

## **Deed**

### **Bago Quarry Planning Agreement**

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

**Port Macquarie-Hastings Council**

**Volcanic Resources Pty Ltd**

**Warren James Roche, Inez Marie Roche, Mark Andrew Roche**

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**Developer Name/Position**

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**Developer Name/Position**

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**Warren James Roche**

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**Witness**

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**Inez Marie Roche**

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**Witness**

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**Mark Andrew Roche**

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**Witness**

## **Bago Quarry Planning Agreement**

### **Planning Agreement**

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## **Bago Quarry Planning Agreement**

### **Summary Sheet**

#### **Council:**

**Name:** Port Macquarie-Hastings Council  
**Address:** Cnr Lord & Burrawan Streets Port Macquarie NSW 2444  
**Telephone:** (02) 6581 8111  
**Facsimile:** (02) 6581 8123  
**Email:** council@pmhc.nsw.gov.au  
**Representative:** Vanessa Penfold

#### **Developer:**

**Name:** Volcanic Resources Pty Ltd  
**Address:** 129 Milligans Road, Herons Creek  
**Telephone:** (02) 6585 7139  
**Email:** volcanicresources@bigpond.com  
**Representative:** Mark Roche

#### **Landowner:**

**Name:** Warren James Roche, Inez Marie Roche, Mark Andrew Roche  
**Address:** 129 Milligans Road, Herons Creek  
**Telephone:** (02) 6585 7139  
**Email:** volcanicresources@bigpond.com  
**Representative:** Mark Roche

#### **Land:**

See definition of *Land* in clause 1.1.

**Development:**

See definition of *Development* in clause 1.1.

**Development Contributions:**

See Part 2.

**Application of s94, s94A and s94EF of the Act:**

See clause 8.

**Security:**

See Part 4.

**Registration:**

See clause 27.

**Restriction on dealings:**

See clause 28.

**Dispute Resolution:**

See Part 3.

**Bago Quarry Planning Agreement**

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## **Bago Quarry Planning Agreement**

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

### **Parties**

**Port Macquarie-Hastings Council** ABN 11 236 901 601 of Cnr Lord & Burrawan Streets Port Macquarie NSW 2444 (**Council**)

and

**Volcanic Resources Pty Ltd** ABN 33 060 536 441 of 129 Milligans Road Herons Creek NSW 2443 (**Developer**)

and

**Warren James Roche, Inez Marie Roche, Mark Andrew Roche** of 129 Milligans Road, Herons Creek NSW 2443 (**Landowner**)

### **Background**

- A The Landowner owns the Quarry Land on which Developer operates a quarry pursuant to an existing Development Consent granted on 24 September 1996.
- B The Developer has lodged Development Application DA2014/960 with the Council seeking an increase in the annual extraction rate to above 30,000 tonnes per annum.
- C The Developer has offered to make the Development Contributions provided for in this Deed if the Development Consent is granted for the Development.
- D The Parties have agreed to enter into this Deed for that purpose.

### **Operative provisions**

## **Part 1 - Preliminary**

### **1 Interpretation**

- 1.1 In this Deed the following definitions apply:

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

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

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

**Bago Road Haulage Route** means the land forming the part of Bago Road shown marked in purple on the Haulage Route Map.

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

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

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

**Commencement Date** means the date the Quarry Consent is granted.

**Contract Year** means the period of 12 months commencing on the Commencement Date and each period of 12 months commencing on each anniversary of the Commencement Date during the Term.

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

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

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

**Defects Liability Period** in relation to the Pre-Termination Work, means the period of 1 year commencing on the day immediately after the Pre-Termination Work is completed in accordance with clause 19.5 for the purposes of this Deed.

**Defects Security** means Security in the amount of 10% of the costs to carry out the Pre-Termination Work as determined by the Council acting reasonably.

**Development** means development the subject of the Quarry Consent.

**Development Application** has the same meaning as in the Act.

**Development Consent** has the same meaning as in the Act.

**Development Contribution** means a monetary contribution, the dedication of land free of cost, the carrying out of work, or the provision of any other

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material public benefit, or any combination of them, to be used for, or applied towards a public purpose, but does not include any Security or other benefit provided by a Party to the Council to secure the enforcement of that Party's obligations under this Deed for the purposes of s93F(3)(g) of the Act.

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

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

**Excavated Material** means material excavated and removed from the Land (as measured by the Developer's weighbridge) pursuant to a Development Consent.

**GST** has the same meaning as in the GST Law.

**GST Law** has the same meaning as in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any other Act or regulation relating to the imposition or administration of the GST.

**Haulage Route** means the Bago Road Haulage Route and the Milligans Road Haulage Route.

**Haulage Route Map** means the map at Schedule 1 of this Deed.

**Land** means the Quarry Land and the Haulage Route.

**Maintenance Specification** means the specifications in Schedule 2, as varied from time to time.

**Maintenance Completion Date** means the date that is the later of:

- (a) 6 months after the date of the Council's notice in clause 19.2, and
- (b) the date of the Council's notice in clause 19.5.

**Maintenance Work** means Work to maintain the Milligans Road Haulage Route as described in the Maintenance Specification.

**Milligans Road Haulage Route** means the land forming the part of Milligans Road shown marked in red on the Haulage Route Map being the road reserve between the 'Give Way' yield line at the intersection of Bago Road and Milligans Road and a point 2.1km along Milligans Road heading west from the intersection of Bago Road.

**Party** means a party to this Deed.

**Pre-Termination Works** means the re-sheeting (by laying gravel or bitumen, compacting and regrading) the entire length of the trafficable surface of the Milligans Road Haulage Route, or Work as otherwise agreed between the Parties, to the Council's satisfaction.

**PPI** means the Producer Price Index (Output of the General Construction Industry – Road and Bridge Construction) for New South Wales published by the Australian Bureau of Statistics.

