

# **Planning Agreement**

**Burwood Council**

and

**Goldfield Investment Pty Ltd**

and

**Goldfield Australia Pty Ltd**

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## Planning Agreement

<b>Date</b>	
<b>Parties</b>	<p><b>Burwood Council ABN 84 362 114 428</b> of Suite 1, Level 2, 1-17 Elsie Street, Burwood, New South Wales</p> <p style="text-align: right;"><b>(Council)</b></p> <p><b>Goldfield Investment Pty Ltd ACN 149 082 664</b> of Level 8, Suite 11, 299 Sussex Street, Sydney, New South Wales</p> <p>and</p> <p><b>Goldfield Australia Pty Ltd ACN 149 202 040</b> as trustee for the Goldfield Unit Trust of Level 8, Suite 11, 299 Sussex Street, Sydney, New South Wales</p> <p style="text-align: right;"><b>(collectively referred to as Developer)</b></p>
<b>Background</b>	<p>A. The Developer is the owner, or is entitled to be the owner, of the Land.</p> <p>B. The Developer has lodged the Development Application with the Consent Authority.</p> <p>C. The Developer has made an offer to enter into this Planning Agreement with Council in connection with the Development Application.</p>

## Agreement

### 1. Planning agreement under the EPAA Act

#### 1.1 Section 93F

The parties agree that this document is a planning agreement within the meaning of section 93F of the EPAA Act.

#### 1.2 Application

The planning agreement constituted by this document applies to the Land and the Development Application.

## 2. Operation

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The parties agree that this Planning Agreement takes effect on the signature of this Planning Agreement by the parties to it.

## 3. Definitions

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In this Planning Agreement unless expressed or implied to the contrary:

**Business Day** means any day on which trading banks are open for business in New South Wales other than a Saturday, Sunday or a public holiday in New South Wales;

**Certificate of Practical Completion** means a certificate from the Developer certifying that Practical Completion has been effected;

**Charge** means the fixed and floating charge over the assets and undertakings of the Developer in favour of the Council given by the Developer under the Contract for Sale;

**Claimant** has the meaning given to that term in clause 13.1;

**Claim Notice** has the meaning given to that term in clause 13.1;

**Consent Authority** means the governmental agency having the function to determine the Development Application (including, without limitation, Council and the Land and Environment Court of New South Wales);

**Construction Certificate** means a certificate referred to section 109C(1)(b) of the EPAA Act;

**Contract for Sale** means the Contract for the Sale of the Land from Council (as vendor) to the Developer (as purchaser) dated 11 February 2011;

**Cost Apportionment Method** means:

- (a) in the case of building damage insurance under the *Conveyancing Act 1919* or the *Strata Schemes (Freehold Development) Act 1973*, the method required under section 84(4) of the *Strata Schemes Management Act 1996*; and
- (b) as recorded by any meter installed for the purposes of recording consumption or use; or
- (c) in the absence of any meter, in shares proportional to the gross floor area of each occupiable part of the building to be constructed on the Land in accordance with the Development Consent comprising a stratum lot, as agreed by the parties (acting reasonably).

**Dealing** has the meaning given to that term in clause 14.1;

**Defect** means a defect arising from materials or workmanship or design other than:

- (a) minor shrinkage;

- (b) minor settlement cracks; and
- (c) spalling of concrete;

**Defects Liability Period** means the period of 12 months from the date on which the Development Works reach Practical Completion;

**Development Application** means the development application lodged by the Developer with the Consent Authority as number.....89/2012..... seeking an authorisation for the development of the Land which includes the Public Car Park and Public Works;

**Development Consent** means a determination made by the Consent Authority under the EPAA Act in respect of the Development Application on conditions acceptable to the Developer (acting reasonably);

**Development Works** means the works to be carried out by the Developer in accordance with the Development Consent (including but not limited to the construction of the Public Car Park and Public Works);

**Discretion** has the meaning given to that term in clause 5.1;

**Dispute Notice** has the meaning given to that term in clause 13.4;

**Easement Instrument** means all instruments (in registrable form) necessary to create the Right of Footway.

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

**Incoming party** has the meaning given to that term in clause 14.1;

**Land** means the land comprised in Lot 3 in Deposited Plan 816606; and

**Law** means:

- (a) the common law including the principles of equity; and
- (b) the requirements of all statutes, rules, ordinances, codes, regulations, proclamations, by-laws, or consents by a governmental agency;

**Mortgage** means the mortgage to be registered on the title to the Land in accordance with the requirements of the Contract for Sale;

**Motor Vehicle** means a motor vehicle not exceeding 1.8 metres in height, 5.2 metres in length and 2.2 metres in width;

**New Law** means a Law that is amended, varied or changed or a new Law either of which comes into force on or after the date of this Planning Agreement;

**Occupation Certificate** means a certificate referred to in section 109C(1)(c) of the EPAA Act;

**Parking Space** means a space in the Public Car Park in which a Motor Vehicle can be parked;

**Planning Agreement** means this document and includes all schedules and annexures to it;

**Practical Completion** means the stage in the construction of the Development Works when, in the opinion of the Developer (acting reasonably) and notified by the Developer to Council under clause 9.10, the Development Works in relation to the Public Car Park and the Public

Walkway are complete except for minor omissions and minor Defects which are non-essential and:

