

Heads of Agreement

Sunshine Coast Regional Council (Council)

The Nambour Tramway Company Ltd ACN 607 814 488 (TNTCo)

Nambour Alliance Inc. ABN 27 565 772 078 (NA)

Details

Date 28 February 2017
Version 2.2

Parties

Name Sunshine Coast Regional Council
Description Council or SCRC
Notice Details
Attention Chief Executive Officer
Address Locked Bag 72
Sunshine Coast Mail Centre
QLD 4560

Name The Nambour Tramway Company Ltd
ACN 607 814 488
Description TNTCo
Notice Details
Attention **The Directors**
Address The Nambour Tramway Company Ltd
PO BOX 141 Nambour Qld.

Name Nambour Alliance Inc.
ABN 27 565 772
Description NA
Notice Details
Attention **The Directors**
Address PO BOX 131 Nambour Qld.

Background

- (i) TNTCo is intending to establish and operate a passenger tramway, the Nambour Heritage Tramway Project (the **Project**), along the existing historic tramline in Howard Street and Mill Street, Nambour.
- (ii) At the date of this Agreement, the scope of the Project includes the re-activation of the Nambour Heritage Tramway scheme utilising the existing track between the Mill Street x Mill Lane roundabout and the Aldi driveway at 131 Howard St and includes the planning, design, approvals and construction of the following:
 - a. track refurbishments;
 - b. intersection upgrades;
 - c. tram;
 - d. depot (tram parking and maintenance);
 - e. terminus facilities (ticketing, tram stop, information centre/small museum, office and amenities for staff);
 - f. car parking facilities at terminus sites as required; and
 - g. acquisition of land and / or easements to assist the operations.
- (iii) Council has resolved to enter into a partnership and provide a level of support to TNTCo for the Project subject to the conditions and hold points stipulated in this Agreement.
- (iv) Although a feasibility analysis has been undertaken in respect of the Project, the parties recognise that detailed project investigations need to be finalised, and certain hold points satisfied, before any party can commit to undertaking construction of the Project.
- (v) Council and TNTCo have agreed to enter into this Heads of Agreement (**Agreement**) to set down in writing various parameters around which those detailed project investigations will be undertaken and further work will proceed in respect of the Project.
- (vi) NA have been included in this HOA as they have been successful in applying for a National Stronger Regions Funding grant, with the Australian Government Department of Infrastructure and Regional Development, for the purposes of assisting in the funding of the tramway infrastructure.
- (vii) Background
 - 1. NA is a long and well established not for profit organisation in Nambour;
 - 2. NA as the lead organisation formed a consortium with The Nambour Tramway Company (TNTCo) to assist with securing community funding for part only of a larger Program of Works centred around the construction of the Nambour Heritage Tramway;

3. On the 15th March 2016 NA applied and was successful with securing National Stronger Regions Funding Round 3 for the Construction of what is known as the Western Terminus or the Nambour Heritage Tramway Depot, located 28 Mill Street Nambour.
4. The grant received by NA for the "Construction of the Nambour Heritage Tramway Depot Project-NSRF 300282" totals \$500,000 AUD, is the sole purpose for NA's inclusion into this Heads of Agreement (HOA) and involvement in the Program of Works centred around the construction of the Nambour Heritage Tramway.
5. NA has no role or responsibility with the wider tramway project, and it's only involvement is with the grant NSRF300282 where its role has been to secure, and now discharge the grant.
6. NA and The Commonwealth of Australia as represented by the Department of Infrastructure and Regional Development shall enter into a Deed of Agreement in the form attached ("Deed of Agreement").
7. Notwithstanding the provisions of the Deed of Agreement, Council and TNTCo shall to the extent such matters are within their control, do all things necessary, and provide all necessary assistance to ensure that NA is able to fulfil all its obligations as contained in the Deed of Agreement.
8. It is intended that this HOA be attached and form part of the NSRF 300282 Deed of Agreement.

Agreement

Purpose and status of this Agreement

1. The purpose of this Agreement is to outline:
 - (a) the roles and responsibilities of the Council, TNTCo and NA governance, funding and key hold points in relation to the Project; and
 - (b) the basis upon which it is anticipated that all further applications, approvals investigations, enquiries and submissions in relation to the Project, will proceed.
2. This Agreement constitutes a legally binding agreement between the parties.

