



# Voluntary Planning Agreement for Hexham Train Support Facility

**Aurizon Operations Limited ABN 124 649 967**

**Newcastle City Council**

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# Voluntary Planning Agreement for Train Support Facility Project

Dated 18 January 2016

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## Parties

**Aurizon**                      **Aurizon Operations Limited ACN 124 649 967**  
of Level 2, 175 Eagle Street, Brisbane Qld 4000

**Council**                      **Newcastle City Council**  
of 282 King Street, Newcastle NSW 2300

## Background

- A      Aurizon was granted the Infrastructure Approval for the TSF Project at Hexham by the Minister for Planning and Infrastructure on 10 October 2013 pursuant to section 115ZB of the Act.
- B      Condition C39 of the Infrastructure Approval requires Aurizon to make any development contribution to Council by way of a planning agreement under section 93F of the Act.
- C      By letter to Council dated 5 March 2015, Aurizon offered to enter into this Agreement with Council in accordance with the requirements of condition C39 of the Infrastructure Approval.
- D      Council has accepted the offer made by Aurizon and the parties enter into this Agreement to give effect to the requirements of the Infrastructure Approval and the agreement reached between them in connection with the Development.

## Agreed terms

### 1 Definitions and interpretation

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#### 1.1 Definitions

In this Agreement the following definitions apply:

<b>Term</b>	<b>Definition</b>
<b>Act</b>	means the <i>Environmental Planning and Assessment Act 1979</i> (NSW)
<b>Agreement</b>	means this Planning Agreement.
<b>Business Day</b>	means a day that is not a Saturday, Sunday or public holiday in Newcastle, NSW.
<b>Claim</b>	means any claim, action, proceeding or demand, however it arises and whether it is present or future, fixed or unascertained, actual or contingent.

<b>Term</b>	<b>Definition</b>
<b>Deposit</b>	means the non-refundable deposit payable by Aurizon to Council under clause 8 of this Agreement, which forms part of the Development Contribution.
<b>Depositholder</b>	means Council's trust fund which must be administered in accordance with section 411 of the <i>Local Government Act 1993 (NSW)</i> .
<b>Development</b>	means the development known as the TSF Project as authorised by the Infrastructure Approval.
<b>Development Contribution</b>	means the monetary contribution detailed in <b>Error! Reference source not found.</b> to be applied towards the upgrade of the Tuxford Park Oval, which includes the Deposit.
<b>Dispute</b>	means a dispute about the terms and operations of this Agreement.
<b>Explanatory Note</b>	means the note exhibited with a copy of this Agreement, when this Agreement is made available for inspection by the public in accordance with the Act, as contemplated by clause 25E of the Regulation.
<b>GST Act</b>	means the <i>A New Tax System (Goods and Services Tax) Act 1999 (Cth)</i> .
<b>Infrastructure Approval</b>	means the infrastructure approval granted by the Minister for Planning and Infrastructure on 10 October 2013 under section 115ZB of the Act for the Development.
<b>Land</b>	means the land the subject of the Infrastructure Approval as set out in Schedule 3.
<b>Minister</b>	means the Minister administering the Act.
<b>Party</b>	means a party to this Agreement, including their successors and assigns.
<b>Parties</b>	means the parties to this Agreement.
<b>Planning Agreement</b>	means the provisions of this Agreement under which Aurizon is required to make the Development Contribution in connection with the carrying out of the Development, and includes any provisions that are incidental or supplementary to those provisions.
<b>Progressive or Periodic Supply</b>	means a Taxable Supply that satisfies the requirements of section 155-6 GST Act.
<b>Public Purpose</b>	means any purpose that benefits the public or a section of the public, including but not limited to a purpose specified under s 93F(2) of the Act.
<b>Regulation</b>	means the <i>Environmental Planning and Assessment Regulation 2000 (NSW)</i> .
<b>Supplier</b>	means the entity making the Supply.
<b>TSF Project</b>	means the development of a train support facility to be constructed by or on behalf of Aurizon on land owned by Aurizon at Hexham, which will be used to undertake train provisioning services and refuelling.
<b>Tuxford Park Oval</b>	means the Tuxford Park Oval located at King Street, Shortland, 2307. The park is owned and maintained by Council and is used for recreational and sporting purposes.

