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Lloyd Release Area Voluntary Planning Agreement No. 2

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

Wagga Wagga City Council
Ehkuk Pty Ltd
Sunpath Holdings Pty Ltd

Date:

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Wagga Wagga City Council

Ehkuk Pty Ltd

Sunpath Holdings Pty Ltd



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Summary Sheet

Council:

Name: Wagga Wagga City Council
Address: PO Box 20, Wagga Wagga NSW 2650
Telephone: 1300 292 442
Facsimile: 02 6926 9199
Email: richardson.craig@wagga.nsw.gov.au
Representative: Mr Craig Richardson

Developer:

Name: Ehkuk Pty Ltd
Address: 3/14 Fitzmaurice Street, Wagga Wagga NSW 2650
Telephone: 02 69324515
Facsimile: 02 6921 5428
Email: mark.kennedy@elderswagga.com.au
Representative: Mr Mark Kennedy

Name: Sunpath Holdings Pty Ltd
Address: PO Box 103, Wagga Wagga NSW 2650
Telephone: 02 6921 8333
Facsimile: 02 6921 8179
Email: michael.mcfeeters@mim-solutions.com
Representative: Mr Michael McFeeters

Land:

See definition of *Land* in clause 1.1.

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Development:

See definition of *Development* in clause 1.1.

Development Contributions:

See Schedule 1.

Application of s94, s94A and s94EF of the Act:

See clause 5.

Security:

See clause 19.

Registration:

Yes. See clause 26.

Restriction on dealings:

See clause 27.

Dispute Resolution:

Expert determination and mediation. See clauses 24 and 25.

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

Parties

Wagga Wagga City Council ABN 56 044 159 537 of PO Box 20, Wagga
Wagga NSW 2650 (**Council**)

and

Ehkuk Pty Ltd ABN 35 001 419 825 of 3/14 Fitzmaurice Street, Wagga Wagga, NSW
2650 (**Ehkuk**)

and

Sunpath Holdings Pty Ltd ABN 35 104 458 764 of PO Box 103, Wagga Wagga
NSW 2650 (**Sunpath**)

Background

- A Ehkuk is the owner of the Ehkuk Land and Sunpath is the owner of the Sunpath Land.
- B The Developer has or proposes to lodge with Council a Development Application relating to the Development.
- C The Developer is prepared to make Development Contributions in connection with the carrying out of the Development in accordance with this Agreement.
- D The Development Contributions to be made by the Developer under this Agreement (which include survey, fencing and construction of the Wiradjuri Walking Track, construction of firebreaks and the dedication of the part the Land to the Council and monetary contributions for revegetation of the Land) meet environmental and recreational objectives of the Council.

Operative provisions

Part 1 - Preliminary

1 Definitions & Interpretation

- 1.1 In this Agreement the following definitions apply:

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

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

Bank Guarantee means an irrevocable and unconditional undertaking without any expiry or end date in favour of the Council to pay an amount or amounts of money to the Council on demand issued by:

- (a) one of the following trading banks:
 - (i) Australia and New Zealand Banking Group Limited,
 - (ii) Commonwealth Bank of Australia,
 - (iii) Macquarie Bank,
 - (iv) National Australia Bank Limited,
 - (iv) St George Bank Limited,
 - (v) Westpac Banking Corporation, or
- (b) any other financial institution approved by the Council in its absolute discretion.

Dedicated Land means all of the Land marked 'Dedicated Land' on the Map.

Defects Liability Period means the period commencing on the date on which a Work is completed under this Agreement and ending 12 months after that date.

Development means the residential development of the Land (other than the Dedicated Land) as facilitated by the Instrument Change.

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, the provision of public infrastructure or another public purpose.

Development Contributions Plan means *City of Wagga Wagga Development Contributions Plan 2006-2019*.

Ehkuk Land means Lot 2 DP 1116883.

Excluded Land means the area of 14,513m² within the area bounded in heavy black and marked '2' on the map in Schedule 4.

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.

Instrument Change means *Wagga Wagga Local Environmental Plan 2010*.

Item means the object of a Development Contribution specified in Column 1 of Schedule 1.

Land means the Sunpath Land and the Ehkuk Land.

Map means the map in Schedule 2

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

Rectification Notice means a notice in writing that identifies a defect in a Work and requires rectification of the defect within a specified period of time.

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

Salinity Study means Salinity Risk and Mitigation Assessment Project Doc Number 22316.32182 prepared by EA Systems and dated February 2010 a copy of which is contained in Schedule 5.

Security means a Bank Guarantee, or a bond or other form of security to the satisfaction of the Council.

Sunpath Land means Lot 3 DP 1116883 and Lot 3 DP 1020507

Survey Plan means a works-as-executed plan in respect of a Work that has been completed in accordance with this Agreement.

Wiradjuri Walking Track means the proposed re-routing of the existing Wiradjuri walking track through the Land along the line shown on the Map

Work means the physical result of any building, engineering or construction work in, on, over or under land required to be carried out by the Developer under this Agreement.