**Quarry** means the extractive industry operating on the Quarry Land pursuant to a Development Consent.

**Quarry Consent** means the Development Consent to Development Application number 2014/960 for the extraction of material from the Quarry Land, as modified from time to time.



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**Quarry Land** means Lot 129 DP 754445, otherwise known as 129 Milligans Road, Herons Creek.

**Rectification Notice** means a notice in writing:

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

**Rectify** means rectify, remedy or correct.

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

**Report** means a report referred to in clause 10.2.

**Reporting Period** means the period of 12 months covered by a Report.

**Security** means a Bank Guarantee indexed in accordance with the PPI from 1 February 2015.

**Term** means the period beginning on the Commencement Date and ending on the Maintenance Completion Date.

**Work** means the physical result of any building, engineering or construction work in, on, over or under land.

1.2 In the interpretation of this Deed, the following provisions apply unless the context otherwise requires:

- 1.2.1 Headings are inserted for convenience only and do not affect the interpretation of this Deed.
- 1.2.2 A reference in this Deed to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- 1.2.3 If the day on which any act, matter or thing is to be done under this Deed is not a business day, the act, matter or thing must be done on the next business day.
- 1.2.4 A reference in this Deed to dollars or \$ means Australian dollars and all amounts payable under this Deed are payable in Australian dollars.
- 1.2.5 A reference in this Deed to a \$ value relating to a Development Contribution is a reference to the value exclusive of GST.
- 1.2.6 A reference in this Deed to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- 1.2.7 A reference in this Deed to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- 1.2.8 A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Deed.
- 1.2.9 An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.

- 1.2.10 Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- 1.2.11 A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
- 1.2.12 References to the word 'include' or 'including' are to be construed without limitation.
- 1.2.13 A reference to this Deed includes the agreement recorded in this Deed.
- 1.2.14 A reference to a Party to this Deed includes a reference to the servants, agents and contractors of the Party, the Party's successors and assigns.
- 1.2.15 Any schedules, appendices and attachments form part of this Deed.
- 1.2.16 Notes appearing in this Deed are operative provisions of this Deed.

## **2 Status of this Deed**

- 2.1 This Deed is a planning agreement within the meaning of s93F(1) of the Act.

## **3 Commencement**

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

## **4 Application of this Deed**

- 4.1 This Deed applies to the Land and to the Development.

## **5 Warranties**

- 5.1 The Parties warrant to each other that they:
  - 5.1.1 have full capacity to enter into this Deed, and
  - 5.1.2 are able to fully comply with their obligations under this Deed.

## **6 Further agreements**

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

## **7 Surrender of right of appeal, etc.**

- 7.1 The Developer is not to commence or maintain, or to cause or procure the commencement or maintenance, of any proceedings in any court or tribunal or similar body appealing against, or questioning the validity of this Deed, or an Approval relating to the Development in so far as the subject-matter of the proceedings relates to this Deed.

## **8 Application of s94, s94A and s94EF of the Act to the Development**

- 8.1 This Deed does not exclude the application of s94 or s94A of the Act to the Development.
- 8.2 This Deed does not exclude the application of s94EF to the Development.

## **Part 2 – Development Contributions**

### **9 Provision of Development Contributions**

- 9.1 The Developer is to carry out the Maintenance Work and Pre-Termination Work at its cost during the Term in accordance with this Deed and otherwise to the satisfaction of the Council.
- 9.2 The Developer is to pay monetary Development Contributions to the Council calculated in accordance with this Deed for the purposes of the maintenance and upgrade of the Bago Road Haulage Route, or such other public roads that Council determines as being impacted on by the Development, in accordance with this Deed.
- 9.3 The Council is to apply each Development Contribution made by the Developer under this Deed towards the public purpose for which it is made and otherwise in accordance with this Deed.
- 9.4 Despite clause 9.3, the Council may apply a Development Contribution made under this Deed towards a public purpose other than the public purpose specified in this Deed if the Council reasonably considers that the public interest would be better served by applying the Development Contribution towards that other purpose rather than the purpose so specified.

### **10 Reports and records of Excavated Material**

- 10.1 The Developer is to retain all weighbridge records, and any other documents created during the Term that show the amount of Excavated Material.
- 10.2 Every 12 months from the Commencement Date, the Developer is to provide to the Council a report showing the amount of Excavated Material since the period covered by the previous report.

- 10.3 On Council's written request, the Developer is to promptly provide it with weighbridge records and any other information that is reasonably required for the Council to verify a Report.

## **11 Calculation of monetary Development Contributions**

- 11.1 Within 10 business days of receiving the Report in any Contract Year, or if Council has requested information pursuant to clause 10.3 for that Report, within 10 days of receipt of that information, the Council is to provide a tax invoice to the Developer notifying it of the amount of monetary Development Contributions required to be paid in respect of the Reporting Period covered by that Report, calculated using the following formula:

$$\text{\$DC} = \$0.18 \times (T - 30,000)$$

Where:

**\\$DC** means the amount of monetary Development Contributions required to be paid.

**T** is the amount of Excavated Material (in tonnes) during the Reporting Period to which the Report relates.

- 11.2 Subject to clause 11.3, the Developer is to pay the amount of monetary Development Contributions notified by the Council pursuant to clause 11.1 within 10 business days of the date of the relevant tax invoice.
- 11.3 If the amount of monetary Development Contributions notified pursuant to clause 11.1 is less than zero, no amount is payable by the Developer to the Council for the relevant Reporting Period.
- 11.4 The amount of monetary Development Contributions required to be paid under this Deed is to be indexed annually in accordance with the PPI as follows:

$$\text{\$DC}_n = \text{\$DC} \times (\text{PPI}_n / \text{PPI}_{n-1})$$

Where:

**\\$DC<sub>n</sub>** is the indexed amount of monetary Development Contributions

**\\$DC** means the amount of monetary Development Contributions calculated in accordance with clause 11.1

**PPI<sub>n</sub>** is the most recently published PPI as at the date of the Report

**PPI<sub>n-1</sub>** is the most recently published PPI as at 1 February 2015

## **12 Procedures relating to payment of monetary Development Contributions**

- 12.1 A monetary Development Contribution is made for the purposes of this Deed when the Council receives the full amount of the contribution payable under this Deed in cash or by unendorsed bank cheque or by the deposit by means of electronic funds transfer of cleared funds into a bank account nominated by the Council.

