

# PLANNING AGREEMENT

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Muswellbrook Shire Council ABN 86 864 180 944

AND

Muswellbrook BESS Pty Ltd ACN 650 555 294 as trustee for  
Muswellbrook BESS Trust ABN 85 857 158 051



# Planning Agreement

<b>Date</b>	
<b>Parties</b>	<p><b>MUSWELLBROOK SHIRE COUNCIL ABN 86 864 180 944</b> of Campbell's Corner, 60-82 Bridge Street, Muswellbrook, NSW 2333</p> <p style="text-align: right;">(Council)</p> <p><b>AND</b></p> <p>Muswellbrook BESS Pty Ltd ACN 650 555 294 as trustee for Muswellbrook BESS Trust ABN 85 857 158 051 of Level 24, 200 George Street, Sydney, NSW 2000</p> <p style="text-align: right;">(Developer)</p>
<b>Background</b>	<p>A. The Developer has made a Development Application for State Significant Development in August 2022, seeking development consent to carry out the Development on the Land.</p> <p>B. The Developer made an offer to the Council to enter into an agreement to make Development Contributions towards a Public Benefit, if a Development Consent to carry out the Development on the Land was granted.</p> <p>C. On 7 July 2023, the Developer was granted Development Consent by the Minister for Planning and Public Spaces to carry out the Development on the Land.</p> <p>D. The Developer has entered into this Agreement with the Council to make Development Contributions for the Public Benefit in accordance with Condition A14 of the Development Consent.</p> <p>E. This Agreement is entered into pursuant to an arrangement under Division 7.1 of Part 7 of the Act.</p>

## Operative Provisions

### 1 Definitions

In this Agreement, unless the context indicates a contrary intention:

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

**Approval** means any certificate, licence, consent, permit, approval or other requirement of any Authority having jurisdiction in connection with the activities contemplated by this Agreement;

**Authority** means any government, semi-governmental, statutory, administrative, fiscal or judicial body, department, commission, authority, tribunal, public or other person;

**Business Day** means a day on which banks are open for general banking business in NSW, excluding Saturdays, Sundays and public holidays;

**Claim** means any claim, loss, liability, damage, proceeding, order, judgment or expense arising out of the operation of this Agreement;

**Council** means the Muswellbrook Shire Council ABN 86 864 180 944;

**CPI** means the All Group Consumer Price Index for Sydney as published by the Australian Bureau of Statistics;

**Date of Commencement of Operation** means the date on which the Development commences Operation, as defined by SSD-29704663;

**Developer** means Muswellbrook BESS Pty Ltd ACN 650 555 294 as trustee for Muswellbrook BESS Trust ABN 85 857 158 051;

**Development** means the development the subject of the Development Application as made by the Developer, and any conditions of the Development Consent;

**Development Application** means the development application described in Item 4 of Schedule 1;

**Development Consent** means the consent granted under the Act to State Significant Development Application SSD 29704663;

**Development Contribution** means \$200 per megawatt hour (MWh) of installed capacity (by nameplate capacity), as allocated to the Public Benefits as set out in Schedule 2;

**Dispute** means any dispute between the parties in connection with this Agreement;

**Force Majeure Event** means an event affecting a party which is outside that party's reasonable control including, but not limited to, fire, storm, flood, drought, earthquake, failure of major dam, explosion, war, invasion, rebellion, sabotage, epidemic, pandemic, labour dispute, failure or delay in transportation, act or omission (including laws, regulations, disapprovals or failures to approve) of any third person (including, but not limited to, subcontractors, customers, governments or government agencies).

**GST Law** means *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*.

**Land** means the parcels of land identified in Appendix 2 of the Development Consent.

**Law** means:

- (a) any law applicable including legislation, ordinances, regulations, by-laws and other subordinate legislation;
- (b) any Approval, including any condition or requirement under it; and
- (c) any fees and charges payable in connection with the things referred to in paragraphs (a) and (b);

**Muswellbrook Shire Community Benefit Fund** means an account established and managed by Council into which identified monies from Planning Agreements are deposited and expended for the Muswellbrook Shire community benefit;

**Notice** means a written notice, consent, approval, direction, order, information, application, request or other communication;

