

Final draft

PLANNING AGREEMENT

PARTIES

Burwood Council (ABN 84 362 114 428) of Suite 1, Level 2, 1-17 Elsie Street, Burwood, New South Wales (**Council**)

and

Barker Street Pty Ltd atf LMP Unit Trust (ABN 76 746 012 375), Antoine Doueihi and Laudi Doueihi (ABN 51 816 766 724) of 7 Florence Street, Strathfield, New South Wales (**Developer**).

BACKGROUND

- A. The Development Consent was granted on 8 June 2012.
- B. The Developer has lodged the Modification Application.
- C. The Developer has offered to provide the Monetary Contribution if the Modification Application is granted.

OPERATIVE PROVISIONS

1 Operation of this Agreement

This agreement operates from the date that it is executed by both parties and ends on the first to occur of the following:

- (1) It is terminated by operation of law.
- (2) All the obligations on the parties under this agreement are performed or satisfied by the parties.
- (3) The parties agree in writing that the Development will not proceed and the Developer surrenders the Development Consent to Council.
- (4) The Development Consent lapses within the meaning of Section 95 of the Act.

2 Planning Agreement under the Act

This agreement is a planning agreement:

- (1) within the meaning set out in section 93F of the Act; and
- (2) governed by Subdivision 2 of Division 6 of Part 4 of the Act.

3 Application of this Agreement

This agreement applies to both the Land and the Development.

4 Definitions and interpretation

4.1 In this agreement the following definitions apply:

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

Assign or Assignment as the context requires refers to any assignment, sale, transfer, disposition, declaration of trust over or other assignment of a legal and/or beneficial interest.

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 and/or use of the Land in accordance with the Development Consent, as modified by the Modification Application.

Development Application has the same meaning as in the Act.

Development Consent means the Development Consent granted by Council in favour of the Developer, DA No. 189/2011.

Monetary Contribution means a monetary contribution in the sum of \$35,872.00 required to be made by the Developer.

GST has the same 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 the GST.

Land means the land contained in certificate of title folio identifiers:

1/79971 and known as 113 Burwood Rd Burwood NSW 2134.

1/91229 and known as 115 Burwood Rd Burwood NSW 2134.

1/80116 and known as 117 Burwood Rd Burwood NSW 2134.

Law means all legislation, regulations, by-laws, common law and other binding order made by any statutory or government authority or agency.

Modification Application means the application submitted by the Developer on or about 19 March 2013 under section 96 of the Act to amend the Development Consent.

Planning Legislation means the Act, the *Local Government Act 1993* (NSW) and the *Roads Act 1993* (NSW).

Regulation means the *Environmental Planning and Assessment Regulation 2000*.

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 includes 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 a 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

The Developer must pay the Monetary Contribution to Council on or before the date of this agreement.

6 Application of the Development Contributions

- 6.1 Subject to clause 6.2, Council will use its reasonable endeavours to ensure that the Monetary Contribution is used to provide and expand public parking supply, however, Council is under no obligation to do so and may use that contribution for improving the quality of the existing public parking in any other part of the Burwood Local Government Area.
- 6.2 Where:
 - (1) it is impracticable (in reasonable circumstances) for Council to comply with clause 6.1; or
 - (2) the Developer gives its written consent to Council not complying with clause 6.1, Council will spend the Monetary Contribution on the upgrade of infrastructure facilities or the provision of services other than in the immediate vicinity of the Land.

- 6.3 If requested by the Developer in writing, Council must provide reasonable evidence to the Developer of its compliance with respect to its obligations under this clause 6.

7 Application of s94 and s94A of the Act to the Development

This agreement excludes the application of section 94 or section 94A of the Act to the Modification Application but does not otherwise exclude the application of those provisions to the Development.

8 Registration of this Agreement

This agreement will not be registered on the title of the Land pursuant to section 93H of the Act.

