
 <p>Adelaide Plains Council</p>	<p>21.3 Confidential Item</p>
<p>23 November 2020</p>	

21.3 Agrisano Holdings Pty Ltd – Draft Infrastructure Deed and Land Management Agreement Wasleys Road, Mallala

RECOMMENDATION

“that:

- 1. Pursuant to section 90(2) of the Local Government Act 1999, Council orders that all members of the public, except Chief Executive Officer, General Manager – Governance and Executive Office, General Manager – Finance and Business, General Manager – Infrastructure and Environment, Manager Governance and Administration, Administration and Executive Support Officer/Minute Taker and Information Technology Officer be excluded from attendance at the meeting of Council for Agenda Item 21.3 – *Agrisano Holdings Pty Ltd – Draft Infrastructure Deed and Land Management Agreement Wasleys Road, Mallala*;**
- 2. Council is satisfied that pursuant to section 90(3)(i) of the Local Government Act 1999, Item 21.3 – *Agrisano Holdings Pty Ltd – Draft Infrastructure Deed and Land Management Agreement Wasleys Road, Mallala* concerns information that relates to actual and ongoing litigation, being appeal proceedings currently on foot, the disclosure of which would be contrary to the public interest on the basis that disclosure may prejudice the Council’s and the Appellant’s case;**
- 3. Council is satisfied that the principle that Council meetings should be conducted in a place open to the public has been outweighed by the need to keep the information, matter and discussion confidential.”**

 Adelaide Plains Council	21.3	Agrisano Holdings Pty Ltd – Draft Infrastructure Deed and Land Management Agreement
	Department: Report Author:	Development and Community General Manager – Development and Community
Date: 23 November 2020	Document Ref:	D20/54468

PURPOSE

The purpose of this report is to present to Council a Land Management Agreement (**Attachment A**) and Infrastructure Agreement (**Attachment B**) for endorsement.

DISCUSSION

At its meeting of 19 March 2020, the Council Assessment Panel (CAP) considered an application for the development of an Integrated Horticulture Facility comprising the staged establishment of 10 greenhouses on the subject land, along with a nursery, staff amenities building, parking area and internal roadways on Wasleys Road Mallala.

Following an assessment against the Mallala Development Plan the recommendation from the Council assessment staff was that the application be granted Development Plan Consent subject to a number of conditions. Notwithstanding this recommendation, the CAP resolved to refuse Development Plan Consent. The applicant (MasterPlan/Agrisano) lodged an appeal with the Environment Resources and Development Court against the decision of CAP decision to refuse the development application.

As part of the ERD Court appeal process, the applicant presented a compromise proposal to Council with various amendments to the proposed development. At its meeting of 2 September 2020 the Council Assessment Panel (CAP) resolved to support the compromise proposal as outlined below:

2(A) That the Council Assessment Panel resolves to accept the amended plans and details as a basis for compromise in determining the appeal against the previous refusal of the application by MasterPlan on behalf of Agrisano Holdings Pty for Integrated Horticulture Facility comprising the staged establishment of 10 greenhouses on the subject land, along with a nursery, staff amenities building, parking area and internal roadways at Wasleys Road Mallala, Allotment 1 in Deposited Plan 15619, Hundred of Grace Certificates of Title Volume 5328 Folio 873 and Allotment 2 in Deposited Plan 15619, Hundred of Grace (Volume 5713 folio 686 (312/14/2020) once:

- *An Infrastructure Agreement and a Land Management Agreement are executed; and*
- *the Land Management Agreement is registered on the Certificates of Titles for the subject land*

Since the resolution of the Council Assessment Panel, Council staff, Council's legal advisors, the applicant and the applicant's legal advisors have been engaged in discussion and dialogue around the content of both a Land Management Agreement and Infrastructure Agreement in relation to the proposed development and the impact off of the subject site. A key element of these discussions revolved around impact on the local road network, which was an initial area of concern for CAP as expressed in its initial reasons for refusing the development application.

The Land Management Agreement (Attachment A) and the Infrastructure Agreement (Attachment B) are now in a form that is acceptable to both the applicant and Council staff. Both agreements have been prepared to be consistent with the plans and reports submitted as part of the compromise development application which is part of the ERD Court appeal process which will form part of the development approval.

Given the Land Management Agreement is between the land owners of the subject site, the developer of the subject site and Council and any work undertaken on the public road network by Agrisano will ultimately become a Council asset, both agreements are now being presented to Council for endorsement. Consideration of the agreements does not involve reconsideration of any element of the compromise development application which has been assessed and supported by the Council Assessment Panel as the Relevant Planning Authority for Adelaide Plains Council.

The key elements of the Infrastructure Agreement outline that the Developer, through its agent, lodged Development Application No. 312/14/2020 ("the Development Application") with the Council on 18 December 2019, seeking Development Plan consent, Building Rules consent and full development approval under the Development Act 1993 ("the Act") for an integrated Horticulture Facility ("the Development") to be constructed on the whole of the land comprised in Certificate of Titles Volume 5328 Folio 873 known as Lot 1 Wasleys Road, Mallala ("Lot 1") and Certificate of Title Volume 5713 Folio 888 known as Lot 2 Wasleys Road, Mallala ("Lot 2"). Lot 1 and Lot 2 are together referred to as "the Land".

The Council, through its Assessment Panel ("CAP") refused Development Plan consent to the Development on 19 March 2020. The Developer appealed the decision to the Environment, Resources and Development Court (ERD-20-33) ("the Appeal") on 27 March 2020.

The Developer has submitted a compromise proposal to the Council in order to settle the Appeal. The compromise proposal includes additional information concerning certain aspects of the Development.

The CAP has agreed to support the compromise proposal and consent to Orders from the ERD Court granting Development Plan consent to the Development (thereby settling the Appeal) subject to:

- (a) this Agreement being executed between the Council and the Developer;
- (b) a Land Management Agreement being executed between the Council, the Developer and the Owner of Lot 1 and the Owner of Lot 2 to preserve this Agreement; and
- (c) the Land Management Agreement being registered on the Certificates of Title for the Land.

The Development proposes the construction of ten (10), 2-hectare greenhouses, a 1.7-hectare nursery, staff amenities building and office, parking area and internal roadways on the Land. The Development is to be undertaken in five (5) Stages.

Access to the Development will be obtained from Wasleys Road with the surrounding road network, including Wasleys Road, Barraba Road and Mallala Road, utilised by both heavy and light vehicles in

association with the Development. Wasleys Road, and Barraba Road are under the care, control and management of the Council.

Of importance to the CAP's agreement to the compromise proposal was it being satisfied that access and egress to the Land and traffic movements associated with the Development are appropriate under the relevant provisions of the Mallala Council Development Plan (consolidated 13 December 2018).

The Developer has agreed, for the purpose of obtaining Development Plan consent (by way of consent order through the ERD Court Appeal) for the Development, to enter into this Agreement with the Council on the terms and conditions contained within this Agreement.

The proposed areas covered by the Infrastructure Agreement are:

- The portion of Wasleys Road (site entrance of Land to Barabba Road).
- The portion of Barabba Road (Wasleys Road to Redbanks Road).
- The intersection of Wasleys Road and Barabba Road.
- The intersection of Wasleys Road and site entrance of the Land.

The key elements of the Land Management Agreement outline that the parties to the agreement will be between **JOHN MAXWELL HOWARD MARSHMAN** of 364 Carrington Street, Adelaide South Australia 5000 ("the Owner Lot 1"), **HUMMOCK HILL PTY. LTD. (ACN: 007 906 176)** of Level 1, 104 Frome Street, Adelaide South Australia 5000 ("the Owner Lot 2"), **AGRISANO HOLDINGS PTY LTD (ACN: 630 271 788)** of Level 7, 420 King William Street, Adelaide South Australia 5000 ("the Developer") and **ADELAIDE PLAINS COUNCIL** of 2a Wasleys Road, Mallala South Australia 5502 ("the Council").

It also outlines that the parties will enter into an Agreement as a Land Management Agreement pursuant to section 57A(1) of the Act to agree matters relating to the development and management of the Land. In particular, this Agreement is to ensure that infrastructure upgrades occur in conjunction with the construction of the Development regardless of ownership arrangements for the Land.

CONCLUSION

While these agreements relate to a compromise development application (Development Application No. 312/14/2020) that is currently before the ERD Court, Council has no role in the consideration of the merits of the development application, which has been undertaken by the Council Assessment Panel as the relevant planning authority.

Council's role is to endorse an agreement between itself and the land owners/developers of the subject land and to endorse the work to Agrisano will be undertaking off-site infrastructure on the public road network as per the conditions of the Infrastructure Agreement.

