

DRAFT VOLUNTARY PLANNING AGREEMENT

DATED:

PARTIES:

Burwood Council of 2 Conder Street, Burwood, in the State of New South Wales (**Council**).

and

Blairgrove Pty Ltd ACN: 003 914 305 of 121 Burwood Road, Burwood, in the State of New South Wales. (**Owner/Developer**).

BACKGROUND:

1. The Land is situated at 127-133 Burwood Road, Burwood in the State of New South Wales.
2. On (11/11/2021), the Owner/Developer lodged the Development Application for the change of use of its car parking area from a fourteen (14) open car parking to an open (alfresco) seating and eating area for patrons of the existing development, and pop-up food stalls, including the provision and service of alcohol involving the retail sale of liquor for consumption on the premises.
3. The Development Application will see the Land not able to provide the ten (10) car parking spaces. Four (4) of the fourteen (14) car parking spaces will be used for servicing and loading facilities resulting in a shortfall of ten (10) on-site visitor car parking spaces
4. The Development Application was accompanied by an offer by the Owner/Developer to make Development Contributions in lieu of the provision of ten (10) on-site visitor car parking if the Development Consent is granted to the Development Application for the development, in order for the Council to fund additional car parking elsewhere in the Burwood Town Centre.
5. The Owner/Developer is the registered proprietor of the Land.
6. As contemplated by section 7.4 of the Act, the parties wish to enter into a Planning Agreement with respect to the contribution for visitor parking for the Land contemplated by the Development Application.

OPERATIVE PROVISIONS

1. Planning Agreement under the Act

The Parties acknowledge and agree that this Planning Agreement is a planning agreement within the meaning of section 7.4 of the Act and is governed by Part 7 of the Act.

2. Application of this Planning Agreement

This Agreement applies to both the Land and the Development.

3. Operation of this Planning Agreement

3.1 The parties are to execute this Planning Agreement following the grant by the Council of the Development Consent.

3.2 This Planning Agreement shall operate from the date of execution of this Planning Agreement.

3.3 When this Planning Agreement operates it is a binding contract between the parties.

4. Definitions and interpretation

4.1 In this Planning Agreement the following definitions apply:

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

Agreement has the same meaning as Planning Agreement

Approval means any approvals, consents, section modifications, certificates or other approvals under the Act, certificates, construction certificates, occupation certificates, complying development certificates, permits, endorsements, licences, conditions or requirements (and any variation to them) which may be required by this Planning Agreement and/or the Development Consent.

Authority means any government, local government, statutory, public, ministerial, administrative, fiscal or other authority or body, and includes the any relevant Planning Panel or such other consent authority as may be lawfully appointed and authorised to grant an Approval, including an accredited certifier defined under the Act.

Dealing in relation to the Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the Land.

Development means the development application number DA 119/2021 made for change of use of car parking area by deletion of fourteen (14) car parking spaces on the Land to an open (alfresco) seating and eating area for patrons of the existing development, and pop-up food stalls, including the provision and service of alcohol involving the retail sale of liquor for consumption on the premises.

Development Application has the same meaning as in the Act.

Development Consent has the same meaning as in the Act.

Development Contribution means a monetary contribution or the dedication of land free of cost or the provision of a material public benefit.

GST has the meaning as in the GST Law.

GST Law has the meaning given to that term in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any other Act or regulation relating to the imposition or administration of GST.

Land means Lot 100 in Deposited Plan 703387 situated at and known as 127-133 Burwood Road, Burwood in the State of New South Wales.

Law means:

- a) the common law including principles of equity; and
- b) the requirement of all statutes, rules, ordinances, codes, instruments, regulations, proclamations, by-laws or consent by an Authority, that presently apply or that may apply in the future.

Monetary Contribution means the sum of \$432,960 (four hundred and thirty two thousand nine hundred and sixty) excluding GST representing the sum of $10 \times \$54,120.00 \times 0.8$.

Party means a party to this Agreement, including their successors and assigns.

Planning Agreement means this Voluntary Planning Agreement.

Public Benefit means the Monetary Contribution and the Public Facilities that are derived therefrom.

Public Facilities means the augmentation or improving of open space, community facilities, public car parking or other public facilities as determined by the Council.

Regulation means the *Environmental Planning and Assessment Regulation 2000* (NSW).

4.2 In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:

- (a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
- (b) A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- (c) If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.
- (d) A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
- (e) A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- (f) A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- (g) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.

