

Voluntary Planning Agreement

Wagga Wagga City Council (Council)

McIntyre Nash Pty Ltd (Developers)

MinterEllison

L A W Y E R S

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Voluntary Planning Agreement

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Details

Date

Parties

Name Wagga Wagga City Council
ABN 56 044 189 537
Short form name Council
Notice details PO Box 20
WAGGA WAGGA NSW 2650

Facsimile +61 2 6926 9199
Attention Craig Richardson

Name McIntyre Nash Pty Ltd
ABN 17 114 198 944
Short form name Developer
Notice details 27 Lake Albert Road
WAGGA WAGGA NSW 2650

Facsimile +61 2 6921 2728
Attention Chris Nash

Background

- A The Developer is the owner of the Land.
- B In August 2005, the Developer made an application to the Council for the Instrument Change for the purpose of making a Development Application to the Council for Development Consent to carry out the Development on the Land.
- C The Developer has agreed to enter into this Agreement to make Developer Contributions in connection with the Instrument Change on the terms set out in this Agreement.

Agreed terms

1. Defined terms & interpretation

1.1 Defined terms

In this document the following definitions apply:

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

Agreement includes any schedules, annexures and appendices to this Agreement.

Dealing, in relation to the Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the Land.

Development means the residential development of the Land facilitated by the rezoning of the Land to Residential 3 (R3) effected by the Instrument Change.

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 or the provision of a material public benefit.

GST has the same meaning as in the GST Law.

GST Law has the meaning given to that term 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.

Instrument Change means the making of the LEP.

Land means Lot 1 DP 726729, Lot 328 DP 823293 and Lots 11 & 12 DP 20812, known as 231 Gurwood Street, Wagga Wagga.

LEP means the *Wagga Wagga Local Environmental Plan 2008* if that instrument has the effect of zoning the Land as Zone R3 – Medium Density Residential within the meaning of the *Standard Instrument – Principal Local Environmental Plan* made by the *Standard Instrument (Local Environmental Plans) Order 2006*, or another local environmental plan that has that effect.

Party means a party to this agreement, including their successors and assigns.

Planning Agreement means the provisions of this Agreement under which the Developer is required to make Development Contributions, and includes any provisions that are incidental or supplementary to those provisions.

Public Facilities means a public amenity, a public service, a public facility, public land, public infrastructure, a public road, a public work or any other act, matter or thing that meets a Public Purpose.

Public Purpose means any purpose that benefits the public or a section of the public, including but not limited to a purpose specified in subsection 93F(2) of the Act.

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

1.2 Interpretation

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

- (a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
- (b) A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- (c) If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.
- (d) A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
- (e) A reference in this Agreement 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.
- (f) A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- (g) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
- (h) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (i) 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.
- (j) 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 gender.
- (k) References to the word 'include' or 'including' are to be construed without limitation.
- (l) A reference to this Agreement includes the agreement recorded in this Agreement.
- (m) A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.
- (n) Any schedules and attachments form part of this Agreement.

2. Operative Provisions

2.1 Planning agreement under the Act

The Parties agree that this Agreement is a planning agreement governed by Subdivision 2 of Division 6 of Part 4 of the Act.

2.2 Application of this Agreement

This Agreement applies to the Instrument Change in respect of the Land.

2.3 Operation of this Agreement

- (a) This Agreement takes effect on the date of execution.
- (b) This Agreement ceases to have effect immediately upon a determination by the Minister not to rezone the Land to Residential (R3).

3. Development Contributions to be made under this Agreement

- (a) Subject to the following clauses, the Developer is to pay to the Council a monetary contribution of \$310,000 (GST exclusive).
- (b) The monetary contribution is to be paid by the Developer in two equal instalments as follows:
 - (i) The first instalment of \$155,000 is to be paid within 7 days of the gazettal of the LEP.
 - (ii) The second instalment of \$155,000 is to be paid within 7 days of the second anniversary of the gazettal of the LEP.
- (c) The Developer is to lodge with Council a bank guarantee to the value of \$155,000 at the time of payment of the first instalment. The bank guarantee will be returned upon payment of the second instalment.
- (d) The Council is to repay all of the monetary contribution paid by the Developer to the Council within 7 days of this Agreement ceasing to have effect as provided for in clause 2.3(b).

4. Application of the Development Contributions

Subject to this Agreement, the Council is to apply the Monetary Contribution towards the Public Purpose for which it is made, and otherwise in accordance with this Agreement.

5. Application of s94 and s94A of the Act to the Development

- (a) Section 94 of the Act continues to apply to the Development.
- (b) Section 94A of the Act does not apply to the Development.

