

Deed of Planning Agreement

between

Muswellbrook Shire Council

and

NQ Asphalt Pty Ltd

ABN 99 625 248 179

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Annexure A – Development Contributions

Annexure B – Dispute Resolution Procedures

This Deed of Planning Agreement made on between

1 Muswellbrook Shire Council
of 157 Maitland Street, Muswellbrook NSW 2333
(Council) of the first part,

and

2 NQ Asphalt Pty Ltd
ABN 99 625 248 179
of 36 Burleigh Street, Toronto NSW 2283
(NQ) of the other part

Recitals

- A. NQ has made a Development Application to the Council for Development Consent to carry out the Development on the Land.
- B. The Development Application was accompanied by an offer by NQ to enter into this agreement pursuant to Subdivision 2 of Division 7.1 of Part 7 of the Environmental Planning & Assessment Act 1979 to make Development Contributions towards a public purpose.
- C. The Council has approved the development application with a condition requiring that the parties enter into this agreement prior to the issue of an occupation certificate.

Operative Provisions

1 Definitions and interpretation

1.1 Definitions

In this deed unless the context admits otherwise:

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

Business Day means a day on which banks are open for business in Sydney excluding a Saturday, Sunday or public holiday;

Construction Certificate means a construction certificate under Part 6 of the Act in respect of work relating to any or all of the matters referred to in paragraph (a) of the definition of Development;

Development means the construction and operation of a General Industry (Asphalt Plant) on the Land;

Development Application has the same meaning as in the Act and relates to the Development referred to in DA 2019-50;

Development Consent has the same meaning as in the Act and relates to the Development Application;

Development Contributions means the contributions set out in **Annexure A**;

Dispute Resolution Procedures means the procedures set out in **Annexure B**;

Explanatory Note means the note exhibited with a copy of this Deed as prepared in accordance with cl.25E of the *Environmental Planning and Assessment Regulation 2000*.

Governmental Authority means any government or any governmental, semi-governmental, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity (whether local, state or federal);

GST has the same meaning as in the GST Law;

GST Law has the same meaning given to that term in A New Tax System (Goods and Services Tax) Act 1999 (Cth).

Land means Lot 14 DP 1119843, 43-45 Enterprise Crescent, Muswellbrook;

Occupation Certificate has the same meaning as in the EP&A Act;

1.2 Interpretation

In this agreement, headings and bold type are for convenience only and do not affect the interpretation of this agreement and, unless the context otherwise requires:

- (a) words importing the singular include the plural and vice versa;
- (b) words importing a gender include any gender;
- (c) other parts of speech and grammatical forms of a word or phrase defined in this agreement have a corresponding meaning;
- (d) an expression importing a natural person includes any company, partnership, joint venture, association, corporation or other body corporate and any Governmental Authority;
- (e) a reference to any thing (including any right) includes a part of that thing but nothing in this clause 1.2(e) implies that performance of part of an obligation constitutes performance of the obligation;
- (f) a reference to a clause, party, annexure, exhibit or schedule is a reference to a clause of, and a party, annexure, exhibit and schedule to, this agreement and a reference to this agreement includes any annexure, exhibit and schedule;
- (g) a reference to a statute, regulation, proclamation, ordinance or by-law includes all statutes, regulations, proclamations, ordinances or by-laws amending, consolidating or replacing it, whether passed by the same or another Governmental Authority with legal power to do so, and a

reference to a statute includes all regulations, proclamations, ordinances and by-laws issued under that statute;

- (h) a reference to a document includes all amendments or supplements to, or replacements or novations of, that document;
- (i) a reference to a party to a document includes that party's successors and permitted assigns;
- (j) a covenant or agreement on the part of 2 or more persons binds them severally;
- (k) a reference to an agreement other than this agreement includes an undertaking, agreement, agreement or legally enforceable arrangement or understanding whether or not in writing;
- (l) a reference to an asset includes all property of any nature, including a business, and all rights, revenues and benefits;
- (m) a reference to a document includes any agreement in writing, or any certificate, notice, instrument or other document of any kind; and
- (n) a reference to liquidation includes official management, appointment of an administrator, compromise, arrangement, merger, amalgamation, reconstruction, winding-up, dissolution, deregistration, assignment for the benefit of creditors, scheme, composition or arrangement with creditors, insolvency, bankruptcy, or any similar procedure or, where applicable, changes in the constitution of any partnership or person, or death.

1.3 Inclusive expressions

Specifying anything in this agreement after the words "includes" or "for example" or similar expressions does not limit what else is included unless there is express wording to the contrary.

1.4 Business Day

Where the day on or by which any thing is to be done is not a Business Day, that thing must be done on or by the next Business Day.

1.5 Contra preferentum

In the interpretation of this deed of agreement no rule of construction shall apply to disadvantage one party on the basis that that party put forward the particular covenant term or provision.