- (h) An expression importing a natural person including any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (i) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- (j) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and reference to any gender denotes the other genders.
- (k) References to the word 'include' or 'including' are to be construed without limitation.
- (l) A reference to this Agreement includes the agreement recorded in this Agreement.
- (m) A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.
- (n) Any schedules and attachments form part of this Agreement.

5. Development Contributions to be made under this Agreement

- (a) The Owner/Developer will pay to the Council the amount of the Monetary Contribution on the date of execution of this Planning Agreement and prior to any change in the use of the existing car parking area on the Land approved by the Development Consent.
- 5.1 The payment of the Monetary Contribution will be by way of the delivery of a bank cheque to the Council which must be:
- (b) for the amount of the Monetary Contribution;
 - (c) made payable to the Council; and
 - (d) in a form acceptable to the Council.
- 5.2 The Monetary Contribution will be taken to have been paid when the Council notifies the Owner/Developer in writing that the bank cheque has been received and cleared funds have been deposited into the Council's nominated bank account.
- 5.3 The Owner/Developer covenants and agrees not to change the use of the existing car parking area on the Land approved by the Development Consent until the Monetary Contribution required to be made to the Council herein has been paid.
- 5.4 Subsequent to payment of the Monetary Contribution, in the event the Development Consent is not taken up by the Owner/Developer, Council will refund the amount of the Monetary Contribution to the Owner/Developer within 14 days of notice being given to Council by the Owner/Developer of such event.
- 5.5 If there is a refund of the Monetary Contribution pursuant to clause 5.4 of this Agreement, the Planning Agreement will terminate and no longer continue to have effect.
- 5.6 Subsequent to the Owner/Developer having paid the Monetary Contribution to Council and the Development Consent having been taken up by the Owner/Developer, the Land will retain

credit for the ten (10) car parking spaces in relation to any future development application on the Land.

- 5.7 Such credit will be applied as a reduction in the number of car parking spaces required by Council regarding any future Development Application upon written notice being given by the Owner/Developer or any future owner or developer of the Land to Council.
- 5.8 In the event the Development Consent expires, is abandoned, is surrendered, or ceases to have effect, the Planning Agreement will also expire and cease to have effect and from that point on will not be binding on any party.

6. Application of the Development Contributions

- 6.1 The Monetary Contribution paid by the Owner/Developer under this Planning Agreement will be used by the Council to develop and provide Public Facilities.
- 6.2 The Public Facilities will:
- (a) not be provided to coincide with the conduct or completion of the Development;
 - (b) be constructed at a time determined by the Council at its absolute discretion; and
 - (c) be available for use by the general public and will not be restricted for use by patrons of the Development.
- 6.3 The Monetary Contribution paid by the Owner/Developer under this Agreement will be used by the Council towards the provision of 10 car parking spaces within the Burwood Town Centre.

7. Application of section 7.11 and section 7.12 of the Act to the development

This Planning Agreement does not exclude the application of:

- a) section 7.11 or section 7.12 of the Act;
- b) any affordable Housing Levy;
- c) any other monetary contributions in connection with the Development Application.

Benefits under the Planning Agreement are not to be taken into account in determining a development contribution under section 7.11 or section 7.12 of the Act.

8. Registration of this Agreement

- 8.1 The Owner/Developer further covenants with the Council:
- (a) That prior to any change in the use of the existing car parking area on the Land approved by the Development Consent, or within such further time as the parties hereto agree, they shall do all things reasonably necessary to obtain the consent to the registration of this Planning Agreement over the title to the Land pursuant to section 7.6 of the Act from all persons who have an interest in the Land;

- (b) that forthwith after receiving the consents specified in subclause (a) hereof they shall cause this Agreement to be registered on the title of the Land;
- (c) that if this Agreement is not registered on the title to the Land, and if the Owner/Developer should propose to sell the Land or any part thereof then it shall:
 - (i) within seven (7) days of listing the Land or any part thereof for sale, either through an agent or privately, notify the Council of such intention;
 - (ii) as a condition of any sale, require that the incoming purchaser enter into with Council a like agreement to this present Agreement in which substantially the same covenants as set out herein shall apply;
 - (iii) within seven (7) days of exchange of contracts for the sale, notify the Council of the sale and provide the Council with a copy of the contract;
 - (iv) within twenty one (21) days of receipt from the Council of a replacement agreement between the Council and the purchaser substantially in the form of this Agreement, have it executed by the purchaser and return it to the Council;
 - (v) that if this Agreement is not registered on the title to the Land, and if the Owner/Developer should propose otherwise than by sale to transfer or assign its interest in the Land or any part thereof to a transferee or assignee, then it shall before effecting such assignment or transfer have the incoming transferee or assignee enter into an agreement with the Council substantially in the form of this Agreement insofar as concerns the interest assigned or transferred and shall provide same to the Council.

