



**UNDER SEPARATE COVER
ATTACHMENTS**

**ORDINARY MEETING
23 JULY 2024**

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Officers Reports

APPROVAL OF WORKS IN KIND AGREEMENT - FARLEY OFFROAD TRAIL, ROAD & EARTH WORKS - RAVENSFIELD DOWNS PTY LTD & DBH PROPERTY PTY LTD

Draft Works in Kind Agreement (Under Separate Cover)

Meeting Date: 23 July 2024

Attachment No: 1

Number of Pages: 26

Works-in-Kind Deed
Offroad Trail, Road and Earth Works
Rossington Way and Mapplewell Circuit, Farley

Maitland City Council (ABN 11 596 310 805)

and

Ravensfield Downs Pty Ltd (ACN 104 067 398)

and

DBH Property Pty Ltd (ACN 610 861 357)

Dated: [Insert Date]

Works-in-Kind Deed

Offroad Trail, Road and Earth Works, Farley

Maitland City Council / Ravensfield Downs Pty Ltd / DBH Pty Ltd

Works-in-Kind Deed

Offroad Trail, Road and Earth Works, Farley

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Schedule 2..... 26

DRAFT

Works-in-Kind Deed

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Works-in-Kind Deed

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Parties

Maitland City Council ABN 11 596 310 805 of PO Box 220 Maitland NSW ('**Council**')
and

The person or persons named in Item 1 of the Reference Schedule
('**Developer**')

Background

- A The Developer has carried out and completed the Developer Works in connection with the Development.
- B The Developer Works have been handed over to the Council.
- C The Council and the Developer wish to enter into this Agreement to acknowledge the carrying out of the Developer Works by the Developer in part satisfaction of the Monetary Contributions.
- D Section 7.11(5)(b) of the Act authorises the Council and the Developer to enter into this Agreement to make provision for the carrying out of the Developer Works by the Developer in part satisfaction of the Monetary Contributions.

Operative provisions

Part 1 – Preliminary

1 Interpretation

- 1.1 In this Agreement the following definitions apply:

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

Applicable Contributions Plan means the Development Contributions Plan specified in Item 8 of the Reference Schedule as amended by resolution of the Council from time to time.

Applicable Development Consents means the development consents for the Development specified in Item 3 of the Reference Schedule.

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Approved Person means a person reasonably approved by the Council to undertake design, construction, supervision, inspection, testing or certification of the Developer Works because of the suitability of their qualifications, skills and experience in the Council's reasonable opinion.

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

Background Intellectual Property means Intellectual Property that:

- (a) relates to the Developer Works,
- (b) exists at the date of this Deed or is later created but not as a result of performing this Deed,
- (c) does not belong to a third party.

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

Cost means a contribution, charge, cost, expense, fee, levy, outgoing, payment, tax 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 the Developer Works.

Developer means Ravensfield Downs Pty Ltd or DBH Property Pty Ltd as the case may be, as specified in Item 1 of the Reference Schedule.

Developer Works means the Works specified or described in Item 3 of the Reference Schedule, including design, construction, supervision, testing and certification.

Developer Works Location Plan means the plan in Schedule 2.

Developer Works Agreed Cost means, in respect of an item of the Developer Work, the \$ amount specified in Item 4 of the Reference Schedule corresponding to that item of Developer Work.

Development means the Development specified or described in Item 2 of the Reference Schedule.

Development Contribution means a monetary contribution under s7.11 of the Act, or a levy under s7.12 of the Act, payable to the Council pursuant to a condition of the Applicable Development Consent.

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

Development Contribution Amount in respect of an Applicable Development Consent, means the \$ amount specified in Item 9 of the Reference Schedule corresponding to that Applicable Development Consent.

Development Contribution Credit Amount in respect of an item of the Developer Works, means the \$ amount specified in Item 10 of the Reference Schedule corresponding to that item of the Developer Works.

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.

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Intellectual Property means all copyright (including moral rights), patents, trademarks, designs, confidential information, circuit layouts, data and any other rights from intellectual activity in the industrial, scientific, literary and artistic fields recognised in domestic law anywhere in the world.

Item means a numbered item and the corresponding text in the Reference Schedule.

Monetary Contributions means the monetary Development Contributions required to be paid to the Council under condition 2 of the Applicable Development Consents for the public purposes and amounts in accordance with condition 2 of the Applicable Development Consents to the date of this Agreement .