1.2 In the interpretation of this Agreement, 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 Agreement.

1.2.2 A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.

1.2.3 If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.

1.2.4 A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.

1.2.5 A reference in this Agreement to a \$ value relating to a Development Contribution is a reference to the value exclusive of GST.

1.2.6 A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.

1.2.7 A reference in this Agreement 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 Agreement.

1.2.9 An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.

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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 Agreement includes the agreement recorded in this Agreement.

1.2.14 A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.

1.2.15 Any schedules, appendices and attachments form part of this Agreement.

1.2.16 Notes appearing in this Agreement are operative provisions of this Agreement.

2 Application of this Agreement

2.1 This Agreement applies to the Land and to the Development.

3 Further Agreements Relating to this Agreement

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

4 Surrender of right of appeal, etc.

4.1 The Developer is not to commence or maintain, or cause to be commenced or maintained, any proceedings in the Land and Environment Court involving an appeal against, or questioning the validity of, a Development Consent relating to the Development or an approval under s96 of the Act to modify a Development Consent relating to the Development to the extent that it relates to the validity of this Agreement or a condition of the Development Consent that requires this Agreement to be entered into and/or performed according to the terms of this Agreement.

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

5.1 This Agreement does not exclude the application of s94 to the Development.

5.2 However, Development Contributions provided by the Developer under this agreement may be taken into consideration in determining a development

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contribution under section 94 of the Act for the Development. In that regard, the Parties agree that:

- 5.2.1 the rate of credit for consideration under s94 is \$366 per residential lot;
- 5.2.2 the actual rate of credit will be the rate of credit in clause 5.2.1 indexed in accordance with the rate of indexation applied to contribution rates under section 2.11 of the *City of Wagga Wagga Section 94 Contributions Plan 2006 - 2019*.
- 5.3 This Agreement excludes the application of s94A to the Development.
- 5.4 This Agreement does not exclude the application of s94EF to the Development.
- 5.5 The Parties further agree that in consideration of this Agreement under s79C(1) of the Act, the consent authority may consider the monetary Development Contribution to be made by the Developer in accordance with Item 2 in Schedule 1 in relation to any offsets required to mitigate against tree removal proposed as part of the Development.

Part 2 – Development Contributions

6 Provision of Development Contributions

- 6.1 The Developer is to make Development Contributions to the Council in accordance with this Agreement and otherwise to the satisfaction of the Council.
- 6.2 Schedule 1 has effect in relation to Development Contributions to be made by the Developer under this Agreement.
- 6.3 The Developer is to make such other Development Contributions to the Council as are provided for in this Agreement to the satisfaction of the Council.
- 6.4 The Council is to apply each Development Contribution made by the Developer under this Agreement towards the public purpose for which it is made and otherwise in accordance with this Agreement.

7 Procedures relating to payment of monetary Development Contributions

- 7.1 A monetary Development Contribution is made for the purposes of this Agreement when the Council receives the full amount of the contribution payable under this Agreement in cash or by unendorsed bank cheque or by the deposit by means of electronic funds transfer of cleared funds into a bank account nominated by the Council.
- 7.2 The Developer is to give the Council not less than 2 business days written notice of its intention to pay a monetary Development Contribution.
- 7.3 The Developer is not required to pay a monetary Development Contribution under this Agreement unless the Council, after having received the

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Developer's notice under clause 7.2, has given to the Developer a tax invoice for the amount of the Development Contribution.

- 7.4 The Developer is not in breach of this Agreement if it fails to pay a monetary Development Contribution at the time required by this Agreement by reason only of the Council's failure to give to the Developer a tax invoice in relation to the amount proposed to be paid by it.

8 Procedures relating to the dedication of land

- 8.1 A Development Contribution comprising the dedication of land is made for the purposes of this Agreement when the Council is given an instrument in registrable form under the *Real Property Act 1900* that is effective to transfer the title to the land to the Council when registered.
- 8.2 For the purposes of clause 8.1, the parties are to do all things reasonably requested by the other party to enable registration of the instrument.

9 Carrying out of Work

- 9.1 Any Work that is required to be carried out by the Developer under this Agreement is to be carried out in accordance with any reasonable design or specification specified by the Council, any relevant development consent and any other applicable law, and otherwise to the satisfaction of the Council.
- 9.2 If the Developer is required by the Council to prepare or modify a design or specification relating to a Work required to be completed under clause 9.1, the Council is to bear all costs relating to the preparation of modified designs, plans and specifications.

10 Access to the Land

- 10.1 The Developer is to permit the Council, its officers, employees, agents and contractors to enter the Land or any other land at any time, upon giving reasonable prior notice, in order to inspect, examine or test any Work or to remedy any breach of the Developer relating to the carrying out of a Work.
- 10.2 The Council is to permit the Developer to enter and occupy any land owned or controlled by the Council for the purpose of enabling the Developer to carry out any Work under this Agreement that is required to be carried out on such land or to perform any other obligation imposed on the Developer by or under this Agreement.