8.2 The Owner/Developer further covenants and agrees with the Council that pending the registration of this Agreement on the title of the Land as required by clause 8.1, the Council shall be entitled to register a caveat at Land & Property Information over the title to the Land to protect its interest therein pursuant to this Agreement

9. Acknowledgements

9.1 The Owner/Developer acknowledges that the Council may include a notation on Planning Certificates under section 10.7(5) of the Act in relation to this Agreement.

9.2 The parties acknowledge that the Council is a consent authority with statutory rights and obligations pursuant to the terms of the Act and other legislation.

10. Dispute resolution

10.1 If a party believes that there is a dispute in respect of this Agreement then:

- (a) the party must give notice in writing to the other party stating that there is a dispute (the Dispute Notice); and
- (b) the Dispute Notice must outline:

- (i) what the party believes the dispute to be;
 - (ii) what the party wants to achieve;
 - (iii) what the party believes will settle the dispute; and
 - (iv) who will be the party's representative to negotiate the dispute.
- 10.2 Within fifteen (15) business days of a Dispute Notice being served, the representatives of each of the parties must meet in order to resolve the dispute.
- 10.3 Both parties must adhere to the dispute resolution procedure set out in this Planning Agreement. The only time that either party may depart from the dispute resolution procedure set out in this clause is when urgent interlocutory relief is required to restrain a breach or threatened breach of this Planning Agreement.
- 10.4 If the parties cannot resolve the dispute after adhering to the dispute resolution procedure set out in this Planning Agreement then either party may seek any other avenues available to it in order to resolve the dispute.

11. Enforcement

- 11.1 This Planning Agreement may be otherwise enforced by either party in any court of competent jurisdiction.
- 11.2 For the avoidance of doubt, nothing in this Planning Agreement prevents:
- (a) a party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Planning Agreement or any matter to which this Planning Agreement relates; and
 - (b) the Council from exercising any function under the Act or law relating to the enforcement of any aspect of this Planning Agreement or any matter to which this Planning Agreement relates.
- 11.3 The rights of the Council expressly provided for herein are cumulative and in addition to and not exclusive of the rights of the Council existing at law or which the Council would otherwise have available to it.

12. Notices

- 12.1 Any notice, consent, information, application or request that must or may be given or made to a party under this Planning Agreement is only given or made if it is in writing and sent in one of the following ways:
- (a) Delivered or posted to that party at its address set out below.
 - (b) Faxed to that party at its fax number set out below.
 - (c) Email to that party at its email address set out below.

Council

Attention: The General Manager
Address: 2 Conder Street BURWOOD NSW 2134
Post: PO Box 240, Burwood NSW 1805
Fax Number: (02) 9911 9900
Email: council@burwood.nsw.gov.au

Owner/Developer

Attention: Richard Whitfield
Address: 121 Burwood Road BURWOOD NSW 2134
Post: PO Box 1306 BURWOOD NSW 1805
Fax Number: (02) 9744 8880
Email: richardwhitfield@95norton.com

- 12.2 If a party gives the other party three (3) business days' notice of a change of its address or fax number, any notice, consent, information, application or request is only given or made by that other party if it is delivered, posted or faxed to the latest address or fax number.
- 12.3 Any notice, consent, information, application or request is to be treated as given or made at the following time:
- (a) If it is delivered, when it is left at the relevant address.
 - (b) If it is sent by post, two (2) business days after it is posted.
 - (c) If it is sent by fax, as soon as the sender receives from the sender's fax machines a report of an error-free transmission to the correct fax number.
 - (d) If it is sent by email, at the time it is sent.
- 12.4 If any notice, consent, information, application or request is delivered, or an error-free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5:00pm on that day in the place of the party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

13. Approvals and consent

Except as otherwise set out 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. A party is not obligated to give its reasons for giving or withholding consent or for giving consent subject to conditions.

14. Assignment and dealings

The Owner/Developer agrees that this Planning Agreement shall be binding upon the Owner/Developer and upon their respective transferees, assignees or successors.