Party means a party to this Deed.

Practical Completion Certificate means a certificate issued by an independent certifier or the Council to the effect that, in the reasonable opinion of the independent certifier or the Council, the Developer Works are substantially complete and any incomplete part or Defect is of a minor nature.

Practical Completion Date means the date when the Practical Completion Certificate was issued for the Developer Works.

Rectify means rectify, remedy or correct.

Reference Schedule means Schedule 1.

Technical Data means all technical know-how and information in material form, including manuals, designs, standards, specifications, reports, models, plans, drawings, calculations, software, source code and test results.

Third Party Intellectual Property means Intellectual Property relating to the Developer Works that is owned by a person other than the Council or the Developer.

Works-As-Executed Plan means detailed plans and specifications of the Developer Works at the Practical Completion Date.

- 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.

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- 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 a Party to this Deed includes a reference to the servants, agents and contractors of the Party, the Party's successors and assigns.
- 1.2.14 A reference to 'dedicate' or 'dedication' in relation to land is a reference to dedicate or dedication free of cost.
- 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 Commencement

- 2.1 This Deed takes effect on the date when all Parties have executed this Deed.
- 2.2 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.

3 General warranties

- 3.1 Each party represents and warrants that:
 - 3.1.1 it has full legal capacity and power to:
 - (a) own its property and carry on its business,
 - (b) enter into this Deed and carry out the transactions it covers,
 - 3.1.2 it holds each authorisation necessary to:
 - (a) properly execute this document and carry out the transactions,
 - (b) make this document legal, valid, binding and admissible in evidence,
 - (c) properly carry on its business,

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(d) and it is complying with any conditions of those authorisations,

3.1.3 it is not entering into this Deed as a trustee of any trust or settlement.

3.1.4 it has the full power to enter into and perform its obligations under this Deed and that, when executed, this Deed will constitute legal, valid and binding obligations according to its terms.

4 Power of attorney

4.1 Each person who executes this document under a power of attorney declares that he or she is not aware of any fact or circumstance that might affect his or her authority to do so.

5 Parties' relationship

5.1 Nothing in this Deed:

5.1.1 makes the Developer a partner, agent or legal representative of the Council,

5.1.2 creates a partnership, agency or trust,

5.1.3 confers on the Developer any authority to bind the Council in any way.

5.2 The rights of the parties do not merge once the Developer Works are completed or this Deed is terminated.

6 Deed not construction contract

6.1 This Deed is not a construction contract or arrangement as defined in the *Building and Construction Industry Security of Payments Act 1999* (NSW), between the Council and the Developer.

7 Developer Works before execution of Deed

7.1 This Deed applies to any Developer Works that occur before the Deed itself is executed.

8 Not used

Part 2 – Developer Works

9 Not used

10 Not used

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11 Not used

12 Warranties relating to Developer Works

- 12.1 The Developer warrants to the Council that:
 - 12.1.1 it has obtained all Approvals and has complied with all laws and applicable industry standards in relation to the Developer Works,
 - 12.1.2 the Developer Works are fit for purpose,
 - 12.1.3 only Approved Persons have been engaged in relation to the Developer Works,
 - 12.1.4 the Developer Works have been carried out and completed in a good and workmanlike manner having regard to the intended purpose of the Developer Works.
- 12.2 The Developer is to procure in favour of the Council from the appropriate Approved Person engaged in relation to the Developer Works, any warranty reasonably required by the Council relating to the design, construction, supervision, inspection, testing or certification of the Developer Works.

13 Not used

14 Not used

15 Not used

16 Not used

17 Not used

18 Not used

19 Not Used

20 Not used

21 Not used

22 Not used

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23 Not used

24 Access to information & records

- 24.1 The Council may make a written request to the Developer:
 - 24.1.1 to provide information to the Council concerning the Developer Works,
 - 24.1.2 to allow the Council to inspect the Developer's records concerning the Developer Works, including by giving the Council access to premises owned, occupied or controlled by the Developer for that purpose.
- 24.2 The Developer is to comply with any such request made by the Council not later than 14 days after the Council makes the request.

25 Not used

26 Practical Completion of Developer Works

- 26.1 The Parties acknowledge that Council has issued a Practical Completion Certificate for the Developer Works and is reasonably satisfied that no aspect of the relevant Developer Works reasonably requires completion, rectification or repair.

