



**UNDER SEPARATE COVER
ATTACHMENTS**

**ORDINARY MEETING
23 JANUARY 2024**

TABLE OF CONTENTS

ITEM	SUBJECT	PAGE NO
11.1	Works in Kind Agreement For Roundabout at Springfield Drive Lochinvar	
	Attachment 1 Draft WIK (Under Separate Cover).....	1

Planning and Environment

WORKS IN KIND AGREEMENT FOR ROUNDBOUT AT SPRINGFIELD DRIVE LOCHINVAR

Draft WIK (Under Separate Cover)

Meeting Date: 23 January 2024

Attachment No: 1

Number of Pages: 41

Works-in-Kind Deed
Construction Roundabout
Springfield Drive, Lochinvar

Maitland City Council

and

McCloy Project Management Pty Ltd

McCloy Lochinvar Pty Ltd

Dated:

Works-in-Kind Deed
Construction of Roundabout, Lochinvar
Maitland City Council / McCloy Project Management Pty Ltd

Works-in-Kind Deed

Construction of Contributions Plan Item L27 Roundabout

Springfield Drive, Lochinvar

Table of Contents

Parties	5
Background	5
Operative provisions	5
Part 1 – Preliminary.....	5
1 Interpretation.....	5
2 Commencement	10
3 General warranties	10
4 Power of attorney.....	10
5 Parties' relationship	10
5A Joint and several liability.....	11
6 Deed not construction contract.....	11
7 Developer Works before execution of Deed.....	11
8 Developer to procure compliance.....	11
Part 2 – Developer Works.....	11
9 Approved persons.....	11
10 Principal Contractor	12
11 General obligations relating to Developer works.....	12
12 Warranties relating to Developer Works.....	12
13 Cost of Developer Works.....	12
14 Ownership & Care of Developer Works.....	13
15 Work Health & Safety	13
16 Accidents & dangerous occurrences	14
18 Variations to approved Developer Works	15
19 Protection of people, property & utilities	15
20 Damage to assets & property	16
21 Entry onto Land	16
22 Audit, inspection, testing of Developer Works	16

Works-in-Kind Deed**Construction of Roundabout, Lochinvar****Maitland City Council / McCloy Project Management Pty Ltd**

23	Access to information & records	17
25	Practical Completion of Developer Works	17
26	Transfer of Ownership Notice	18
27	Works-As-Executed Plan	18
28	Rectification of defects	18
29	Development Contributions	19
Part 3 – Dispute Resolution		
30	Expert determination	19
31	Mediation	20
32	Arbitration Excluded	20
Part 4 - Enforcement		
33	Developer Works Security	20
34	Breach of obligations	21
35	Termination	21
36	Effect of termination	21
37	Enforcement in a court of competent jurisdiction	22
38	Restriction on dealings	22
Part 5 – Indemnities & Insurance		
39	Risk	22
40	Release	22
41	Indemnity	23
42	Developer's Insurances	23
43	Subcontractors' insurances	24
Part 6 – Other Provisions		
44	Confidentiality	24
45	Ownership of Intellectual Property	25
46	Technical Data	25
48	Force Majeure	25
49	Notices	26
50	Approvals and Consent	26
51	Costs	27
52	Entire Deed	27
53	Further Acts	27
54	Governing Law and Jurisdiction	27
55	No Fetter	27
56	Illegality	27
57	Amendment	28

**Works-in-Kind Deed
Construction of Roundabout, Lochinvar
Maitland City Council / McCloy Project Management Pty Ltd**

58	Waiver.....	28
59	GST.....	28
	Execution.....	30
	Schedule 1	32
	Schedule 2.....	34
	Background.....	36

Works-in-Kind Deed
Construction of Roundabout, Lochinvar
Maitland City Council / McCloy Project Management Pty Ltd

Works-in-Kind Deed

Project and Location

Parties

Maitland City Council ABN 11 596 310 805 of PO Box 220 Maitland NSW ('**Council**')
and