- (a) which do not prevent the Public Car Park from being reasonably capable of being used for its intended purpose;
- (b) which Council determines the Developer has reasonable grounds for not promptly rectifying; and
- (c) the rectification of which will not prejudice the convenient use of the Public Car Park;

**Prescribed Rate** means the rate prescribed from time to time under the Uniform Civil Procedure Rules 2005 as the rate of interest on judgment debts, calculated daily and compounded on the last day of each month;

**Public Car Park** means a public car park to be constructed on the Land by the Developer which:

- (a) comprises contiguous Parking Spaces in such number being the lesser of:
  - (i) the maximum number of Parking Spaces, for public use, achievable under the Development Consent after deducting the number of Parking Spaces which are required as a condition of the Development Consent; and
  - (ii) 185 Parking Spaces;
- (b) is ready for use to the standard reasonably required by Council including (without limitation) line marking, barriers and lighting;
- (c) is fit for purpose, compliant with the Building Code of Australia and has the benefit of mechanical ventilation;
- (d) has the benefit of a distribution board separate from the distribution board servicing the balance of the Development Works; and
- (e) is located within a stratum lot created by the stratum subdivision of the Land, on the first available and adjacent basement car parking levels of the Land below ground level, with the stratum lot having the benefit of such easements, covenants and restrictions on use as are required by Council (acting reasonably) containing terms and conditions which are acceptable to Council (acting reasonably);

**Public Walkway** means a public walkway to be constructed across the Land by the Developer in a position determined, at its absolute discretion, in accordance with the *Burwood Local Environmental Plan (Burwood Town Centre) 2010* and the *Burwood Consolidated Development Control Plan Part Number 36 – Burwood Town Centre*;

**Public Works** means the works required to construct the Public Walkway;

**Quarter** means each consecutive period of three months (or part of it) ending on the respective last days of March, June, September and December;

**Register** means the Torrens Title register held by the Land and Property Management Authority of New South Wales;

**Respondent** has the meaning given to that term in clause 13.1;

**Right of Footway** means an easement in gross burdening that part of the Land comprising the Public Walkway for the benefit of Council on the terms contained in Part 2 of Schedule 8 of the *Conveyancing Act 1919*;



**Schedule** means a schedule to this Planning Agreement;

**Security** means security given by the Developer to Council for the performance of its obligations under this Planning Agreement being:

- (a) an unconditional and irrevocable bank guarantee or bank guarantees for the Security Amount issued by a bank trading in Australia or other financial institution acceptable to Council which does not have an expiry date and is otherwise on terms and conditions acceptable to Council; or
- (b) the Mortgage and the Charge;

**Security Amount** means, in the case of the Security being provided in the form of a bank guarantee or bank guarantees, the amount of \$3,700,000.00 subject to adjustment from time to time under clause 12;

**Security Amount Review Date** means each anniversary of the date of this Planning Agreement commencing on the third anniversary of the date of this Planning Agreement;

**Stratum Subdivision Documents** mean a draft stratum subdivision plan and associated documents (such as any easement instruments and managements statements) that upon registration will create a stratum lot comprising the Public Car Park having the benefit of any easements, covenants and restrictions on use as are required by Council (acting reasonably) containing terms and conditions which are acceptable to Council (acting reasonably);

**Transfer Date** means the date being 10 Business Days after registration of the Stratum Subdivision Documents; and

**Transfer Fee** means the sum of \$40,000 (exclusive of GST) multiplied by the number of Parking Spaces contained within the Public Car Park on Practical Completion.

## 4. Interpretation

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### 4.1 Governing law and jurisdiction

This Planning Agreement is governed by and is to be construed in accordance with the Laws of New South Wales. Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of New South Wales and waives any right to object to proceedings being brought in those courts.

### 4.2 Persons

In this Planning Agreement, a reference to:

- (a) a person includes a firm, partnership, joint venture, association, corporation or other corporation body;
- (b) a person includes the legal personal representatives, successors and permitted assigns of that person; and
- (c) any body, which no longer exists or has been reconstituted, renamed, replaced or whose powers or functions have been removed or transferred to another body or agency is a reference to the body which most closely serves the purposes or objects of the first-mentioned body.

**4.3 Joint and several**

- (a) If a party consists of more than one person, this Planning Agreement binds them jointly and each of them severally.
- (b) A promise, representation or warranty made by a party which consists of more than one person constitutes a promise, representation or warranty by both persons.

**4.4 Legislation**

In this Planning Agreement, a reference to a statute includes regulations under it and consolidations, amendments, re-enactments or replacements of any of them.

**4.5 Clauses and headings**

In this Planning Agreement:

- (a) a reference to this Planning Agreement or other document includes this Planning Agreement or the other document as varied or replaced regardless of any change in the identity of the parties;
- (b) a reference to a clause, schedule, appendix or annexure is a reference to a clause, schedule, appendix or annexure in or to this Planning Agreement all of which are deemed part of this Planning Agreement;
- (c) a reference to writing includes all modes of representing or reproducing words in a legible, permanent and visible form;
- (d) heading and sub-headings are inserted for ease of reference only and do not affect the interpretation of this Planning Agreement;
- (e) where an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning;
- (f) where the expression "including" or "includes" is used it means "including but not limited to" or "including without limitation";
- (g) a reference to governmental agency, means the Crown, any government, any governmental ministry or department, or any Crown, governmental, semi-governmental, statutory, parliamentary; administrative, fiscal, public, municipal, local, judicial or regulatory entity, agency instrumentality, authority, court, commission, tribunal or statutory corporation having jurisdiction over or in respect of the Land or its use or both; and
- (h) a reference to any notice, claim, demand, consent agreement, approval, authorisation, specification, direction, notification, request, communication, appointment or waiver being given or made by a party to this Planning Agreement is a reference to its being given or made in writing, and the expression notice includes any of the foregoing.