**Public Benefit** for the purpose of this Agreement means the public benefits described in Schedule 2;

**Regulation** means the *Environmental Planning and Assessment Regulation 2021* (NSW);

**Related Body Corporate** has the meaning given in the *Corporation Act 2001* (Cth);

**Schedule** means any schedule to this Agreement;

**Suspension event** means when the Development ceases operation for a continuous period of 3 months or more;

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

**Trust** means Muswellbrook BESS Trust ABN 85 857 158 051.

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## 2 Interpretation

In this Agreement, unless the context indicates a contrary intention:

- (a) **(documents)** a reference to this Agreement or another document includes any document which varies, supplements, replaces, assigns or novates this Agreement or that other document;
- (b) **(references)** a reference to a party, clause, paragraph, schedule or annexure is a reference to a party, clause, paragraph, schedule or annexure to or of this Agreement;
- (c) **(headings)** clause headings and the table of contents are inserted for convenience only and do not affect interpretation of this Agreement;
- (d) **(person)** a reference to a person includes a natural person, corporation, statutory corporation, partnership, the Crown and any other organisation or legal entity and their personal representatives, successors, substitutes (including persons taking by novation) and permitted assigns;
- (e) **(party)** a reference to a party to a document includes that party's personal representatives, executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns;
- (f) **(president, CEO or managing director)** the president, CEO or managing director of a body or Authority means any person acting in that capacity;
- (g) **(requirements)** a requirement to do any thing includes a requirement to cause that thing to be done, and a requirement not to do any thing includes a requirement to prevent that thing being done;
- (h) **(including)** including and includes are not words of limitation, and a list of examples is not limited to those items or to items of a similar kind;
- (i) **(corresponding meanings)** a word that is derived from a defined word has a corresponding meaning;
- (j) **(singular)** the singular includes the plural and vice-versa;
- (k) **(gender)** words importing one gender include all other genders;
- (l) **(parts)** a reference to one or more things includes each part and all parts of that thing or group of things but nothing in this clause implies that part performance of an obligation constitutes performance of that obligation;

- (m) **(legislation)** a reference to any legislation or provision of legislation includes all amendments, consolidations or replacements and all regulations or instruments issued under it;
- (n) **(time and date)** a reference to a time or date in connection with the performance of an obligation by a party is a reference to the time and date in Australia, even if the obligation is to be performed elsewhere;
- (o) **(joint and several)** an agreement, representation, covenant, right or obligation:
  - (i) in favour of two or more persons is for the benefit of them jointly and severally; and
  - (ii) on the part of two or more persons binds them jointly and severally;
- (p) **(writing)** a reference to a notice, consent, request, approval or other communication under this Agreement or an agreement between the parties means a written notice, request, consent, approval or agreement;
- (q) **(replacement bodies)** a reference to a body (including an institute, association or Authority) which ceases to exist or whose powers or functions are transferred to another body is a reference to the body which replaces it or which substantially succeeds to its power or functions;
- (r) **(Australian currency)** a reference to dollars or \$ is to Australian currency;
- (s) **(day)** a reference to a day is a reference to an ordinary business day in New South Wales;
- (t) **(month)** a reference to a month is a reference to a calendar month; and
- (u) **(year)** a reference to a year is a reference to twelve consecutive calendar months.

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### 3 Explanatory note

The explanatory note prepared in accordance with clause 205 of the Regulation must not be used to assist in construing this Agreement.

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### 4 Planning Agreement under the Act

- (a) The parties agree that this Agreement is a planning agreement within the meaning of section 7.4 of the Act.
- (b) Schedule 1 of this Agreement summarises the requirements for planning agreements under s 7.4 of the Act and the way this Agreement addresses those requirements.

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### 5 Application of this Agreement

This Agreement applies to the Land.

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### 6 Operation of this Agreement

- (a) This Agreement commences on and from the date it is executed by both parties.
- (b) On and from the date of termination of this Agreement in accordance with clause 10 (Termination), this Agreement will cease to have effect and the Council will immediately return to the Developer any title documentation or other security it holds under this Agreement.

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## 7 Application of s 7.11, s 7.12 and s 7.24 of the Act

This Agreement does not exclude the application of section 7.11, 7.12 or 7.24 of the Act to the Development, however, this Agreement represents the whole of the Development Contributions required to be made under the Development Consent.