McCloy Project Management Pty Ltd ACN 613 410 450 of Suite 2, Ground Floor, 317
Hunter Street Newcastle NSW 2300 ('**Developer**')

and

McCloy Lochinvar Pty Ltd ACN 082 035 658 of Suite 2, Ground Floor/317 Hunter Street
Newcastle, NSW 2300 ('**Landowner**')

Background

- A The Developer proposes to carry out the Developer Works in connection with the Development.
- B The Developer Works, if carried out in accordance with this Deed, will partly satisfy Development Contributions payable by the Developer to the Council in connection with the Development.
- C The Developer Works will become the property of the Council after Handover.
- D The Parties have agreed to enter into this Deed to set out their rights and obligations in relation to the Developer Works.

Operative provisions

Part 1 – Preliminary

1 Interpretation

- 1.1 In this Deed the following definitions apply:

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

Applicable Contributions Plan means the Development Contributions Plan specified in Item 8 of the Reference Schedule as amended by resolution of the Council from time to time.

Works-in-Kind Deed**Construction of Roundabout, Lochinvar****Maitland City Council / McCloy Project Management Pty Ltd**

Applicable Development Consent means the development consent specified or described in Item 2(b) of the Reference Schedule.

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

Approved Person means a person reasonably approved by the Council to undertake design, construction, supervision, inspection, testing or certification of the Developer Works because of the suitability of their qualifications, skills and experience in the Council's reasonable opinion.

Assignment Deed means the form of Deed contained in Schedule 2.

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

Background Intellectual Property means Intellectual Property that:

- (a) relates to the Developer Works,
- (b) exists at the date of this Deed or is later created but not as a result of performing this Deed, and
- (c) does not belong to a third party.

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 Limited,
 - (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.

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

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

Council Developer Works Contribution Amount means the \$ amount specified in Item 11 of the Reference Schedule.

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

Defect means anything that adversely affects, or is likely to adversely affect, the appearance, structural integrity, functionality or use or enjoyment of the Developer Works.

Works-in-Kind Deed**Construction of Roundabout, Lochinvar****Maitland City Council / McCloy Project Management Pty Ltd**

Defects Liability Period means, in relation to the Developer Works, the period specified in Item 7 of the Reference Schedule commencing on the day immediately after a Practical Completion Certificate is given for the Developer Works.

Developer Works means the Works specified or described in Item 3 of the Reference Schedule, including design, construction, supervision, testing and certification.

Developer Works Completion Date means the date specified in Item 5 of the Reference Schedule.

Developer Works Agreed Cost means the \$ amount specified in Item 4 of the Reference Schedule.

Developer Works Security means a Bank Guarantee, or a bond or other form of security on terms reasonably satisfactory to the Council in the amount specified in Item 6(a) of the Reference Schedule indexed in accordance with the indexation method specified in Item 6(b) of the Reference Schedule from the date of this Deed.

Development means the Development specified or described in Item 2 of the Reference Schedule.

Development Contribution means a monetary contribution under s7.11 of the Act, or a levy under s7.12 of the Act, payable to the Council pursuant to a condition of the Applicable Development Consent.

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

Development Contribution Amount means the \$ amount specified in Item 9 of the Reference Schedule.

Development Contribution Credit Amount means the \$ amount specified in Item 10 of the Reference Schedule.

Development Surplus Credit Amount means the amount by which the Developer Works Agreed Cost exceeds the Development Contribution Amount.

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

Force Majeure Event means an earthquake, cyclone, fire, riot or serious civil commotion, sabotage, act of a public enemy, act of God (excluding storms), war, revolution, radioactive contamination or flood, the effects of which cannot be prevented by taking those steps a prudent and competent person would take.

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.

Handover means the hand-over to the Council of the Works in accordance with this Deed.

Independent Certifier means a person appointed in accordance with this Deed to certify any aspect of the Developer Works provided for in this Deed, being a person having no current involvement with the project management,

Works-in-Kind Deed**Construction of Roundabout, Lochinvar****Maitland City Council / McCloy Project Management Pty Ltd**

design or superintendency of the Developer Works on behalf of the Developer.