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11 Protection of people and property

- 11.1 The Developer is to ensure to the fullest extent reasonably practicable in relation to the carrying out of any Work that:
 - 11.1.1 all necessary measures are taken to protect people and property, and
 - 11.1.2 unnecessary interference with the passage of people and vehicles is avoided, and
 - 11.1.3 nuisances and unreasonable noise and disturbances are prevented.

12 Damage and repairs to Work

- 12.1 Where the Council causes loss or damage to a Work prior to the date on which the Work is taken to have been completed under this Agreement, the Council, at its own cost, is to repair and make good the loss or damage.
- 12.2 The Developer, at its own cost, is to repair and make good to the satisfaction of the Council any loss or damage to a Work from any cause not contemplated by clause 12.1 which occurs prior to the date on which the Work is taken to have been completed under this Agreement.

13 Variation of Work

- 13.1 A Work is not to be varied by the Developer, unless:
 - 13.1.1 the Parties agree in writing to the variation, and
 - 13.1.2 any consent or approval required under the Act or any other law to the variation is first obtained, and
 - 13.1.3 the Developer bears all of the Council's costs of and incidental to agreeing to and approving the variation.
- 13.2 For the purposes of clause 13.1 a variation may relate to any matter in relation to the Works that is dealt with by this Agreement.
- 13.3 The Council is to bear the additional cost of any variation of a Work that is carried out by the Developer at the Council's request.

14 Procedures relating to the completion of Work

- 14.1 Work is completed for the purposes of this Agreement if the Council, acting reasonably, gives a certificate to the Developer to that effect or the Developer gives the Council a Compliance Certificate issued by an Accredited Certifier to the Developer to that effect.

15 Procedures relating to the rectification of defects

- 15.1 During the Defects Liability Period, the Council may give to the Developer a Rectification Notice.

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15.2 Subject to the resolution of a dispute in accordance with clause 24 or 25, the Developer is to comply with a Rectification Notice at its own cost according to its terms and to the reasonable satisfaction of the Council.

15.3 If the Developer breaches clause 15.2, the Council may have the relevant defect rectified and may recover its costs of so doing as a debt due in a court of competent jurisdiction.

16 Failure to carry out Work

16.1 If the Council considers that the Developer is in breach of any obligation under this Agreement relating to the carrying out of any Work, the Council may elect to give the Developer a notice requiring:

16.1.1 the carrying out of further work relating to the Work to immediately cease except in relation to the rectification of the breach, and

16.1.2 the breach to be rectified to the Council's satisfaction.

16.2 The Council is not required to give the Developer a notice under clause 16.1 as a pre-condition to exercising its rights under the Security referred to in clause 19 in relation to the Developer's breach.

16.3 A notice given under clause 16.1 is to allow the Developer a period of not less than 28 days or such further period as the Council considers reasonable in the circumstances to rectify the breach.

16.4 Without limiting any other rights the Council has to enforce this Agreement, the Council may, if the Developer does not comply with a notice given under clause 16.1:

16.4.1 exercise its rights under the Security referred to in clause 19, and

16.4.2 carry out and complete the Work the subject of the Developer's breach.

16.5 Clauses 24 and 25 do not prevent a notice being given under clause 16.1 and do not apply to such a notice or the circumstances relating to the giving of that notice, and any procedure commenced under clause 24 or clause 25 ceases to apply when such a notice is given.

17 Survey Plan

17.1 No later than 60 days after a Work is completed in accordance with this Agreement, the Developer is to submit to the Council the Survey Plan in respect of the Work.

Part 3 – Other Provisions

18 Indemnity and Insurance

18.1 The Developer indemnifies the Council, its employees, officers, agents, contractors and workmen from and against all losses, damages, costs

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(including legal costs on a full indemnity basis), charges, expenses, actions, claims and demands whatsoever which may be sustained, suffered, recovered or made arising in connection with the carrying out by the Developer of any Work and the performance by the Developer of any other obligation under this Agreement.

18.2 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 Agreement up until the Work is taken to have been completed in accordance with this Agreement:

18.2.1 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,

18.2.2 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,

18.2.3 workers compensation insurance as required by law, and

18.2.4 any other insurance required by law.

18.3 If the Developer fails to comply with clause 18.2, 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:

18.3.1 by calling upon the Security provided by the Developer to the Council under this Agreement, or

18.3.2 recovery as a debt due in a court of competent jurisdiction.

18.4 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 18.2.

19 Provision of Security

19.1 Upon the execution of this Agreement by all of the Parties, the Developer is to provide the Council with Security in the amount of \$20,000.00.

19.2 The amount of the Security is to be indexed quarterly in accordance with the Consumer Price Index (All Groups - Sydney) as provided by the Australian Bureau of Statistics and the Developer must ensure that the Security held by the Council at all times equals the indexed amount notified to the Developer by the Council.