## 1.2 Interpretation

In this document:

- a) a singular word includes the plural and vice versa;
- b) a word which suggests one gender includes the other gender;
- c) a reference to a clause, schedule, annexure or part is a reference to a clause of, and a schedule, annexure or part to, this document and references to this document include any schedules or annexures;
- d) a reference to a party to this document or any other document or agreement includes the party's successors, permitted substitutes and permitted assigns;
- e) if a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- f) a reference to a document or agreement (including a reference to this document) is to that document or agreement as amended, supplemented, varied or replaced;
- g) a reference to this document includes the agreement recorded by this document;
- h) a reference to legislation or to a provision of legislation (including subordinate legislation) is to that legislation as amended, re-enacted or replaced, and includes any subordinate legislation issued under it;
- i) if any day on or by which a person must do something under this document is not a Business Day, then the person must do it on or by the next Business Day.
- j) a reference to a person includes a corporation, trust, partnership, unincorporated body, government and local authority or agency, or other entity whether or not it comprises a separate legal entity; and
- k) a reference to 'month' means calendar month.

## 2 Application of the Agreement

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This Agreement applies to:

- a) the Land; and
- b) the Development.

## 3 Planning Agreement under the Act

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This Agreement constitutes a planning agreement within the meaning of section 93F of the Act. Schedule 1 demonstrates how this Agreement complies with each of the requirements of Division 6 Part 4 of the Act.

## 4 Application of sections 94, 94A and 95EF

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- a) This Agreement does not exclude the application of sections 94, 94A and 94EF of the Act to the Development.
- b) The Parties agree that pursuant to the conditions of the Infrastructure Approval, sections 94 and 94A of the Act do not currently apply to the Development.

## 5 Provision of Development Contribution

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Subject to this Agreement, Aurizon will pay the Development Contribution to Council:

- c) under the specification in column 1 of **Error! Reference source not found.**;
- d) in the amount referred to in column 2 of **Error! Reference source not found.**; and
- e) at the time referred to in column 3 of **Error! Reference source not found.**

## 6 Development Contribution to be made under this Agreement

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### 6.1 Tuxford Park Oval upgrade

The Parties agree that the Development Contribution is to be applied to the upgrade of the Tuxford Park Oval.

### 6.2 Documentation required

Following execution of this Agreement, Council is required to submit to Aurizon:

- a) a draft work plan detailing the proposed works that will be undertaken by Council to upgrade Tuxford Park Oval (**Draft Work Plan**); and
- b) a tax invoice for the amount of the Development Contribution.

### 6.3 Acceptance of Work Plan

- a) Within 10 Business Days of Aurizon receiving the Draft Work Plan, Aurizon, acting reasonably, must provide notice to Council as to whether it:
  - (i) accepts the proposed works as described in the Draft Work Plan: or
  - (ii) proposes amendments to the Draft Work Plan.
- b) If Aurizon accepts the Draft Work Plan without amendments, the Draft Work Plan provided by Council becomes the Final Work Plan (Final Work Plan) from the date that notice is provided by Aurizon in accordance with clause 6.3**Error! Reference source not found.**
- c) Alternatively, if amendments to the Draft Work Plan are required by Aurizon, the Parties must work together to reach agreement as to the works to be undertaken by Council. The Final Work Plan must be provided to Aurizon within 10 Business Days of it being agreed by the Parties.

### 6.4 Time of payment

Within 10 Business Days of Council providing Aurizon with the Final Work Plan and the tax invoice as required by clauses 6.2 and 6.3, Aurizon will transfer the Development Contribution (less the amount of the Deposit which has already been paid) into a bank account nominated by Council.

The Development Contribution is paid for the purposes of this Agreement when cleared funds are deposited by means of electronic transfer into a bank account nominated by Council.

### 6.5 No liability for maintenance

- a) Aurizon's Development Contribution towards to the upgrade of the Tuxford Park Oval is capped at \$260,000;
- b) Aurizon accepts no liability for any ongoing maintenance of Tuxford Park Oval before or after the carrying out of the upgrade works; and
- c) Council will indemnify Aurizon for any Claims arising with respect to the upgrade works undertaken at Tuxford Park Oval.



## 7 Enforcement

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- a) Without limiting any other remedies available to the Parties, this Agreement may be enforced by either Party in any court of competent jurisdiction.
- b) 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 Minister from exercising any function under this Act or any other statute or law relating to the enforcement of any aspect of this Agreement or any matter to which this Agreement relates.