Intellectual Property means all copyright (including moral rights), patents, trademarks, designs, confidential information, circuit layouts, data and any other rights from intellectual activity in the industrial, scientific, literary and artistic fields recognised in domestic law anywhere in the world.

Item means a numbered item and the corresponding text in the Reference Schedule.

Monetary Contributions means the monetary Development Contributions required to be paid to the Council under condition 2 of the Applicable Development Consent for the public purposes and in the amounts that have been indexed in accordance with condition 2 of the Applicable Development Consent to the date of this Deed.

Other Land means land owned or occupied by a person other than the Developer or the Council to which entry and access is needed by the Developer to perform this Deed.

Party means a party to this Deed.

Practical Completion Certificate means a certificate issued by an Independent Certifier to the effect that, in the reasonable opinion of the Independent Certifier, the Developer Works are substantially complete and any incomplete part or Defect is of a minor nature.

Practical Completion Date means the date when the Council issues a Practical Completion Certificate for the Developer Works.

Principal Contractor means the Person defined in as the Principal Contractor under the *Work Health and Safety Act 2011* (NSW) or *Work Health and Safety Regulation 2011* (NSW) or an equivalent under Commonwealth work health and safety laws.

Rectification Notice means a notice in writing:

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

Rectify means rectify, remedy or correct.

Reference Schedule means Schedule 1.

Stage means a stage of the Development specified in the drawing titled '239591-DAE-109'.

Technical Data means all technical know-how and information in material form, including manuals, designs, standards, specifications, reports, models, plans, drawings, calculations, software, source code and test results.

Third Party Intellectual Property means Intellectual Property relating to the Developer Works that is owned by a person other than the Council or the Developer.

Transfer of Ownership Notice means a notice to the effect that the Developer Works are now vested in the Council.

Works-in-Kind Deed**Construction of Roundabout, Lochinvar****Maitland City Council / McCloy Project Management Pty Ltd**

WHS Law means the *Work Health and Safety Act 2011* (NSW) and *Work Health and Safety Regulation 2011* (NSW).

Works-As-Executed Plan means detailed plans and specifications of the Developer Works at the Practical Completion Date.

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

Works-in-Kind Deed**Construction of Roundabout, Lochinvar****Maitland City Council / McCloy Project Management Pty Ltd**

2 Commencement

- 2.1 This Deed takes effect on the date when all Parties have executed this Deed.
- 2.2 The Party who executes this Deed last is to insert on the front page the date they did so and provide a copy of the fully executed and dated Deed to any other person who is a Party.

3 General warranties

- 3.1 Each party represents and warrants that:
 - 3.1.1 it has full legal capacity and power to:
 - (a) own its property and carry on its business,
 - (b) enter into this Deed and carry out the transactions it covers,
 - 3.1.2 it holds each authorisation necessary to:
 - (a) properly execute this document and carry out the transactions,
 - (b) make this document legal, valid, binding and admissible in evidence,
 - (c) properly carry on its business,
 - (d) and it is complying with any conditions of those authorisations,
 - 3.1.3 it is not entering into this Deed as a trustee of any trust or settlement, and
 - 3.1.4 it has the full power to enter into and perform its obligations under this Deed and that, when executed, this Deed will constitute legal, valid and binding obligations according to its terms.

4 Power of attorney

- 4.1 Each person who executes this document under a power of attorney declares that he or she is not aware of any fact or circumstance that might affect his or her authority to do so.

5 Parties' relationship

- 5.1 Nothing in this Deed:
 - 5.1.1 makes the Developer or the Landowner a partner, agent or legal representative of the Council,
 - 5.1.2 creates a partnership, agency or trust, or
 - 5.1.3 confers on the Developer or the Landowner any authority to bind the Council in any way.
- 5.2 The rights of the parties do not merge once the Developer Works are completed or this Deed is terminated.