20 Release & return of Security

20.1 The Council is to return the Security or any remaining part of it to the Developer within 28 days of the dedication of the Dedicated Land to the Council.

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- 20.2 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 clause 19.1 as indexed.
- 20.3 On receipt of a replacement Security, the Council is to release and return to the Developer as directed, the Security it holds which has been replaced.

21 Call-up of Security

- 21.1 The Council may call-up the Security if, in its absolute discretion and despite clauses 24 and 25, it considers that the Developer has breached this Agreement.
- 21.2 If the Council calls on the Security, it may use the amount so paid to it in satisfaction of any costs incurred by it in remedying the Developer's breach being:
 - 21.2.1 the reasonable costs of the Council's servants, agents and contractors reasonably incurred for that purpose,
 - 21.2.2 all fees and charges necessarily or reasonably incurred by the Council in order to have the Work carried out, completed or rectified, and
 - 21.2.3 without limiting clause 21.2.2, all legal costs and expenses reasonably incurred by the Council, by reason of the Developer's breach.
- 21.3 If the Council calls on the Security in accordance with this Agreement, the Council may, by notice in writing to the Developer, require the Developer to provide a further or replacement Security in an amount that, when added to any unused portion of any existing Security, does not exceed the amount of the Security the Council is entitled to hold under clause 19.1 as indexed.

22 Recovery of cost of Work carried out by the Council

- 22.1 If the Council incurs a cost in carrying out, completing or rectifying a defect in a Work that is not met by the Security referred to in clause 19, the Council may recover the cost from the Developer in a court of competent jurisdiction.
- 22.2 For the purpose of clause 22.1, the Council's costs of carrying out, completing or rectifying a defect in a Work includes, but is not limited to:
 - 22.2.1 the reasonable costs of the Councils servants, agents and contractors reasonably incurred for that purpose,
 - 22.2.2 all fees and charges necessarily or reasonably incurred by the Council in order to have the Work carried out, completed or rectified, and
 - 22.2.3 without limiting clause 22.2.2, all legal costs and expenses reasonably incurred by the Council, by reason of the Developer's failure to comply with this Agreement.



23 Enforcement in a court of competent jurisdiction

- 23.1 Without limiting any other provision of this Agreement, the Parties may enforce this Agreement in any court of competent jurisdiction.
- 23.2 For the avoidance of doubt, nothing in this Agreement prevents:
- 23.2.1 a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Agreement or any matter to which this Agreement relates,
- 23.2.2 the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Agreement or any matter to which this Agreement relates.

24 Dispute Resolution – expert determination

- 24.1 This clause applies to a dispute under this Agreement which relates to a matter that can be determined by an appropriately qualified expert.
- 24.2 Any dispute between the Parties as to whether a dispute to which this clause applies can be determined by an appropriately qualified expert is to be referred to the Chief Executive Officer of the professional body that represents persons with the relevant expertise for determination, which is to be final and binding on the Parties.
- 24.3 Such a dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the dispute.
- 24.4 If a notice is given under clause 24.3, the Parties are to meet within 14 days of the notice in an attempt to resolve the dispute.
- 24.5 If the dispute is not resolved within a further 28 days, the dispute must be referred to the President of the NSW Law Society to appoint an expert for expert determination.
- 24.6 The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.
- 24.7 Each Party must bear its own costs arising from or in connection with the appointment of the expert and the expert determination.

25 Dispute Resolution – mediation

- 25.1 This clause applies to any dispute under this Agreement other than a dispute to which clause 24 applies.
- 25.2 Such a dispute 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 in an attempt to resolve the dispute.
- 25.4 If the dispute is not resolved within a further 28 days, the Parties must mediate the dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and must request

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the President of the Law Society, or the President's nominee, to select a mediator.

- 25.5 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.

26 Registration of this Agreement

- 26.1 The Parties agree to register this Agreement for the purposes of s93H of the Act.
- 26.2 On execution of this agreement, the Developer is to provide the Council with a request by the Council for registration of this Agreement over the Land, duly executed by the Developer and otherwise in registrable form together with the written and irrevocable consent of each person referred to in s93H(1) of the Act to that registration.
- 26.3 The Parties are to agree to a request by the other for the lodging of a request for any registration of this Agreement over the title of the Land to be removed from the title if this Agreement is terminated.
- 26.4 The Parties may at any time agree to the lodging of a request for the registration of this Agreement over the title to any part of the Land to be removed.
- 26.5 The Parties are to agree to the lodging of a request for the registration of this Agreement to be removed from title of the Land after the completion by the Developer of all of its obligations under this Agreement to the satisfaction of the Council.