RECOMMENDATION 1

“that Council, having considered Item 21.3 – *Agrisano Holdings Pty Ltd – Draft Infrastructure Deed and Land Management Agreement*, dated 23 November 2020, receives and notes the report and in doing so instructs the Mayor and Chief Executive Officer, pursuant to sections 38 and 44 of the Local Government Act 1999 to execute under common seal the Land Management Agreement between (Attachment A) JOHN MAXWELL HOWARD MARSHMAN of 364 Carrington Street, Adelaide South Australia 5000 (“the Owner Lot 1”), HUMMOCK HILL PTY. LTD. (ACN: 007 906 176) of Level 1, 104 Frome Street, Adelaide South Australia 5000 (“the Owner Lot 2”), AGRISANO HOLDINGS PTY LTD (ACN: 630 271 788) of Level 7, 420 King William Street, Adelaide South Australia 5000 (“the Developer”) and ADELAIDE PLAINS COUNCIL of 2a Wasleys Road, Mallala South Australia 5502 (“the Council”) by affixing the common seal of Council in accordance with section 38 of the Local Government Act 1999.”

RECOMMENDATION 2

“that Council instructs the Mayor and Chief Executive Officer, pursuant to sections 38 and 44 of the Local Government Act 1999 to execute under common seal the Infrastructure Agreement between Agrisano Holdings Pty Ltd and Adelaide Plains Council (Attachment B) by affixing the common seal of Council in accordance with section 38 of the Local Government Act 1999.

BUDGET IMPACT

Estimated Cost:	Ongoing costs associated with the ERD Court Appeal
Future ongoing operating costs:	Infrastructure works to be undertaken by Agrisano
Is this Budgeted?	Not Applicable

RISK ASSESSMENT

Should the LMA & Infrastructure Agreement not be endorsed by Council, Development Application No. 312/14/2020 may undergo a full ERD Court hearing/appeal at significant cost to Council. In addition any ongoing appeal in the ERD Court is likely to be on the original refused development application and not the compromise proposal meaning any improvements to the proposed development as part of the compromise proposal would be removed.

Should Development Application No. 312/14/2020 proceed to a full ERD Court hearing the offer from Agrisano to undertake infrastructure works outside the development site will also likely be withdrawn.

Attachments

1. Attachment A Land Management Agreement
2. Attachment B Infrastructure Agreement

RECOMMENDATION

“that Council, having considered the matter of Item 21.3 – *Agrisano Holdings Pty Ltd – Draft Infrastructure Deed and Land Management Agreement Wasleys Road, Mallala* in confidence under sections 90(2) and 90(3)(i) of the *Local Government Act 1999*, resolves that:

- 1. The report, Attachment 1 and Attachment 2 pertaining to Item 21.3 – *Agrisano Holdings Pty Ltd – Draft Infrastructure Deed and Land Management Agreement Wasleys Road, Mallala* remain confidential and not available for public inspection until such time as the appeal proceedings are finalised with the exception of providing a copy of the finalised Attachment 1 and Attachment 2 to Agrisano Pty Ltd and Ms Christine Musolino (the other parties to the appeal);**
- 2. Pursuant to section 91(9)(a) of the *Local Government Act 1999*, the confidentiality of the matter will be reviewed every 12 months; and**
- 3. Pursuant to section 91(9)(c) of the *Local Government Act 1999*, the Committee delegates the power to revoke this confidentiality order to the Chief Executive Officer.”**

LAND MANAGEMENT AGREEMENT

JOHN MAXWELL HOWARD MARSHMAN

("the Owner Lot 1")

And

HUMMOCK HILL PTY. LTD. (ACN: 007 906 176)

("the Owner Lot 2")

And

AGRISANO HOLDINGS PTY LTD (ACN: 630 271 788)

("the Developer")

And

ADELAIDE PLAINS COUNCIL

("the Council")

Kelley Jones

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THIS AGREEMENT is made the _____ day of _____ 2020

BETWEEN

JOHN MAXWELL HOWARD MARSHMAN of 364 Carrington Street, Adelaide South Australia 5000 (“the Owner Lot 1”)

AND

HUMMOCK HILL PTY. LTD. (ACN: 007 906 176) of Level 1, 104 Frome Street, Adelaide South Australia 5000 (“the Owner Lot 2”)

AND

AGRISANO HOLDINGS PTY LTD (ACN: 630 271 788) of Level 7, 420 King William Street, Adelaide South Australia 5000 (“the Developer”)

AND

ADELAIDE PLAINS COUNCIL of 2a Wasleys Road, Mallala South Australia 5502 (“the Council”)

BACKGROUND

- A. The Owner Lot 1 is the registered proprietor in fee simple of the land in Certificate of Title Register Book Volume 5328 Folio 873 commonly known as Lot 1 Wasleys Road, Mallala (“Lot 1”). The Owner Lot 2 is the registered proprietor in fee simple of the land in Certificate of Title Register Book Volume 5713 Folio 888 commonly known as Lot 2 Wasleys Road, Mallala (“Lot 2”). Lot 1 and Lot 2 are together referred to as “the Land”.
- B. The Developer intends to develop an integrated horticulture facility comprising the staged establishment of ten (10) greenhouses, each 2 hectares in size, a 1.7 hectare nursery, staff amenities building and office, parking area and internal roadways on the Land (“the Development”).
- C. To achieve this the Developer lodged Development Application 314/14/2020 with the Council.
- D. The Council Assessment Panel refused DA 314/14/2020. The Developer appealed the refusal to the Environment, Resources and Development Court (ERD-20-33) (“the Appeal”).
- E. Through the Appeal the Developer submitted a compromise proposal. The compromise proposal is largely the same as the original proposal, but includes additional information

regarding certain aspects of the Development.

- F. The parties to the Appeal have subsequently reached in principal agreement that the compromise proposal can be supported subject to:
- (a) an Infrastructure Agreement being executed between the Council and the Developer;
 - (b) a Land Management Agreement being executed between the Council, the Developer and the Owner of Lot 1 and the Owner of Lot 2; and
 - (c) the Land Management Agreement being registered on the Certificates of Title for the Land.
- G. A copy of the planning report prepared by MasterPlan dated July 2020 and proposal plans submitted as part of the compromise proposal form **Annexure 1** to this Agreement.
- H. The Developer intends to undertake the Development, including obtaining building rules consent and development approval, in five (5) stages:
- (a) Stage 1 – Greenhouse 1 (2 hectares), carpark, nursery and wastewater management;
 - (b) Stage 2 – Greenhouses 2 and 3 (2 hectares each) and increase to size of nursery;
 - (c) Stage 3 – Greenhouses 4 and 5 (2 hectares each), increase to size of nursery and additional carpark area;
 - (d) Stage 4 – Greenhouse 6 and 7 (2 hectares), increase to size of nursery, control facility, toilet/shower and lunch room; and
 - (e) Stage 5 – Greenhouses 8, 9 and 10 (2 hectares each) and increase to size of nursery.

A copy of the staging plans form **Annexure 2** to this Agreement.

- I. The progression of the Development to Stage 2 and the following Stages will be dependent on the commercial viability of the business.
- J. A Traffic Impact Assessment prepared by Tonkin dated July 2020 (“the Traffic Impact Assessment”) was provided as part of the compromise proposal. A copy of the Traffic

Impact Assessment forms **Annexure 3** to this Agreement.

- K. The Traffic Impact Assessment confirms that:
- (a) the dimensions, material and condition of the Council's roads are suitable for up to 10 hectares of greenhouse development (or up to Stage 3 of the Development);
 - (b) as greenhouse development on the Land increases in size, up to 20 hectares, there will be a proportional increase in traffic volumes on the surrounding road network;
 - (c) as the Development increases in size the Developer is required to monitor traffic volumes to determine if infrastructure upgrades to the surrounding road network are required; and
 - (d) depending on the monitoring results, the Developer is required to upgrade the Council infrastructure, including, but not limited to, sealing unsealed roads, upgrading intersection/s and installing channelised right turn lane/s.
- L. The Developer has also provided a letter to the Council prepared by MasterPlan and dated 20 August 2020 ("the Letter"). The Letter confirms that the Developer intends to undertake traffic monitoring, maintenance of Wasleys Road and infrastructure upgrades in association with the Development. The Letter forms **Annexure 4** to this Agreement.
- M. Maintenance of Wasleys Road will be required on an ongoing basis until such time as the roads are upgraded in accordance with the Infrastructure Agreement.
- N. Infrastructure upgrades will only be required if the Development increases in size and/or if traffic monitoring confirms that the increase in traffic volumes associated with the Development requires the Council's roads to be upgraded in accordance with the Infrastructure Agreement.
- O. The maintenance and infrastructure upgrades are the subject of an Infrastructure Agreement between the Council and the Developer. An unexecuted copy of the Infrastructure Agreement forms **Annexure 5** to this Agreement.
- P. The parties have entered into this Agreement as a Land Management Agreement pursuant to section 57A(1) of the Act to agree matters relating to the development and

management of the Land, on the terms and conditions which follow.