27 Ownership of Developer Works

- 27.1 The Parties acknowledge that the Developer Works are vested in the Council.

28 Works-As-Executed Plan

- 28.1 The Parties acknowledge that the Developer has submitted to the Council a full Works-As-Executed-Plan for the Developer Works in a format agreed to by the Council.
- 28.2 The Developer, being the copyright owner in the Works-As-Executed Plan, assigns the copyright in the Works-As-Executed Plan to the Council free of Cost to the Council.
- 28.3 If the Developer is not the copyright owner of the Work-As-Executed Plan, the Developer is to promptly procure the assignment of the copyright of the Works-As-Executed Plan to the Council free of cost to the Council.

29 Not used

30 Development Contributions

- 30.1 This clause applies if Items 9 and 10 of the Reference Schedule specify a Development Contribution Amount payable by the Developer to the Council

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- and a Development Contribution Credit Amount, respectively, in relation to the Developer Works.
- 30.2 The Developer acknowledges the obligation imposed by the Applicable Development Consent to pay to the Council the Development Contribution Amount in relation to the Development.
- 30.3 Pursuant to s7.11(5)(b) of the Act, in consideration of the Developer carrying out the Developer Works and otherwise performing all of its obligations under this Deed, the Development Contribution Amount payable by the Developer is to be reduced by the Development Contribution Credit Amount relevant to the Developer Work.

Part 3 – Dispute Resolution

31 Expert determination

- 31.1 This clause applies to a Dispute between the Parties to this Deed concerning a matter arising in connection with this Deed that can be determined by an appropriately qualified expert.
- 31.2 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.
- 31.3 If such a notice is given, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 31.4 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.
- 31.5 The expert determination is binding on the Parties except in the case of fraud or misfeasance by the expert.
- 31.6 Each Party is to bear its own costs arising from or in connection with the appointment of the expert and the expert determination.
- 31.7 The Parties are to share equally the costs of the President, the expert, and the expert determination.

32 Mediation

- 32.1 This clause applies to any Dispute arising in connection with this Deed other than a Dispute that is subject to expert determination in accordance with this Deed.
- 32.2 Such a Dispute is taken to arise if one Party gives another Party a notice in writing specifying particulars of the Dispute.
- 32.3 If such a notice is given, the Parties are to meet within 14 days of the notice in an attempt to resolve the Dispute.
- 32.4 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 NSW Law Society to select a mediator.

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- 32.5 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.
- 32.6 Each Party is to bear its own costs arising from or in connection with the appointment of a mediator and the mediation.
- 32.7 The Parties are to share equally the costs of the President, the mediator, and the mediation.

33 Arbitration Excluded

- 33.1 The arbitration of any Dispute between the Parties arising under, or in connection with, this Deed is expressly excluded.

Part 4 - Enforcement

34 Not used

35 Breach of obligations

- 35.1 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:
- 35.1.1 specifying the nature and extent of the breach, and
- 35.1.2 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, and
- 35.1.3 specifying the period within which the breach is to be rectified or compensation paid, being a period that is reasonable in the circumstances.

36 Termination

- 36.1 If the Council reasonably considers that the Developer has failed to fully comply with a written notice given under this Deed in relation to a breach of the Developer's obligations, the Council may, without further notice to the Developer terminate this Deed by written notice to the Developer.

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37 Effect of termination

- 37.1 If the Council terminates this Deed:
 - 37.1.1 the Parties are to immediately stop performing the Deed,
 - 37.1.2 no rights of the Council existing at the date of termination are affected,
 - 37.1.3 the Developer is not entitled to any payment or compensation for damages, losses or Costs arising because of the termination,
 - 37.1.4 the Developer is to pay any Costs the Council incurs, and which are invoiced to the Developer, in rectifying the breach

38 Enforcement in a court of competent jurisdiction

- 38.1 Without limiting any other provision of this Deed, the Parties may enforce this Deed in any court of competent jurisdiction.
- 38.2 For the avoidance of doubt, nothing in this Deed prevents:
 - 38.2.1 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
 - 38.2.2 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.

39 Not used

Part 5 – Indemnities & Insurance

40 Risk

- 40.1 The Developer performs this Deed at its own risk and at its own Cost unless otherwise expressly provided in this Deed.

41 Release

- 41.1 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.

42 Indemnity

- 42.1 The Developer indemnifies the Council from and against all Claims that may be sustained, suffered, recovered or made against the Council arising in