### **13 Carrying out of Work**

- 13.1 The Developer, at its own cost, is to obtain all necessary Approvals for the Work.
- 13.2 Without limiting any other provision of this Deed, any Work that is required to be carried out by the Developer under this Deed is to be carried out in accordance with the Maintenance Specification, any other design or specification specified or approved by the Council, any relevant Approval and any other applicable law, to the Council's satisfaction.
- 13.3 The Developer, at its own cost, is to comply with any reasonable direction given to it by the Council to prepare or modify a design or specification relating to a Work that the Developer is required to carry out under this Deed.

### **14 Variation to the Maintenance Specification**

- 14.1 The Parties, acting reasonably, may agree in writing to vary the Maintenance Specification without the necessity for an amendment to this Deed.
- 14.2 Without limiting clause 14.1, the Developer may make a written request to the Council to approve a variation to the Maintenance Specification in order to enable it to comply with the requirements of any Authority imposed in connection with any Approval relating to the carrying out of the Maintenance Work.
- 14.3 The Council is not to unreasonably delay or withhold its approval to a request made by the Developer under clause 14.2.

### **15 Access to land by Developer**

- 15.1 The Council authorises the Developer to enter, occupy and use land owned or controlled by the Council for the purpose of performing its obligations under this Deed.
- 15.2 Nothing in this Deed creates or gives the Developer any estate or interest in any part of the land referred to in clause 15.1.

### **16 Access to land by Council**

- 16.1 The Council may enter any land on which a Work is being carried out by the Developer under this Deed in order to inspect, examine or test the Work, or to remedy any breach by the Developer of its obligations under this Deed relating to the Work.
- 16.2 If Council is not the owner of the land, the Council is to give the Developer prior reasonable notice before it enters land under clause 16.1.

### **17 Council's obligations under this Deed**

- 17.1 The Council is not to unreasonably delay, hinder or otherwise interfere with the performance by the Developer of its obligations under this Deed, and is to use its reasonable endeavours to ensure third parties unrelated to the

Developer do not unreasonably delay, hinder or otherwise interfere with the performance of those obligations.

## **18 Protection of people, property & utilities**

- 18.1 The Developer is to ensure to the fullest extent reasonably practicable in relation to the performance of its obligations under this Deed that:
  - 18.1.1 all necessary measures are taken to protect people and property,
  - 18.1.2 unnecessary interference with the passage of people and vehicles is avoided, and
  - 18.1.3 nuisances and unreasonable noise and disturbances are prevented.
- 18.2 Without limiting clause 18.1, the Developer is not to obstruct, interfere with, impair or damage any public road, public footpath, public cycleway or other public thoroughfare, or any pipe, conduit, drain, watercourse or other public utility or service on any land except as authorised in writing by the Council or any relevant Authority.

## **19 Completion of Maintenance Work**

- 19.1 The Developer may give the Council written notice of its intention to terminate this Deed (**'Termination Notice'**).
- 19.2 Within 6 months of the Council giving written notice to the Developer that:
  - 19.2.1 it has received the Termination Notice, and
  - 19.2.2 is satisfied that no further extractive industry is or will be carried out on the Quarry Land,the Developer is to carry out Pre-Termination Work to the Council's satisfaction.
- 19.3 The Developer is to give the Council written notice of the date on which it will complete the Pre-Termination Work.
- 19.4 The Council is to inspect the Pre-Termination Work within 14 days of the date specified in the notice for completion of the Pre-Termination Work.
- 19.5 The Pre-Termination Work required to be carried out by the Developer under this Deed is completed for the purposes of this Deed when the Council, acting reasonably, gives a written notice to the Developer to that effect.
- 19.6 Before the Council gives the Developer a notice referred to in clause 19.5, it may give the Developer a written direction to complete, Rectify or repair any specified part of the Maintenance Work to the reasonable satisfaction of the Council.
- 19.7 The Developer, at its own cost, is to promptly comply with a direction referred to in clause 19.6.

## **20 Rectification of defects**

- 20.1 The Council may give the Developer a Rectification Notice during the Term and/or Defects Liability Period.

- 20.2 The Developer, at its own cost, is to comply with a Rectification Notice according to its terms and to the reasonable satisfaction of the Council.
- 20.3 The Council is to do such things as are reasonably necessary to enable the Developer to comply with a Rectification Notice that has been given to it under clause 20.1

## **21 Removal of Equipment**

- 21.1 When the Maintenance Work or Pre-Termination Work on any Council owned or controlled land is completed for the purposes of this Deed, the Developer, without delay, is to:
  - 21.1.1 remove any Equipment from Land and make good any damage or disturbance to the land as a result of that removal, and
  - 21.1.2 leave the land in a neat and tidy state, clean and free of rubbish.

## **Part 3 – Dispute Resolution**

### **22 Dispute resolution – expert determination**

- 22.1 This clause applies to a Dispute between any of the Parties to this Deed concerning a matter arising in connection with this Deed that can be determined by an appropriately qualified expert if:
  - 22.1.1 the Parties to the Dispute agree that it can be so determined, or
  - 22.1.2 the Chief Executive Officer of the professional body that represents persons who appear to have the relevant expertise to determine the Dispute gives a written opinion that the Dispute can be determined by a member of that body.
- 22.2 A Dispute to which this clause applies is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 22.3 If a notice is given under clause 22.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 22.4 If the Dispute is not resolved within a further 28 days, the Dispute is to be referred to the President of the NSW Law Society to appoint an expert for expert determination.
- 22.5 The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.
- 22.6 Each Party is to bear its own costs arising from or in connection with the appointment of the expert and the expert determination.
- 22.7 The Parties are to share equally the costs of the President, the expert, and the expert determination.