- Q. In particular, this Agreement is to ensure that maintenance of Wasleys Road and infrastructure upgrades occur in conjunction with the construction of the Development regardless of ownership arrangements for the Land.
- R. The operation of this Agreement is contingent on the parties to the appeal reaching a settlement and consent orders being granted by the Court, granting Development Plan consent to the Development.

1. DEFINITIONS AND INTERPRETATION

1.1 The parties acknowledge that the matters set out in the Background to this Agreement are true and accurate and agree that they form part of the terms of this Agreement.

1.2 In this Agreement:

1.2.1 “**Act**” means the Development Act 1993 and includes any successor legislation that may be in force at the relevant time including the *Planning, Development and Infrastructure Act 2016*.

1.2.2 “**Agreement**” means this Agreement as executed by the parties.

1.2.3 “**Infrastructure Agreement**” means the Infrastructure Agreement to be executed by the Developer and the Council which forms **Annexure 5** to this Agreement.

1.2.4 “**Land**” means the whole or any part of the land now comprised in Certificate of Title Register Book Volume 5328 Folio 873 and Certificate of Title Register Book Volume 5713 Folio 888.

1.2.5 “**Notice**” means a notice, demand, consent, approval or communication issued under this Agreement.

1.2.6 “**Owner**” means any person who is, or is entitled to become, the registered proprietor of an estate in fee simple of the Land, or any part of the Land, and includes a successor in title to an estate in fee simple to the Land.

1.2.7 “**Public Road**” has the same meaning as in the *Local Government Act 1999* and includes footpaths, verges, and other areas not trafficable by

motor vehicles.

1.2.8 **“Works”** has the meaning given to that term in the Infrastructure Agreement which forms **Annexure 5** to this Agreement.

1.3 In this Agreement unless the context otherwise requires:

1.3.1 A term, other than a term defined in the Background or in Clause 1.2, has the same meaning as in a provision of the Act or the *Development Regulations 2008* (“the Regulations”) as in force at the date of this Agreement. A term which is defined in the Background or in Clause 1.2 has the meaning there defined;

1.3.2 headings do not affect interpretation;

1.3.3 the term “person” includes a corporate body, partnership, association, government body or other entity;

1.3.4 a reference to a party includes its executors, administrators, successors and permitted assigns;

1.3.5 singular includes plural and plural includes singular;

1.3.6 where two or more persons are bound by this Agreement to observe or perform any obligation or agreement whether express or implied then they shall be bound jointly and also severally;

1.3.7 a reference to any statute or subordinate legislation includes all statutes and subordinate legislation amending, consolidating or replacing the statute or subordinate legislation referred to; and

1.4 The requirements of this Agreement are to be construed as additional to any requirements upon either party in relation to the Land under the Act or any other legislation.

1.5 In the consideration of any further development application(s) for the Land under the Act, in relation to the Development, the provisions of this Agreement are to be afforded significant weight.

2. OWNER LOT 1 AND OWNER LOT 2 UNDERTAKINGS AND OBLIGATIONS

2.1 The Owner Lot 1 and Owner Lot 2 is liable to the Council for any act or omission

on the part of an officer, employee, contractor, agent, invitee, lessee or licensee of the Owner Lot 1 and Owner Lot 2 which, if done or not done by the Owner Lot 1 and Owner Lot 2 would constitute a breach of this Agreement.

2.2 Where a person ceases to be an Owner, such person ceases to be a party to this Agreement, but without prejudice to rights or obligations already accrued.

2.3 The Owner Lot 1 and Owner Lot 2 warrants and represents that all persons with a legal interest in the Land consent to the Owner Lot 1 and Owner Lot 2 entering into this Agreement.

2.4 The Owner Lot 1 and Owner Lot 2 agree the following:

2.4.1 the Council will not confirm that the Development satisfies traffic management and safety unless and until the Infrastructure Agreement is executed;

2.4.2 the Council will not grant development approval for the Works, and is not obliged to grant development approval for the Works otherwise than in accordance with clause 6 of the Infrastructure Agreement;

2.4.3 should the Developer determine not to proceed with the Development, the Development will not be granted development approval unless another party executes an agreement in the terms of the Infrastructure Agreement with the Council.

3. DEVELOPER'S ACKNOWLEDGEMENTS AND OBLIGATIONS

3.1 The Developer acknowledges the requirements of section 57A of the Act as they relate to the Development.

3.2 The Developer acknowledges and agrees that, in accordance with the Traffic Impact Assessment and the Letter:

3.2.1 In conjunction with the Council, it will prepare and provide a dilapidation report to the Council that confirms the condition of Wasleys Road between the entrance to the Land and Mallala/Two Wells/Adelaide/Aerodrome Road and includes the intersection of Wasleys Road and Barraba Road prior to the commencement of construction of the Development.

3.2.2 It will undertake traffic monitoring for and in association with the

Development.

- 3.2.3 Traffic monitoring will be carried out every six (6) months upon completion of Stage 1 of the Development and each stage of the Development thereafter.
- 3.2.4 It will notify the Council when traffic monitoring is being carried out.
- 3.2.5 It will provide a copy of each traffic monitoring report to the Council within one (1) month of the monitoring being completed.
- 3.2.6 Where the traffic monitoring report identifies that traffic volumes have increased such that infrastructure upgrades to the Council's roads are required, the Developer will ensure the Works are undertaken to the reasonable satisfaction of the Council and in accordance with the Infrastructure Agreement.

4. COUNCIL'S POWERS AND OBLIGATIONS

- 4.1 The Council agrees to apply to rescind this Land Management Agreement under section 57A of the Act within ten (10) business days of the Development being cancelled by the Owner Lot 1 or the Owner Lot 2 or the Developer.
- 4.2 The Council, including any employee or agent of the Council authorised by the Council, may at any reasonable time enter the Land for the purpose of:
 - 4.2.1 inspecting the Land and any building or structure on the Land; or
 - 4.2.2 exercising any other powers of the Council under this Agreement, or pursuant to any other law.
- 4.3 If the Owner Lot 1, the Owner Lot 2 or the Developer is in breach of this Agreement, the Council may, by Notice served on the Owner Lot 1, the Owner Lot 2 or the Developer specifying the nature of the breach, require the Owner Lot 1, the Owner Lot 2 or the Developer to remedy the breach within such time as is specified in the Notice. If the Owner Lot 1, the Owner Lot 2 or the Developer fails to comply with the Notice, the Council (or its servants or agents) may enter the Land and cause the works or requirements specified in the Notice to be carried out and may recover its costs of doing so against the Owner Lot 1 and/or the Owner Lot 2 and/or the Developer.

- 4.4 Without providing a Notice to the Owner Lot 1, the Owner Lot 2 or the Developer, the Council may apply to the Registrar-General to note this Agreement against the Certificates of Title of the Land.
- 4.5 In the event of a breach or threatened breach of the Agreement by the Owner Lot 1, the Owner Lot 2 or the Developer, the Council may (without limiting any other remedy available to the Council, including under Part 11 of the Act), obtain an injunction restraining the Owner Lot 1, the Owner Lot 2 and/or the Developer from committing a breach of the Agreement without proving any actual damage has or will be sustained by the Council. The parties agree that a breach of this Agreement by the Owner Lot 1, the Owner Lot 2 and/or the Developer may cause injury for which damages may not be an adequate remedy to the Council.

5. OPERATION AND APPLICATION OF THE AGREEMENT

- 5.1 Upon execution, this Agreement is effective as an Agreement.
- 5.2 The parties intend that this Agreement will be effective as a Land Management Agreement pursuant to section 57A of the Act upon being registered under the *Real Property Act 1886* as a note against the instrument of title to the Land.
- 5.3 This Agreement is the whole agreement between the parties in relation to the matters contained within it. This Agreement may only be varied by a supplementary agreement executed by the Council and the Owner Lot 1, the Owner Lot 2 and the Developer.
- 5.4 Nothing in this Agreement shall be construed as the Council granting consent, approval or in any way agreeing to a development application or any current or future development of the Land.