Works-in-Kind Deed**Construction of Roundabout, Lochinvar****Maitland City Council / McCloy Project Management Pty Ltd**

5A Joint and several liability

- 5A.1 In this Deed, a reference to the Developer is taken to include a reference to the Landowner unless the context requires otherwise.
- 5A.2 The Landowner agrees that it is jointly and severally liable with the Developer to the Council for the due performance and observance of all the terms and conditions on the part of the Developer contained or implied in this Deed.
- 5A.3 The terms and conditions of this Deed bind the Developer and the Landowner jointly and severally and their obligations and liabilities under this Deed are joint and several.

6 Deed not construction contract

- 6.1 This Deed is not a construction contract or arrangement as defined in the *Building and Construction Industry Security of Payments Act 1999* (NSW), between the Council and the Developer.

7 Developer Works before execution of Deed

- 7.1 This Deed applies to any Developer Works that occur before the Deed itself is executed.

8 Developer to procure compliance

- 8.1 The Developer is to provide every Approved Person engaged in relation to the Developer Works with a copy of this Deed executed by both Parties and procure their compliance with the relevant requirements of this Deed.

Part 2 – Developer Works**9 Approved persons**

- 9.1 The Developer is to design, construct, supervise, and test the Developer Works using Approved Persons.
- 9.2 The Developer is to supply to the Council, and keep current, a list of all Approved Persons who are engaged from time to time in relation to the Developer Works.
- 9.3 The Council may, in its reasonable discretion, notify the Developer that an Approved Person whose name appears on the list submitted by the Developer to the Council is not to be engaged in relation to the Developer Works, and the Developer must promptly take such action as is necessary to ensure that the Approved Person does not continue to be engaged in relation to the Developer Works.

Works-in-Kind Deed**Construction of Roundabout, Lochinvar****Maitland City Council / McCloy Project Management Pty Ltd**

10 Principal Contractor

- 10.1 The Developer is to notify the Council of the details of the Principal Contractor for the Developer Works before any construction of the Developer Works occurs.

11 General obligations relating to Developer works

- 11.1 The Developer is to carry out the Developer Works by the Developer Works Completion Date.
- 11.2 The Developer is to carry out and complete the Developer Works in a good and workmanlike manner having regard to the intended purpose of the Developer Works and in accordance with:
- 11.2.1 the location, design, specifications, materials, and finishes for the Developer Works approved by the Council,
 - 11.2.2 any Approval,
 - 11.2.3 the lawful requirements of any Authority, and
 - 11.2.4 all applicable laws.
- 11.3 The Developer is to give the Council not less than 5 business days' written notice of its intention to commence construction of the Developer Works.
- 11.4 The Developer is to ensure that anything necessary for the proper performance of its obligations under this Deed is supplied or made available.

12 Warranties relating to Developer Works

- 12.1 The Developer warrants to the Council that:
- 12.1.1 it has obtained all Approvals and has complied with all laws and applicable industry standards in relation to the Developer Works,
 - 12.1.2 it accepts that, if any aspect of the Developer Works do not comply this Deed, the Council is entitled to require the Developer to cease the Developer Works and immediately pursue its legal and equitable rights and remedies relating to the non-compliance,
 - 12.1.3 the Developer Works, when completed, are to be fit for purpose, and
 - 12.1.4 only Approved Persons are to be engaged in relation to the Developer Works.
- 12.2 The Developer is to procure in favour of the Council from the appropriate Approved Person engaged in relation to the Developer Works, any warranty reasonably required by the Council relating to the design, construction, supervision, inspection, testing or certification of the Developer Works.

13 Cost of Developer Works

- 13.1 The Developer is responsible for meeting all Costs of and incidental to the Developer Works unless one of both of the following applies:

Works-in-Kind Deed**Construction of Roundabout, Lochinvar****Maitland City Council / McCloy Project Management Pty Ltd**