## **23 Dispute Resolution - mediation**

- 23.1 This clause applies to any Dispute arising in connection with this Deed other than a Dispute to which clause 22 applies.
- 23.2 Such a Dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 23.3 If a notice is given under clause 23.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 23.4 If the Dispute is not resolved within a further 28 days, the Parties are to mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and are to request the President of the Law Society to select a mediator.
- 23.5 If the Dispute is not resolved by mediation within a further 28 days, or such longer period as may be necessary to allow any mediation process which has been commenced to be completed, then the Parties may exercise their legal rights in relation to the Dispute, including by the commencement of legal proceedings in a court of competent jurisdiction in New South Wales.
- 23.6 Each Party is to bear its own costs arising from or in connection with the appointment of a mediator and the mediation.
- 23.7 The Parties are to share equally the costs of the President, the mediator, and the mediation.



## **Part 4 – Security and Enforcement**

### **24 Security for performance of obligations**

- 24.1 The Developer is to provide the Council with a rolling Security in the amount of \$179,000 in relation to the performance of its obligations under this Deed.
- 24.2 The Developer is to provide the Security to the Council on the Commencement Date.
- 24.3 The Developer may make a request to the Council to reduce the amount of the Security at the end of the fifth Contract Year.
- 24.4 The Council is to consider the Developer's request under clause 24.3 and determine the revised amount of Security to be provided by the Developer having regard to the future annual extraction rate of Excavated Material and the Developer's other obligations under this Deed.
- 24.5 The Council's determination under clause 24.4 is final and binding on the Parties.
- 24.6 The Council may call-up and apply the Security in accordance with clause 25 to remedy any breach of this Deed notwithstanding any other remedy it may have under this Deed, under any Act or otherwise at law or in equity.
- 24.7 The Council is to release and return the Security or any unused part of it to the Developer, upon the Developer's written request, within 21 days of the end of the Term provided the Developer has given the Defects Security to the Council.
- 24.8 The Council is to release and return the Defects Security or any unused part of it to the Developer, upon the Developer's written request, within 21 days of the end of the Defects Liability Period.
- 24.9 The Developer may at any time provide the Council with a replacement Security.
- 24.10 On receipt of a replacement Security, the Council is to release and return the Security that has been replaced to the Developer.
- 24.11 If the Council calls-up the Security or any portion of it, it may, by written notice to the Developer, require the Developer to provide a further or replacement Security to ensure that the amount of Security held by the Council equals the amount it is entitled to hold under this Deed.
- 24.12 The Developer is to ensure that the Security provided to the Council is at all times maintained to the full current indexed value.

### **25 Breach of obligations**

- 25.1 If the Council reasonably considers that the Developer is in breach of any obligation under this Deed, it may give a written notice to the Developer:
  - 25.1.1 specifying the nature and extent of the breach,
  - 25.1.2 requiring the Developer to:
    - (a) rectify the breach if it reasonably considers it is capable of rectification, or

- (b) pay compensation to the reasonable satisfaction of the Council in lieu of rectifying the breach if it reasonably considers the breach is not capable of rectification,
- 25.1.3 specifying the period within which the breach is to be rectified or compensation paid, being a period that is reasonable in the circumstances.
- 25.2 If the Developer fails to fully comply with a notice referred to in clause 25.1, the Council may, without further notice to the Developer, call-up the Security provided by the Developer under this Deed and apply it to remedy the Developer's breach.
- 25.3 Notwithstanding clause 25.1, if the Council reasonably considers that the Developer is in breach of an obligation under this Deed, the Council may step-in and remedy the breach and may enter, occupy and use any land owned or controlled by the Developer and any Equipment on such land for that purpose.
- 25.4 Any costs incurred by the Council in remedying a breach in accordance with clause 25.2 or clause 25.3 may be recovered by the Council by either or a combination of the following means:
  - 25.4.1 by calling-up and applying the Security provided by the Developer under this Deed, or
  - 25.4.2 in the event the costs reasonably incurred by the Council in remedying a breach cannot be met by the Security, the Developer must pay the difference to the Council within thirty (30) days of receiving a written demand for such payment,
  - 25.4.3 as a debt due in a court of competent jurisdiction.
- 25.5 For the purpose of clause 25.4, the Council's costs of remedying a breach the subject of a notice given under clause 25.1 include, but are not limited to:
  - 25.5.1 the costs of the Council's servants, agents and contractors reasonably incurred for that purpose,
  - 25.5.2 all fees and charges necessarily or reasonably incurred by the Council in remedying the breach, and
  - 25.5.3 all legal costs and expenses reasonably incurred by the Council, by reason of the breach.
- 25.6 Nothing in this clause 25 prevents the Council from exercising any rights it may have at law or in equity in relation to a breach of this Deed by the Developer, including but not limited to seeking relief in an appropriate court.

## **26 Enforcement in a court of competent jurisdiction**

- 26.1 Without limiting any other provision of this Deed, the Parties may enforce this Deed in any court of competent jurisdiction.
- 26.2 For the avoidance of doubt, nothing in this Deed prevents:
  - 26.2.1 a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Deed or any matter to which this Deed relates, or

- 26.2.2 the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Deed or any matter to which this Deed relates.