6. NOTING OF THIS AGREEMENT

- 6.1 Each party shall do and execute all such acts, documents and things necessary so that as soon as practicable following the execution of this Agreement by all parties, the Agreement is noted against the Certificates of Title for the Land pursuant to the provisions of Section 57A(5) of the Act in priority to any other registered instrument.

7. WAIVER

- 7.1 The Council may, conditionally or unconditionally, waive compliance by the Owner with the whole or any part of the Owner Lot 1, the Owner Lot 2 and the Developer's past or future obligations under this Agreement.
- 7.2 To be effective, a waiver must be in writing and signed by the Council.
- 7.3 The failure, delay, relaxation or indulgence by a party in exercising a power or right under this Agreement is not a waiver of that power or right.
- 7.4 An exercise of a power or right under this Agreement does not preclude a further exercise of it or the exercise of another right or power.

8. SEVERANCE

- 8.1 Where a clause or part of a clause in this Agreement would, but for this clause, be unenforceable:
 - 8.1.1 the clause or part of the clause shall be read down to the extent necessary to avoid that result; or
 - 8.1.2 where the clause or part of the clause cannot be read down, it may be severed from this Agreement and the remainder of the clause or of the Agreement shall continue in force, unless this would result in a material change to the intended effect of the Agreement.

9. GOVERNING LAW

- 9.1 This Agreement is governed by the law in South Australia.

10. NOTICES

- 10.1 A Notice must be in writing, be signed by the party issuing the Notice, and be hand delivered or sent by pre-paid post to the recipient's address as stated in this Agreement, or as last notified.
- 10.2 A Notice is deemed to be received:
 - 10.2.1 if hand delivered, on delivery; and
 - 10.2.2 if sent by pre-paid post, two business days after posting.

10.3 If two or more people comprise a party, providing a Notice to one is effective as notice to all.

11. ABOUT THE COUNCIL

11.1 The Council may delegate any of its powers under this Deed or pursuant to law.

11.2 The Council enters into this Agreement as a council acting under section 57A of the Act and not in any other capacity. This Agreement does not preclude or preempt the exercise by the Council of any other regulatory function of power.

12. COSTS

12.1 The Owner must pay to the Council on demand the Council's costs and expenses (including legal costs and expenses) of preparing, stamping and noting this Agreement.

13. COUNTERPARTS

13.1 This Agreement may be executed in any number of counterparts which together will constitute one instrument. A party may execute this Agreement by signing any counterpart.

14. DISPUTE RESOLUTION

14.1 A party at any time may notify the other party of a dispute concerning any matter relating to or arising out of this Agreement ("the Dispute") and require that it be resolved in accordance with this Agreement ("Notice of Dispute").

14.2 The Notice of Dispute must:

14.2.1 be in writing;

14.2.2 identify the subject matter of the dispute;

14.2.3 nominate the person who will have authority to settle the dispute;

14.2.4 have annexed to it copies of all relevant correspondence and background information relevant to the dispute; and

14.2.5 contain particulars of the quantification of any claim in relation to the dispute.

- 14.3 The parties must use their best endeavours to settle the dispute within twenty (20) Business Days after the date of the issue of the Notice of Dispute, or such further period as the parties agree.
- 14.4 If the Dispute is not resolved under clause 14.3, it will be mediated in accordance with the Australian Commercial Disputes Centre Guidelines for Commercial Mediation (“the Guidelines”) current at the date that the Notice of Dispute was issued. Where there is any inconsistency between the Guidelines and this Agreement, this Agreement prevails.

EXECUTED by JOHN MAXWELL HOWARD MARSHMAN:

.....
John Maxwell Howard Marshman

In the presence of:

.....
Witness Signature

.....
Witness Name (print name)

.....
Date

EXECUTED by **HUMMOCK HILL PTY. LTD. (ACN: 007 906 176)** in accordance with Section 127 of the *Corporations Act 2001* (Cth):

.....
Signature Director/Relevant Company Officer

.....
Print name

.....
Signature Director/Secretary

.....
Print name

.....
Date

EXECUTED by **AGRISANO HOLDINGS PTY LTD (ACN: 630 271 788)** in accordance with Section 127 of the *Corporations Act 2001* (Cth):

.....
Signature Director/Relevant Company Officer

.....
Print name

.....
Signature Director/Secretary

.....
Print name

.....
Date

EXECUTED by the **ADELAIDE PLAINS COUNCIL**

The Common Seal of the **Adelaide Plains Council** was affixed in accordance with the *Local Government Act 1999* in the presence of:

.....
James Miller
Chief Executive Officer

.....
Mark Wasley
Mayor

.....
Date

ANNEXURE 1

MasterPlan Report and Proposal Plans

ANNEXURE 2

Staging Plans

ANNEXURE 3

Traffic Impact Assessment prepared by Tonkin

ANNEXURE 4

Letter by MasterPlan dated 20 August 2020

ANNEXURE 5

Unexecuted Infrastructure Agreement

INFRASTRUCTURE AGREEMENT

AGRISANO HOLDINGS PTY LTD (ACN: 630 271 788)

("the Developer")

And

ADELAIDE PLAINS COUNCIL

("the Council")

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THIS AGREEMENT is made the _____ day of _____ 2020

BETWEEN

AGRISANO HOLDINGS PTY LTD (ACN: 630 271 788) of Level 7, 420 King William Street, Adelaide South Australia 5000 (“the Developer”)

AND

ADELAIDE PLAINS COUNCIL of 2A Wasleys Road, Mallala South Australia 5502 (“the Council”)

BACKGROUND

- A. The Council is a council constituted under the *Local Government Act 1999*.
- B. The Developer, through its agent, lodged Development Application No. 312/14/2020 (“the Development Application”) with the Council on 18 December 2019, seeking Development Plan consent, Building Rules consent and full development approval under the *Development Act 1993* (“the Act”) for an integrated Horticulture Facility (“the Development”) to be constructed on the whole of the land comprised in Certificate of Titles Volume 5328 Folio 873 known as Lot 1 Wasleys Road, Mallala (“Lot 1”) and Certificate of Title Volume 5713 Folio 888 known as Lot 2 Wasleys Road, Mallala (“Lot 2”). Lot 1 and Lot 2 are together referred to as “the Land”.
- C. The Council, through its Assessment Panel (“CAP”) refused Development Plan consent to the Development on 19 March 2020. The Developer appealed the decision to the Environment, Resources and Development Court (ERD-20-33) (“the Appeal”) on 27 March 2020.
- D. The Developer has submitted a compromise proposal to the Council in order to settle the Appeal. The compromise proposal includes additional information concerning certain aspects of the Development.
- E. The CAP has agreed to support the compromise proposal and consent to Orders from the ERD Court granting Development Plan consent to the Development (thereby settling the Appeal) subject to:
 - (a) this Agreement being executed between the Council and the Developer;
 - (b) a Land Management Agreement being executed between the Council, the Developer and the Owner of Lot 1 and the Owner of Lot 2 to preserve this Agreement; and
 - (c) the Land Management Agreement being registered on the Certificates of Title for the Land.
- F. The Development proposes the construction of ten (10), 2-hectare greenhouses, a 1.7-hectare nursery, staff amenities building and office, parking area and internal roadways on the Land. The Development is to be undertaken in five (5) Stages being:

- (a) Stage 1 – Greenhouse 1 (2 hectares), carpark, nursery and wastewater management;
- (b) Stage 2 – Greenhouses 2 and 3 (2 hectares each) and increase to size of nursery;
- (c) Stage 3 – Greenhouses 4 and 5 (2 hectares each), increase to size of nursery and additional carpark area;
- (d) Stage 4 – Greenhouse 6 and 7 (2 hectares), increase to size of nursery, control facility, toilet/shower and lunch room; and
- (e) Stage 5 – Greenhouses 8, 9 and 10 (2 hectares each) and increase to size of nursery.

The Staging Plans form **Annexure 1** to this Agreement.