Definitions

The following words have these meanings in this Agreement unless the contrary intention appears:

1. **Agreement** means this Heads of Agreement, including all annexures.
2. **Council** means Sunshine Coast Regional Council.
3. **TNTCo** means The Nambour Tramway Company

4. **NA** means the Nambour Alliance Inc.
5. **Project** means the Nambour Heritage Tramway Project as described in the “Background” section of this Agreement, paragraph (ii).

Interpretation

In this Agreement unless the contrary intention appears, a reference to:

1. this Agreement or another instrument includes any variation or replacement of either of them;
2. a statute, ordinance, code, planning scheme, by-law or other law includes regulations and other instruments under them and consolidations, amendments, re-enactments or replacements of any of them;
3. a person includes a reference to the person’s executors, administrators and successors;
4. a day is to be interpreted as the period of time commencing at midnight and ending 24 hours later;
5. the word including when introducing an item or list of items does not limit the meaning of the words to which the list relates to that item or items or to items of a similar kind;
6. the singular includes the plural and vice versa;
7. the word person includes a firm, a body corporate, an unincorporated association or an authority;
8. if a period of time is specified and dates from a given day or the day of an act or event, it is to be calculated exclusive of that day;
9. headings are inserted for convenience and do not affect the interpretation of this Agreement; and
10. where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings.

1. BUILD, OWN & OPERATE

- 1.1 TNTCo will operate the entire tramway scheme including the rolling stock, signals and terminuses, and will acquire all necessary permits and insurances for safe operations, and provide all operational support resources, including appropriately qualified operational and support staff, ongoing supervision and financial support and governance.
- 1.2 TNTCo will:
 - (a) set fees for use of the tramway scheme in a manner in which they choose (provided that such fees must be reasonable); and

- (b) collect such fees and revenue from other means, to offset the operational costs of the tramway scheme.

1.3 TNTCo will build and own any rolling stock.

1.4 Council will own any tramway track and will build and own any signals and terminuses, including land and buildings on which the terminuses are to be constructed up to the value of Council's approved budget amount and including any infrastructure purchased through grant funds that can be properly assigned to council ownership.

1.5 Council will not be responsible for or involved with the operation of the tramway scheme, provided however that the parties acknowledge and agree that Council may require the right to take action in relation to the tramway scheme in certain limited circumstances, for example, in circumstances where there is an immediate threat to health or safety of persons or other emergency. The parties will negotiate in good faith to agree upon appropriate arrangements in this regard.

1.6 The parties to this HOA acknowledge that:

- (a) Notwithstanding the provisions of the Deed of Agreement, Council and TNTCo shall to the extent such matters are within their control, do all things necessary, and provide all necessary assistance to ensure that NA is able to fulfil all its' obligations as contained in the Deed of Agreement, as if Council and TNTCo were a party to the Deed of Agreement. Without limiting this clause, Council will undertake the project management role and in doing so will apply due care and skill in project managing the works authorised by the Commonwealth Grant NSRF300282. NA will act as a conduit between the Australian Government and Council.
- (b) It is intended that this HOA be attached and form part of the NSRF 300282 Deed of Agreement.
- (c) Nothing in this clause 1.6 will require a party to engage in anything that would place it in breach of any law, regulation or State or Federal Government policy.

2. ACQUISITION OF LAND & INFRASTRUCTURE

2.1 Any tram ("TNTC Item") that is to be purchased is to be purchased and owned by TNTC at TNTC's cost.

2.2 Any land, tramway tracks, signals and necessary buildings ("Council Items") that need to be acquired are matters for which Council will be responsible and will be at Council's cost up to the value of Council's approved budgeted amount referred to in clause 6.4. Council items will be owned or otherwise secured by Council in a tenure that (in its absolute discretion) Council is satisfied provides an appropriate level of control to enable the proper operation of its asset and the tramway.

2.3 This clause left blank intentionally

- 2.4 Council will provide to TNTCo and TNTCo will accept from Council a lease, licence or other right to use any Council items for the purpose of operating the tramway.