## **Part 5 – Registration & Restriction on Dealings**

### **27 Registration of this Deed**

- 27.1 The Parties agree to register this Deed for the purposes of s93H(1) of the Act on the title to the Quarry Land.
- 27.2 Not later than 10 days after the Commencement Date and before the Developer carries out the Development, the Developer and the Landowner are to deliver to the Council in registrable form:
- 27.2.1 an instrument requesting registration of this Deed on the title to the Quarry Land duly executed by the Landowner, and
- 27.2.2 the written irrevocable consent of each person referred to in s93H(1) of the Act to that registration.
- 27.3 The Developer and Landowner are to do such other things as are reasonably necessary to enable registration of this Deed to occur.
- 27.4 If the Developer is not in breach of this Deed, the Parties are to do such things as are reasonably necessary to remove any notation relating to this Deed from the title to the Quarry Land:
- 27.4.1 within a reasonable period of time after the Maintenance Completion Date, or
- 27.4.2 upon this Deed coming to an end for any reason.

### **28 Restriction on dealings**

- 28.1 The Developer and Landowner are not to:
- 28.1.1 sell or transfer the Quarry Land, or
- 28.1.2 assign the Developer's rights or obligations under this Deed, or novate this Deed,
- to any person unless:
- 28.1.3 the Developer or Landowner (as the case may be) has, at no cost to the Council, first procured the execution by the person to whom the Quarry Land or part is to be sold or transferred or the Developer's rights or obligations under this Deed are to be assigned or novated, of a deed in favour of the Council on terms reasonably satisfactory to the Council, and
- 28.1.4 the Council has given written notice to the Developer or Landowner (as the case may be) stating that it reasonably considers that the purchaser, transferee, assignee or novatee, is reasonably capable of performing its obligations under this Deed, and
- 28.1.5 the Developer or Landowner is not in breach of this Deed, and

- 28.1.6 the Council otherwise consents to the transfer, assignment or novation, such consent not to be unreasonably withheld.

## **Part 6 – Indemnities & Insurance**

### **29 Risk**

- 29.1 The Developer performs this Deed at its own risk and its own cost.

### **30 Release**

- 30.1 The Developer releases the Council from any Claim it may have against the Council arising in connection with the performance of the Developer's obligations under this Deed except if, and to the extent that, the Claim arises because of the Council's negligence or default.

### **31 Indemnity**

- 31.1 The Developer indemnifies the Council from and against all Claims that may be sustained, suffered, recovered or made against the Council arising in connection with the performance of the Developer's obligations under this Deed except if, and to the extent that, the Claim arises because of the Council's negligence or default.

### **32 Insurance**

- 32.1 The Developer is to take out and keep current to the satisfaction of the Council the following insurances in relation to Work required to be carried out by the Developer under this Deed for the duration of the Term:
- 32.1.1 contract works insurance, noting the Council as an interested party, for the full replacement value of the Work (including the cost of demolition and removal of debris, consultants' fees and authorities' fees), to cover the Developer's liability in respect of damage to Milligans Road,
  - 32.1.2 public liability insurance for at least \$20,000,000.00 for a single occurrence, which covers the Council, the Developer and any subcontractor of the Developer, for liability to any third party,
  - 32.1.3 workers compensation insurance as required by law, and
  - 32.1.4 any other insurance required by law.
- 32.2 If the Developer fails to comply with clause 32.1, the Council may effect and keep in force such insurances and pay such premiums as may be necessary for that purpose and the amount so paid shall be a debt due from the Developer to the Council and may be recovered by the Council as it deems appropriate including:

- 32.2.1 by calling upon the Security provided by the Developer to the Council under this Deed, or
- 32.2.2 recovery as a debt due in a court of competent jurisdiction.
- 32.3 The Developer is not to commence to carry out any Work unless it has first provided to the Council satisfactory written evidence of all of the insurances specified in clause 32.1.
- 32.4 The Developer is to provide to the Council satisfactory written evidence of all the insurances specified in clause 32.1 on request by the Council from time to time.

## **Part 7 – Other Provisions**

### **33 Termination**

- 33.1 This Deed terminates on the date that the Council gives the Developer a notice in writing that all obligations under this Deed have been completed in accordance with the requirements of this Deed.

### **34 Review of Deed**

- 34.1 The Parties agree to review this Deed if either party is of the opinion that there is a change to a law that restricts or prohibits or enables the Council or any other planning authority to restrict or prohibit any aspect of the Development.
- 34.2 For the purposes of addressing any matter arising from a review of this Deed referred to in clause 34.1, the Parties are to use all reasonable endeavours to agree on and implement appropriate amendments to this Deed.
- 34.3 If this Deed becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties agree to do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Deed is entered into.
- 34.4 A failure by a Party to agree to take action requested by the other Party as a consequence of a review referred to in clause 34.1 (but not 34.3) is not a Dispute for the purposes of this Deed and is not a breach of this Deed.

## **35 Notices**

- 35.1 Any notice, consent, information, application or request that is to or may be given or made to a Party under this Deed is only given or made if it is in writing and sent in one of the following ways:
  - 35.1.1 delivered or posted to that Party at its address set out in the Summary Sheet,
  - 35.1.2 faxed to that Party at its fax number set out in the Summary Sheet, or
  - 35.1.3 emailed to that Party at its email address set out in the Summary Sheet.
- 35.2 If a Party gives the other Party 3 business days' notice of a change of its address, fax number or email, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted, faxed or emailed to the latest address or fax number.
- 35.3 Any notice, consent, information, application or request is to be treated as given or made if it is:
  - 35.3.1 delivered, when it is left at the relevant address,
  - 35.3.2 sent by post, 2 business days after it is posted,
  - 35.3.3 sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number, or
  - 35.3.4 sent by email and the sender does not receive a delivery failure message from the sender's internet service provider within a period of 24 hours of the email being sent.
- 35.4 If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

## **36 Approvals and Consent**

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

## **37 Costs**

- 37.1 The Developer is to pay to the Council the Council's reasonable costs not exceeding \$8,000 (ex GST) of preparing, negotiating, executing and stamping this Deed, and any document related to this Deed within 7 days of a written demand by the Council for such payment.

- 37.2 The Developer is also to pay to the Council the Council's reasonable costs of enforcing this Deed within 7 days of a written demand by the Council for such payment.

