



Performance Bond and Licence Deed

BACKGROUND

This form of deed is used for the provision of a Performance Bond to Council in relation to Public (Municipal) Works to be constructed on land that is owned or occupied by Council or on privately owned or occupied land.

The Performance Bond is to be provided to Council by way of a Bank Guarantee unless Council approves its provision in cash.

Deed Particulars

Applicant

Insert name of the applicant. Include ACN if a company.

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Applicant's Address & Email

Insert address for service of notices on the Applicant.

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Land

Insert details of the land on which the Infrastructure Works are to occur.

Lot	Plan	Address
Further particulars		

Development Permit

Insert details of the development permit requiring construction of the Infrastructure Works.

<p><i>Specify conditions of the permit outlining the Infrastructure Works that are to be carried out on the Land. Attach page if insufficient space.</i></p>	Type of development permit	<input type="checkbox"/> Reconfiguration of a lot <input type="checkbox"/> Operational works <input type="checkbox"/> Other
	Council application no.	
	Date of decision notice	
	Conditions	

Completion Deadline

Insert the deadline for completion of the Infrastructure Works.

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Bond Amount

Insert the amount of the performance bond being provided.

\$

Deed Particulars

How Performance Bond is provided

Insert how the Performance Bond is being provided.

<input type="checkbox"/> Cash	<input type="checkbox"/> Bank Guarantee – details below	
Issuing bank	Date of Bank Guarantee	Amount of Bank Guarantee
		\$

Special Conditions

Insert any special conditions, such as special conditions relating to the rehabilitation of the Land.

Is public liability insurance required?

<input type="checkbox"/> Yes
<input type="checkbox"/> No

Deed Conditions

1. Definitions

Accept on Maintenance – see clause 10.1.2(1) of PSP 3.

Applicant – see the Deed Particulars.

Bank Guarantee – a bank guarantee complying with clause 10.1.4(1)(j) of PSP 3 or which is accepted by Council as security for the Secured Obligations.

Bond Amount – see the Deed Particulars.

Claims – liabilities, losses, penalties, payments, costs, charges, expenses and claims arising directly or indirectly from any cause including in negligence, trespass, some other tort, contract, under statute or otherwise and whether direct, indirect or consequential.

Completion Deadline – the date specified as such in the Deed Particulars, or a later date agreed or specified by Council in its discretion by notice in writing to the Applicant.

Conditions – the conditions of the Development Permit specified in the Deed Particulars.

Council – Ipswich City Council.

Development Permit – the development permit specified in the Deed Particulars.

Insolvency Event – the following:

- (a) if the Applicant or a person comprising the Applicant is a company – that company becoming an externally-administered body corporate (as defined by the *Corporations Act 2001*), even if before the Completion Deadline; or
- (b) if the Applicant or a person comprising the Applicant is an individual – that individual becoming an insolvent under administration (as defined by the *Corporations Act 2001*), even if before the Completion Deadline.

Infrastructure Works – the following:

- (a) the Public (Municipal) Works required to be carried out on the Land under the Conditions; and
- (b) all works necessary or reasonably required by Council to reinstate, restore or make good any damage done to the Land in the course of or in respect of those Public (Municipal) Works, including any such works required under the Special Conditions.

Performance Bond – the following:

- (a) a Bank Guarantee given to Council for the Bond Amount or any part of it as security under this

Deed Conditions

- deed (whether before or after this deed is entered into); and
- (b) an amount of cash paid to Council in the amount of the Bond Amount or any part of it as security under this deed (whether before or after this deed is entered into); and
 - (c) a Bank Guarantee or cash referred to in paragraph 5.2(b).

PPSA – the *Personal Property Securities Act 2009*.

PSP 3 – Council's *Planning Scheme Policy 3 – General Works*.

Public (Municipal) Works – see clause 10.1.2(1) of PSP 3.

Rectification Charges – the following:

- (a) the costs incurred by Council in carrying out or procuring the carrying out of any Rectification Works and any additional amount certified by Council as the fair estimated cost of carrying out or arranging the Rectification Works or dealing with the Applicant's failure to comply with a Secured Obligation (including Council's charges for supervision, interest, administration charges, legal costs and charges on a full indemnity basis, overheads and any reasonable contingency sum determined by Council); and
- (b) the amount of any Claim to which the indemnity in subclause 2.6 applies.