3. PLANNING & DESIGN

- 3.1 The preparation of a business case (as contemplated in hold point 2 in clause 7) and any further feasibility analysis which is undertaken for the Project is the sole cost and responsibility of TNTCo.
- 3.2 Planning, design, fabrication and cost of the tram are to be the responsibility of TNTCo.
- 3.3 Planning and design of traffic solutions, traffic intersections, tram stop and depot facilities, tram track works and all associated costs are to be the responsibility of Council up to the capital contribution endorsed by Council as per Clause 6.4.

4. LAND USE APPROVALS

- 4.1 Any development land use approvals including those under the *Sustainable Planning Act 2009* and *Building Act 1975* required for the east and west terminuses and depot facilities are to be the responsibility and cost of Council. TNTCo will provide in-kind support.
- 4.2 This clause left blank intentionally
- 4.3 Any approval required under the *Queensland Heritage Act 1992* will be the responsibility and cost of Council. TNTCo will provide in-kind support.
- 4.4 The parties acknowledge that interface agreements may be required with third parties in relation to the Project, and:
- (a) the parties will negotiate in good faith to determine the third parties who will be party to, the requirements for, and the scope of, such interface agreements;
 - (b) the parties will jointly consult with and negotiate the terms of such interface agreements with those third parties;
 - (c) Council will be responsible for the reasonable third party costs of preparing, negotiating such agreements; and
 - (d) TNTCo will be responsible for implementing and performing (including the costs of implementing and performing) its obligations under such interface agreements, provided that Council must provide TNTCo with such in kind support (agreed between the parties) which is reasonably required to enable TNTCo to perform its obligations.
- 4.5 Council will negotiate with neighbouring land holders in relation to securing, and use reasonable endeavours to secure, adequate vehicular parking and access rights to facilitate the establishment of the west depot at 28 Mill Street, Nambour.

- 4.6 This clause left blank intentionally

5. RAIL ACCREDITATION and OPERATOR APPROVALS

- 5.1 For the purposes of any approvals and operation permits required under the *Transport (Rail Safety) Act 2010* and *Transport (Rail Safety) Regulation 2010*, TNTCo will be the Rail Infrastructure Manager and Rail Transport Operator.
- 5.2 Any accreditation, approvals and consents required including development of safety management systems required to manage and operate the tramway, including any required from Translink or as Rail Infrastructure Manager and Rail Transport Operator under the *Transport (Rail Safety) Act 2010* and *Transport (Rail Safety) Regulation 2010*, will be the responsibility of TNTCo.
- 5.3 Council will pay the reasonable costs of a rail safety consultant to prepare documentation for the purpose of obtaining operator accreditation for TNTCo, and Council will provide such other assistance reasonably required to assist TNTCo in obtaining such operation accreditation. TNTCo will be responsible for the application for any necessary rail accreditation including the payment of fees and provision of information as may be requested by the relevant rail authority.

6. FUNDING

- 6.1 TNTCo is to contribute a minimum of \$600,000.00 funding for the Project.
- 6.2 TNTCo's contribution referred to in clause 6.1 is to be raised or secured on or before 30 June 2017, and must be on terms and conditions satisfactory to Council.
- 6.3 TNTCo must provide to Council for Council's assessment copies of any documentation and information that Council may require to assess TNTCo's obligation under clause 6.2. TNTCo hereby authorises Council to communicate with and obtain information from any party that TNTCo relies upon for its funding and will give all reasonable assistance to Council in obtaining such information.
- 6.4 Subject to clause 6.7, Council is to contribute up to \$500,000 for the Project for the 2015/16 financial year, with further contributions by Council of \$500,000 for each of the following two financial years being subject to budget approval
- 6.5 Any funding contribution by Council is to be applied only for the purpose of project management, design and consultancy services, approvals, land acquisition, railway track refurbishment, depot and terminus facilities and road-rail intersections.
- 6.6 All expenditure of Council contributions shall be managed in accordance with Council's Procurement Policy, Guidelines and Procedures.
- 6.7 For the purpose of calculating Council contributions, if the Council owned property at 28 Mill Street, Nambour, is used for the purpose of the Project, the value of 28 Mill Street will be recognised in calculating Council's financial contributions under clause 6.4, and Council's required contribution under clause 6.4 will be reduced proportionately.
- 6.8 For the avoidance of doubt, the funding contribution referred to in clause 6.4 represents Council's maximum funding for the Project. If the required Council contribution exceeds this amount, Council may:

- (a) reconsider its support for the Project;
- (b) enter into discussions with TNTCo to agree the basis upon which Council may elect to continue to support the Project; or
- (c) terminate this Agreement.

