within 14 days after the date of service on the Developer by Council of a notice which specifies the Developer's failure to comply with any provision of this Agreement, the Developer covenants:

4.10.1 to allow Council its officers, employees, contractors or agents to enter the Land and rectify the non-compliance;

4.10.2 to pay to Council on demand, Council's reasonable costs and expenses ("**Costs**") incurred as a result of the Developer's non-compliance;

4.10.3 to pay interest at the rate of 2% above the rate prescribed under section 2 of the *Penalty Interest Rates Act 1983* on all moneys which are due and payable but remain owing under this Agreement until they are paid in full;

and the Developer agrees:

4.10.4 to accept a certificate signed by the Chief Executive Officer of the Council (or any nominee of the Chief Executive Officer) as prima facie

proof of the Costs incurred by the Council in rectifying the Developer's non-compliance with this Agreement;

4.10.5 that any payments made for the purposes of this Agreement shall be appropriated first in payment of any interest and any unpaid Costs of the Council and then applied in repayment of the principal sum; and

4.10.6 that all Costs or other monies which are due and payable under this Agreement but which remain owing shall be a charge on the Land until they are paid in full.

4.11 **Council access**

The Developer covenants to allow the Council and its officers, employees, contractors or agents or any of them, to enter the Land (at any reasonable time) to assess compliance with this Agreement.

4.12 **Covenants run with the Land**

The Owner's obligations in this Agreement are intended to take effect as covenants which shall be annexed to and run at law and in equity with the Land and every part of it, and bind the Owner and its successors, assignees and transferees, the registered proprietor or proprietors for the time being of the Land and every part of the Land.

4.13 **Developer's warranty**

The Developer warrants and covenants that:

4.13.1 the Developer is the registered proprietor (or is entitled to become the registered proprietor) of the Land and is also the beneficial owner of the Land;

4.13.2 there are no mortgages, liens, charges or other encumbrances or leases or any rights inherent in any person other than the Developer affecting the Land which have not been disclosed by the usual searches of the folio of the Register for the Land or notified to the Council;

4.13.3 no part of the Land is subject to any rights obtained by adverse possession or subject to any easements or rights described or referred to in section 42 of the *Transfer of Land Act 1958*; and

4.13.4 until this Agreement is recorded on the folio of the Register which relates to the Land, the Developer will not sell, transfer, dispose of, assign, mortgage or otherwise part with possession of the Land or any part of the Land without first disclosing to any intended purchaser, transferee, assignee or mortgagee the existence and nature of this Agreement.

5 **COUNCIL OBLIGATIONS**

5.1 **Council's costs**

Council agrees to pay its own costs and expenses of and incidental to the preparation, execution and recording of this Agreement.

5.2 Reimbursement of Developer

Council agrees that:

- 5.2.1 that it must provide the construction plans and specifications for the Public Infrastructure Works to the Developer as may be appropriate [confirm whether Council or developer is doing detailed design];
- 5.2.2 it must undertake inspections as specified in the approved construction drawings and specifications;
- 5.2.3 upon written notice from the Developer that in its reasonable opinion the Subdivision Permit Works and/or Public Infrastructure Works are practically completed, the Council must within 14 days either issue a Completion of Works Certificate or provide specific details in writing of any incomplete works;
- 5.2.4 subject to compliance with clause 4.2 by the Developer, where applicable, it must reimburse the Developer for the cost of the Public Infrastructure Works (excluding GST) that exceed the Development Contribution liability of the Developer in accordance with this Agreement;
- 5.2.5 payment to the Developer is subject to the Developer providing a Tax Invoice to Council for the part of the cost of the Public Infrastructure Works excluding GST as approved by Council under this clause that exceed the DCP Contribution;
- 5.2.6 if GST is payable in relation to the part of Public Infrastructure Works for which a reimbursement is required under this clause, the reimbursement payment pursuant must include any additional amount for GST for that part of the Public Infrastructure Works;
- 5.2.7 subject to compliance with this Agreement by the Developer, the reimbursement under this clause to the Developer must be made within 21 days of a Tax Invoice being provided to Council under this clause; and
- 5.2.8 compliance with this Agreement satisfies the Development Contribution obligations to the extent specified in this Agreement of the Developer under the Scheme in respect of the Land or the Other Land.

6 GENERAL

6.1 No fettering of Council's powers

This Agreement does not fetter or restrict Council's power or discretion in respect of any of the Council's decision making powers.

6.2 Governing law and jurisdiction

This Agreement is governed by and is to be construed in accordance with the laws of Victoria. Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts and tribunals of Victoria and waives any right to object to proceedings being brought in those courts or tribunals.

6.3 Enforcement and severability

- 6.3.1 This Agreement shall operate as a contract between the parties and be enforceable as such in a Court of competent jurisdiction regardless of whether, for any reason, this Agreement were held to be unenforceable as an agreement pursuant to Division 2 of Part 9 of the Act.
- 6.3.2 If a Court, arbitrator, tribunal or other competent authority determines that a word, phrase, sentence, paragraph or clause of this Agreement is unenforceable, illegal or void, then it shall be severed and the other provisions of this Agreement shall remain operative.