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## 8 Contributions to be made under this Agreement

### 8.1. Contributions

- (a) The Developer must make the Development Contributions to the Council in accordance with Schedule 2 of this Agreement and any other provision of this Agreement relating to the making of Development Contributions.
- (b) Council will apply each Development Contribution made by the Developer under this Agreement:
  - (i) for the relevant Public Benefit; and
  - (ii) otherwise in accordance with this Agreement.
- (c) Payment of Development Contributions in accordance with Schedule 2 must be paid by cash, bank cheque made payable to Muswellbrook Shire Council or by electronic transfer into a bank account, the details of which are to be provided by Council to the Developer.
- (d) A monetary Development Contribution is made for the purposes of this Agreement when Council receives the full amount of the contribution payable under this Agreement in cash or by unendorsed bank cheque or by deposit by means of electronic funds transfer of cleared funds into the bank account nominated by Council.
- (e) If a Suspension Event has been in effect in the period preceding the payment date, the Development Contributions are to be reduced on a pro-rata basis by the number of months that the Suspension Event occurred as notified to Council. The Developer is to notify the Council of a Suspension Event as soon as reasonably practicable after becoming aware of this.
- (f) If a Force Majeure Event occurs in the period preceding the payment date resulting in the suspension of the Development for a period of 3 months or more, the Development Contributions are to be reduced on a pro-rata basis by the number of months that the Force Majeure Event occurred as notified to Council. The Developer is to notify the Council of any Force Majeure Event as soon as reasonably practicable after becoming aware of this.

### 8.2. Adjustment for CPI

- (a) The Development Contributions will be indexed on each annual anniversary of the date of this Agreement as follows:

$$DCP = \frac{DC \times A}{B}$$

where:

- DCP = the actual Development Contribution payment amount payable at the time the particular payment is made;
- DC = the particular Development Contribution payment amount required to be paid as per Schedule 2;
- A = is the CPI index number most recently published before the annual anniversary of the date of this Agreement; and
- B = is the CPI index number most recently published prior to the date of this Agreement.

- (b) Notwithstanding any other provision to the contrary, the Development Contributions are

indexed annually according to CPI from the date of this Agreement irrespective of when the Development Contributions are payable.

- (c) If after the formula in clause 8.2(a) is applied the indexed Development Contribution will be less than the Development Contribution immediately before the indexation, the Development Contribution will not be adjusted.

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## **9 Registration of this Agreement**

### **9.1. Developer interest**

The Developer represents and warrants to Council that as at the date of this Agreement it has obtained the consent of each person who has an estate or interest in the Land registered under the *Real Property Act 1900* (NSW) to enable registration of this Agreement pursuant to clause 9.2.

### **9.2. Registration of this Agreement**

- (a) The Developer agrees to procure the registration of this Agreement under the *Real Property Act 1900* (NSW) on the relevant titles to the Land in accordance with section 7.6 of the Act.
- (b) The Developer, at its own expense, will within 3 months after the date of this Agreement, take all practical steps, and otherwise do anything that Council reasonably requires to procure the registration of this Agreement on the titles to the Land under the *Real Property Act 1900* (NSW).
- (c) The Developer acknowledges and agrees that Council may lodge and maintain a caveat against the title to the Land reflecting its rights under this Agreement provided that any caveat lodged by Council will be removed contemporaneously with registration of this Agreement against the title to the Land.

### **9.3. Removal of Agreement**

When requested to do so after termination of this Agreement, Council will, at the Developer's expense, promptly execute such documents and take such steps as may reasonably be required to remove notification of registration of this Agreement from the title to the Land.

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## **10 Termination**

This Agreement terminates on:

- (a) the date on which a Court of competent jurisdiction declares that the Development Consent is invalid; or
- (b) at such time it is mutually agreed between the parties in writing.

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## **11 Review of this Agreement**

- (a) This Agreement may be reviewed or modified by agreement of the parties provided that no review will be undertaken within the 2 years following the date of this Agreement.
- (b) No review or modification of this Agreement will be of any force or effect unless it is in writing and signed by the parties to this Agreement.
- (c) A party is not in breach of this Agreement if it does not agree to an amendment to this Agreement requested by a party in, or as a consequence of, a review.

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## **12 Dispute Resolution**

### **12.1. General**

This clause applies to any Dispute arising in connection with this Agreement.

## **12.2. Notice of Dispute**

The party wishing to commence the dispute resolution process must give written notice (Notice of Dispute) to the other party of:

- (a) the nature of the Dispute;
- (b) the alleged basis of the Dispute; and
- (c) the position which the party issuing the Notice of Dispute believes is correct.