- G. Access to the Development will be obtained from Wasleys Road with the surrounding road network, including Wasleys Road, Barraba Road and Mallala Road, utilised by both heavy and light vehicles in association with the Development. Wasleys Road, and Barraba Road are under the care, control and management of the Council. Wasleys Road and Barraba Road are presently unsealed.
- H. Of importance to the CAP's decision to agree to the compromise proposal is it being satisfied that access and egress to the Land and traffic movements associated with the Development are appropriate under the relevant provisions of the Mallala Council Development Plan (consolidated 13 December 2018).
- I. To support DA 312/14/2020, the Developer obtained a Traffic Impact Assessment prepared by Tonkin and dated 7 July 2020 ("the Report") and provided a letter to the Council dated 20 August 2020 ("the Letter"). The Report forms **Annexure 2** to this Agreement. The Letter forms **Annexure 3** to this Agreement
- J. In accordance with the Report and the Letter, the Developer is required to:
 - (a) in conjunction with the Council, prepare a dilapidation report, that provides the condition of Wasleys Road and Barabba Road between the entrance to the Land and Mallala-Two Wells Road and includes the intersection of Wasleys Road and Barraba Road, prior to the commencement of construction of the Development;
 - (b) monitor traffic movements for the Development;
 - (c) as required by the Council under this Agreement, contribute to or undertake the ongoing maintenance of Wasleys Road and Barabba Road between the entrance to the Land and Mallala-Two Wells Road including the intersection of Wasleys Road and Barraba Road proportionate to the impact caused by vehicles associated with the development as reasonably determined by the Council having regard to the traffic monitoring undertaken for the land in accordance with clause J(b) above;
 - (d) carry out infrastructure upgrade works as provided in the Report, the Letter and

Annexure 4 of this Agreement (the “Works”) when traffic volumes for the Development as measured from the gate of the Land reach 150 vehicles per day.

- (e) provide to the Council four (4) safety signs that the Council will place at the intersection of Barraba Road and Wasleys Road prior to the commencement of construction of the Development on-site with the design and size of the signs to be agreed by the Council.
- K. In determining if and when maintenance and the Works are required, the Council will have regard to the results of the traffic monitoring to be carried out by the Developer and/or the Stage of the Development.
- L. The Developer has agreed, for the purpose of obtaining Development Plan consent (by way of consent order through the Appeal) for the Development, to enter into this Agreement with the Council on the terms and conditions contained within this Agreement.
- M. The purpose of this Agreement is to secure maintenance of Wasleys Road and Barabba Road and the undertaking of the Works once the Development is lawfully commenced in accordance with the Report, the Letter and this Agreement.
- N. In this Agreement, the parties agree when the Works will be required and the terms and conditions which apply to the undertaking of the Works.

THE PARTIES AGREE as follows:

1. ACKNOWLEDGEMENT OF BACKGROUND

The parties agree that the Background is true and accurate and forms part of this Agreement.

2. DEFINED TERMS AND INTERPRETATION

2.1 Introductory

In this Agreement, unless the contrary intention appears:

- 2.1.1 headings do not affect interpretation;
- 2.1.2 singular includes plural and vice versa;
- 2.1.3 words of one gender include any gender;
- 2.1.4 a reference to a party includes its agents, executors, administrators, successors and permitted assigns;
- 2.1.5 a reference to a person includes a corporation, association, government body and any other entity and vice versa;
- 2.1.6 a reference to this Agreement includes the Annexures;

- 2.1.7 an agreement, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally;
- 2.1.8 an agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;
- 2.1.9 a reference to legislation includes any amendment to it, any legislation substituted for it, and any subordinate legislation made under it;
- 2.1.10 words or expressions given meaning in this Agreement have those meanings and subject to that, the same meaning as in a provision of the Act or regulations made under the Act that deals with the same matter;
- 2.1.11 the meaning of general words is not limited by specific examples introduced by 'including', 'for example' or similar expressions.
- 2.1.12 where two or more terms are connected with the word 'or', any one or more, or all of those terms are referred to.

3. DEFINITIONS

In the interpretation of this Agreement, unless the contrary intention appears or the context otherwise requires, the following expressions have the following meanings:

- 3.1 **“Act”** means the *Development Act 1993* (SA) and includes any successor legislation that may be in force at the relevant time including the *Planning, Development and Infrastructure Act 2016*.
- 3.2 **“Actual Practical Completion Date”** means, in accordance with clause 12.3.4 of this Agreement, the expiration of ten (10) clear Business Days after the Council receives a certificate in accordance with clause 12.3.3 of this Agreement and no objection to the certificate is made by the Council to the Developer, or, if it occurs earlier, the date on which the Council issues a certificate of practical completion for the Works.
- 3.3 **“Agreement”** means this agreement as executed by the parties.
- 3.4 **“Business Day”** means a day that is not a Saturday, Sunday or public holiday in South Australia.
- 3.5 **“Defects Warranty Period”** means, in respect of the Works, twelve (12) calendar months from the Actual Practical Completion Date.
- 3.6 **“Development”** means the proposed development of the Land by way of construction of an integrated Horticulture Facility as contained in DA 312/14/2020.
- 3.7 **“Development Application”** means development application number 312/14/2020 lodged in respect of the Land.
- 3.8 **“Dispute”** is defined in clause 28.1 of this Agreement.

- 3.9 **“Engineering Plans and Specifications”** means the detailed engineering plans and specifications required to undertake the Maintenance and the Works which will be obtained by the Developer and approved by the Council in accordance with clauses 5 and 6 of this Agreement.
- 3.10 **“Estimate of Costs”** means a detailed estimate of all costs reasonably required for completion of the Works including (but not limited to) the cost of all labour, materials and equipment and other incidental costs required for the Works.
- 3.11 **“Final Completion”** means the state of the Works being complete and fit for use by the Developer, the Council and the public generally, including all performance or structural tests and inspections (including commissioning if applicable) required by the Council having been satisfactorily completed, all “As Built” drawings having been handed over and all omissions or defects having being made good.
- 3.12 **“Land”** means the whole of the land comprised in Certificate of Title Register Book Volume 5328 Folio 873 known as Lot 1 Wasleys Road, Mallala (“Lot 1”) and Certificate of Title Register Book Volume 5713 Folio 888 known as Lot 2 Wasleys Road, Mallala (“Lot 2”) (together referred to as “the Land”).
- 3.13 **“Letter”** means the letter to the Council dated 20 August 2020 which forms Annexure 3 to this Agreement.
- 3.14 **“Maintenance”** means the maintenance of, including but not limited to maintenance patching, the portion of Wasleys Road and Barabba Road between the entrance to the Land and Mallala-Two Wells Road including the intersection of Wasleys Road and Barraba Road to be carried out by the Developer on an ongoing basis, as required by the Council having regard to the dilapidation report, traffic monitoring, and proportionate to the impact of vehicles associated with the Development, in accordance with clause 5 of this Agreement.
- 3.15 **“Notice of Dispute”** is defined in clause 28.1 of this Agreement.
- 3.16 **“Practical Completion”** means the state of being substantially complete and fit for use by the Developer, its agents and contractors and the public generally, all performance or structural tests required by the Council having been satisfactorily completed and omissions or defects being limited to items:
- 3.16.1 the immediate making good of which by the Developer is accepted by the Council as not being practicable; and
- 3.16.2 which the Council accepts do not cause any impediment to the use or enjoyment of the Works or the Land by the Developer, its agents and contractors or the public generally (as the case may be).
- 3.17 **“Practical Completion Date”** means the date which is eighteen (18) months following the approval being granted by Council to undertake Works under clause 6.
- 3.18 **“Professional Engineer”** is defined in regulation 55(3) of the Regulations.

- 3.19 “**Rectification Work**” is defined in clause 14.1 of this Agreement.
- 3.20 “**Stage Work**” means, with respect to Stage 2 and each later Stage of the Development, such relevant Works as are provided in the Report and determined as being required in the reasonable opinion of the Council under this Agreement.
- 3.21 “**Regulations**” mean the *Development Regulations 2008*.
- 3.22 “**Report**” means the Traffic Impact Assessment dated 7 July 2020 prepared by Tonkin contained in **Annexure 2**.
- 3.23 “**Security**” means the bank guarantee or such other security as it approved by the Council in writing in accordance with clause 15.
- 3.24 “**Stage or Stages**” means Stages one (1) to five (5) (inclusive) of the Development as described at Background F and demonstrated in the Staging Plans forming **Annexure 1** to this Agreement.
- 3.25 “**Staging Plan**” means the plans for the Development forming **Annexure 1** to this Agreement.
- 3.26 “**Total Works Cost**” means the estimated total cost of the Stage Works as determined in accordance with clause 8 of this Agreement.
- 3.27 “**Works**” means the infrastructure upgrades to Council’s roads described in the Report, Letter and **Annexure 4** of this Agreement and, with respect to each Stage of the Development, comprises the Stage Works as the context requires.