Rectification Works – the following (including physical works, site works, design work and professional services relating to any of the following):

- (a) any works necessary to remedy a failure by the Applicant to comply with the Secured Obligations or a breach of the Secured Obligations; and
- (b) any alteration or rectification of any works done in respect of or in purported compliance with the Secured Obligations; and
- (c) any other works that Council considers appropriate to mitigate the effects of any works done in respect of or in purported compliance with the Secured Obligations; and
- (d) any works carried out or commissioned by Council in order to fulfil the Secured Obligations after an Insolvency Event; and
- (e) testing of any works described above; and
- (f) the compilation of "as constructed" information with respect to any works described above.

Release Conditions – the Applicant has applied in writing to Council for the return of the Performance Bond and the Secured Obligations have been satisfied.

Secured Obligations – the Applicant's obligations under subclauses 2.6 and 3.1.

Special Conditions – see the Deed Particulars.

2. Licence to enter the Land

- 2.1 If Council owns or is in possession of the Land, Council (subject to subclause 2.2) grants to the Applicant a licence to:
- (a) enter on the Land and stay there for as long as is reasonably necessary for the purposes of:
 - (i) carrying out the Infrastructure Works; and
 - (ii) carrying out any inspection, testing or investigations associated with the carrying out of, or preparations for the carrying out of, the Infrastructure Works; and
 - (iii) satisfying the Secured Obligations; and
 - (b) bring onto, and use and store on, the Land any equipment, material or things connected with an entry on the Land for a purpose specified in paragraph (a); and
 - (c) remove from the Land any soil or other material in respect of any inspection, testing or investigations or the carrying out of Rectification Works and dispose of the soil or material in the way Council decides without being liable to account to the Applicant; and

Deed Conditions

- (d) use the resources of the Land for the purpose of carrying out any inspection, testing or investigations or Rectification Works.
- 2.2 Before the licence under subclause 2.1 may be exercised:
- (a) unless the answer to the question "Is public liability insurance required?" in the Deed Particulars is "No", the Applicant must give Council evidence satisfactory to Council that the Applicant holds public liability insurance cover of at least \$20,000,000 per claim on terms satisfactory to Council (including, if required by Council, that Council is noted as an interested party on the insurance); and
 - (b) Council must hold the Performance Bond.
- 2.3 The Applicant may grant sublicences to other people (such as its employees, agents, contractors and subcontractors) to do any or all of the things specified in subclause 2.1 while the licence under subclause 2.1 may be exercised.
- 2.4 The licence under subclause 2.1 and the Applicant's right under subclause 2.3 expire on the Completion Deadline.
- 2.5 The Applicant releases Council from all Claims relating to the Applicant and its employees, agents, contractors, subcontractors and sublicensees entering the Land, being on the Land, doing anything on the Land, doing anything permitted by the licence under subclause 2.1 or a sublicence under subclause 2.3 or breaching this deed, except to the extent that the Claims arise from Council's negligence.
- 2.6 The Applicant indemnifies Council against all Claims relating to the Applicant and its employees, agents, contractors, subcontractors and sublicensees entering the Land, being on the Land, doing anything on the Land, doing anything permitted by the licence under subclause 2.1 or a sublicence under subclause 2.3 or breaching this deed, except to the extent that the Claims arise from Council's negligence.

3. Applicant's obligations relating to the Infrastructure Works

- 3.1 The Applicant must ensure that:
- (a) if Council does not own and is not in possession of the Land, the Applicant procures the consent of the owner and occupier of the Land before entering the Land or doing any work on the Land; and
 - (b) the Infrastructure Works are completed and Accepted on Maintenance by the Completion Deadline; and
 - (c) the Applicant promptly rectifies any latent defects or design defects in the Infrastructure Works of which Council gives notice to the Applicant; and
 - (d) no damage is done to any Council land or any other asset owned by or under the control of Council (including public roads) by the Applicant or in respect of the Infrastructure Works and any such damage is promptly rectified.
- 3.2 The Applicant has given, or will give, the Performance Bond to Council to secure compliance with the Secured Obligations.