6. No Registration of this Agreement

The Parties agree not to register this Agreement under section 93H of the Act.

7. Review of this Agreement

This Agreement is not subject to Review, other than in accordance with clause 21.

8. Dispute Resolution

- (a) This clause applies to any dispute under this Agreement.
- (b) Such a dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the dispute.
- (c) If a notice is given under clause 13.2, the Parties are to meet within 14 days of the notice in an attempt to resolve the dispute.
- (d) If the dispute is not resolved within a further 28 days, the Parties must mediate the dispute in accordance with the Mediation Rules of the Law Society of New South Wales published from time to time and must request the President of the Law Society, or the President's nominee, to select a mediator.

- (e) 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.

9. Enforcement

- (a) Without limiting any other remedies available to the Parties, this Agreement may be enforced by the Parties in any court of competent jurisdiction.
- (b) For the avoidance of doubt, nothing in this Agreement prevents:
- (i) a Party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Agreement or any matter to which this Agreement relates; or
 - (ii) the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Agreement or any matter to which this Agreement relates.

10. Notices

10.1 Service of notices

- (a) Any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:
- (i) Delivered or posted to that Party at its address set out below;
 - (ii) Faxed to that Party as its fact number set out below;
 - (iii) Emailed to that Party at its email address set out below.

Council

Attention: Ms Lyn Russell, General Manager
Address: PO Box 20, Wagga Wagga NSW 2650
Fax Number: +61 2 6926 9199
Email: russell.lyn@wagga.nsw.gov.au

Developer

Attention: Mr Chris Nash
Address: 27 Lake Albert Road, Wagga Wagga NSW 2650
Fax Number: +61 2 6921 2728
Email: Chris@nashbroconstructions.com.au

- (b) If a Party gives the other Party 3 business days' notice of a change of its address or fax number, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.

10.2 Effective on receipt

- (a) Any notice, consent, information, application or request is to be treated as given or made at the following time:
- (i) If it is delivered, when it is left at the relevant address;
 - (ii) If it sent by post, 2 business days after it is posted;

- (iii) If it is 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.
- (b) 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.

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) Unless the matters specified in clause (b) are satisfied, the Developer is not to do any of the following:
 - (i) if the Developer is the owner of the Land, to transfer the Land to any person; or
 - (ii) assign or novate to any person the Developer's rights or obligations under this Agreement.
- (b) The matters required to be satisfied for the purposes of clause (a) are as follows:
 - (i) the Developer has, at no cost to the Council, first procured the execution by the person to whom the Developer's rights or obligations under this Agreement are to be assigned or novated, of an agreement in favour of the Council on terms satisfactory to the Council; and
 - (ii) the Council, by notice in writing to the Developer, has stated that evidence satisfactory to the Council has been produced to show that the assignee or novatee, is reasonably capable of performing its obligations under the Agreement; and
 - (iii) the Developer is not in breach of this Agreement.
- (c) Clauses (a) and (b) do not apply after the Developer has paid the Monetary Contribution.

13. Costs

The Developer is to pay for the legal costs of preparing, negotiating and executing this Agreement.

14. Entire agreement

This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with. 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 Agreement 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 requests to effect, perfect or complete this Agreement and all transactions incidental to it.

16. Governing law and jurisdiction

This Agreement 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 Agreement, any agreement, covenant, representation or warranty under this Agreement by 2 or more persons binds them jointly and each of them individually, and any benefit in favour of 2 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

- (a) 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.
- (b) 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

- (a) 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.
- (b) 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.

- (c) It is not to be taken as an implied waiver or any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasions.

23. GST

23.1 Defined GST terms

Words and expressions which are not defined in this Agreement but which have a defined meaning in GST Law have the same meaning as in the GST Law.

23.2 Consideration does not include GST

Any consideration expressed in this Agreement is, unless otherwise specified, GST exclusive and does not include any amount for, or on account of, GST.

23.3 GST payable

- (a) If GST is payable on a taxable supply made under, by reference to or in connection with this Agreement, the recipient of the taxable supply must pay to the supplier an additional amount equal to the GST payable on or for the taxable supply.
- (b) The supplier must deliver a tax invoice or an adjustment note to the recipient before the supplier is entitled to payment of an amount under clause 23.3(a). The recipient can withhold payment of the amount until the supplier provides a tax invoice or an adjustment note, as appropriate.

23.4 Reimbursement

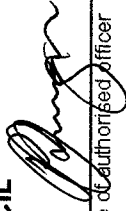
Where a Party is required under this Agreement to pay or reimburse an expense or outgoing of another Party, the amount to be paid or reimbursed by the first party will be the sum of:

- (i) the amount of the expense or outgoing less any input tax credits in respect of the expense or outgoing to which the other party, or to which the representative member for a GST group of which the other party is a member, is entitled; and
- (ii) if the payment or reimbursement is subject to GST, an amount equal to that GST.