- 13.1.1 Item 11 of the Reference Schedule specifies a Council Developer Works Contribution Amount, and
- 13.1.2 this Deed otherwise expressly provides for a Cost to be met that is not required to be met by the Developer.
- 13.2 If Item 11 of the Reference Schedule specifies a Council Developer Works Contribution Amount, the Council is to pay that amount to the Developer in relation to the Developer Works.
- 13.3 However, the Council is not required to make any payment to the Developer relating to the Council Developer Works Contribution Amount unless:
 - 13.3.1 the Developer submits a written claim for payment to the Council, accompanied by a tax invoice for GST purposes addressed to the Council if required by the Council,
 - 13.3.2 the claim for payment relates to costs incurred by the Developer in relation to the Developer Works, which are verified in writing by the Developer in any manner reasonably required by the Council,
 - 13.3.3 the Council is reasonably of the opinion that the costs to which the claim for payment relates were properly incurred by the Developer, and
 - 13.3.4 the claim for payment is made in accordance with a payment schedule that has been agreed in writing between the Council and the Developer.

14 Ownership & Care of Developer Works

- 14.1 The Developer owns, and is responsible for care of, the Developer Works, and bears all risk and liability in connection with the Developer Works, until the Council gives the Developer a Transfer of Ownership Notice relating to the Developer Works.

15 Work Health & Safety

- 15.1 The Developer acknowledges that it is the Principal Contractor under WHS Law for the Developer Works unless and until such time that the Developer engages a person to construct the Developer Works, or engages another person conducting a business, or undertaking, to be the Principal Contractor for the Developer Works, and authorises the person to have management or control of the workplace relating to the Developer Works and to discharge the duties of a Principal Contractor under WHS Law.
- 15.2 If the Developer at any time terminates the engagement of the person engaged to construct the Developer Works or to otherwise be the Principal Contractor for the Developer Works, the Developer becomes the Principal Contractor until such time as a new person is appointed to construct the Developer Works or to otherwise be the Principal Contractor for the Developer Works.
- 15.3 The Developer is to use its best endeavours to ensure that all persons involved in the Developer Works comply with relevant WHS Law and procedures, including but not limited to:
 - 15.3.1 following published government and industry WHS guidelines,

Works-in-Kind Deed**Construction of Roundabout, Lochinvar****Maitland City Council / McCloy Project Management Pty Ltd**

- 15.3.2 providing WHS induction training,
- 15.3.3 keeping and regularly updating WHS records,
- 15.3.4 preparing and maintaining an WHS management plan,
- 15.3.5 preparing a Project Safety Plan that details safety strategies, including how persons must act to comply with WHS Law,
- 15.3.6 providing safe work method statements for all tasks and ensuring they are complied with,
- 15.3.7 directing staff to take corrective action or stop work if they are not complying with the method statements or WHS Law,
- 15.3.8 identifying hazards and assessing risks using due diligence,
- 15.3.9 eliminating or controlling risks in line with WorkCover requirements using due diligence,
- 15.3.10 reviewing risk assessments and controlling measures,
- 15.3.11 providing information to employers and contractors about WHS, and
- 15.3.12 documenting site-specific safety procedures.
- 15.4 The Developer is to use its best endeavours to ensure that:
 - 15.4.1 The Council can audit, inspect and test the Developer Works without breaching WHS Law, and
 - 15.4.2 The Council can access and use the Developer Works without breaching WHS Law.
- 15.5 The Developer is to promptly inform the Council of any incident occurring in relation to the Developer Works where a person is injured or otherwise exposed to a risk to his or her health or safety, including, but not limited to, an incident which is required to be reported to WorkCover.

16 Accidents & dangerous occurrences

- 16.1 The Developer is to notify WorkCover, and the Council, as soon as it becomes aware of any serious accident or dangerous occurrence relating to the Developer Works.
- 16.2 Within a further 7 days, the Developer must formally notify or procure the notification of WorkCover of the accident or occurrence in accordance with the WHS Law, using any prescribed form.
- 16.3 The Developer must give to the Council a copy of all information and documents that have been provided to WorkCover relating to the accident or occurrence.
- 16.4 The Developer must also give to the Council, if requested by the Council, a written report relating to the accident or occurrence in the form specified by the Council.
- 16.5 The Developer must cooperate with WorkCover and the Council if the accident or occurrence is investigated by Work Cover or the Council.
- 16.6 The Developer must immediately give the Council a copy of any improvement or prohibition notices that WorkCover issues in relation to the Developer Works.