27 Assignment, Sale of Land, etc

- 27.1 Unless the matters specified in clause 27.2 are satisfied, the Developer is not to do any of the following:
- 27.1.1 if the Developer is the owner of the Land, to transfer the Land to any person, or
- 27.1.2 assign or novate to any person the Developer's rights or obligations under this Agreement.
- 27.2 The matters required to be satisfied for the purposes of clause 27.1 are as follows:
- 27.2.1 the Developer has, at no cost to the Council, first procured the execution by the person to whom the Developer's rights or obligations under this Agreement are to be assigned or novated, of an agreement in favour of the Council on terms satisfactory to the Council, and
- 27.2.2 the Council, by notice in writing to the Developer, has stated that evidence satisfactory to the Council has been produced to show that the assignee or novatee, is reasonably capable of performing its obligations under the Agreement,
- 27.2.3 the Developer is not in breach of this Agreement, and

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27.2.4 the Council otherwise consents to the transfer, assignment or novation.

27.3 Clause 27.1 does not apply if the Developer has complied with all of its obligations to make Development Contributions as required by this Agreement.

28 Illegality, unenforceability or invalidity

28.1 If this Agreement 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 Agreement is entered into.

29 Notices

29.1 Any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:

29.1.1 delivered or posted to that Party at its address set out in the Summary Sheet,

29.1.2 faxed to that Party at its fax number set out in the Summary Sheet, or

29.1.3 emailed to that Party at its email address set out in the Summary Sheet.

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

29.3 Any notice, consent, information, application or request is to be treated as given or made if it is:

29.3.1 delivered, when it is left at the relevant address,

29.3.2 sent by post, 2 business days after it is posted,

29.3.3 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

29.3.4 sent by email and the sender does not receive a message from its internet service provider or the recipient's mail server indicating that it has not been successfully transmitted.

29.4 If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, or the sender does not receive a message from its internet service provider or the recipient's mail server indicating that the email has not been successfully transmitted, 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.

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Wagga Wagga City Council

Ehkuk Pty Ltd

Sunpath Holdings Pty Ltd



30 Approvals and Consent

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

31 Costs

- 31.1 The Developer is to pay to the Council the Council's costs not exceeding \$6,000.00 of preparing, negotiating, executing and stamping this Agreement, and any document related to this Agreement within 14 days of a written demand by the Council for such payment.
- 31.2 The Developer is also to pay to the Council the Council's reasonable costs of enforcing this Agreement within 14 days of a written demand by the Council for such payment.
- 31.3 Nothing in clause 31.2 operates so as to limit the means of enforcement in respect of which the Council may recover its reasonable costs.

32 Entire Agreement

- 32.1 This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with.
- 32.2 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 Agreement was executed, except as permitted by law.

33 Further Acts

- 33.1 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 Agreement and all transactions incidental to it.

34 Governing Law and Jurisdiction

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



35 Joint and Individual Liability and Benefits

35.1 Except as otherwise set out in this Agreement:

35.1.1 any agreement, covenant, representation or warranty under this Agreement by 2 or more persons binds them jointly and each of them individually, and

35.1.2 any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.

36 No Fetter

36.1 Nothing in this Agreement 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.

37 Representations and Warranties

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

38 Severability

38.1 If a clause or part of a clause of this Agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way.

38.2 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 Agreement, but the rest of this Agreement is not affected.

39 Modification

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

40 Waiver

40.1 The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another Party.

40.2 A waiver by a Party is only effective if it is in writing. A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given.

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Ehkuk Pty Ltd

Sunpath Holdings Pty Ltd



- 40.3 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.

41 GST

- 41.1 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.

- 41.2 Subject to clause 41.4, if GST is payable on a Taxable Supply made under, by reference to or in connection with this Agreement, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.

- 41.3 Clause 41.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Agreement to be GST inclusive.

- 41.4 No additional amount shall be payable by the Council under clause 41.2 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.

- 41.5 If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this Agreement 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:

41.5.1 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;

41.5.2 that any amounts payable by the Parties in accordance with clause 41.2 (as limited by clause 41.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.

- 41.6 No payment of any amount pursuant to this clause 41, 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.

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- 41.7 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.
- 41.8 This clause continues to apply after expiration or termination of this Agreement.

42 Explanatory Note Relating to this Agreement

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

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Sunpath Holdings Pty Ltd



Schedule 1

(Clause 6)

Development Contributions

Column 1	Column 2	Column 3	Column 4
Item	Public Purpose	Manner & Extent	Timing
Monetary Contributions			
1	Conservation Management Plan for the Dedicated Land	\$5,666.00	Within 21 days after the execution of this agreement.
2	Trees, tree guards and ripping required for revegetation identified by the Salinity Study.	\$45,580.50	Within 60 days after the execution of this agreement.

Dedicated Land	
3	Conservation and open space
	Dedicated Land
	Within 6 months after the execution of this agreement; not earlier than the completion of the Work referred to in Items 4-8 below and not later than seven (7) days after the completion of those Works.