7. APPLICATION FOR AND DISBURSMENT OF GRANTS

- 7.1 Consultation with all parties should be undertaken prior to any one party making application for Federal, State or Local Government grants.
- 7.2 If any party is successful in applying for a grant the other parties shall endeavour to assist that party in the correct disbursement of the grant according to the accompanying deed of agreement.
- 7.3 Letters of support by council and commitments to match funding shall be honoured.

8. HOLD POINTS & FURTHER CONTRACTUAL DOCUMENTATION

- 8.1 The parties acknowledge and agree that certain of Council's obligations under this Agreement (**Conditional Obligations**) are subject to, and are not required to be undertaken unless, certain hold points have been achieved to Council's satisfaction.
- 8.2 The Conditional Obligations referred to in clause 8.1 are:
- (a) making of the Council owned land at 28 Mill Street available for purchase or lease by Council to the Project; and
 - (b) construction by Council of depot and terminus facilities, and track and intersection works;
- 8.3 The hold points which need to be achieved to Council's satisfaction prior to Council undertaking the Conditional Obligations, and the timeframe for achievement of those hold points are set out in the below table.

Hold Point	Timeframe by which Hold Point must be achieved
Hold Point 1 – The Heads of Agreement between Council and TNTCo	To be ratified by Council prior to execution
Hold Point 2 – TNTCo is to submit an updated business case analysis to demonstrate its ability to operate the scheme into the future for perpetuity.	May 2016
Council report Ratification of the Heads of Agreement Project costing update	

Business case update	
Fund raising and grant funding status	
Hold Point 3 – TNTCo to secure \$600,000	30 June 2017
Hold Point 4 – parking requirements for and access to 28 Mill Street is to be secured through neighbouring land by Council in accordance with clause 4.6 of this Agreement.	To be negotiated with relevant land holders
Hold Point 5 – Council to acquire a suitable property and appropriate access to allow the construction of the east terminus in accordance with clause 4.6 of this Agreement.	To be negotiated with relevant land holders

8.4 The parties acknowledge and agree that upon the achievement of the above hold points, further contractual documentation (including interface agreements between the parties) may be required to record the parties' rights and obligations in respect of the Project. The parties will act reasonably and negotiate in good faith with the intent of agreeing:

- (a) the various contractual documents which are required; and
- (b) the terms and conditions of those contractual documents.

8.5 As at the date of this Agreement, the Parties envisage that the contractual documents will be generally consistent with the terms and conditions in this Agreement, but the parties acknowledge that as a consequence of the further applications, approvals, investigations, enquiries, and submissions which are still to be undertaken in respect of the Project:

- (a) the terms and conditions of the contractual documents may differ from the terms and conditions in this Agreement; and
- (b) additional terms may be required which may amend the terms and conditions of this Agreement.

9. INSURANCE

9.1 Each party will be responsible for procuring insurance in relation to their respective obligations under this Agreement (as applicable) and their respective property.

9.2 Without limiting clause 9.1, the TNTCo shall procure such insurance which an experienced and prudent person having obligations substantially similar to TNTCo's obligation under this Agreement would procure, which shall include:

- (a) public liability insurance with a limit of indemnity of not less than \$20 million;
- (b) worker's compensation insurance (and insurance for volunteer workers); and
- (c) professional indemnity insurance, as applicable.

10. COMMUNICATIONS

- 10.1 The parties agree that they will not disclose any information relating to the Project to the public, whether through media outlets or other communication modes, without obtaining the consent of the other party (such consent not to be unreasonably withheld) before any release.