**4.6 Severance**

- (a) If a provision in this Planning Agreement is held to be illegal, invalid, void, voidable or unenforceable, that provision must be read down to the extent necessary to ensure that it is not illegal, invalid, void, voidable or unenforceable.
- (b) If it is not possible to read down a provision as required in this clause, that provision is recoverable without affecting the validity or enforceability of the remaining part of that provision or the other provisions in this Planning Agreement.

4.7 **Business Day**

If a payment or other act is required by this Planning Agreement to be made or done on a day which is not a Business Day, the payment or act must be made or done on the next following Business Day.

4.8 **Number and gender**

In this Planning Agreement, a reference to:

- (a) the singular includes the plural and vice versa; and
- (b) a gender includes the other genders.

**5. No fetter**

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5.1 **Discretion**

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

- (a) the sovereignty of the Parliament of the State of New South Wales to make any Law;
- (b) the power of the executive government of the State of New South Wales to make any statutory rules; or
- (c) the exercise of any statutory power or discretion of any Minister of the State of New South Wales or any governmental agency,

(all referred to in this Planning Agreement as **Discretion**).

5.2 **No fetter**

No provision in this Planning Agreement is intended to or does constitute any unlawful fetter on any Discretion. If, contrary to the operation of this clause 5, any provision of this Planning Agreement is held by Court of competent jurisdiction to constitute an unlawful fetter on any Discretion, the parties agree:

- (a) they will take all practical steps including the execution of any further documents to ensure that the objective of this clause 5 is substantially satisfied;
- (b) in the event that clause 5.1 cannot be achieved without giving rise to unlawful fetter on a Discretion, the relevant provisions are to be severed and the remainder of this Planning Agreement has full force and effect; and
- (c) to endeavour to satisfy the common objectives of the parties in relation to the agreement which is held to be an lawful fetter to the extent that is possible having regard to the relevant Court judgment.

5.3 **Conflict**

In the event of any conflict between the exercise of a Discretion and the performance or Obligations under this Planning Agreement, the former prevails.

## 6. Registration

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### 6.1 Procure registration

The parties agree to procure registration of this Planning Agreement on the Register pertaining to the Land as soon as practicable (and within 20 Business Days after signature of this Planning Agreement) in accordance with this clause 6 including obtaining the consent of any mortgagee or other person who has an interest in the Land.

### 6.2 Effect of registration

The parties acknowledge and agree that if any part of the Land is subdivided and sold, then all of the obligations of this Planning Agreement are jointly and severally binding on, and enforceable against, the owner of each subdivided parcel of land from time to time, on whose title this Planning Agreement is registered, as if each owner for the time being had entered into this Planning Agreement.

### 6.3 Release

Council agrees to provide a release and discharge of this Planning Agreement with respect to any part of the Land if the Developer gives to Council a written notice requesting a release and discharge of this Planning Agreement (whether in full or part) and:

- (a) in the case of a request for a full release and discharge, the Developer has complied with all its obligations under this Planning Agreement to Council's satisfaction; or
- (b) in the case of a request for partial release and discharge, the Developer has, at the time of the request, complied with its obligations under this Planning Agreement to Council's satisfaction to the extent that they affect that part of the Land to which the partial release relates.

## 7. Review

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Subject to clause 20.1, this Planning Agreement may be reviewed or modified by agreement of the parties using their best endeavours and acting in good faith.

## 8. EPAA Act Application

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### 8.1 Sections 94, 94A and 94EF of the FFAA Act

Subject to clause 8.2, section 94, 94A and 94EF of the EPAA Act apply to the Development Application.

### 8.2 Benefits

Benefits obtained by Council under this Planning Agreement are not to be taken into consideration in determining any development contribution under section 94 of the EPAA Act in respect of the Development Application.

## 9. Development Works

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### 9.1 Essential Term

The parties acknowledge and agree that the terms of this clause 9 relating to the construction and delivery of the Public Car Park and Public Works to Council are essential terms of this Planning Agreement.

**9.2 Approvals and consents**

- (a) The Developer must, at its own cost, obtain all approvals and consents from any relevant governmental agencies having jurisdiction over or in respect of the Development Works.
- (b) Before commencing the Development Works, the Developer must give to Council copies of all approvals and consents relating to the Development Works.

**9.3 Construction work**

The Developer must, at its own cost, substantially commence the Development Works as soon as practicable after the Consent Authority issues the Development Consent and, in any event, no later than the expiry date of the Development Consent and:

- (a) carry out and complete the Development Works in accordance with all approvals and consents relating to the Development Works issued by any relevant governmental agencies having jurisdiction over and in respect of the Development Works;
- (b) carry out and complete the Development Works in relation to the Public Car Park in accordance with the standards set out in Schedule 1 to this Planning Agreement;
- (c) ensure that the Development Works are carried out with all due expedition in a proper and workmanlike manner so that the Public Car Park and Public Works are structurally sound, fit for purpose, and suitable for its intended use;
- (d) ensure that the Development Works are designed in a manner so that they are fit for purpose and suitable for their intended use; and
- (e) promptly give written notice to Council of any delays which it experiences in completing the Development Works.