## 8 Security

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### 8.1 Deposit

Upon execution of this Agreement, Aurizon must provide the Depositholder with a Deposit in the amount of \$26,000 as security for the payment of the balance of the Development Contribution, by a payment method agreed between the Parties in writing.

### 8.2 Release of Deposit

The Depositholder must release the Deposit:

- a) to Council's consolidated fund immediately after Aurizon pays the balance of the Development Contribution in accordance with clause 6.4; or
- b) to Aurizon if this Agreement is terminated for any reason, other than breach of the Agreement by Aurizon.

### 8.3 Forfeit of Deposit

If Aurizon fails to pay the balance of the Development Contribution required to be paid under clause 5 in accordance with the terms of the Agreement, Council may terminate this Agreement by written notice to Aurizon and recover the Deposit from the Depositholder.

## 9 Registration

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

## 10 Dispute resolution

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### 10.1 Not Commence

A party may not commence any court proceedings relating to a Dispute under this Agreement unless it complies with clause 10.

### 10.2 Written Notice of the Dispute

A Party claiming that the Dispute has arisen about or under this Agreement must give written notice to the other Party specifying the nature of the Dispute.

## 10.3 Attempt to Resolve

On receipt of notice under clause 10.2, the Parties must endeavour in good faith to resolve the Dispute expeditiously using informal dispute resolution techniques such as mediation, expert evaluation or other techniques agreed by them.

## 10.4 Mediation

If the Parties do not agree within seven days of receipt of notice under clause 10.2 (or any further period agreed in writing by them) as to:

- a) the dispute resolution technique and procedures to be adopted;
- b) the timetable for all steps in those procedures; and
- c) the selection and compensation of the independent person required for such technique,

the Parties must mediate the dispute in compliance with the Mediation Rules of the Law Society of New South Wales (or any replacement). The Parties must request the President of the Law Society of New South Wales or the President's nominee to select the mediator and determine the mediator's remuneration.

## 10.5 Costs

Each Party to the Dispute must pay its own costs of complying with clause 10. The Parties to the Dispute must equally pay the costs of the mediation including without limitation the fees of any mediator and the cost of room hire.

## 10.6 Court proceedings

If the Dispute is not resolved within 42 days after the notice is given under clause 10.2, then any Party which has complied with clause 10 may in writing terminate any dispute resolution process commenced under clause 10 and may commence court proceedings about the Dispute.

## 10.7 Not use information

The Parties acknowledge the purpose of any exchange of information or documents or the making of an offer of settlement under clause 10 is to attempt to settle the Dispute. No Party may use any information or documents obtained through any dispute resolution process under clause 10 for any purpose other than in an attempt to settle the Dispute.

## 10.8 No prejudice

Clause 10 does not prejudice the right of a Party to institute court proceedings for urgent injunctive or declaratory relief about any matter arising out of or relating to this Agreement.

## 11 Costs

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Aurizon agrees to pay Council's reasonable costs not exceeding \$5,000 for negotiating and executing this Agreement and any document related to this Agreement.

## 12 GST

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### 12.1 Definitions

Any terms capitalised in clause 12 and not already defined in clause 1.1 have the same meaning given to those terms in the GST Act.

### 12.2 GST inclusive

The consideration for a Supply made under or in connection with this document includes GST.

### 12.3 Taxable Supply

If a Supply made under or in connection with this document is a Taxable Supply, then at or before the time the consideration for the Supply is payable the Supplier must give the Recipient a Tax Invoice for the Supply.

### 12.4 Warranty that Tax Invoice is issued regarding a Taxable Supply

Where a Tax Invoice is given by the Supplier, the Supplier warrants that the Supply to which the Tax Invoice relates is a Taxable Supply and that it will remit the GST (as stated on the Tax Invoice) to the Australian Taxation Office.

## 13 Explanatory Notice to the Agreement

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Under clause 25E(7) of the Regulation, the Parties agree that the Explanatory Note is not to be used to assist in the interpretation of this Agreement.

## 14 General

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### 14.1 Amendments

This document may only be amended by written agreement between all parties.

### 14.2 Assignment

A party may only assign this Agreement or a right under this Agreement with the written consent of the other party, whose consent may not be unreasonably withheld.