Carrying out of Work	
4	Conservation and open space
	Detailed survey of boundaries of Dedicated Land.
	Prior to the dedication of the Dedicated Land.
5	Wiradjuri walking track
	Detailed survey of boundaries of Wiradjuri Walking Track
	Prior to the dedication of the Dedicated Land.

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	Conservation and open space	Fencing of the Dedicated Land to the following specification	Prior to the dedication of the Dedicated Land.
6		180mm x 180mm x 2.1m concrete strainer posts every 200 lineal metres (including 2 concrete stays and stay blocks per post) 1 x 1.8m concrete line post every 20 metres 4 x 1.65m steel posts per 20 metres 7 line wire ringlock (7/90/30) 4 high tensile plain (TY Easy)	
7	Wiradjuri walking track	Wiradjuri Walking Track to the following specification: Path 2 metres wide, on the alignment shown on the Map. 20mm road base to a depth of 100mm. Road base to be roller compacted. Directional signage to be erected at the start of each section and each end to indicate distance to the next access point or significant feature to aid navigation. Fences to have crossing stiles for walkers and lockable gates nearby to allow access of machinery for path maintenance.	Prior to the dedication of the Dedicated Land.

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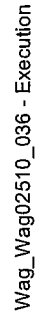


8	Firebreaks	Generally in accordance with the line of the firebreak identified in the specification in Schedule 3 except where this is not practicable (for example due to the presence of trees which would otherwise need to be cleared or if the firebreak would otherwise cross a farm dam) in which case the line shall be as agreed with the Council in writing.	Prior to the dedication of the Dedicated Land.
9	Conservation and open space	Detailed survey and proposed boundaries of the Excluded Land	Within 6 months after the execution of this agreement.

Other material public benefits

10	Wiradjuri walking track	Creation of right of way over Wiradjuri Walking Track in favour of the Minister for Lands on terms satisfactory to the Minister.	At the same time as the Dedicated Land is dedicated.
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Map