**9.4 Inspection of works**

- (a) Council may (but is not obliged), at reasonable times and on reasonable prior written notice to the Developer, inspect the Development Works during the course of construction.
- (b) Council must promptly give written notice to the Developer of any material or significant Defect, error or omission in the Development Works identified during or as the result of such inspection. The parties expressly agree that any failure to identify a Defect, error and omission, will not be construed as amounting to an acceptance by Council of that defect, error or omission.

**9.5 Insurance**

- (a) The Developer must:
  - (i) procure and maintain public liability insurance for an amount not less than \$20 million (or such greater amount as required by Council, acting reasonably) covering all aspects of the Development Works and submit a copy of the certificate of insurance to Council prior to the commencement of the construction of the Development Works and when otherwise reasonably required by Council;
  - (ii) ensure that all relevant third parties procure and maintain all other insurance policies required by Law in respect of the Development Works including, but not limited to, insurance of the Development Works and insurance against death or injury to persons employed in relation to the undertaking of the Development Works, and any other insurances required at Law; and

- (iii) ensure that all relevant third parties procure and maintain professional indemnity insurance in respect of the design of the Development Works for an amount not less than \$20 million (or such greater amount as required by Council, acting reasonably).

**9.6 Insurance requirements**

All insurance policies which the Developer must procure and keep current under this Planning Agreement must:

- (a) be established with one or more insurance companies which are respectable, reputable, financially sound and approved by Council (such approval not to be unreasonably withheld);
- (b) name Council as an insured party;
- (c) cover the parties' respective interests;
- (d) be kept current until the expiration of the Defects Liability Period.

**9.7 Evidence**

No later than 10 Business Days after any written request by Council, the Developer must provide Council with a certificate of currency (or such other evidence as Council may reasonably require) in respect of any insurance that must be established and maintained under this Planning Agreement.

**9.8 Practical Completion**

When, in the opinion of the Developer, acting reasonably, the Development Works in relation to the Public Car Park and the Public Walkway have reached Practical Completion, the Developer must give written notice to Council which includes:

- (a) a statement from the person(s) with direct responsibility, carriage and supervision of the Development Works that, in their opinion, the Development Works in relation to the Public Car Park and the Public Walkway have reached Practical Completion; and
- (b) copies of any warranties, guarantees, maintenance information or other material reasonably required for the ongoing nature of the Development Works in relation to the Public Car Park and the Public Walkway; and
- (c) at least three sets of the "as built" drawings of the Development Works in relation to the Public Car Park and the Public Walkway, including one set in electronic format.

**9.9 Final Inspection by Council**

- (a) Council must, within 20 Business Days after receiving the written notice from the Developer pursuant to clause 9.8, inspect the Development Works in relation to the Public Car Park and the Public Walkway and give written notice to the Developer:
  - (i) confirming that Practical Completion has been achieved; or
  - (ii) disagreeing that Practical Completion has been achieved and (if Council so disagrees) identifying the errors or omissions which have been identified and which in Council's opinion prevent Practical Completion; or
  - (iii) issuing to the Developer a written notice of the nature identified in clause 9.11.

- (b) Nothing in this clause 9.9 will be construed to reduce or waive in any manner the Developer's responsibility to correct minor Defects of minor omissions, whether or not these are identified by Council.

**9.10 Date of Practical Completion**

- (a) The Developer must ensure that any errors or omissions notified to the Developer by Council under clause 9.9(a) are rectified promptly after receiving Council's notice.
- (b) Promptly after the Developer has rectified the errors and omissions notified to the Developer by Council under clause 9.9(a), the Developer must notify Council in writing that it has corrected the errors and omissions and serve on Council a Certificate of Practical Completion.
- (c) Subject to clause 9.10(d), the Developer must ensure that the Development Works reach Practical Completion and that the Developer complies with its obligations under clause 10.7 no later than 2 years after the date on which the Developer substantially commenced the Development Works.
- (d) If Practical Completion of the Development Works is delayed as a result of any of the following:
  - (i) industrial action which is not specific to the Development Works and is beyond the reasonable control of the Developer;
  - (ii) inclement weather;
  - (iii) a variation of the Development Works required by Council and which the Developer agrees to carry out,

then the Developer may by written notice to Council extend the date for Practical Completion and compliance with its obligations under clause 10.7 to a revised date stated in the written notice that is no later than the date which is 2 years after the date on which the Developer substantially commenced the Development Works extended by the length of the delay incurred.

**9.11 Non-completion of Development Works**

- (a) Council may permit the Developer not to complete the Development Works (or any part of them) in relation to the Public Car Park and the Public Walkway by issuing a written notice to the Developer expressly stating that completion of the items identified in that notice is not required to achieve Practical Completion.
- (b) If the Developer fails to complete the whole of the Development Works in relation to the Public Car Park and the Public Walkway in the form and to the standards required under this Planning Agreement and all approvals and consents relating to the Development Works issued by any relevant governmental agencies having jurisdiction over or in respect of the Development Works, then Council may either:
  - (i) complete the Development Works in relation to the Public Car Park and the Public Walkway; or

- (ii) modify the public benefits so as reasonably to achieve the objectives identified in this Planning Agreement,

and may recover all costs reasonably incidental to that work from the Developer. The Developer agrees that the Security secures all such costs and that Council may exercise its rights under the Security to recover all such costs from the Developer as a debt due and owing.