9 Developer Warranties

The Developer warrants to Council that:

- (1) it is able to fully comply with its obligations under this agreement;
- (2) it has full capacity to enter into this agreement; and
- (3) there is no legal impediment to it entering into this agreement, or performing the obligations imposed on it under this agreement.

10 Assignment and Security

10.1 Prohibition

Neither party may Assign their rights under this agreement without the prior written consent of the other party.

10.2 Assignment of the Land

The Developer must not Assign its interest in the Land unless:

- (1) Council consents to the Assignment, acting reasonably;
- (2) the proposed assignee enters into an agreement to the satisfaction of Council under which the assignee agrees to be bound by the terms of this agreement; and
- (3) the Developer is not in breach of any terms of this agreement.

11 Position of Council

11.1 Consent authority

The parties acknowledge that Council is a consent authority with statutory rights and obligations pursuant to the terms of the Planning Legislation.

11.2 Agreement does not fetter discretion

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

- (1) the power of Council to make any Law; or
- (2) the exercise by Council of any statutory power or discretion,
(Discretion).

11.3 Severance of provisions

- (1) No provision of this agreement is intended to, or does, constitute any unlawful fetter on any Discretion. If, contrary to the operation of this clause, any provision of this agreement is held by a court of competent jurisdiction to constitute 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 the objective of this clause is substantially satisfied;
 - (b) in the event that paragraph (1)(a) cannot be achieved without giving rise to an unlawful fetter on a Discretion, the relevant provision is to be severed and the remainder of this agreement has full force and effect; and
 - (c) to endeavour to satisfy the common objectives of the parties on relation to the provision of this agreement which is held to be an unlawful fetter to the extent that it is possible having regard to the relevant court judgment.
- (2) Where the Law permits Council to contract out of a provision of that Law or gives Council power to exercise a Discretion, then if Council has in this agreement contracted out of a provision or exercised a Discretion under this agreement, then to the extent of this agreement is not to be taken to be inconsistent with the Law.

11.4 No obligations

Nothing in this agreement will be deemed to impose any obligation on Council to exercise any of its functions under the Act in relation to the Development Consent, the Modification Application, the Land or the Development in a certain manner.

12 Dispute Resolution

12.1 Notice of Dispute

If a party believes that there is a dispute in respect of this agreement (**Dispute**) then:

- (1) that party must give notice (**Dispute Notice**) in writing to the other party stating that there is a Dispute; and
- (2) the Dispute Notice must outline:
 - (a) what the party believes the Dispute to be;
 - (b) what the party wants to achieve;
 - (c) what the party believes will settle the Dispute; and
 - (d) who will be the party's representatives to negotiate the Dispute.

12.2 Consultation between the Representatives

Within fifteen (15) Business Days of a notice served in accordance with clause 14.1(1) the representatives (**Representatives**) of each of the parties must meet in order to resolve the Dispute.

12.3 Exclusivity of dispute resolution procedure

- (1) Both parties must adhere to the dispute resolution procedure set out in this agreement.

- (2) 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 agreement.

12.4 Settlement of Dispute

If the parties cannot resolve the Dispute after adhering to the dispute resolution procedure set out in this agreement, then either party may seek any other avenues available to it in order to resolve the Dispute.

13 Default in Performance

13.1 Events of Default

The Developer commits an event of default if it breaches a term of this agreement (**Event of Default**).

13.2 Consequences of Events of Default

Where the Developer commits an Event of Default, Council may serve a notice on the Developer requiring the relevant breach to be rectified within seventy two (72) days of the date of that notice.

13.3 No restriction on rights

The rights vested in Council pursuant to clause 13.2 do not prevent Council from exercising any other rights that it may possess at law.

13.4 Termination

This agreement terminates in the event Council serves notice on the Developer terminating this agreement where the Developer has failed to comply with a notice issued in accordance with 15.2.

13.5 Consequence of termination

Upon termination of this agreement:

- (1) all future rights and obligations of the parties are discharged; and
- (2) all pre-existing rights and obligations of the parties continue to subsist.