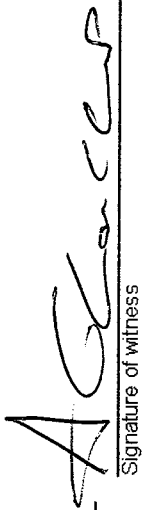
Signing page

EXECUTED as an agreement.

Executed by **WAGGA WAGGA CITY COUNCIL**



Signature of authorised officer

Phil Pinjon
Name of authorised officer (print)



Signature of witness

Andrew Crakanthorp
Name of witness (print)


Executed by **McINTYRE NASH PTY LTD**


Signature of director

Peter McIntyre
Name of director (print)


Signature of director/company secretary
(Please delete as applicable)

CHRISTOPHER NASH
Name of director/company secretary (print)


SCOTT NASH

Appendix

Explanatory Note

Environmental Planning and Assessment Regulation 2000

(Clause 25E)

Planning Agreement

Under section 93F of the *Environmental Planning and Assessment Act 1979 (the Act)*

Parties

Wagga Wagga City Council ABN 56 044 159 537 of PO Box 20 Wagga Wagga NSW 2650 (**Council**)

and

McIntyre Nash Pty Ltd ABN 17 114 198 944 of 27 Lake Albert Road, Wagga Wagga NSW 2650
(**Developer**)

Description of the Land to which the Planning Agreement applies

Lot 1 DP 726729, Lot 328 DP 823293 and Lots 11 & 12 DP 20812, known as 231 Gurwood Street, Wagga Wagga.

Description of proposed development

The residential development of the Land.

Summary of objectives, nature and effect of the Planning Agreement

Objectives of the Planning Agreement

The objective of the Planning Agreement is to ensure that public facilities are developed and maintained in Wagga Wagga as a result of the Development.

Nature of the Planning Agreement

The Planning Agreement is a planning agreement under section 93F of the Act. It is an agreement between the Council and the Developer pursuant to which the Developer agrees to make a monetary development contribution (as defined in clause 1.1 of the Planning Agreement) for any public purpose that benefits the public or a section of the public, including but not limited to a purpose specified in subsection 93F(2) of the Act.

Effect of the Planning Agreement

The Planning Agreement:

- relates to the rezoning of the Land;
- does not exclude the application of section 94 of the Act to the Development;
- excludes the application of section 94A of the Act to the Development;
- requires a monetary Development Contribution to be paid and applied towards a Public Purpose, including but not limited to a purpose specified in subsection 93F(2) of the Act;
- requires the Developer to pay a monetary Development Contribution in two equal instalments as follows:
 - the first instalment is to be paid within 7 days of the gazettal of the LEP (as defined in clause 1.1 of the Planning Agreement);
 - the second instalment is to be paid within 7 days of the second anniversary of the gazettal of the LEP;
- is not to be registered on the title to the Land;
- provides a dispute resolution method for a dispute under the Agreement, being mediation;
- provides that the agreement is governed by the law of New South Wales.

Assessment of the merits of the Planning Agreement

The planning purposes served by the Planning Agreement

The Planning Agreement:

- promotes and coordinates the orderly and economic use and development of the Land to which the agreement applies;
- compensates for the loss of open space resulting from the Development by providing for contributions towards the development of public facilities for public purposes; and
- provides increased opportunity for public involvement and participation in environmental planning and assessment of the Development.

How the Planning Agreement promotes the public interest

The Planning Agreement promotes the public interest by promoting the objects of the Act as set out in subsection 5(a)(ii)-(v) and 5(c) of the Act, namely:

- to encourage:
 - the promotion and coordination of the orderly and economic use and development of land;
 - the protection, provision and coordination of communication and utility services;
 - the provision of land for public purposes;
 - the provision and coordination of community services and facilities; and
- to provide increased opportunity for public involvement and participation in environmental planning and assessment.

How the Planning Agreement promotes the elements of the Council's charter

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

- providing services and facilities for the community;
- providing a means for the private funding of public facilities for the benefit of the Development and the wider community; and
- providing a means that allows the wider community to make submissions to the Council in relation to the Agreement.

Whether the Planning Agreement conforms with the Council's capital works program

The monetary contribution will be applied towards the development of public facilities, including costs relating to the provision of rugby league facilities at Wagga Wagga Exhibition Centre which forms part of the Council's Capital Works Program.