## 10. Stratum Subdivision and Easement Instrument

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### 10.1 Essential Term

The parties acknowledge and agree that the terms of this clause 10 are essential terms of this Planning Agreement.

### 10.2 Acknowledgments

- (a) The parties acknowledge and agree that:
  - (i) the Public Car Park will be a stratum lot comprising part only of the Development Works;
  - (ii) the Developer is entitled to subdivide the Land (other than the stratum lot comprising the Public Car Park) by stratum plan or strata plan or both as it sees fit;
  - (iii) the Development Works will be subject to a registered building management statement (under the *Conveyancing Act 1919*) or a strata management statement (under the *Strata Schemes (Freehold Development) Act 1973*) in a form and on terms agreed by the Developer and Council, with each party acting reasonably;
  - (iv) when the Developer has served on Council a Certificate of Practical Completion under clause 9.10(b), the Developer must insure the Development Works under a damage policy which complies with the *Conveyancing Act 1919* or the *Strata Schemes (Freehold Development) Act 1973* in joint names of the stratum lot owners;
  - (v) each owner of a stratum lot (including Council) must contribute to the costs of facilities or areas that each owner shares with other owners (including costs incurred under clause 10.2(a)(iv)) and to the costs of the building damage insurance under the building management statement or the strata management statement (as the case may be) according to the Cost Apportionment Method;
  - (vi) neither party will require either the Stratum Subdivision Documents or the Easement Instrument to contain any terms and provisions not commonly found in mixed use stratum subdivisions of the kind intended to be undertaken on the Land; and
  - (vii) clause 10 must be read subject to the agreements and acknowledgements in this clause 10.2.
- (b) Council acknowledges that the stratum lot for the Public Car Park may, in addition to the Parking Spaces required by this Planning Agreement, contain utility and service areas and rooms. These areas and rooms will be subject to the rights and obligations (including for use and access) under any easement instruments or management statements forming part of the Stratum Subdivision Documents.



**10.3 Stratum Subdivision**

The Developer must, at its own cost, promptly after Practical Completion has taken place (but may, at any time prior to Practical Completion), prepare and deliver to Council:

- (a) the Stratum Subdivision Documents; and
- (b) the Easement Instrument.

**10.4 Review of the Stratum Subdivision Documents**

The following provisions apply to Council's review of the Stratum Subdivision Documents. For the purpose of this review, the Developer acknowledges that Council will undertake its review of the Stratum Subdivision Documents pursuant to this clause 10.4 in its capacity as a land owner and not in its capacity as a Consent Authority.

- (a) Council must promptly review the first and any subsequent version of the Stratum Subdivision Documents submitted by the Developer and provide its comments to the Developer within 10 Business Days of receiving those documents as to whether:
  - (i) they are wholly acceptable; or
  - (ii) they are wholly or partly unacceptable and the basis on which Council considers the Stratum Subdivision Documents to be unacceptable (in which case, the comments must include Council's requested amendments to the Stratum Subdivision Documents); or
  - (iii) clarification or further detail is required in relation to any aspect of the Stratum Subdivision Documents;
- (b) in providing comments pursuant to this clause 10.4, Council must limit those comments to the extent to which the Stratum Subdivision Documents, in Council's opinion (acting reasonably), adequately provide for the Public Car Park in accordance with this Planning Agreement;
- (c) the Developer must consider Council's comments and, if appropriate, revise the Stratum Subdivision Documents and submit revised Stratum Subdivision Documents to Council for approval within 10 Business Days of receiving any amendments requested by Council;
- (d) when Council considers the Stratum Subdivision Documents to be acceptable, Council must promptly give approval to those documents by written notice to the Developer; and
- (e) Council will not unreasonably refuse to provide approval to the Stratum Subdivision Documents if Council considers that the Stratum Subdivision Documents submitted by the Developer adequately provide for the Public Car Park in accordance with this Planning Agreement.

**10.5 Review of the Easement Instrument**

- (a) Council must promptly review the first and any subsequent version of the Easement Instrument submitted by the Developer and provide its comments to the Developer within 10 Business Days of receiving the Easement Instrument as to whether:
  - (i) it is wholly acceptable; or
  - (ii) it is wholly or partly unacceptable and the basis on which Council considers the Easement Instrument to be unacceptable (in which case, the comments

must include Council's requested amendments to the Easement Instrument);  
or

- (iii) clarification or further detail is required in relation to any aspect of the Easement Instrument;
- (b) in providing comments pursuant to this clause 10.5, Council must limit those comments to the extent to which the Easement Instrument, in Council's opinion (acting reasonably), adequately provides for the Right of Footway;
- (c) the Developer must consider Council's comments and, if appropriate, revise the Easement Instrument and submit a revised Easement Instrument to Council for approval within 10 Business Days of receiving any amendments requested by Council; and
- (d) when Council considers the Easement Instrument to be acceptable, Council must promptly give approval to that document by written notice to the Developer; and
- (e) Council will not unreasonably refuse to provide approval to the Easement Instrument if Council considers that the Easement Instrument submitted by the Developer adequately provides for the Right of Footway as required by this Planning Agreement.