## **12.3. Representatives of parties to meet**

- (a) The representatives of the parties must promptly (and in any event within 20 Business Days of the Notice of Dispute) meet in good faith to attempt to resolve the notified Dispute.
- (b) The parties may, without limitation:
  - (i) resolve the Dispute during the course of that meeting,
  - (ii) agree that further material or expert determination in accordance with clause 12.6 about a particular issue or consideration is needed to effectively resolve the Dispute (in which event the parties will, in good faith, agree to a timetable for resolution); or
  - (iii) agree that the parties are unlikely to resolve the Dispute and, in good faith, agree to a form of alternative dispute resolution (including expert determination, arbitration or mediation) which is appropriate for the resolution of the relevant Dispute.

## **12.4. Further Notice if not settled**

If the Dispute is not resolved within 20 Business Days after the nominated representatives have met, either party may give to the other a written notice calling for determination of the Dispute (Determination Notice) by mediation under clause 12.5 or by expert determination under clause 12.6.

## **12.5. Mediation**

If a party gives a Determination Notice calling for the Dispute to be mediated:

- (a) the parties must agree to the terms of reference of the mediation within 10 Business Days of the receipt of the Determination Notice (the terms shall include a requirement that the mediation rules of the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply);
- (b) the mediator will be agreed between the parties, or failing agreement within 10 Business Days of receipt of the Determination Notice, either party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator;
- (c) the mediator appointed pursuant to this clause 12.5 must:
  - (i) have reasonable qualifications and practical experience in the area of the Dispute; and
  - (ii) have no interest or duty which conflicts or may conflict with their function as a mediator, the mediator being required to fully disclose any such interest or duty before their appointment;
- (d) the mediator shall be required to undertake to keep confidential all matters coming to their knowledge by reason of their appointment and performance of their duties;
- (e) the parties must within 15 Business Days of receipt of the Determination Notice notify each other of their representatives who will be involved in the mediation;
- (f) the parties agree to be bound by a mediation settlement and may only initiate judicial



proceedings in respect of a Dispute which is the subject of a mediation settlement for the purpose of enforcing that mediation settlement; and

- (g) in relation to costs and expenses:
  - (i) each party will bear its own professional and expert costs incurred in connection with the mediation; and
  - (ii) the costs of the mediator will be shared equally by the parties unless the mediator determines that a party has engaged in vexatious or unconscionable behaviour in which case the mediator may require the full costs of the mediation to be borne by that party.

#### **12.6. Expert determination**

If the Dispute is not resolved under clause 12.3 or clause 12.5, or the parties otherwise agree that the Dispute may be resolved by expert determination, the parties may refer the Dispute to an expert, in which event:

- (a) the Dispute must be determined by an independent expert in the relevant field:
  - (i) agreed upon and appointed jointly by the parties; and
  - (ii) in the event that no agreement is reached, or no appointment is made within 10 Business Days of the agreement, to refer the Dispute to an expert, appointed on application of a party by the then President of the Law Society of New South Wales;
- (b) the expert must be appointed in writing and the terms of the appointment must not be inconsistent with this clause;
- (c) the determination of the Dispute by such an expert will be made as an expert and not as an arbitrator and will be in writing and contain the reasons for the determination;
- (d) the expert will determine the rules for the conduct of the process but must conduct the process in accordance with the rules of natural justice;
- (e) each party will bear its own costs in connection with the process and the determination by the expert and will share equally the expert's fees and costs; and
- (f) any determination made by an expert pursuant to this clause is final and binding upon the parties unless:
  - (i) within 20 Business Days of receiving the determination, a party gives written notice to the other party that it does not agree with the determination and intends to commence litigation; or
  - (ii) the determination is in respect of, or relates to, termination or purported termination of this Agreement by a party, in which event the expert is deemed to be giving a non-binding appraisal.

#### **12.7. No suspension of contractual obligations**

Subject to any interlocutory order, the referral to or undertaking of a Dispute resolution process under this clause 12 does not suspend the parties' obligations under this Agreement.

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## **13 Enforcement**

### **13.1. Default**

- (a) In the event a party considers another party has failed to perform and fulfil an obligation under this Agreement, it may give notice in writing to the other party (Default Notice) giving all particulars of the matters in respect of which it considers the default has occurred and by such notice require the default to be remedied within a reasonable time not being less than 30 days.