7 GOODS AND SERVICES TAX

7.1 Definitions and expressions

Expressions used in this Agreement that are defined in the *GST Act* have the same meaning as given to them in the *GST Act*, unless expressed to the contrary.

7.2 Amounts payable do not include GST

Each amount, of whatever description, specified as payable by one party to the other party under this Agreement is expressed as a GST exclusive amount unless specified to the contrary.

7.3 Liability to pay any GST

Subject to clause 7.4, in addition to any amount payable by one party to the other party under this Agreement in respect of a taxable supply, the party liable to pay the amount (“**Recipient**”) must pay to the other party (“**Supplier**”) a sum equivalent to the GST payable, if any, by the Supplier in respect of the taxable supply on the date on which the Supplier makes a taxable supply to the Recipient irrespective of when the Supplier is liable to remit any GST under this Agreement in respect of a taxable supply to any governmental authority.

7.4 Tax Invoice

A party’s right to payment under clause 7.3 is subject to a Tax Invoice being delivered to the Recipient.

8 NOTICES

8.1 Service of notice

A notice or other communication required or permitted, under this Agreement, to be served on a person must be in writing and may be served:

- 8.1.1 personally on the person;
- 8.1.2 by leaving it at the person’s address set out in this Agreement;
- 8.1.3 by posting it by prepaid post addressed to that person at the person’s current address for service;
- 8.1.4 by email to the person’s current number notified to the other party; or
- 8.1.5 by facsimile to the person’s current number notified to the other party.

8.2 Time of service

A notice or other communication is deemed served:

- 8.2.1 if served personally or left at the person's address, upon service;
- 8.2.2 if posted within Australia to an Australian address, five Business Days after posting;
- 8.2.3 if served by email or facsimile, subject to the next clause, at the time indicated on the transmission report produced by the sender's email service or facsimile machine indicating that the communication was sent in its entirety to the addressee's facsimile; and
- 8.2.4 if received after 5.00pm in the place of receipt or on a day which is not a Business Day, at 9.00am on the next Business Day.

9 INTERPRETATION

In this Agreement, unless the contrary intention appears:

- 9.1 the singular includes the plural and vice versa;
- 9.2 a reference to a document or instrument, including this Agreement, includes a reference to that document or instrument as novated, altered or replaced from time to time;
- 9.3 a reference to an individual or person includes a partnership, body corporate, government authority or agency and vice versa;
- 9.4 a reference to a party includes that party's executors, administrators, successors, substitutes and permitted assigns;
- 9.5 words importing one gender include other genders;
- 9.6 other grammatical forms of defined words or expressions have corresponding meanings;
- 9.7 a covenant, undertaking, representation, warranty, indemnity or agreement made or given by:
 - 9.7.1 two or more parties; or
 - 9.7.2 a party comprised of two or more persons,
 is made or given and binds those parties or persons jointly and severally;
- 9.8 a reference to a statute, code or other law includes regulations and other instruments made under it and includes consolidations, amendments, re-enactments or replacements of any of them;
- 9.9 a recital, schedule, annexure or description of the parties forms part of this Agreement;
- 9.10 if an act must be done on a specified day that is not a Business Day, the act must be done instead on the next Business Day;

- 9.11 if an act required to be done under this Agreement on a specified day is done after 5.00pm on that day in the time zone in which the act is performed, it is taken to be done on the following day;
- 9.12 a party that is a trustee is bound both personally and in its capacity as trustee;
- 9.13 a reference to an authority, institution, association or body ("**original entity**") that has ceased to exist or been reconstituted, renamed or replaced or whose powers or functions have been transferred to another entity, is a reference to the entity that most closely serves the purposes or objects of the original entity;
- 9.14 headings and the provision of a table of contents are for convenience only and do not affect the interpretation of this Agreement.

EXECUTED as an agreement under Division 2 of Part 9 of the Act.

THE COMMON SEAL of the **GREATER**)
SHEPPARTON CITY COUNCIL was affixed)
on this day of 2016)
in the presence of the Chief Executive Officer)
being a delegated officer pursuant to Local)
Law No. 2 of the Council:)

.....
CHIEF EXECUTIVE OFFICER

EXECUTED by **[OWNER – IF DIFFERENT**)
TO THE DEVELOPER] in accordance with)
section 127(1) of the *Corporations Act 2001*)
(Cth) by being signed by authorised persons:)

.....
Director

.....
*Director/company secretary

*Delete whichever is inapplicable

.....
Full Name

.....
Full Name

.....
Usual Address

.....
Usual Address

EXECUTED by **[DEVELOPER]** in)
accordance with section 127(1) of the)
Corporations Act 2001 (Cth) by being signed)
by authorised persons:)

.....
Director

.....
*Director/company secretary
*Delete whichever is inapplicable

.....
Full Name

.....
Full Name

.....
Usual Address

.....
Usual Address

SCHEDULE 1

PUBLIC INFRASTRUCTURE WORKS

SCHEDULE 2

SUBDIVISION PERMIT WORKS