### **38 Entire Deed**

- 38.1 This Deed contains everything to which the Parties have agreed in relation to the matters it deals with.
- 38.2 No Party can rely on an earlier document, or anything said or done by another Party, or by a director, officer, agent or employee of that Party, before this Deed was executed, except as permitted by law.

### **39 Further Acts**

- 39.1 Each Party must promptly execute all documents and do all things that another Party from time to time reasonably requests to effect, perfect or complete this Deed and all transactions incidental to it.

### **40 Governing Law and Jurisdiction**

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

### **41 Joint and Individual Liability and Benefits**

- 41.1 Except as otherwise set out in this Deed:
- 41.1.1 any agreement, covenant, representation or warranty under this Deed by 2 or more persons binds them jointly and each of them individually, and
- 41.1.2 any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.

### **42 No Fetter**

- 42.1 Nothing in this Deed 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.

## 43 Illegality

- 43.1 If this Deed or any part of it becomes illegal, unenforceable or invalid as a result of any change to a law, the Parties are to co-operate and do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Deed is entered into.

## 44 Severability

- 44.1 If a clause or part of a clause of this Deed 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.
- 44.2 If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Deed, but the rest of this Deed is not affected.

## 45 Amendment

- 45.1 No amendment of this Deed will be of any force or effect unless it is in writing and signed by the Parties to this Deed in accordance with clause 25D of the Regulation.

## 46 Waiver

- 46.1 The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Deed, does not amount to a waiver of any obligation of, or breach of obligation by, another Party.
- 46.2 A waiver by a Party is only effective if it is in writing.
- 46.3 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.

## 47 GST

- 47.1 In this clause:

**Adjustment Note, Consideration, GST, GST Group, Margin Scheme, Money, Supply and Tax Invoice** have the meaning given by the GST Law.

**GST Amount** means in relation to a Taxable Supply the amount of GST payable in respect of the Taxable Supply.

**GST Law** has the meaning given by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

**Input Tax Credit** has the meaning given by the GST Law and a reference to an Input Tax Credit entitlement of a party includes an Input Tax Credit for an acquisition made by that party but to which another member of the same GST Group is entitled under the GST Law.



## Bago Quarry Planning Agreement

### Port Macquarie-Hastings Council

### Volcanic Resources Pty Ltd

Warren James Roche, Inez Marie Roche, Mark Andrew Roche

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**Taxable Supply** has the meaning given by the GST Law excluding (except where expressly agreed otherwise) a supply in respect of which the supplier chooses to apply the Margin Scheme in working out the amount of GST on that supply.

- 47.2 Subject to clause 47.4, if GST is payable on a Taxable Supply made under, by reference to or in connection with this Deed, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.
- 47.3 Clause 47.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Deed to be GST inclusive.
- 47.4 No additional amount shall be payable by the Council under clause 47.2 unless, and only to the extent that, the Council (acting reasonably and in accordance with the GST Law) determines that it is entitled to an Input Tax Credit for its acquisition of the Taxable Supply giving rise to the liability to pay GST.
- 47.5 If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this Deed by one Party to the other Party that are not subject to Division 82 of the *A New Tax System (Goods and Services Tax) Act 1999*, the Parties agree:
  - 47.5.1 to negotiate in good faith to agree the GST inclusive market value of those Supplies prior to issuing Tax Invoices in respect of those Supplies;
  - 47.5.2 that any amounts payable by the Parties in accordance with clause 47.2 (as limited by clause 47.4) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 47.6 No payment of any amount pursuant to this clause 47, and no payment of the GST Amount where the Consideration for the Taxable Supply is expressly agreed to be GST inclusive, is required until the supplier has provided a Tax Invoice or Adjustment Note as the case may be to the recipient.
- 47.7 Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred by a party, must exclude the amount of any Input Tax Credit entitlement of that party in relation to the relevant cost, expense or other liability.
- 47.8 This clause continues to apply after expiration or termination of this Deed.