- (b) In determining a reasonable time, regard must be had to both the nature of the default and the action required to remedy it and whether or not the continuation of the default constitutes a public nuisance or raises other circumstances of urgency or emergency.
- (c) If a party disputes the Default Notice it may, if the Default Notice relates to a Dispute, refer the Dispute to dispute resolution under clause 12 of this Agreement.

### **13.2. General enforcement**

- (a) Without limiting any other remedies available to the parties, this Agreement may be enforced by a party 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 Law relating to the enforcement of any aspect of this Agreement or any matter to which this Agreement relates.

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## **14 Assignment**

- (a) Subject to clause 14(b), the Developer must not assign or deal with any right under this Agreement without the prior written consent of Council (not to be unreasonably withheld).
- (b) The Developer may, without consent from the Council, assign all or part of its rights arising out of or under this Agreement, or novate its rights and obligations under this Agreement, to a Related Body Corporate, provided the Developer first:
  - (i) satisfies Council on reasonable grounds that the relevant Related Body Corporate has the financial resources necessary to carry out the Developer's obligations under this Agreement; and
  - (ii) procures that the relevant Related Body Corporate executes and delivers to Council prior to any such dealing taking effect, a deed in favour of Council whereby the relevant Related Body Corporate becomes contractually bound with Council to perform all of the Developer's obligations (including obligations which may have arisen before the transfer, assignment or novation takes effect).
- (c) Council may withhold its consent to any proposed assignment by the Developer unless it is satisfied on reasonable grounds that the proposed assignee has sufficient financial and technical resources to enable it to comply with the Developer's obligations under this Agreement.
- (d) NOT USED.
- (e) Any purported dealing in breach of this clause is of no effect.

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## **15 Approvals and consents**

Except as otherwise set out in this Agreement, and subject to any Law, 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 that party. A party is not obligated to give its reasons for giving or withholding consent or for giving consent subject to conditions.

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## **16 Council's position**

### **16.1. Agreement does not fetter Discretion**

This Agreement is not intended to operate to fetter, in any manner the:

- (a) power of Council to make any Law; or

- (b) exercise by Council of any statutory power or discretion

(all referred to in this Agreement as a "Discretion").

## **16.2. Severance of provisions**

- (a) No provision of this Agreement is intended to, or does, constitute any unlawful fetter on any exercise of any Discretion. If, contrary to the operation of this clause, any provision of this Agreement is held by a court of competent jurisdiction to constitute a fetter on any Discretion, the parties agree:
- (i) they will take all practical steps, including the execution of any further documents, to ensure the objective of this clause 16 is substantially satisfied; and
  - (ii) in the event that clause 16.2(a)(i) cannot be achieved without giving rise to a fetter on a Discretion, the relevant provision is to be severed and the remainder of this Agreement has full force and effect.

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## **17 Notices**

### **17.1. Notices**

- (a) Any Notice that must or may be given or made to a party to this Agreement is only given or made if it is in writing and sent in one or more of the following ways:
- (i) delivered or posted to that party at its address set out below; or
  - (ii) emailed to that party at its email address set out below

#### **Council**

Attention	The General Manager
Address	PO Box 122, Muswellbrook, NSW, 2333
Email	council@muswellbrook.nsw.gov.au

#### **Developer**

Attention	The Chief Executive Officer Muswellbrook BESS Pty Ltd
Address	Level 24, 200 George Street, Sydney NSW 2000
Email	info@firmpower.com.au

- (b) If a party gives the other party 3 Business Days notice of a change of its address, number or email, any Notice is only given or made by that party if it is delivered, posted or emailed to the latest address or email.
- (c) Any Notice is to be treated as given or made at the following time if it is:
- (i) delivered, when it is left at the relevant address;
  - (ii) sent by post, 5 Business Days after it is posted.
- (d) If any Notice 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.

### **17.2. Notices sent by email**

- (a) A party may serve a Notice by email if the Notice:

- (i) includes a signature block specifying:
    - a. the name of the person sending the Notice; and
    - b. the sender's position within the relevant party;
  - (ii) states in the body of the message or the subject field that it is sent as a Notice under this Agreement;
  - (iii) contains an express statement that the person sending the Notice has the authority to serve a Notice under this Agreement; and
  - (iv) is sent to the email address specified in clause 617.1(a) or the email address last notified by the intended recipient to the sender.
- (b) The recipient of a Notice served under this clause 17.2 must:
- (i) promptly acknowledge receipt of the Notice; and
  - (ii) keep an electronic copy of the Notice.
- (c) Failure to comply with clause 17.2 does not invalidate service of a Notice under this clause.