4. **DEVELOPMENT AUTHORISATIONS**

- 4.1 The parties acknowledge and agree that:
- 4.1.1 the Development is the subject of an Appeal commenced by the Developer;
 - 4.1.2 a compromise proposal has been submitted by the Developer to settle the Appeal;
 - 4.1.3 the decision as to whether or not the Council agrees to support the compromise proposal has been made by the CAP;
 - 4.1.4 the CAP has determined to support the compromise proposal subject to the Developer entering into this Agreement and the owner of the Land entering into a Land Management Agreement to preserve this Agreement.
- 4.2 The Council agrees that the execution of this Agreement satisfies all traffic management and safety provisions of the Mallala Council Development Plan (consolidated 13 December 2018) relevant to the Development.
- 4.3 Clauses 5 – 30 (inclusive) of this Agreement are only binding on the Developer from the date that Development Plan consent for the Development becomes operative.

- 4.4 This Agreement terminates:
- 4.4.1 if Development Plan consent to the Development is not granted (by consent of the parties through the Appeal);
 - 4.4.2 upon the cancellation of Development Plan consent or development approval for the Development;
 - 4.4.3 in the event that Development Plan consent or development approval for the Development lapses in accordance with the Act.

5. MAINTENANCE OF WASLEYS ROAD AND BARABBA ROAD

- 5.1 Prior to the commencement of on-site construction of the Development the Developer must, in conjunction with the Council, provide the Council with a dilapidation report that confirms current pre-construction condition of Wasleys Road and Barabba Road between the entrance to the Land and Mallala-Two Wells Road, including the intersection of Wasleys Road and Barraba Road.
- 5.2 From the commencement of the construction of the Development the Council will monitor the condition of Wasleys Road and Barabba Road and will advise the Developer of the requirement for Maintenance to be undertaken, including the nature of the Maintenance works required, having regard to the dilapidation report, traffic monitoring and proportionate to the impact of vehicles associated with the Development.
- 5.3 In carrying out the Maintenance the Developer may:
- 5.3.1 with the approval of the Council, undertake the Maintenance to the reasonable satisfaction of the Council; or
 - 5.3.2 request that the Council undertake the Maintenance and pay the Council the quoted amount for it to undertake the Maintenance.
- 5.4 If the Developer seeks to undertake the Maintenance itself in accordance with clause 5.3.1 the Developer must, within thirty (30) days of agreed notice from Council undertake the maintenance to the reasonable satisfaction of the Council.
- 5.5 The Developer will pay to the Council the quoted amount within seven (7) days of receiving the quote/invoice from the Council. The Council will undertake the Maintenance within thirty (30) days upon receipt of the quoted amount.

6. WORKS - ENGINEERING PLANS AND SPECIFICATIONS

- 6.1 If the Development progresses beyond Stage 1 and the Council determines (acting reasonably) and having regard to traffic monitoring and/or the stage of the development (refer Background J and **Annexure 4** in this Agreement) that Works are required, the Developer must, within sixty (60) days of the Council's written request, procure:
- 6.1.1 final Engineering Plans and Specifications, from a Professional Engineer as are required for the Works; and

- 6.1.2 a traffic management plan which demonstrates how and when the Works can occur so as not to cause significant interference for road users, and provide those plans and specifications to the Council for its written approval, such approval shall not be unreasonably withheld and provided by the Council as soon as reasonably practicable after the provision of plans and specifications under this clause 6.

7. SAFETY SIGNS

- 7.1 The Developer will provide to the Council four (4) safety road signs to be placed at the intersection of Barraba Road and Wasleys Road by the Council.
- 7.2 The signs must be provided to the Council prior to the commencement of the Development on-site.
- 7.3 Prior to the signs being prepared, the Developer will need to obtain the written agreement of the Council in respect of the content, colour, design and size of the signs to ensure that the signs meet the Council's standard requirements.

8. TOTAL WORKS COST

- 8.1 Prior to commencing the Works approved in accordance with clause 6, the Developer must provide the Council with:
- 8.1.1 an Estimate of Costs from the Developer's civil contractor engaged to complete the Works; and
- 8.1.2 Security in accordance with clause 9.
- 8.2 The Total Works Cost for the purpose of this Agreement will be the amount of the Estimate of Costs provided to the Council in accordance with clause 8.1, plus an additional 20% for contingency.

9. SECURITY

- 9.1 At least fourteen (14) days prior to the commencement of the Works approved in accordance with clause 6, the Developer must provide to the Council Security with a value equal to the value of the Total Works Costs for the relevant Stage and otherwise in accordance with clause 15.
- 9.2 Provided that Building Rules consent has been granted for the relevant Stage of the Development, the Council must issue development approval under the Act to the relevant Works within seven (7) days of receiving the Security.

10. THE WORKS

- 10.1 The Developer must undertake (or cause to be undertaken) the Maintenance and/or the Works:
- 10.1.1 at the Developer's cost and risk in all things;
- 10.1.2 in accordance with:

- (a) the approved plans and details for the Development;
- (b) the Engineering Plans and Specifications approved by the Council in accordance with clauses 5 and 6 of this Agreement; and
- (c) all relevant Australian Standards;

10.1.3 under the supervision of a Professional Engineer engaged by the Developer and with the exercise of reasonable skill, care and diligence;

10.1.4 as far as is reasonably practicable, minimising any disturbance and inconvenience to others; and

10.1.5 allowing the Council and its agents to inspect the Maintenance and/or the Works at reasonable times after the Council has given the Developer (or its contractor for the Maintenance and/or the Works) reasonable notice.

10.2 The Developer must, prior to commencement of the Maintenance and/or the Works, take out a policy of public risk insurance with cover of not less than twenty million dollars (\$20,000,000) per claim, and the Developer must:

10.2.1 keep such policy current at all times until expiry of the Defects Warranty Period; and

10.2.2 prior to commencement of the Maintenance and/or the Works and at any other time upon request by the Council, provide the Council with a copy of the certificate of currency and policy for such insurance.

10.3 The Developer must, at its own cost, obtain and comply with any approval, consent, certificate, permit or licence from any statutory authority or body or property owner as is required to undertake the Maintenance and/or the Works.

10.4 Upon request by the Council, the Developer must notify the Council of the names and telephone numbers of individuals (including contractors) having management responsibility for the Maintenance and/or the Works and the Council may contact those individuals after-hours for matters relating to the Works.

11. COUNCIL INPUT AND OBLIGATIONS

11.1 Unless the contrary is stated in this Agreement, the Council is not obliged to provide the Developer with any:

11.1.1 connection to any services including but not limited to water, electricity, gas, stormwater and the like or other services as may be upon or adjacent to the Land or the Adjacent Land;

11.1.2 materials, plant and equipment; or

11.1.3 records or other information held by the Council.

12. PRACTICAL COMPLETION

- 12.1 The Developer must achieve Practical Completion of the Works on or before the Practical Completion Date.
- 12.2 If the Developer believes or is aware (or should reasonably be aware) that Practical Completion is unlikely to be achieved by the Practical Completion Date, the Developer must promptly notify the Council and advise the Council of the reasons for the expected delay and the date which the Developer expects to be the Actual Practical Completion Date.
- 12.3 Practical Completion is not achieved unless:
- 12.3.1 the Developer notifies the Council at least five (5) Business Days in advance of the Actual Practical Completion Date;
 - 12.3.2 the Developer notifies the Council at least two (2) Business Days prior to the date upon which a Professional Engineer will inspect the Works for the purpose of assessing Practical Completion and inviting the Council to take part in the inspection;
 - 12.3.3 within five (5) Business Days after the inspection detailed at clause 12.3.2, the Professional Engineer issues to the Council a certificate or other written confirmation that the Works have achieved Practical Completion (as that term is defined in clause 3.16 of this Agreement); and
 - 12.3.4 within ten (10) Business Days after receiving the Professional Engineer's certificate or confirmation, the Council does not notify the Developer of any objection to the issue of that certificate or confirmation.
- 12.4 If following the inspection undertaken pursuant to clause 12.3.3 above, the Council is of the opinion that additional work is required to achieve Practical Completion, then:
- 12.4.1 within ten (10) Business Days after the inspection, the Council must notify the Developer of the additional work required;
 - 12.4.2 the Developer must, as soon as is reasonably practicable, cause the additional work to be carried out in accordance with the requirements of this Agreement; and
 - 12.4.3 when the additional work is completed, the process under clause 12 must be carried out again.

13. AFTER PRACTICAL COMPLETION

- 13.1 As soon as practicable and in any event within sixty (60) days after the Actual Practical Completion Date, the Developer must provide the Council with:
- 13.1.1 a copy of all certificates, licences, permits, consents or approvals required for the Works;

13.1.2 where the Engineering Plans and Specifications required tests or inspections to be carried out before Practical Completion of the Works was achieved, copies of the results of those tests or inspections;

13.1.3 as constructed drawings in 'AutoCAD' and 'pdf' electronic format, operating and maintenance manuals and all other documents relevant to the use, operation or maintenance of the Works; and

13.1.4 all other documents as this Agreement may require the Developer to provide to the Council.