15. Costs

15.1 The Owner/Developer will pay its costs directly related, and incidental to negotiating, preparing, executing, stamping and registering the Planning Agreement, including any costs of lodging/removing caveats on the title to the Land.

15.2 The Owner/Developer will pay Council's reasonable legal costs not exceeding \$5,000.00 (five thousand dollars) exclusive of GST directly related, and incidental to Council's costs in its negotiating, preparing, legal vetting, executing, stamping and registering the Planning Agreement and of drafting, registering and removing caveats on the title to the Land.

16. Entire Agreement

This Planning Agreement contains everything to which the Parties have agreed in relation to the matters it deals with. No party can rely on an earlier document, or anything said or done by another party, or by a director, officer, agent or employee of that party, before this Planning Agreement was executed, except as permitted by law.

17. Further acts

Each party must promptly execute all documents and do all things that another party from time to time reasonably requests to effect, perfect or complete this Planning Agreement and all transactions incidental to it.

18. Governing law and jurisdiction

This Planning Agreement is governed by the law of New South Wales. The parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them. The parties will not object to the exercise of jurisdiction by those courts on any basis.

19. Joint and individual liability and benefits

Except as otherwise set out in this Planning Agreement, any agreement, covenant, representation or warranty under this Planning Agreement by two (2) or more persons binds them jointly and each of them individually, and any benefit in favour of two (2) or more persons is for the benefit of them jointly and each of them individually.

20. No fetter

Nothing in this Planning Agreement shall be construed as requiring Council to do anything that would cause it to be in breach of any of its obligations at law, and without limitation, nothing shall be constructed as limiting or fettering in any way the exercise of any statutory discretion or duty.

21. Representations and warranties

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

22. Severability

If a clause or part of a clause of this Planning Agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Planning Agreement, but the rest of this Planning Agreement is not affected.

23. Modification

No modification of this Planning Agreement will be of any force or effect unless it is in writing and signed by the parties to this Planning Agreement.

24. Waiver

The fact that a party fails to do, or delays in doing, something the party is entitled to do under this Planning Agreement, does not amount to a waiver of any obligations of, or breach of obligations by, another party. A waiver by a party is only effective if it is in writing. A written waiver by a party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

25. Explanatory note

The explanatory note put on exhibition with this Planning Agreement is not to be used in construing the terms of this Planning Agreement.

26. Goods and Services Tax

- 26.1 All words in this clause which are also defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ("the GST Act") have a corresponding meaning to that in the GST Act.
- 26.2 The consideration for any supply under this Planning Agreement excludes GST.
- 26.3 Where a party to this Planning Agreement is taken to have made a supply to another party, the recipient of that supply must, in addition to the consideration payable for the supply and when paying the consideration for the supply, also pay to the maker of the supply an amount equal to

the GST payable in respect of that supply. The recipient of a supply must also pay the GST payable in respect of a supply for which no monetary consideration is payable when the maker of the supply demands payment.

- 26.4 The maker of a supply must give the recipient a tax invoice in the form required by the GST Act at the same time it receives payment from the recipient of the GST payable for that supply.
- 26.5 Despite any other provision of this Planning Agreement, any amount payable under this Planning Agreement, which is calculated by reference to an amount paid or incurred by a party to this Planning Agreement, is reduced by the amount of any input tax credit to which that party or a member of its GST Group is entitled in respect of that amount.

27. Confidentiality

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

28. Release from Planning Agreement

Once the Council is satisfied that the Owner/Developer has fully complied with all of its obligations under this Planning Agreement, the Council agrees to provide a full release and discharge of this Planning Agreement with respect of the whole of the Land. In such circumstances the Council will do all things reasonably necessary, including the execution of any documents to enable the Owner/Developer to remove any caveat and the notation of this Planning Agreement on the title to the Land.

EXECUTED AS AN AGREEMENT

Signed for and on behalf of **Burwood Council** by its attorney, **Tommaso Briscese**, under power of attorney dated 29 May 2019 registered book 4760 number 381, in the presence of:

.....
Signature of Witness

.....
(Print) Name of Witness

.....
Signature of Attorney
Tommaso Briscese

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

2 Conder 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.

Executed by **Blairgrove Pty Ltd** ACN: 003
914 305 in accordance with section 127 of
the *Corporations Act 2001* (Cth) in the
presence of:

Signature of Director/Secretary

(Print) Name of Director/Secretary