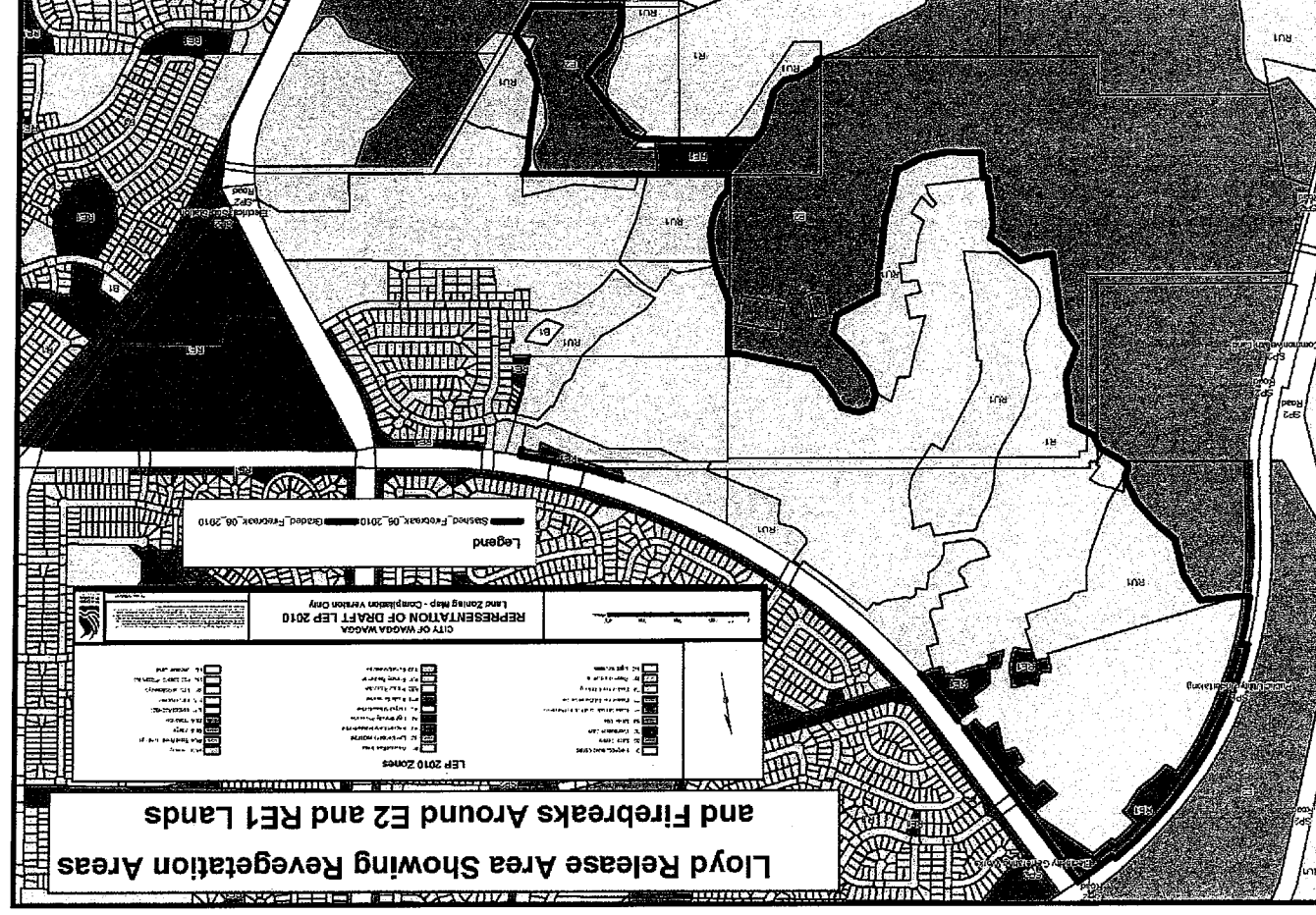




Schedule 3

(Schedule 1)

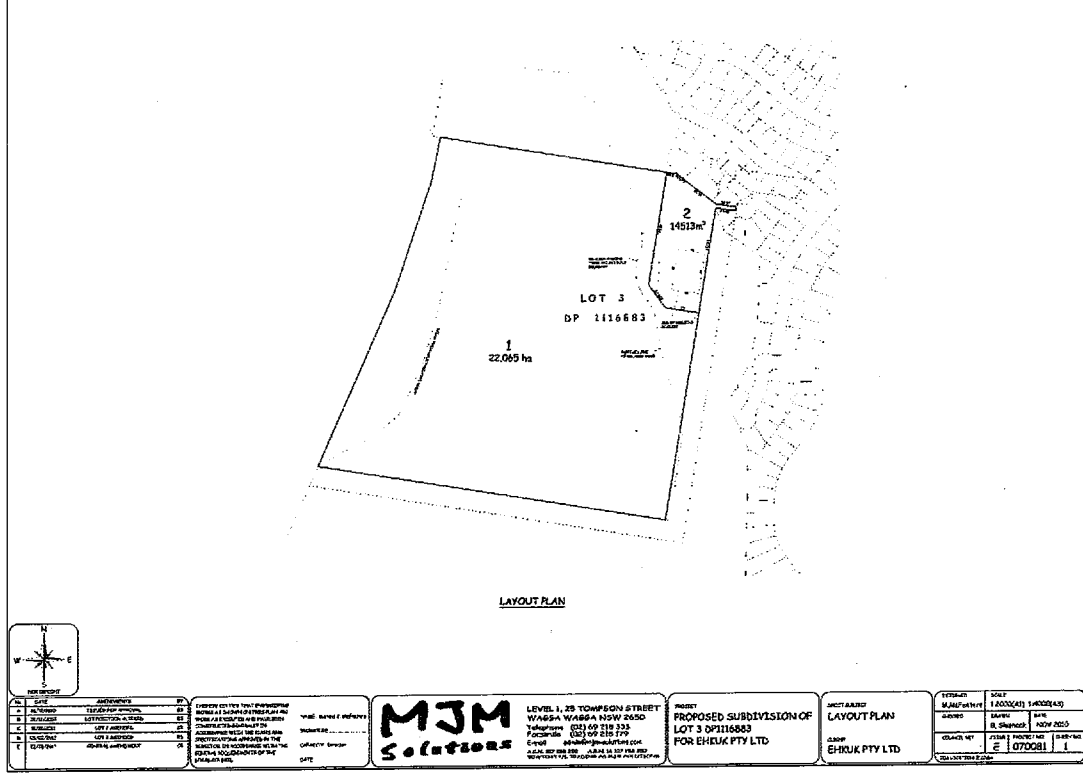
Firebreaks Specification





Schedule 4
(Clause 1.1)

Excluded Land



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Schedule 5

(Clause 1.1)

Salinity Study

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Sunpath Holdings Pty Ltd



Execution

Executed as an Agreement

Dated: 7/6/11

Executed on behalf of the Council



General Manager

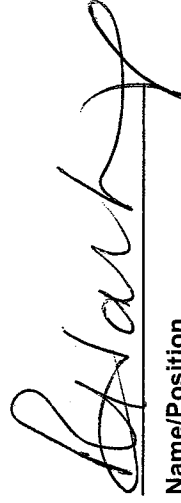
Joanne Skismore JOANNE SKISMORE EXEC ASSISTANT

Witness/Name/Position

Executed on behalf of Ehkuk in accordance with s127(1) of the Corporations Act
(Cth) 2001

S. M. Kennedy

Name/Position



Name/Position

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Ehkuk Pty Ltd

Sunpath Holdings Pty Ltd



Executed on behalf of Sunpath in accordance with s127(1) of the Corporations Act
(Cth) 2001

Name/Position

Name/Position

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Sunpath Holdings Pty Ltd



Appendix

(Clause 42)

Environmental Planning and Assessment Regulation 2000

(Clause 25E)