### **17.3. Receipt of Notices sent by email**

- (a) A Notice sent under clause 17.2 is taken to be given or made:
- (i) when the sender receives an email acknowledgement from the recipient's information system showing the Notice has been delivered to the email address stated above;
  - (ii) when the Notice enters an information system controlled by the recipient; or
  - (iii) when the Notice is first opened or read by the recipient, whichever occurs first.
- (b) If under clause 17.3 a Notice would be taken to be given or made on a day that is not a Business Day in the place to which the Notice is sent, or later than 5pm (local time), it will be taken to have been given or made at the start of business on the next Business Day in that place.

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## **18 Interest to accrue**

### **18.1. Interest**

- (a) The Developer agrees to pay interest on any amount under this Agreement which is not paid on the due date for payment. Interest accrues daily from (and including) the due date to (but excluding) the date of actual payment and is calculated on actual days elapsed and a year of 365 days.
- (b) The Developer agrees to pay interest under this clause without demand from Council.

### **18.2. Rate of interest**

The rate of interest applying to each daily balance is the maximum rate permitted to accrue on unpaid rates by Section 566(3) of the *Local Government Act 1993* (NSW).

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## **19 General**

### **19.1. Relationship of the Parties**

- (a) Nothing in this Agreement constitutes a partnership between the parties, nor does it constitute one party to be the agent of the other.
- (b) A party cannot in any way or for any purpose bind another party or contract in the name

of another party.

#### **19.2. Entire Agreement**

This Agreement constitutes the entire agreement of the parties in relation to its subject matter and supersedes all prior agreements, understandings and negotiations between the parties. Subject to any contrary requirement of any Law, no other covenants or provisions are implied or arise between the parties by way of collateral or other agreement. The existence of any such implication or collateral or other agreement is expressly negative to the extent permitted by Law.

#### **19.3. Construction**

No rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of or seeks to rely on this Agreement or any part of it.

#### **19.4. Confidentiality**

The parties agree that the terms of this Agreement are not confidential and this Agreement may be treated as a public document and exhibited or reported without restriction by any party.

#### **19.5. Governing Law and Jurisdiction**

- (a) The laws applicable in New South Wales govern this Agreement.
- (b) Each party irrevocably submits to the non-exclusive jurisdiction of the New South Wales Courts and Courts competent to hear appeals from those Courts.

#### **19.6. Costs**

- (a) The Developer must pay to Council the Council's reasonable costs (exclusive of GST) and disbursements in connection with the negotiation, preparation, execution, registration and release and discharge of this Agreement and any other document relating to this Agreement, and for all advertising and associated costs, within 7 days of a written demand by Council for such payment.
- (b) The Developer must also pay to Council the Council's reasonable costs of enforcing this Agreement within 7 days of a written demand by Council for such payment.
- (c) The costs payable under clauses 19.6(a) shall be capped at \$10,000 in the aggregate.

#### **19.7. Further assurances**

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.

#### **19.8. Representation and warranties**

The parties represent and warrant that they have the power and authority 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.

#### **19.9. Severability**

Subject to clause 16, this Agreement must, so far as possible, be interpreted or construed so as not to be invalid, illegal or unenforceable in any respect but if any provision on its true interpretation or construction is held to be illegal, invalid or unenforceable:

- (a) that provision will, so far as possible, be read down to the extent that it may be necessary to ensure that it is not illegal, invalid or unenforceable and as may be reasonable in all the circumstances so as to give it a valid operation of a partial character; or
- (b) if the provision or part of it cannot effectively be read down, that provision or part of it will be deemed to be void and severable and the remaining provisions of this Agreement will not in any way be affected or impaired and will continue notwithstanding that illegality, invalidity or unenforceability.