14. DEFECTS WARRANTY

14.1 The Developer must rectify and make good any defects or omissions to the Works arising from faulty materials and/or workmanship during the Defects Warranty Period ("the Rectification Work").

14.2 If the defect or omission is known to the Developer on the Actual Practical Completion Date, the Developer must complete the Rectification Work as soon as practicable and in any event within sixty (60) days of the Actual Practical Completion Date.

14.3 If the defect or omission only becomes known to the Developer during the Defects Warranty Period, the Developer must complete the Rectification Work as soon as practicable and in any event within sixty (60) days of knowing of, or receiving notice of, the defect or omission.

14.4 The Developer must notify the Council within two (2) Business Days of its completion of any Rectification Work.

14.5 If during the Defects Warranty Period the Council forms the view that a defect or omission in the Works for which the Developer is responsible poses a material danger to the safety or health of any member of the public, the Council may direct the Developer to rectify the defect or omission within a reasonable period which may be less than the periods specified in clauses 14.2 and 14.3 .

14.6 A separate Defects Warranty Period of six (6) calendar months commences on the date any Rectification Work is completed and notified to the Council in accordance with clause 14.4.

15. SECURITY

15.1 The Developer must provide the Security to the Council for the due observance of the Developer's obligations under this Agreement under clause 9 and this clause 15. The Developer's liability under this Agreement is not limited to the Security.

15.2 The Security must comprise either:

two (2) unconditional Bank Guarantees for the amounts that are:

15.2.1 90% of the Total Works Cost; and

15.2.2 10% of the Total Works Cost,

with both Bank Guarantees to be noted in favour of the Council and acceptable to the Council in its absolute discretion, and which will pay such amounts in full to the Council on demand, at the Council's election and for any reason whatsoever; or

15.2.3 such other security as is approved by the Council in writing (which approval may be withheld by the Council in its absolute discretion).

15.3 The Council may have recourse to the Security to discharge or partially discharge any liability or potential liability of the Developer to the Council as a result of the failure of the Developer to perform any of the Developer's obligations under this Agreement with respect to the Works or the Rectification Works.

15.4 In the event of a breach by the Developer of the Developer's obligations under this Agreement with respect to the Works or the Rectification Works, the Council may have recourse to the Security at any time without reference or notice to the Developer.

15.5 The Council must return the Bank Guarantee noted in clause 15.2.1 to the Developer (or otherwise return 90% of the value of any other Security approved by the Council in lieu of the Bank Guarantee) within ten (10) Business Days of the Actual Practical Completion Date.

15.6 The Council must return the remaining Security (if any) to the Developer upon the expiration of the Defects Warranty Period, as extended from time to time pursuant to clause 14.6 above, or such earlier date as the Council in its absolute discretion may determine.

15.7 The Council must return the Security to the Developer if this Agreement is terminated in accordance with clause 4.4 above.

16. PERFORMANCE OF THE WORKS BY THE COUNCIL

16.1 If:

16.1.1 on the Practical Completion Date, the Developer has not achieved Practical Completion of the Works; and

16.1.2 the Council notifies the Developer that it intends to complete the relevant Works itself, and if such Works are not completed within a reasonable period following the notice (being not less than sixty (60) days following the notice); and

16.1.3 Practical Completion of the relevant Works has still not been achieved by the date for completion describe in the Council's notice,

then without further notice to the Developer, the Council may:

16.1.4 complete the Works to the exclusion of the Developer and for that purpose take possession of any such of the following as may be reasonably required:

- (a) any materials, plant or equipment on the land the subject of the Works as are under the control of or owned by the Developer and that are required for completing the Works;
- (b) any approval, consent, certificate, authorisation, permit or licence from any person held by or for the benefit of the Developer in relation to the Works; and
- (c) the Engineering Plans and Specifications, and all other plans, drawings and specifications for the Works.

16.1.5 The Council must, as soon as reasonably practicable, return anything taken pursuant to clause 16.1.4 which is surplus to the Council's requirements to achieve Practical Completion of the Works.

17. PERFORMANCE OF DEFECTS RECTIFICATION BY COUNCIL

17.1 If the Developer fails to substantially commence and then diligently complete any Rectification Works pursuant to clauses 14.1, 14.2 or 14.3 (as the case may be), then the Council may without notice to the Developer, cause the Rectification Works to be undertaken.

18. RECOVERY OF PERFORMANCE COSTS

18.1 If the Council carries out any work in exercise of its rights pursuant to clauses 16.1.4 or 16.1.5 ("the Council's Works"):

18.1.1 the Council must use reasonable endeavours to minimise the costs and expenses incurred in undertaking the Council's Works;

18.1.2 the Council must keep commercially reasonable records of the Council's Works and the costs and expenses incurred in undertaking the Council's Works and must allow the Developer to inspect and take copies of those records at any time during the Council's business hours upon reasonable notice;

18.1.3 within sixty (60) days after completion of the Council's Works, the Council must notify the Developer of the costs and expenses incurred by the Council in undertaking the Council's Works; and

18.1.4 the Council may recover from the Developer its reasonable costs and expenses incurred in undertaking the Council's Works by issuing a tax invoice to the Developer for payment within thirty (30) days; or by recourse to the Security (or a combination of both, as the Council sees fit).

18.2 For the purposes of clause 18.1, the Council's costs and expenses include (but are not limited to):

18.2.1 where any of the Council's employees carry out or manage work, the hourly rates customarily charged by the Council to third parties;

18.2.2 where any of the Council's plant or equipment is used for the works, the rates customarily charged by the Council to third parties for such plant or equipment; and

18.2.3 where the Council supplies any materials for the work, the cost to the Council in procuring and/or supplying those materials.

18.3 For the sake of clarification, GST input tax credits allowable to the Council for its costs and expenses will be deducted from any costs and expenses recovered by the Council from the Developer pursuant to clause 18.1 above.

18.4 If the Council's tax invoice issued under clause 18.1.4 is not paid within thirty (30) days, the Council may recover from the Developer interest on the amount unpaid calculated at a rate of 12% per annum on and from the date the amount was due and payable up to and including the date the invoice amount is paid.

19. RECORDS

19.1 At all times up to the Actual Practical Completion Date and for at least twelve (12) calendar months thereafter, the Developer must keep or cause to be kept commercially reasonable records regarding the undertaking of the Works and of any Rectification Work. At any time during that period, the Council may inspect and take extracts from those records wherever kept.

20. REPORTS

20.1 On the same day as occurs or, at the very latest, on the next Business Day, the Developer must report to the Council (in writing):

20.1.1 any material complaint by a member of the public about the undertaking of the Maintenance and/or the Works or any Rectification Work;

20.1.2 any theft or material damage to property in carrying out the Maintenance and/or Works or any Rectification Work, whether covered by insurance or not;

20.1.3 any serious or material environmental harm arising from the Maintenance and/or the Works or any Rectification Work which must be reported under the *Environment Protection Act 1993*; and

20.1.4 any material variation, suspension, revocation or expiry without renewal of the insurance required to be held by the Developer under this Agreement.

20.2 The Developer must, within 48 hours of a request being made, provide to the Council reasonable details of any matter reported under clause 20.1.

21. COUNCIL'S INSURANCE

21.1 If by reason of the Developer's default under this Agreement or any negligent act or omission of the Developer in undertaking the Maintenance and/or the Works and/or any Rectification Work, the Council makes a claim under the Local Government Association Mutual Liability Scheme or under any insurance policy

held by the Council, the Developer must pay any excess or deductible for that claim.

22. INDEMNITY AND LIABILITY

22.1 As a continuing obligation, the Developer indemnifies and holds harmless the Council against all losses damages costs and expenses suffered or incurred by the Council:

22.1.1 which are caused by or arising out of any execution, rectification or maintenance by the Developer of the Maintenance and/or the Works or any Rectification Work or the state or condition of those works (where such state or condition arises out of faulty or negligent design, materials and/or workmanship);

22.1.2 in respect of all actions, proceedings, claims and demands which may be brought or made against the Council in respect of the death of or any injury to any person or any loss of or damage to any property caused by or arising out of:

- (a) any negligent act or omission of the Developer on the Land or the Adjacent Land;
- (b) faulty design, materials and/or workmanship in the execution of the Maintenance and/or the Works or any Rectification Work;
- (c) the state or condition of the Maintenance and/or the Works or any Rectification Work or any part thereof (where such state or condition arises out of faulty design, material and/or workmanship); or
- (d) the Developer's failure to observe or perform its obligations under this Agreement.