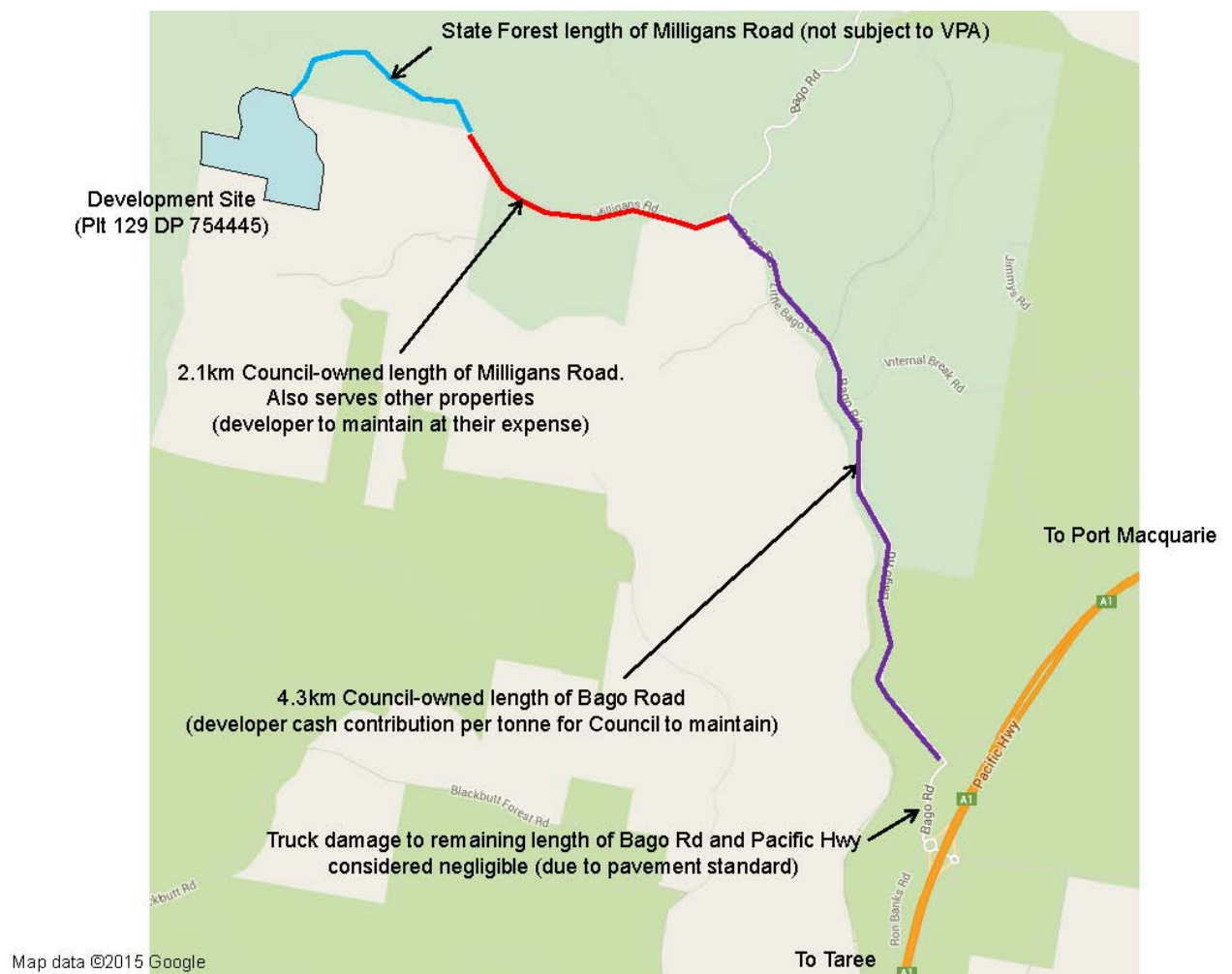
## 48 Explanatory Note

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

## Schedule 1

(Clause 1.1)

### Haulage Route Map



## Schedule 2

(Clause 1.1)

### Maintenance Specification

- 1 The Developer is to carry out the following routine maintenance:
  - 1.1 patrol along the entire length of the Milligans Road Haulage Route to inspect road conditions and identify new hazards at least once a month,
  - 1.2 re-grade the entire length of the trafficable surface of the Milligans Road Haulage Route at least once every twelve (12) months, and
  - 1.3 re-sheet (by laying gravel or bitumen, compacting and re-grading) the trafficable surface of the Milligans Road Haulage Route at least once every five (5) years.
- 2 The Developer is to maintain a register detailing the routine maintenance works carried out, such register to contain information as required by the Council from time to time and be provided to the Council on request.
- 3 During the Term, the Developer is to maintain a register of hazards occurring on the Milligans Road Haulage Route that it becomes aware of, such register to contain information as required by the Council from time to time and be provided to the Council on request.
- 4 Each hazard that the Developer becomes aware of is to be categorised according to Table 1 below and noted in the register of hazards.

**Table 1: Hazard Types and Severity**

Description of Hazard		Hazard Category				
Sealed Pavements						
		1	2	3	4	5
a) Obstructions and Substances on Road						
i.	Small sized object, max. dimension of less than 100mm	X				
ii.	Medium sized object, max. dimension of 100mm to 200mm		X			
iii.	Large object, max. dimension greater than 200mm			X		
b) Spilled Materials on Roads						
i.	Moderate spills of granular materials	X				
ii.	Large spills of granular materials, any spills of oil or other slippery substance		X			
iii.	Large spills of oil, wet clay or other slippery substance					X

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c) Potholes					
i. Pothole diameter 200mm to 300mm and/or depth of 50mm to 75mm	X				
ii. Pothole with diameter greater than 300mm and/or depth greater than 75mm			X		
d) Shoving and/or Rutting					
i. Deformations 50mm to 100mm deep and greater than 4m long	X				
ii. Deformations greater than 100mm deep and greater than 4m long and/or ponding hazard			X		
e) Edge Drop and Pavement Joints					
i. Drop 50mm to 75mm and greater than 5m long	X				
ii. Drop 75mm to 150mm and greater than 5m long		X			
iii. Drop greater than 150mm and greater than 5m long				X	
<b>Unsealed Pavements</b>					
	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>
a) Rutting and Scouring					
i. Up to 50mm deep, 150mm to 300mm wide and	X				
• Less than 10m long					
• Greater than or equal to 10m long		X			
ii. 50mm to 100mm deep, less than 150mm wide and		X			
• Less than 10m long					
• Greater than or equal to 10m long			X		
iii. 50mm to 100mm deep, 150mm to 300mm wide and			X		
• Less than 10m long					
• Greater than or equal to 10m long				X	
iv. Greater than 100mm deep and/or greater than 300mm wide				X	
b) Potholes					
i. Diameter 150mm to 300mm, depth less than 50mm and length affected	X				
• Less than 10m					
• Greater than 10m		X			
ii. Diameter 150mm to 300mm, depth 50mm to		X			

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100mm and length affected					
• Less than 10m					
• Greater than 10m			X		
iii. Diameter greater than 300mm, depth 50mm to 100mm and length affected			X		
• Less than 10m					
• Greater than 10m				X	
iv. Diameter greater than 300mm and/or depth greater than 100mm				X	
c) Corrugations					
i. 15mm to 25mm deep and length affected		X			
• Less than 10m					
• Greater than 10m			X		
ii. Greater than 25mm deep and length affected			X		
• Less than 10m					
• Greater than 10m				X	
<b>Roadside Devices</b>					
	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>
a) Regulatory and warning signs					
i. In poor condition		X			
ii. Missing or illegible					X
b) All other signs					
i. In poor condition	X				
ii. Missing or illegible		X			
c) Guideposts					
i. In poor condition	X				
ii. Missing		X			
iii. In a dangerous condition or location					X
d) Delineation					
i. In poor condition		X			
ii. Missing or in a critical location					X
e) Guardrail and Safety Fencing					
i. In poor condition	X				
ii. Missing or in a dangerous condition or location					X
f) Road Markings, Line Markings, Transverse Markings, Pavement Symbols and Markers					

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i. Missing or illegible in a non-critical location	X				
ii. Missing or illegible in a critical location					X

- 5 In respect of each hazard, the Developer is to carry out the corresponding maintenance activity relevant to its hazard category and within the timeframes shown in Table 2 below.