2 Planning agreement under the Act

The parties agree that this agreement is a planning agreement, governed by Subdivision 2 of Division 7.1 of Part 7 of the Act.

3 Application of this agreement

This agreement applies to the Development and the Land.

4 Operation of this agreement

This agreement operates on and from the date it is made except that the obligations of NQ to provide the Development Contributions do not arise to be performed until the date specified in table in Annexure A.

5 Development Contributions to be made under this agreement

- (a) The nature and extent of the provision of Development Contributions to be made under this agreement are set out in Annexure A.
- (b) The times at which the Development Contributions are to be made are set out in Annexure A.

6 Application of s.7.11 and s.7.12 of the Act to the Development

This agreement excludes the application of Sections 7.11 and 7.12 of the Act to the Development.

7 Registration of this agreement

NQ shall do all things reasonably necessary after the date on which this agreement is made to enable the Council to obtain registration of this agreement under section 7.6 of the Act by the Registrar-General such that on registration of this agreement, the Registrar-General will have made an entry in the relevant Folio of the Registrar kept under the Real Property Act 1900 in relation to the Land. To that end, within 20 business days of the date on which the agreement is made, NQ shall deliver to the Council all necessary documents in registrable form to enable the Council to lodge those documents at Land and Property Information at the Department of Lands, Sydney and obtain registration of this agreement.

8 Review of this agreement

The Parties agree that from time to time it may become necessary to review this agreement, but any amendment to this agreement shall only be effective in writing and signed by all Parties and registered under section 7.6 of the Act. If a party requires a review it shall request the other party to participate in a review

and the review shall be undertaken accordingly. Any such review will be conducted in the circumstances and in the manner determined by the parties.

9 Dispute resolution

In the event that the Council and NQ cannot agree in relation to any matter relating to this Agreement then the Council or NQ may give notice and particulars of such matter the subject of the failure to agree to the other and may require that such matter be resolved by the Dispute Resolution Procedures.

10 Notices

- (a) Any notice or other communication including any request, demand, consent or approval, to or by a party to this agreement:
 - (1) must be in legible writing and in English addressed as shown at the commencement of this agreement or as specified to the sender by any party by notice;
 - (2) must be signed by the sender (if a natural person) or an officer or under the common seal of the sender (if a corporation);
 - (3) is regarded as being given by the sender and received by the addressee:
 - (A) if by delivery in person, when delivered to the addressee;
 - (B) if by post, 3 Business Days from and including the date of postage; or
 - (C) if by facsimile transmission, whether or not legibly received, when transmitted to the addressee,but if the delivery or receipt is on a day which is not a Business Day or is after 4pm (addressee's time) it is regarded as received at 9am on the following Business Day; and
 - (4) can be relied upon by the addressee and the addressee is not liable to any other person for any consequences of that reliance if the addressee believes it to be genuine, correct and authorised by the sender.
- (b) A fax transmission is regarded as legible unless the addressee telephones the sender within two hours after transmission is received or regarded as received under clause 1.1(a)(3) and informs the sender that it is not legible.
- (c) In this clause 10, a reference to an addressee includes a reference to an addressee's officers, agents or employees.

11 Approvals and consent

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

12 Assignment and Dealings

- (a) Rights arising out of or under this agreement are not assignable by one party without the prior written consent of the other party.
- (b) A party must not unreasonably withhold its consent.

13 Costs

Each party is to pay its own costs associated with the preparation and registration of this Agreement.

14 Entire agreement

This deed contains everything to which the parties have agreed in relation to the matters it deals with. No Party can rely on an earlier document, the Explanatory Note, anything said or done by another Party, or by an Authorised Officer, agent or employee of that Party, before this deed was executed, except as permitted by law.

15 Further Acts

Each Party must promptly execute all documents and do all things that another Party from time to time reasonably request to affect, perfect or complete this deed and all transactions incidental to it.

16 Governing Law and Jurisdiction

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

17 Joint and individual liability and benefits

Except as otherwise set out in this deed, any agreement, covenant, representation or warranty under this deed by two or more persons binds them

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

18 No fetter

Nothing in this agreement shall be construed as requiring Council to do anything that would cause it to be in breach of any of its obligations at law, and without limitation, nothing shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

19 Representations and warranties

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

20 Severability

If a clause or part of a clause of this agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this agreement, but the rest of this agreement is not affected.

21 Modification

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

22 Waiver

The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another Party. A waiver by a Party is only effective if it is in writing. A written waiver by a party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

23 Goods and Services Tax

- (a) Any reference in this clause to terms defined or used in the A New Tax System (Goods and Services Tax) Act 1999 is, unless the context indicates otherwise, a reference to that term as defined or used in that Act.
- (b) Any amount referred to in this Agreement which is relevant in determining a payment to be made by one of the parties to the other is exclusive of any GST unless indicated otherwise.
- (c) If GST is imposed on a supply made under or in connection with this Agreement then the consideration provided for that supply is increased by the rate at which that GST is imposed. The additional consideration is payable together with the consideration to which it relates at the time of settlement or such other time as the parties agree.
- (d) The supplier must issue a tax invoice to the recipient of the supply at settlement or such other time as the parties agree.
- (e) If one of the parties to this Agreement is entitled to be reimbursed for an expense or outgoing incurred in connection with the Agreement, then the amount of the reimbursement will be net of any input tax credits which may be claimed by the party being reimbursed in relation to that expense or outgoing.