#### **10.6 Registration of the Stratum Subdivision Documents and Easement Instrument**

The Developer must, at its own cost, do all things necessary to cause the Stratum Subdivision Documents and the Easement Instrument to be registered with the Land and Property Management Authority without delay after Council has given its approval to the Stratum Subdivision Documents and Easement Instrument under this clause 10.

#### **10.7 Transfer of the Stratum Lot for the Public Car Park**

- (a) In consideration of the covenant by Council to pay the Transfer Fee to the Developer, the Developer must transfer to Council the title to the stratum lot comprising the Public Car Park as an estate in fee simple free from any encumbrance (other than those contemplated or referred to in this Planning Agreement) on the Transfer Date.
- (b) On the Transfer Date, the Developer must deliver to Council:
  - (i) the certificate of title in respect of the stratum lot comprising the Public Car Park;
  - (ii) a transfer instrument in respect of the stratum lot comprising the Public Car Park; and
  - (iii) any other documents or instruments reasonably required by Council in order to effect the transfer of title in respect of the stratum lot comprising the Public Car Park to Council, free from any encumbrance (other than those contemplated or referred to in this Planning Agreement),

in consideration for Council paying the Transfer Fee to the Developer.

### **11. Defects Liability**

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#### **11.1 Essential Term**

The parties acknowledge and agree that the terms of this clause 11 are essential terms of this Planning Agreement.

### 11.2 Defects in the Development Works

If Council notifies the Developer of a Defect in the Development Works within the Defects Liability Period, the Developer must remedy that Defect to Council's satisfaction (acting reasonably) within a reasonable period.

### 11.3 Security for Defects Liability Period

- (a) The Developer agrees that Council is not required to give to the Developer a release of the Security before the expiration of the Defects Liability Period.
- (b) If the Developer does not rectify any Defect in the Development Works within 40 Business Days after being notified of the Defect by Council, then:
  - (i) Council may rectify the Defect in the Works at the Developer's expense; and
  - (ii) the Developer must allow Council access to the Land and all improvements erected on the Land for the purposes of remedying the Defect.

## 12. Security

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### 12.1 Essential Term

The parties acknowledge and agree that the terms of this clause 12 are essential terms of this Planning Agreement.

### 12.2 Delivery

On the date of completion of the Contract for Sale, the Developer (at its election) must deliver the Security to Council as security for the performance by the Developer of its obligations under this Planning Agreement.

### 12.3 Security Amount Adjustment

The Security Amount is to be increased on each relevant Security Amount Review Date by an amount equivalent to 10% of the Security Amount applicable immediately prior to the relevant Security Amount Review Date.

### 12.4 Security by way of Mortgage and Charge

- (a) If the Developer elects to provide Security by way of the Mortgage and Charge, the Developer must deliver to Council all things reasonably required by Council in order for Council to register the Mortgage and Charge in accordance with the requirements of the Contract for Sale.
- (b) Council agrees that, if the Developer has provided the Mortgage and Charge as the Security, the Developer may provide, as a substitute, Security in the form of a bank guarantee or bank guarantees for the Security Amount at any time, but, in any event, must do so on the release by Council of the Mortgage and Charge under the Contract for Sale.

### 12.5 Security Review

If the Security for the time being held by Council is in the form of a bank guarantee or bank guarantees, the Developer must give to Council substitute or supplementary Security in the form of a bank guarantee for the revised Security Amount no later than 20 Business Days after each Security Amount Review Date.

If the Security for the time being held by Council is in the form of the Mortgage and Charge, the Developer must give Council further mortgages and charges (and do all things necessary to enable Council to register the further mortgages and charges) to the extent reasonably required by Council if Council gives to the Developer a written notice stating that Council considers that the value of the Land at the time of its written notice is greater than the amount secured by the Mortgage and Charge.

### 12.6 **Appropriation**

The Developer acknowledges and agrees that:

- (a) Council may make an appropriation from the Security to compensate or reimburse Council for loss it has suffered or the costs it has incurred as a result of the breach of this Planning Agreement by the Developer;
- (b) Council may make an appropriation from the Security despite any objection, claim or direction by the Developer to the contrary; and
- (c) if the Security is provided by way of the Mortgage, it will be necessary for Council to invoke rights under the Mortgage (including the exercise of the power of sale) in order for Council to be compensated or reimbursed for any losses suffered or the costs it has incurred as a result of any breach of this Planning Agreement by the Developer.

### 12.7 **Replacement bank guarantee**

At Council's request, the Developer must provide additional supplementary Security if, in the case of the Security provided in the form of a bank guarantee, there has been appropriation that results in the value of the Security held by Council after the appropriation being less than the Security Amount.

### 12.8 **Security return**

If the Developer has complied with all its obligations under this Planning Agreement, Council must, if at the relevant time the Security provided is in the form of a bank guarantee or bank guarantees, return the bank guarantee or bank guarantees to the Developer.

## **13. Dispute resolution**

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### 13.1 **Notice of dispute**

If a party claims that a dispute has arisen under this Planning Agreement (**Claimant**), it must give written notice to the other party (**Respondent**) stating the matters in dispute and designating as its representative a person to negotiate the dispute (**Claim Notice**).

### 13.2 **Claim notice response**

Within 20 Business Days of receiving the Claim Notice, the Respondent must give written notice to the Claimant of its representative to negotiate the dispute.

### 13.3 **Negotiation**

The nominated representatives must:

- (a) meet to discuss the matter in good faith within 10 Business Days after the Respondent has given a written notice advising the Claimant of its representatives; and
- (b) use their best endeavours to settle or resolve a dispute within 15 Business Days after they have met.