14 Notices

14.1 Any notice, consent, information, application, communication or request under this agreement must be in writing and signed by or on behalf of the person giving it, addressed to the person to whom it is to be given and sent in one of the following ways:

- (1) Delivered or posted to that Party at its address set out below.
- (2) Faxed to that Party at its fax number set out below.
- (3) Emailed to that Party at its email address set out below.

Council

Attention: Michael Gerard McMahon

Address: Suite 1, Level 2, 1-17 Elsie Street, Burwood

Fax Number: 02 9911 9900

Email: mgm@burwood.nsw.gov.au

Developer

Attention: Michael Doueihi

Address: 7 Florence Street, Strathfield

Fax Number: 02 9616 0190

Email: mdoueihi@dynamicpm.com.au

- 14.2 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, communication 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.
- 14.3 Any notice, consent, information, application, communication or request is to be treated as given or made at the following time:
- (1) If delivered to a person's address, on the day of delivery if a business day, otherwise on the next business day.
 - (2) If sent by pre-paid mail, on the third business day after posting.
 - (3) If transmitted by facsimile or other electronic means to a person's address and a correct and complete transmission report is received, on the day of transmission if a Business Day, otherwise on the next Business Day.
- 14.4 For the purpose of this clause, the address of a person is the address set out in this agreement or other address of which that person may from time to time give notice to each other person.

15 Approvals and consent

Except as otherwise set out in this agreement, and subject to any statutory obligations, a party may give or withhold an approval or consent to be given under this agreement in that party's absolute discretion and subject to any conditions determined by the party. A party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

16 Costs

- 16.1 The Developer must reimburse Council for all costs incurred by Council arising out of the negotiation, preparation, execution of this agreement.
- 16.2 All stamp duty (including fines, penalties and interest, payable in connection with this agreement and any instrument executed or any transaction evidenced by this agreement must be borne by the Developer.

17 Entire agreement

This 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 agreement was executed, except as permitted by law.

18 Further acts

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

19 Governing law and jurisdiction

This agreement is governed by the law of New South Wales. The parties submit to the exclusive jurisdiction of the courts of New South Wales and any courts that may hear appeal from those courts in respect of any proceedings in connection with this agreement. The parties may not seek to have any proceedings removed from the jurisdiction of New South Wales on the grounds of *forum non conveniens*.

20 Joint and individual liability and benefits

Except as otherwise set out in this agreement, any agreement, covenant, representation or warranty under this 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.

21 Severability

If a clause or part of a clause of this 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 Agreement, but the rest of this Agreement is not affected.

22 Amendment

This agreement may only be amended or supplemented in writing signed by the parties and in accordance with the requirements of the Act and/or the Regulation.

23 Waiver

The non-exercise of or delay in exercising any power or right of a party does not operate as a waiver of that power or right, nor does any single exercise of a power or right preclude any other or further exercise of it or the exercise of any other power or right. A power or right may only be waived in writing, signed by the parties to be bound by the waiver.

24 GST

If any party reasonably decides that it is liable to pay GST on a supply made to the other party under this agreement and the supply was not priced to include GST, then the recipient of the supply must pay an additional amount equal to the GST on that supply.

25 Counterparts

This agreement may be executed in any number of counterparts and all of those counterparts taken together constitute one and the same instrument.

EXECUTION PAGE

Executed as a deed.

Dated: 3 February 2014

Signed, sealed and delivered by the Developer in accordance with section 127(1) of the Corporations Act by authority of its directors.

Director/Secretary (Signature)

MICHAEL CALEHI

Name of Director/ Secretary (Print Name)

Director (Signature)

Antane Rajah

Name of Director (Print Name)

Signed, sealed and delivered by Burwood Council by its duly appointed attorney pursuant to registered Power of Attorney Book No 4615 Folio 590

Witness (Signature)

Vera Karpowicz

Name of Witness (Print Name)

Attorney (Signature)

Michael McMahon

Name of Attorney (Print Name)