24 Timing and staging of the Development

24.1 Timing of the Development

The periods for the items in the Development Contributions may, by the agreement of the parties each of whom must act reasonably, be extended to facilitate the carrying out and completion of the Development as a whole.

24.2 Staging

The Council also acknowledges that NQ may:

- (a) carry out the Development; and
- (b) perform its obligations under this agreement (including the Works), in stages as NQ considers to be most appropriate.

25 NQ to provide Development Contributions

25.1 Principles

NQ must provide the Development Contributions in accordance with Annexure A.

Executed as a Deed:

Signed sealed and delivered by the parties hereto

NQ Asphalt Pty Ltd
pursuant to s.127 of the Corporations Act 2001



Director

Geoff Cox

Name (please print)

Director/Secretary

Name (please print)

The Common Seal of Muswellbrook Shire Council
Was hereunto affixed pursuant to a resolution of
the Council made on



Mayor

Steven Reynolds

Name (please print)



General Manager

Derek Finnigan

Name (please print)

Annexure A – Development Contributions

NQ shall pay to the Council \$0.11 per tonne of material produced from the Development.

NQ shall provide a record of production from the development with the payment.

The required payment is to be paid to Council on an annual basis on 30 June.

Annexure B – Dispute Resolution Procedures

1 Dispute Resolution Procedure

- 1.1.1 The Council and NQ agree that in the interests of expeditiously resolving any dispute or difference which arises between them under or in connection with this agreement (**dispute**) they will use their best endeavours to resolve the dispute by procuring the General Manager of NQ and the General Manager of the Council to enter into good-faith negotiation within 10 Business Days (or such other period that the parties may agree) of the dispute arising.
- 1.1.2 If the dispute cannot be resolved within the period stipulated in or agreed pursuant to clause 1.1.1, the parties may, subject to clause 1.1.3, submit to the process of adjudication set out in clauses 1.2-1.5.
- 1.1.3 However, nothing in this Annexure B prevents either party seeking final or interlocutory relief from a court in connection with a dispute the subject of this agreement without first having to attempt to negotiate and determine the dispute in accordance with this Annexure B.
- 1.2 Either party may issue a notice of dispute to the other within 14 days of the first occurrence or manifestation of the said dispute or difference or act or omission if the dispute or difference involves an act or omission. The notice is to set out the nature of the dispute or difference and an outline of that party's contentions in respect of the same with such reasonable particularity as is appropriate in the circumstances to allow the other party to understand the matter in dispute and what is being contended for.
- 1.3 Within 7 days of receiving such a notice of dispute, the receiving party shall issue to the other a response, setting out what it believes the nature of the dispute is (if this is different to that set out in the notice of dispute) and an outline of its contentions with such reasonable particularity as is appropriate in the circumstances to allow the party who issued the notice of dispute what the receiving party contends in relation to the dispute.
- 1.4 The General Manager of NQ and the General Manager of the Council may direct that the dispute be resolved by the process of expert determination as set out in subclauses 1.7 and 1.8 below and the dispute is then referred to expert determination. Such a direction is and will be final and binding and not in itself subject to a notice of dispute.
- 1.5 In every other case, the dispute is to be resolved by arbitration pursuant to the provisions of the Commercial Arbitration Act 2010.
- 1.6 Where such dispute fails to be resolved by expert determination, such a determination shall be conducted in accordance with and subject to the Institute of Arbitrators & Mediators Australia Expert Determination Rules and an appropriately qualified expert is to be appointed, subject to the reasonable objection by either party, by the Chairman of the NSW Chapter of the Institute.
- 1.7 In respect of the said Expert Determination Rules, the determination of the dispute by the expert shall, in the absence of any error of law, be final and binding.

- 1.8 Subject to subclause 1.10 below, where such dispute or difference is to be resolved by arbitration, the arbitration shall be conducted in accordance with and subject to the Institute of Arbitrators & Mediators Australia Rules for the Conduct of Commercial Arbitrations with the arbitrator to be appointed, subject to reasonable objection by either party, by the Chairman of the NSW Chapter of the Institute.
- 1.9 In respect of all questions of procedure for any arbitration or expert determination the parties shall participate in the same in good faith and do all and agree to do all things as are appropriate so as to achieve expedition in determination of the issues so referred.

2 Continuing liability

The reference of any dispute for resolution under this agreement will not relieve either party from any liability for the due and punctual performance of that party's duties and obligations under this agreement.