### 14.3 Counterparts

This document may be signed in any number of counterparts. All counterparts together make one instrument.

### 14.4 No merger

The rights and obligations of the parties under this Agreement do not merge on completion of any transaction contemplated by this Agreement.

## 14.5 Entire agreement

- a) This Agreement supersedes all previous agreements about its subject matter and embodies the entire agreement between the Parties.
- b) To the extent permitted by law, any statement, representation or promise made in any negotiation or discussion, has no effect except to the extent expressly set out or incorporated by reference in this Agreement.

## 14.6 Further assurances

Each Party must do all things reasonably necessary to give effect to this Agreement and the transactions contemplated by it.

## 14.7 Representations and warranties

The Parties represent and warrant that they have the power to enter into this Agreement and comply with their obligations under this Agreement and that entry into this Agreement will not result in the breach of any law.

## 14.8 Confidentiality

- a) The Parties agree that the terms of this Agreement are not confidential and that this Agreement may be treated as a public document and exhibited or reported without restriction by either Party.
- b) Any information disclosed by a Party under this Agreement:
  - (i) must be kept confidential unless it is already available in the public domain; and
  - (ii) may only be used to attempt to resolve a Dispute.

## 14.9 No waiver

- a) The failure of a Party to require full or partial performance of a provision of this document does not affect the right of that Party to require performance subsequently.
- b) A single or partial exercise of or waiver of the exercise of any right, power or remedy does not preclude any other or further exercise of that or any other right, power or remedy.
- c) A right under this Agreement may only be waived in writing signed by the Party granting the waiver, and is effective only to the extent specifically set out in that waiver.

## 14.10 Governing law and jurisdiction

- a) New South Wales law governs this Agreement.
- b) Each Party irrevocably submits to the exclusive jurisdiction of the New South Wales courts and courts competent to hear appeals from those courts.

## 14.11 Severability

A clause or part of a clause of this Agreement that is illegal or unenforceable may be severed from this document and the remaining clauses or parts of the clause of this document continue in force.

## 14.12 Notice

A notice, consent or communication under this Agreement is only effective if it is:

- a) in writing, signed by or on behalf of the person giving it;
- b) addressed to the person to whom it is to be given; and
- c) given as follows:
  - (i) delivered by hand to that person's address;
  - (ii) sent by prepaid mail (or by prepaid airmail if the person is overseas) to that person's address;
  - (iii) sent by fax to that person's fax number where the sender receives a transmission confirmation report from the despatching machine indicating the transmission was made without error and showing the relevant number of pages and the correct destination fax number or name of recipient; or
  - (iv) sent by email to that person's email address.

### 14.13 When is notice given

A notice, consent or communication given under clause 14.12 is given and received on the corresponding day set out in the table below. The time expressed in the table is the local time in the place of receipt.

If a notice is	It is given and received on
Delivered by hand or sent by fax	(a) that day, if delivered by 5.00pm on a Business Day; or (b) the next Business Day, in any other case.
Sent by post	(a) three Business Days after posting, if sent within Australia; or (b) seven Business Day after posting, if sent to or from a place outside Australia.
Sent by email	(a) as soon as the sender receives an email receipt or other written confirmation or verbal confirmation from the recipient to the sender indicating that the email was received

### 14.14 Address for notices

A person's address and fax number are those set out below, or as the person notifies the sender:

<b>Name</b>	Aurizon Operations Limited ACN 124 649 967
<b>Attention</b>	Brent Boden
<b>Address</b>	Level 2, 192 Ann Street, Brisbane, QLD 4000
<b>Fax</b>	02 3019 7502
<b>Email</b>	<a href="mailto:Brent.Boden@aurizon.com.au">Brent.Boden@aurizon.com.au</a>

<b>Name</b>	Newcastle City Council
<b>Attention</b>	Frank Cordingley
<b>Address</b>	282 King Street, Newcastle NSW 2300
<b>Fax</b>	02 4974 2222
<b>Email</b>	<a href="mailto:fcordingley@ncc.nsw.gov.au">fcordingley@ncc.nsw.gov.au</a>