#### 13.4 Further notice

If the dispute is not resolved within 15 Business Days after the nominated representatives have met, either party may give to the other a written notice calling for the termination of the dispute (**Dispute Notice**).

The parties agree that a dispute will be mediated if it is the subject of a Dispute Notice, in which case:

- (a) the parties must agree to the terms of reference for the mediation within 5 Business Days of receipt of the Dispute Notice, including 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 5 Business Days of receipt of the Dispute 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 13 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 his or her function as mediator, he or she being required to disclose fully any such interest or duty before his or her appointment;
- (d) the mediator shall be required to undertake to keep confidential all matters coming to his or her knowledge by reason of his or her appointment and performance of his or her duties;
- (e) the parties must within 5 Business Days of receipt of the Dispute Notice notify each other if their representatives will be involved in the mediation;
- (f) the parties agree to be bound by a mediation settlement and may only initiate judicial proceedings for the purpose of enforcing the mediation settlement;
- (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 cost of the mediation be borne by that party.

#### 13.5 Litigation

If a dispute is not finally resolved in accordance with this clause 13, either party is at liberty to litigate the dispute.

#### 13.6 Continue to perform obligations

Each party must continue to perform its obligations under this Planning Agreement, notwithstanding the existence of a dispute.

## 14. Assignment and other dealings

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### 14.1 Land owner dealings

The Developer must not sell, transfer, assign, mortgage, lease or otherwise deal with (**Dealing**) its right, title and interest in the Land (if any) or its rights and obligations under this Planning Agreement, or allow any interest in them to arise or be varied, in each case, without Council's prior written consent, unless, before any such sale, transfer, assignment, charge, encumbrance or novation, the Developer:

- (a) has given prior written notice (of not less than 10 Business Days) to Council of the proposed Dealing; and
- (b) prior to any such Dealing taking effect, has procured execution of a deed by the transferee, assignee or novatee (**Incoming Party**) in favour of Council in a form and substance acceptable to Council whereby:
  - (i) the incoming party becomes contractually bound to perform all of the Developer's Obligations (including obligations which may have arisen before the transfer, assignment or novation takes effect) and have the benefit of all the Developer's rights under this Planning Agreement; and
  - (ii) the Developer agrees to pay all legal costs (assessed on an indemnity basis) and expenses incurred by Council in connection with the negotiation, preparation and signature of such deed,

and has delivered that deed to Council.

### 14.2 Restriction on transfer of shares

If the Developer is a corporation (other than a corporation listed on the Australian Stock Exchange (**ASX**), a change in effective control of the Developer (by way of change in shareholding ownership or otherwise) is deemed to be a dealing for the purposes of clause 14.1 and the requirements of clause 14.1 apply.

## 15. Costs, GST and interest

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### 15.1 Preparation costs

Each party must pay its own legal costs and expenses in relation to the negotiation, preparation, execution and registration of this Planning Agreement, unless expressly stated otherwise.

### 15.2 Advertising costs

Council must pay all costs and expenses incurred in connection with the advertising and exhibiting this Planning Agreement in accordance with the EPAA Act.

### 15.3 Default and administration costs

In connection with this Planning Agreement and any document or matter in connection with it, each party must pay:

- (a) for everything it must do; and
- (b) all costs, damages and expenses (including any reasonable legal costs and expenses) in relation to any default by it under this Planning Agreement or any enforcement by a party of its rights under this Planning Agreement.

**15.4 GST**

- (a) In this clause 15.4 words that are defined in *A New Tax System (Goods and Services Tax Act 1999)* have the same meaning as their definition in that Act.
- (b) Except as otherwise provided by this clause 15.4, all consideration payable under this Planning Agreement in relation to any supply is exclusive of GST.
- (c) If GST is payable in respect of any supply made by a supplier under this Planning Agreement, subject to clause 15.4(d) the recipient will pay to the supplier an amount equal to the GST payable on the supply at the same time and in the same manner as the consideration for the supply is to be provided under this Planning Agreement.
- (d) The supplier must provide a tax invoice to the recipient before the supplier will be entitled to payment of the GST payable under this clause 15.4.

**15.5 Interest**

- (a) If the Developer does not pay any other moneys payable under this Planning Agreement on time, the Developer must pay interest at the Prescribed Rate on the outstanding amount for the period from the day the unpaid money was due until it is paid. The interest must be paid to Council no later than 10 Business Days after Council has given the Developer a demand for any interest.
- (b) If Council does not pay any other moneys payable under this Planning Agreement on time, Council must pay interest at the Prescribed Rate on the outstanding amount for the period from the day the unpaid money was due until it is paid. The interest must be paid to the Developer no later than 10 Business Days after the Developer has given Council a demand for any interest.

**16. Notices**

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**16.1 Service of notice**

A notice or other communication required or permitted, under this Planning Agreement, to be served on a person must be in writing and may be served:

- (a) personally on the person;
- (b) by leaving it at the person's current address for service;
- (c) by posting it by prepaid post addressed to that person at the person's current address for service; or
- (d) by facsimile to the person's current number for service.

**16.2 Particulars for service**

- (a) The particulars for service of each party are set out on page one of this Planning Agreement under the heading "parties";
- (b) A party may change the address, facsimile or email number for service by giving written notice to the other party; and
- (c) If the person to be served is a company, the written notice or other communication may be served on it at the company's registered office.