#### **19.10. Waiver**

- (a) A right or remedy created by this Agreement cannot be waived except in writing signed by the party entitled to that right. Delay by a party in exercising a right or remedy does not constitute a waiver of that right or remedy, nor does a waiver (either wholly or in part) by a party of a right operate as a subsequent waiver of the same right or of any other right of that party.
- (b) The fact that a party fails to do, or delays in doing, something the party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another party. A waiver by a party is only effective if it is in writing. A written waiver by a party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

#### **19.11. Developer as trustee – limitation of liability**

- (a) The Developer enters into this Agreement only in its capacity as trustee of the Trust and in no other capacity.
- (b) A liability arising under or in connection with this Agreement is limited to and can be enforced against the Developer only to the extent to which it can be satisfied out of the property of the Trust out of which the Developer is actually indemnified for the liability.
- (c) The limitation of the Developer's liability contained in this clause 619.11 applies notwithstanding any other provisions of this Agreement and extends to all liabilities and obligations of the Developer in connection with this Agreement.
- (d) The other parties to this Agreement may not sue the Developer in any capacity other than as trustee of the Trust, including seeking the appointment to the Developer of a receiver (except in relation to the property of the Trust), a liquidator, administrator or any other similar person.
- (e) The provisions of clauses 619.11(a) to (d) (inclusive) will not apply to any liability or obligation of the Developer to the extent there is a reduction in the extent of its indemnification out of the Trust as a result of the Developer's fraud, negligence or breach of trust, or to the extent that the Developer fails to exercise any right of indemnity it has out of the assets of the Trust in relation to the relevant liability.

## Schedule 1

### Summary of requirements (Section 7.4)

Item	Subject and subsection of the Act	Planning Agreement
1.	<b>Planning instrument and/or Development Application</b>  Section 7.4(1)  The Developer has:  (a) sought a change to an environmental planning instrument, or  (b) made, or proposes to make, a development application or application for a complying development certificate, or  (c) who has entered into an agreement with, or is otherwise associated with, a person to whom paragraph (a) or (b) applies,	(a) No  (b) Yes  (c) No
2.	<b>Description of the land to which the planning Agreement applies</b>  Section 7.4(3)(a)	Clause 1 (definitions of "Land")
3.	<b>Description of change to the environmental planning instrument to which this agreement applies</b>  Section 7.4(3)(b))	Not applicable
4.	<b>Description of the Development to which this agreement applies</b>  Section 7.4(3)(b)(ii)	Clause 1 (definitions of "Development")
5.	<b>Applicability of section 7.11 of the Act</b> Section 7.4(3)(d)	See clause 7.
6.	<b>Applicability of section 7.12 of the Act</b> Section 7.4(3)(d)	See clause 7.
7.	<b>Applicability of section 7.24 of the Act</b> Section 7.4(3)(d)	See clause 7.
8.	<b>Mechanism for dispute resolution</b>	See clause 12.

Item	Subject and subsection of the Act	Planning Agreement
	Section 7.4(3)(f)	
9.	<b>Enforcement of the Planning Agreement</b> Section 7.4(3)(g)	See clause 13.
10.	<b>Registration of the Planning Agreement</b> Section 7.4(3)(g)	To be registered against the Land. See clause 9.
11.	<b>No obligation to grant consent or exercise functions</b> Section 7.4(9)	See clauses 15 and 16.



## Schedule 2

### Development Contributions

Description of Development Contribution and Public Benefit	Type of Development Contribution	Frequency and allocation of Development Contribution
Muswellbrook Shire Community Benefit Fund	Monetary Contribution	<p>Subject to clause 68.1 of this Agreement, 85% of the Development Contribution is to be paid annually from the Date of Commencement of Operation and allocated to the Muswellbrook Shire Community Benefit Fund.</p> <p>Indexed to the CPI annually on the anniversary of the Date of Commencement of Operation.</p>
Environmental Officer	Monetary Contribution	<p>Subject to clause 68.1 of this Agreement, 15% of the Development Contribution is to be paid annually from the Date of Commencement of Operation and allocated to the funding of an Environmental Officer at Council.</p> <p>Indexed to the CPI annually on the anniversary of the Date of Commencement of Operation.</p>

**EXECUTED AS AN AGREEMENT:**

**EXECUTED** by **Muswellbrook Shire Council** )  
**ABN 86 864 180 944** by its authorised delegate )  
pursuant to Section 377 of the *Local* )  
*Government Act 1993 (NSW)*, in the presence  
of:

.....  
Signature of Witness

.....  
Authorised Delegate

.....  
Name of Witness (Print)

.....  
Name of Authorised Delegate

**EXECUTED** by **Muswellbrook BESS Pty Ltd** )  
**ACN 650 555 294** as trustee for )  
**Muswellbrook BESS Trust ABN 85 857 158** )  
**051** in accordance with Section 127 of the  
*Corporations Act 2001 (Cth)*:

.....  
Signature of Director

.....  
Signature of Director/Secretary

.....  
Name of Director (Print)

.....  
Name of Director/Secretary (Print)