## SCHEDULE 1

Requirements of Division 6 Part 4 of the Act

Subject and subsection of the Act	The planning agreement
<p><b>Planning Instrument or Development Application</b> (Section 93F(1))</p> <p>Aurizon has:</p> <p>(a) sought a change to an environmental planning instrument;</p> <p>(b) made, or proposes to make, a development application; or</p> <p>(c) entered into an agreement with, or is otherwise associated with, a person to whom paragraph (a) and (b) applies.</p>	<p>No.</p> <p>Yes.</p> <p>No.</p>
<p><b>Planning Instrument or Development Application</b> (Section 93F(1))</p> <p>For the purpose of being used or applied towards a Public Purpose, Aurizon has:</p> <p>(a) dedicated land free of cost;</p> <p>(b) paid a monetary contribution; or</p> <p>(c) provided any other material public benefit.</p>	<p>No.</p> <p>Yes.</p> <p>No.</p>
<p><b>Description of the land to which the Agreement applies</b> (Section 93F(3)(a))</p>	<p>See <b>Error! Reference source not found.</b></p>
<p><b>The scope, timing and manner of delivery of contribution required by the Planning Agreement</b> (Section 93F(3)(c))</p>	<p>See clauses 5 and 6.</p>
<p><b>Applicability of Section 94 of the Act</b> (Section 93F(3)(d))</p>	<p>The application of section 94 of the Act is not excluded.</p>
<p><b>Applicability of Section 94A of the Act</b> (Section 93F(3)(d))</p>	<p>The application of section 94A of the Act is not excluded.</p>
<p><b>Applicability of Section 94EF of the Act</b> (Section 93F(3)(d))</p>	<p>The application of section 94EF of the Act is not excluded.</p>
<p><b>Mechanism for dispute resolution</b> (Section 93F(3)(f))</p>	<p>See clause 10.</p>
<p><b>Enforcement of the Planning Agreement</b> (Section 93F(3)(g))</p>	<p>See clauses 7 and 8.</p>
<p><b>Registration of the Planning Agreement</b> (Section 93F(3)(g))</p>	<p>See clause 9.</p>

## SCHEDULE 2

### Development Contribution

<b>Purpose of Development Contribution</b>	<b>Development Contribution</b>	<b>Date for payment of Development Contribution</b>
Upgrade of Tuxford Park Oval in accordance with the Final Work Plan.	\$260,000.00	The Deposit is to be paid upon execution of this Agreement. The balance of Development Contribution to be paid within 10 Business Days of receipt of the Final Work Plan and invoice in accordance with clauses 6.2 and 6.3.

## SCHEDULE 3

### Land

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The land the subject of the Infrastructure Approval is a 255 hectare site located on the western side of the New England Highway and the Great Northern Railway, on the following land parcels in the City of Newcastle local government area:

- 1 Lot 101 DP 1084709;
- 2 Lot 102 DP 1084709;
- 3 Lot 2 DP 735456;
- 4 Lot 10 DP 735235;
- 5 Lot 104 DP 1084709;
- 6 Lot 113 DP 755232;
- 7 Lot 1 DP 155530;
- 8 Lot 12 DP 1075150;
- 9 Lot 1 DP 1062240;
- 10 Lot 311 DP 583724; and
- 11 Lot 1 DP 128309.




## Execution

EXECUTED as an agreement:

Signed by  
Aurizon Operations Limited ACN 124 649 967 by  
its duly authorised officer in the presence of:

  
^ \_\_\_\_\_  
Signature of witness

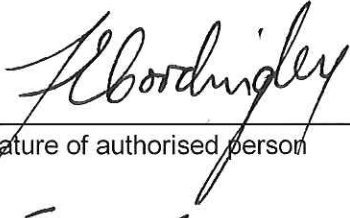
Kristin Day  
^ \_\_\_\_\_  
Name of witness (print)

  
^ \_\_\_\_\_  
Signature of Authorised Officer

Brent Boden  
^ \_\_\_\_\_  
Full Name of Authorised Officer

Vice President Program Delivery  
^ \_\_\_\_\_  
Office Held

Signed by  
Newcastle City Council in accordance with a  
resolution passed on

  
^ \_\_\_\_\_  
Signature of authorised person

FRANK CORDINGLEY  
^ \_\_\_\_\_  
Name of authorised person

INTERIM CEO  
^ \_\_\_\_\_  
Office held

^ \_\_\_\_\_  
Signature of authorised person

^ \_\_\_\_\_  
Name of authorised person

^ \_\_\_\_\_  
Office held