**16.3 Time of service**

A written notice or other communication is deemed served:

- (a) if served personally or left at the person's address upon service;
- (b) if posted within Australia to an Australian address, 2 Business Days after posting and in any other case, 5 Business Days after posting;
- (c) if served by facsimile, subject to clause 16.3(d), at the time indicated on the transmission report produced by the sender's facsimile machine indicating that the facsimile was sent in its entirety to the addressee's facsimile; or
- (d) if received after 6:00 pm in the place of receipt or on a day which is not a Business Day, at 9:00 am on the next Business Day.

**17. Approvals and consents**

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The parties acknowledge that:

- (a) except as otherwise stated in this Planning Agreement, and subject to any statutory obligations, a party may give or withhold an approval or consent to be given under this Planning Agreement in that party's absolute discretion and subject to any conditions determined by the party;
- (b) a party is not obliged to give its reasons for giving or withholding approval or consent or for giving approval or consent subject to conditions; and
- (c) this Planning Agreement does not impose any obligations on a governmental agency to:
  - (i) grant a development consent where it is acting as a Consent Authority; or
  - (ii) exercise any function under any Laws (including the EPAA Act).

**18. Representations and warranties**

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

**19. New Laws**

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If the Developer is obliged by a New Law to do something to pay an amount which it is already contractually obliged to do or pay under this Planning Agreement then, to the extent only that the relevant obligation is required under both the New Law and this Planning Agreement, compliance with the New Law will constitute compliance with the relevant obligation under this Planning Agreement.

**20. General**

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**20.1 Amendment**

This Planning Agreement may only be varied or replaced by a Planning Agreement duly signed by the parties.



**20.2 Entire understanding**

This Planning Agreement contains the entire understanding between the parties as to the subject matter contained in it. All previous agreements, representations, warranties, explanations and commitments, expressed or implied affecting this subject matter are superseded by this Planning Agreement and have no effect.

**20.3 Further assurance**

Each party must promptly, execute and deliver all documents and take all other action necessary or desirable to effect, perfect or complete the transactions contemplated by this Planning Agreement.

**20.4 Waiver and exercise of rights**

- (a) A single or partial exercise or waiver of a right relating to this Planning Agreement does not prevent any other exercise of that right or the exercise of any other right.
- (b) No party will be liable for any loss or expenses incurred by the other party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right.

**20.5 Time of the essence**

Time is of the essence as regards all dates, periods of time and times specified in this Planning Agreement.

**20.6 No relationship**

- (a) No party to this Planning Agreement has the power to obligate or bind any other party.
- (b) Nothing in this Planning Agreement will be construed or deemed to constitute a partnership, joint venture or employee, employer or representative relationship between any of the parties.
- (c) Nothing in this Planning Agreement will be deemed to authorise or empower a party to act as agent for the other party.

Executed as an Agreement

THE COMMON SEAL of BURWOOD COUNCIL was affixed pursuant to the authority conferred by resolution dated in the presence of the Mayor and the General Manager:

General Manager
(Print) Full Name

See attached.

Mayor
(Print) Full Name

EXECUTED by GOLDFIELD INVESTMENT PTY LTD (ABN 76 149 082 664) in accordance with section 127 of the Corporations Act 2001 (Cth):

Sole Director and Sole Company Secretary
Anne Bi
(Print) Full Name

EXECUTED by GOLDFIELD AUSTRALIA PTY LTD (ACN 149 202 040) in accordance with section 127 of the Corporations Act 2001 (Cth):

Sole Director and Sole Company Secretary
Anne Bi
(Print) Full Name

**Signed for and on behalf of Burwood Council by its attorney, Michael Gerard McMahon, under power of attorney dated 6 July 2011 registered book 4615 number 590, in the presence of:**



.....  
(Print) Name of Witness

*David Patrick Baxter*

.....  
(Print) Name of Witness



.....  
Signature of Attorney

Michael Gerard McMahon

.....  
(Print) Full Name of Attorney

Level 2, 1 – 17 Elsie Street, Burwood, New South Wales, 2134

.....  
(Print) Address

By executing this document, the attorney certifies that he has not received notification of revocation of the power of attorney.

### Schedule 1

<b>Electrical Conduits and communication cables</b>	Electrical Conduits and communication cables for such things including (but not limited to) CCTV, parking metres, illuminated signage in locations and numbers to be determined and agreed between the Developer and Council.
<b>Parking Space Requirements</b>	Development Control Plan Part No 36 – Burwood Town Centre  AS 2890.1 2004: Parking Facilities – Part 1 Off Street Parking
<b>Car Park Configuration/Layout</b>	AS 2890.1 2004: Parking Facilities – Part 1 Off Street Parking
<b>Disability Access Requirements</b>	AS 2890.6 2009: Parking Facilities – Part 6 Off Street Parking for People with Disabilities  AS1428.1: Design for Access and Mobility
<b>Signage Requirements</b>	RTA Guide to Signs and Markings  RTA Delineation Guide Part 1-19
<b>Line Marking Requirements</b>	RTA Guide to Signs and Markings
<b>Traffic Generation</b>	RTA Guide to Traffic Generating Developments  State Environmental Planning Policy No 11 – Traffic Generating Developments
<b>Miscellaneous</b>	State Environmental Planning Policy No 66 – Integrated Land Use and Transport