4. When Council may use the Performance Bond

- 4.1 Council may exercise the enforcement powers under subclause 4.2 (and may do so more than once) if:
- (a) a Secured Obligation is not satisfied; or
 - (b) an Insolvency Event occurs.
- 4.2 The enforcement powers that Council may exercise are:
- (a) to the extent that the Performance Bond is a Bank Guarantee:
 - (i) to call on the issuer of the Bank Guarantee to pay all or part of the Bond Amount to

Deed Conditions

- Council to satisfy the Rectification Charges; or
- (ii) to call on the issuer of the Bank Guarantee to pay all or part of the Bond Amount to Council, to be held by Council under this deed as if the Performance Bond was cash; and
 - (b) to the extent that the Performance Bond is cash – to apply the cash to satisfy the Rectification Charges.
- 4.3 If a Secured Obligation is not satisfied and the amount of the Rectification Charges exceeds the amount of the Rectification Charges satisfied by Council using the Performance Bond, the Applicant must pay the difference to Council as a debt.
- 4.4 Council has and may exercise the rights given in subclauses 4.1, 4.2 and 4.3 regardless of whether the Applicant:
- (a) is bound by the Conditions or ceases to be bound by the Conditions; or
 - (b) is in breach of a Secured Obligation or not.

5. Reinstatement of Performance Bond

- 5.1 If Council uses all or any part of the Performance Bond to satisfy Rectification Charges under subclause 4.2, Council may give notice to the Applicant requiring the Applicant to reinstate the Performance Bond by doing one or more of the following things specified in the notice:
- (a) giving Council a Bank Guarantee for the difference between the Bond Amount and the amount of, or secured by, the Performance Bond then being held by Council;
 - (b) paying to Council in cash the difference between the Bond Amount and the amount of, or secured by, the Performance Bond then being held by Council.
- 5.2 If Council gives the Applicant a notice under subclause 5.1, the Applicant must comply with the notice within two business days (that is, days other than Saturdays, Sundays and public and special holidays in Ipswich). If the Applicant:
- (a) does not comply with the notice within that time, Council may recover from the Applicant, as a debt, the difference between the Bond Amount and the amount of, or secured by, the Performance Bond then being held by Council; and
 - (b) complies with the notice, the Bank Guarantee given to Council or the cash paid to Council is taken to be part of the Performance Bond for the purposes of this deed.

6. Return of Performance Bond

- 6.1 To the extent that the Performance Bond is a Bank Guarantee and has been given to Council, Council will give the Bank Guarantee back to the Applicant if and to the extent that:
- (a) the Release Conditions have been satisfied and 1 month has elapsed since they were satisfied; and
 - (b) Council has not used the Performance Bond under this deed; and
 - (c) Council has not returned the Bank Guarantee to its issuer when using the Performance Bond under this deed.
- 6.2 To the extent that the Performance Bond is cash that has been paid to Council, Council will refund the Performance Bond to the Applicant if and to the extent that:
- (a) the Release Conditions have been satisfied and 1 month has elapsed since they were satisfied; and
 - (b) Council has not used the Performance Bond under this deed.
- 6.3 To remove any doubt, Council may still use the Performance Bond (if it is otherwise entitled to do so under this deed) during the period specified in paragraph 6.1(a) or 6.2(a).
- 6.4 To the extent that the Performance Bond is cash, including cash from calling on a Bank Guarantee, Council may keep any interest that it earns on the Performance Bond.

Deed Conditions

7. PPSA

- 7.1 This clause applies only if and to the extent that the Performance Bond is provided to Council in cash.
- 7.2 The Applicant agrees with Council to contract out of sections 95 (to the extent it would require Council to give a notice to the Applicant), 96, 117, 118 (to the extent it allows Council to give a notice to the Applicant), 120, 121(4), 123, 125, 126, 128, 129, 130 (to the extent it allows Council to give a notice to the Applicant), 132(3)(d), 132(4), 134(1), 135, 142, 143 and 157(1) of the PPSA so that those sections will not apply in respect of the Security Bond or any security interest in the Performance Bond held by Council.
- 7.3 Council may, on its own initiative and at any time, lodge and register a financing statement or a financing change statement under the PPSA in relation to any security interest created by this deed.