Explanatory Note

Draft Voluntary Planning Agreement

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

Parties

Wagga Wagga City Council ABN 56 044 159 537 of PO Box 20, Wagga Wagga NSW 2650 (Council)

and

Ehkuk Pty Ltd ABN 35 001 419 825 of 3/14 Fitzmaurice Street, Wagga Wagga, NSW 2650 (Ehkuk)

and

Sunpath Holdings Pty Ltd ABN 35 104 458 764 of PO Box 103, Wagga Wagga NSW 2650 (Sunpath)

Description of the Land to which the Draft Voluntary Planning Agreement Applies

Lot 2 DP1116883

Lot 3 DP1116883

Lot 3 DP1020507

Description of Proposed Development

The residential development of the Land (other than the Dedicated Land) as facilitated by *Wagga Wagga Local Environmental Plan 2010 (Development)*.

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Sunpath Holdings Pty Ltd



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

Objectives of Draft Voluntary Planning Agreement

The objective of the voluntary planning agreement is to provide for environmental and public benefits as a result of the Development.

Nature of Draft Voluntary Planning Agreement

The Draft Voluntary Planning Agreement is a planning agreement under s93F of the *Environmental Planning and Assessment Act 1979 (Act)*. It is an agreement between the Council, Ehkuk and Sunpath (**Developer**) who is also the owner of the land to which the agreement applies. The Draft Voluntary Planning Agreement is an agreement under which Development Contributions (as defined in clause 1.1 of the Draft Voluntary Planning Agreement) are to be made by the Developer for various public purposes (as defined in s93F(3) of the Act).

Effect of the Draft Voluntary Planning Agreement

The Voluntary Planning Agreement:

- relates to the carrying out of the Development on the Land,
- provides for the Developer to make development contributions including the following:
 - the dedication to the Council of certain land (**Dedicated Land**);
 - the fencing and survey of the Dedicated Land;
 - the construction, fencing and survey of a relocated Wiradjuri Walking Track within the Dedicated Land;
 - a monetary contribution of \$5,666.00 towards a Conservation Management Plan for the Dedicated Land;
 - a monetary contribution of \$45,580.50 toward trees, tree guards and ripping required for revegetation identified by the Salinity Study;
 - the creation of right of way over the constructed Wiradjuri Walking Track in favour of the Minister for Lands on terms satisfactory to the Minister at the same time as the Dedicated Land is dedicated;
 - creation of a firebreaks (except where impracticable) in accordance with Schedule 3,
- does not exclude the application of section 94 and 94EF of the Act to the Development but does exclude the application of section 94A;
- specifies that benefits provided under the agreement may be considered by the Council under s94 of the Act in relation to the Development;
- ordinarily, requires the Council to apply Development Contributions made under the agreement towards the specified purpose for which they are made and at the location, in the manner and to the standard (if any) specified in the agreement,
- imposes obligations on the Developer to rectify defects in the Works during a defects liability period,
- provides two (2) methods of dispute resolution being mediation and expert determination;

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- provides for the Developer to provide a security in the form of a bond or bank guarantee to the Council in the amount of \$20,000 (as indexed) which may be called-up by the Council if the Developer's breaches its obligations under the Agreement;
- specifies that the parties agree to register the Agreement over the title of the Land with the effect that the Agreement will bind future owners of the Land as if they are a party to the agreement;
- restricts the power of the Developer to transfer the Land to any person, or assign or novate to any person the Developer's rights or obligations under the Agreement except on certain terms agreed by the Council;
- provides for the Developer to pay the Council's costs not exceeding \$6,000.00 of preparing, negotiating, executing and stamping the Agreement;
- provides that the agreement is governed by the law of New South Wales, and makes provision in relation to GST payable under *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Assessment of the Merits of the Draft Voluntary Planning Agreement

The Planning Purposes Served by the Draft Voluntary Planning Agreement

The voluntary planning agreement provides for the Developer to make development contribution for a public purpose in relation to the Development including:

- dedication of the Dedicated Land for public use.
- relocation of the Wiradjuri Walking Track in the vicinity of the Land to allow for the continuity of its use.

How the Draft Voluntary Planning Agreement Promotes the Public Interest

The Voluntary Planning Agreement promotes the public interest by promoting the objects of the Act as set out in subsection 5(a) and 5(c) of the Act, including:

- to encourage:
 - the promotion and coordination of the orderly and economic use and development of land;
 - the provision of land for public purposes;
 - the provision and coordination of community services and facilities;
 - the protection of the environment;
- to provide increased opportunity for public involvement and participation in environmental planning and assessment.

For Planning Authorities:

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

N/A

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Ehkuk Pty Ltd

Sunpath Holdings Pty Ltd



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

N/A

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

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

- providing services and facilities for the community;
- providing a means for the private funding of public facilities for the benefit of the Development and the wider community; and
- providing a means that allows the wider community to make submissions to the Council in relation to the Agreement.

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

The Draft Planning conforms with the Council's capital works program.

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

No.