22.2 A recommendation, approval, consent or inspection under this Agreement by the Council:

22.2.1 does not create or give rise to any liability to the Developer on the part of the Council;

22.2.2 is not an assumption of a duty of care, nor implies the exercise by the Council or any person acting on its behalf or for whom the Council is responsible, any care or skill; and

22.2.3 does not relieve the Developer from its liabilities or obligations under this Agreement.

22.3 The Developer's obligations and liabilities under this Agreement are in no way limited or restricted by the Developer obtaining and effecting insurance as required by this Agreement, or engaging contractors to carry out the Maintenance and/or the Works or any portion of the Maintenance and/or the Works or any Rectification Work.

23. ABOUT THE COUNCIL

23.1 The Council makes no guarantee that this Agreement, nor any written communication under this Agreement will be kept confidential in that the Council makes no guarantee that this Agreement nor any written communications thereof:

23.1.1 will qualify as an exempt document under the *Freedom of Information Act 1991*; or

23.1.2 if recorded in minutes of the Council kept under the *Local Government Act 1999* would be prevented from being made publicly available under that Act.

23.2 The Council enters into this Agreement as a council intending to act under section 33 of the Act and not in any other capacity under the Act or otherwise. This Agreement does not preclude or pre-empt the exercise by the Council of any other regulatory or statutory power or function.

24. NOTICES AND COMMUNICATION

24.1 Wherever practicable, written communications under this Agreement must be by email or, failing that, by post.

24.2 To be effective, a notice under this Agreement must:

24.2.1 be in writing;

24.2.2 in the case of a notice issued by the Council, be signed by an authorised officer of the Council;

24.2.3 in the case of a notice issued by the Developer, be signed by a person authorised by the Developer; and

24.2.4 be hand delivered or sent by pre-paid post or email to the recipient's last known address.

24.3 A notice is deemed to be received:

24.3.1 if sent by email, upon delivery provided no notification of a failed delivery is received by the sender;

24.3.2 if hand delivered, upon delivery;

24.3.3 if sent by pre-paid post, two (2) Business Days after posting;

24.3.4 however, if the notice is deemed to be received on a day that is not a Business Day or after 5.00 pm on any day, the notice is deemed to be received at 9.00 am on the next Business Day.

24.4 A notice by the Council stating the amount of money owing or payable to it or any other matter is sufficient evidence of that matter unless proved incorrect.

25. **GOODS AND SERVICES TAX**

25.1 In this Agreement an expression defined in the *A New Tax System (Goods and Service Tax) Act 1999 (Cth)* has the meaning given to it in that Act.

25.2 If a party makes a supply under or in connection with this Agreement in respect of which GST is payable, the consideration for the supply is increased by an amount equal to the GST payable by the supplier on the supply.

25.3 A party need not make a payment for a taxable supply under or in connection with this Agreement until it receives a tax invoice for the supply.

26. **COSTS OF THIS AGREEMENT**

26.1 The Developer will bear its own costs and the Council's costs (including legal costs) of and incidental to the preparation of this Agreement.

27. **SURVIVAL OF OBLIGATIONS**

27.1 The Developer's obligations under this Agreement survive any future transfer of the Land or any portion of it to any third party unless the Developer firstly secures:

27.1.1 the third party to enter into a binding agreement with the Council supported by adequate security on the same or substantially similar terms as set out in this Agreement; and

27.1.2 the written consent of the Council to the release of the Developer's obligations under this Agreement.

28. **DISPUTE RESOLUTION**

28.1 A party at any time may notify the other party of a dispute concerning any matter relating to or arising out of this Agreement ("the Dispute") and require that it be resolved in accordance with this Agreement ("Notice of Dispute").

28.2 The Notice of Dispute must:

28.2.1 be in writing;

28.2.2 identify the subject matter of the dispute;

28.2.3 nominate the person who will have authority to settle the dispute;

28.2.4 have annexed to it copies of all relevant correspondence and background information relevant to the dispute; and

28.2.5 contain particulars of the quantification of any claim in relation to the dispute.

28.3 The parties must use their best endeavours to settle the dispute within twenty (20) Business Days after the date of the issue of the Notice of Dispute, or such further period as the parties agree.

28.4 If the Dispute is not resolved under clause 28.3, it will be mediated in accordance with the Australian Commercial Disputes Centre Guidelines for Commercial Mediation (“the Guidelines”) current at the date that the Notice of Dispute was issued. Where there is any inconsistency between the Guidelines and this Agreement, this Agreement prevails.

29. MISCELLANEOUS

29.1 Where a clause or part of a clause in this Agreement would, but for this clause, be invalid, void or unenforceable:

29.1.1 the clause or part of the clause shall be read down to the extent necessary to avoid that result; or

29.1.2 where the clause or part of the clause cannot be read down, such clause or part of the clause will be severed from this Agreement and the remainder of the Agreement shall continue in full force, unless this would result in a material change to the intended effect of the Agreement.

29.2 No failure or delay by a party to exercise any right or remedy under this Agreement will operate as a waiver nor will any singular or partial exercise of any right or remedy under this Agreement preclude any further exercise of that right or remedy or the exercise of any other right or remedy.

29.3 If a party accepts or waives any breach of this Agreement by the other party, that acceptance or waiver cannot be taken as an acceptance or waiver of any future breach of the same obligation or of any other obligation under this Agreement.

29.4 This Agreement is governed by the laws of South Australia and any legal action relating to it must be brought in the courts of that state.

29.5 A party must not assign or otherwise deal with this Agreement or any right under it without the written consent of the other party.

29.6 This Agreement is the whole agreement between the parties in relation to the matters contained within it. This Agreement may only be varied by a supplementary agreement executed by the Council and the Developer.

30. COUNTERPARTS

30.1 This Agreement may be executed in any number of counterparts which together will constitute one instrument. A party may execute this Agreement by signing any counterpart.

EXECUTED by the **ADELAIDE PLAINS COUNCIL**

The **Common Seal** of the **Adelaide Plains Council** was affixed in accordance with the *Local Government Act 1999* in the presence of:

.....
James Miller
Chief Executive Officer

.....
Mark Wasley
Mayor

.....
Date

Annexure 1

Staging Plans

Annexure 2

Traffic Impact Assessment Report prepared by Tonkin 7 July 2020

Annexure 3

Letter from MasterPlan dated 20 August 2020

Annexure 4

The Works

THE WORKS

In accordance with this Agreement the Developer must undertake the following:

The road infrastructure shall be designed and constructed in accordance with Austroads “Guide to Road Design” and any relevant Acts, Regulations and Australian Standards.

1. Engineering plans will be developed with the following minimum standard infrastructure, to the satisfaction of Council and subject to the approval of Council prior to Works commencing
2. The portion of Wasleys Road (between the site entrance of the Land and Barabba Road) to be upgraded to be designed with minimum standards of:
 - 2.1 11 metre wide pavement – Minimum 300mm thick PM2/40 rubble compacted to 95% MMDD
 - 2.2 8 metre wide 14/7 two-coat spray seal
 - 2.3 2 way minimum 3% cross fall from centre line
 - 2.4 metre wide table drain either side and road evenly graded towards disposal site to be confirmed through engineering plans
3. The portion of Barabba Road (Wasleys Road to Redbanks Road) to be upgraded to be designed with minimum standards of:
 - 3.1 11 metre wide pavement – Minimum 300mm thick PM2/40 rubble compacted to 95% MMDD
 - 3.2 8 metre wide 14/7 two-coat spray seal
 - 3.3 2 way minimum 3% cross fall from centre line
 - 3.4 1 metre wide table drain either side and road evenly graded towards disposal site to be confirmed through engineering plans
4. The intersection of Wasleys Road and Barabba Road to be upgraded to be designed with minimum standards of:
 - 4.1 Pavement – Base course – Minimum 300mm thick PM2/40 rubble compacted to 95% MMDD, and 50mm AC10 or an alternative finish as mutually agreed between the Council and the Developer
 - 4.2 Upgrade to accommodate for all movements in a north, south, east and west direction.
5. The intersection of Wasleys Road and site entrance to Land to be upgraded to be designed with minimum standards of:
 - 5.1 Pavement – Base course – Minimum 300mm thick PM2/20 rubble compacted to 95% MMDD, and 50mm AC10
 - 5.2 Upgrade to accommodate for all movements in a west direction.