8. Other provisions

- 8.1 If there are any Special Conditions which are inconsistent with the Deed Conditions, the Special Conditions prevail to the extent of the inconsistency.
- 8.2 Council's rights and powers under this deed are cumulative with any other rights and powers it has. Council may exercise its rights and powers under this deed and its other rights and powers all at the same time or at different times and may exercise them in any order Council chooses without Council losing the ability to exercise them later.
- 8.3 Council will not be taken to have waived a right or power in the absence of an express written waiver signed by Council's chief executive officer or a delegate of the chief executive officer who is acting within the scope of his or her delegation, and then only to the extent expressly provided in the written waiver.
- 8.4 Council does not lose the ability to exercise a right or power as a result of any delay, information given to the Applicant or another person (even if incorrect) or other act, omission or conduct of Council other than a waiver under subclause 8.3.
- 8.5 A provision of this deed continues to be enforceable by Council even after the Infrastructure Works are Accepted on Maintenance and Council has given a Bank Guarantee or Performance Bond back to the Applicant, unless that would produce an absurd or obviously unintended outcome.
- 8.6 A variation of this deed is binding on Council only if it has been put in writing and signed by Council's chief executive officer or a delegate of the chief executive officer who is acting within the scope of his or her delegation. Any verbal, written or other statement, representation, agreement or understanding that existed before this deed was entered into and that would otherwise prevent Council from enforcing this deed according to its express terms is cancelled and has no further effect.
- 8.7 Headings in the Deed Conditions are for reference purposes only and must be ignored in the interpretation of this deed.
- 8.8 If the Applicant comprises two or more persons, this deed binds them jointly and severally.
- 8.9 If Council is required or permitted to give the Applicant a notice under or relating to this deed:
 - (a) Council may do so:
 - (i) by delivering or sending the notice by any form of prepaid post to the Applicant at the address shown for them in the Deed Particulars; or
 - (ii) by using a method provided by section 39 of the *Acts Interpretation Act 1954* or, if the Applicant is a company, section 109X of the *Corporations Act 2001*; or
 - (iii) if the Applicant is the owner of any land in Council's local government area, by using a method that Council could use to give them a rate notice under the *Local Government Act 2009*; and
 - (b) if the Applicant comprises two or more persons, Council need only give the notice to one of those persons; and
 - (c) a notice given by any form of prepaid post is taken to have been served when it would be delivered in the ordinary course of the post unless the contrary is proven.

Deed Conditions

- 8.10 This document is executed by the Applicant as a deed. It is taken to have been sealed and delivered by the Applicant on the date on which it is executed by it. Council may enforce this deed:
- as a deed regardless of any delay by Council in executing it; or
 - as a deed poll even if Council has not executed it at all.

Execution by Applicant (if a company)

**Executed as a deed by
the Applicant under
section 127 of the
Corporations Act 2001**

If the Applicant has only one director who is also its company secretary, and has only one director and no company secretary, that director must sign

Otherwise, the signatures of two officers (each of whom must be a director or company secretary) is required

Signature of
director/company
secretary

Name of
director/company
secretary signing above

Signature of
director/company
secretary

Name of
director/company
secretary signing above

Date signed

Execution by Applicant (if an individual)

**Signed, sealed and
delivered by the
Applicant**

Signature of Applicant

Name of Applicant
signing above

Signature of witness

Name of witness signing
above

Date signed

Execution by Applicant (if an individual)

Signed, sealed and delivered by the Applicant

Signature of Applicant

Name of Applicant signing above

Signature of witness

Name of witness signing above

Date signed

Execution by Council

Signed, sealed and delivered for Council as duly authorised delegate under section 238 of the Local Government Regulations 2012

Signature of Council chief executive officer/delegate

Name/position of person signing above

Signature of witness

Name of witness signing above

Date signed

Information Privacy Collection Notice

Ipswich City Council is collecting your personal information in accordance with the *Integrated Planning Act 1997*, *Sustainable Planning Act 2009* or *Planning Act 2016* so that we can process your application and perform our responsibilities under the planning legislation. We will not disclose your personal information outside of Council unless we are required by law or you have given your consent. However, in order to perform the above functions we may need to disclose your personal information to the Chief Executive who may in turn make this information available to others in accordance with the Regulation. By complete and signing this form and returning it to Council, we will consider that you have given us your consent to manage your personal information in the manner described in Council's Privacy Statement, Personal Information Digest and this collection notice.