**Table 2: Hazard Response**

<b>Hazard Category</b>	<b>Priority</b>	<b>Control Mechanism and Response Time</b>
1 to 2	Low	Program into maintenance works. Effect repair within three (3) months of being made aware of hazard.
3	Medium	Inspect by appropriately qualified person and make safe if required. Erect awareness signage / barriers as appropriate. Effect repair within one (1) month of being made aware of hazard.
4	High	Inspect by appropriately qualified person and make safe within 24 hours. Erect awareness signage / barriers as appropriate. Effect repair within two (2) weeks of being made aware of hazard.
5	Urgent	Inspect by appropriately qualified person and make safe within 24 hours. Erect awareness signage / barriers as appropriate. Effect repair within one (1) week of being made aware of hazard.

## Execution

Executed as a Deed

Dated:

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### Executed on behalf of the Council

\_\_\_\_\_  
General Manager

\_\_\_\_\_  
Witness

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

\_\_\_\_\_  
Name/Position

\_\_\_\_\_  
Name/Position

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### Executed on behalf of the Landowners

Name

Witness

\_\_\_\_\_

\_\_\_\_\_

Name

Witness

\_\_\_\_\_

\_\_\_\_\_

Name

Witness

\_\_\_\_\_

\_\_\_\_\_

## **Appendix**

(Clause 49)

*Environmental Planning and Assessment Regulation 2000*

(Clause 25E)

## **Explanatory Note**

### **Draft Planning Agreement**

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

### **Parties**

**Port Macquarie-Hastings Council** ABN 11 236 901 601 of Cnr Lord & Burrawan  
Streets Port Macquarie NSW 2444 (**Council**)

**Volcanic Resources Pty Ltd** ABN 33 060 536 441 of 129 Milligans Road Herons Creek  
NSW 2443 (**Developer**)

**Warren James Roche, Inez Marie Roche, Mark Andrew Roche** of 129 Milligans  
Road Herons Creek NSW 2443 (**Landowner**)

### **Description of the Land to which the Draft Planning Agreement Applies**

Lot 129 DP 754445, otherwise known as 129 Milligans Road, Herons Creek.

Bago Road Haulage Route and the Milligans Road Haulage Route.

### **Description of Proposed Development**

The excavation and removal of material from the Land in accordance with Development Consent to DA 2014/960.



## **Summary of Objectives, Nature and Effect of the Draft Planning Agreement**

### **Objectives of Draft Planning Agreement**

The objective of the Draft Planning Agreement is to secure the provision of monetary development contributions and maintenance works for the purposes of maintaining the haulage route on Milligans Road and Bago Road.

### **Nature of Draft Planning Agreement**

The Draft Planning Agreement is a planning agreement under s93F of the *Environmental Planning and Assessment Act 1979 (Act)*. The Draft Planning Agreement is a voluntary agreement under which Development Contributions (as defined in clause 1.1 of the Draft Planning Agreement) are made by the Developer for various public purposes (as defined in s93F(3) of the Act).

### **Effect of the Draft Planning Agreement**

The Draft Planning Agreement:

- relates to the carrying out of the proposed development pursuant to any development consent granted to Development Application 2014/960,
- imposes obligations on the Developer to make monetary development contributions and carry out maintenance work on Milligans Road only if the development consent is granted to Development Application 2014/960,
- requires the Developer to provide security for the monetary development contributions and work,
- does not exclude the application of s94, s94A or s94E of the Act to the proposed development,
- is to be registered on the title to the Land,
- imposes restrictions on the Developer and Landowner from transferring the Land or assigning, or novating an interest under the agreement,
- provides two dispute resolution methods for a dispute under the agreement, being expert determination and mediation,
- provides that the agreement is governed by the law of New South Wales, and
- provides that the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* applies to the agreement.

## **Assessment of the Merits of the Draft Planning Agreement**

### **The Planning Purposes Served by the Draft Planning Agreement**

The Draft Planning Agreement:

- promotes and co-ordinates the orderly and economic use and development of the Land to which the Agreement applies,
- encourages the provision and co-ordination of community services and facilities, and

- provides increased opportunity for public involvement and participation in environmental planning and assessment of the Development.

### **How the Draft Planning Agreement Promotes the Public Interest**

The Draft Planning Agreement promotes the public interest by promoting the objects of the Act as set out in s5(a)(ii) and (v) and s5(c).

### **For Planning Authorities:**

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

N/A

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

N/A

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

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

- providing adequate, equitable and appropriate services and facilities for the community and to ensure that those services and facilities are managed efficiently and effectively,
- providing a means that allows the wider community to make submissions to the Council in relation to the Agreement.

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

The Draft Planning Agreement does not conform with the Capital Works Program set out in the Council's Operational Plan for 1 July 2014 – 30 June 2015 but conforms with Council's 2013 – 2017 Delivery Program.

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

The Draft Planning Agreement does not specify any requirements that must be provided before the issuing of a construction certificate, occupation certificate or subdivision certificate.

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**Port Macquarie-Hastings Council**

**Volcanic Resources Pty Ltd**

**Warren James Roche, Inez Marie Roche, Mark Andrew Roche**

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**Developer Name/Position**

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**Developer Name/Position**

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**Warren James Roche**

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**Witness**

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**Inez Marie Roche**

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**Witness**

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**Mark Andrew Roche**

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**Witness**