11. TERMINATION

- 11.1 This Agreement shall terminate upon the completion of the Project and fulfilment of all obligations under or arising out of this Agreement, unless terminated earlier under this clause 11.
- 11.2 Either party may terminate this Agreement before completion by written notice to the other party if:
- (a) TNTCo is unable to secure funding in accordance with clause 6 on terms and conditions that are satisfactory to both TNTCo and Council;
 - (b) any right, permit, approval, ownership, easement or other tenure in accordance with clause 4 or clause 8 is unable to be secured on terms and conditions that are satisfactory to both TNTCo and Council; or
 - (c) the other party:
 - (i) fails to carry out its obligations under this Agreement to the reasonable satisfaction of the non-defaulting party, and the non-defaulting party provides written notice of that failure to the defaulting party; and
 - (ii) fails to rectify the non-performance of its obligation under this Agreement to the reasonable satisfaction of the non-defaulting party within 60 days of the non-defaulting party giving notice under clause 11.2(c)(i).
- 11.3 Council may terminate this Agreement pursuant to clause 6.8(c) by written notice to the TNTCo.

12. Technical Working Group (TWG)

- 12.1 The parties acknowledge that a Technical Working Group (TWG) has been established in relation to the Project.
- 12.2 The Terms of Reference for the TWG (as at the date of this Agreement) are contained in Schedule 1.

13. DISPUTE RESOLUTION

- 13.1 If a dispute arises between the parties in connection with the performance of this Agreement or arising out of this Agreement:
- (a) any party may give written notice to the other party setting out details of the dispute; and

(b) the parties must use their best endeavours to resolve that dispute between themselves.

- 13.2 If the parties fail to resolve the dispute within 20 business days after service of the notice under clause 13.1 (or such other period as agreed in writing between the parties), then the dispute will be referred to an appropriate mediator as agreed between the parties to facilitate the resolution of the dispute. If the parties cannot agree on a mediator to be appointed, one must be appointed by the President of the Institute of Arbitrators and Mediators Australia, Queensland chapter.
- 13.3 The costs of any mediator appointed under clause 13.2 of this Agreement (including the costs of appointment) must be borne equally by the parties.
- 13.4 In the event that the dispute has not been resolved within seven business days (or any other period as is agreed in writing between the parties) after the first mediation then either party may refer the matter to litigation, but not before.
- 13.5 Nothing herein shall prejudice the right of a party to institute proceedings to enforce payment due under the Agreement or to seek injunctive or urgent declaratory relief in respect of a dispute or any matter arising under the Agreement.

14. GENERAL

14.1 Governing law

This Agreement is governed by the law of the State of Queensland.

14.2 No Waiver

No failure or delay by another party in exercising any right, power or remedy under this document will operate as a waiver of any breach of default by the other party. A single, or partial, exercise of any right, power or remedy does not prevent any further, or other, exercise of any right power or remedy.

14.3 Costs

Each party will pay their own legal costs and disbursements in respect of this Agreement and arising out of this Agreement and all future agreements.

14.4 Confidentiality

The parties agree to keep confidential so far as is practicable all terms and conditions of this Agreement.

14.5 Good Faith

The parties will at all times during the term of this Agreement act reasonably and in good faith so as to give effect to the objectives and provisions of this Agreement.

14.6 Variation

The parties may at any time agree to vary, amend or replace the provisions of this Agreement by entering into an agreement which expressly effects those variations, amendments or replacement.

14.7 Novation

No party may novate the rights or obligations under or in respect of this Agreement.

14.8 Assignment

No party may assign all or any of its rights under or in respect of this Agreement, either absolutely or by way of security.

Signing Page

Signed as an agreement.

Signed on behalf of
**Sunshine Coast
Council**

sign (authorised person)

sign (witness)

the witness states that he or
she is not a party and was
present when the authorised
person signed

title (authorised person)

full name (witness)

full name (authorised person)

address (witness)

Signed by **The
Nambour Tramway
Company Ltd ACN 607
814 488** under
s.127(1) of the
Corporations Act 2001

sign

sign

office (director)

office (director or secretary)

full name

full name

Signed by **Nambour
Alliance ABN 27 565
772 078**

sign

sign

office (director)

office (director or secretary)

full name

full name

Schedule 1

[Terms of Reference of TWG to be inserted]

Schedule 2

[Deed of agreement in relation to the Nambour heritage tramway construction (NSRF300282)]