

# DEED OF PLANNING AGREEMENT

## PARTIES

**Burwood Council** of Suite 1, Level 2, 1-17 Elsie Street Burwood in the State of New South Wales (**Council**).

and

**James Trung Vinh Ngo** of 14 Burwood Road, Burwood in the State of New South Wales (**Developer**).

## Background

- A. On 18 November 2016 the Developer submitted a Development Application DA 13/2016 to the Council for Development Consent to carry out the Development on the Land.
- B. The Development Application was accompanied by an offer by the Developer to enter into this Agreement to make Development Contributions towards the Public Facilities if the Development Consent was granted.
- C. The Developer is the registered proprietor of the Land.

## Operative Provisions

### 1. Planning Agreement under the Act

The parties agree that this Agreement is a planning agreement within the meaning of section 93F of the Act and is governed by Subdivision 2 of Division 6 of Part 4 of the Act.

### 2. Application of this Agreement

This Agreement applies to both the Land and the Development.

### 3. 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.

### 4. Definitions and Interpretation

4.1 In this Agreement the following definitions apply:

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

**Agreement** means this Deed which witnesses the parties' Voluntary Planning Agreement herein. Wherever the word "Agreement" appears herein and the context permits, it shall be read as a reference to this Deed.

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

**Development** means DA 13/2016 issued by the Council in respect of the property known as 14 Burwood Road, Burwood NSW 2134

**Development Application** has the same meaning as in the Act.

**Development Consent** means a Development Consent granted by Council in favour of the Developer in respect of DA 13/2016.

**Development Contribution** means a monetary contribution in the sum of \$49,500.00 exclusive of GST 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 Lot 6 in Deposited Plan 771894, known as 14 Burwood Road, Burwood NSW 2134.

**Monetary Contribution** means \$49,500.00 exclusive of GST.

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

**Public Facility** means car parking within the Burwood Town Centre for use by the public.

**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 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**

- 5.1 The Developer will pay to the Council a Monetary Contribution in the sum of forty nine thousand and five hundred dollars (\$49,500.00) (exclusive of GST) on or before the execution of this Agreement.
- 5.2 The Developer must deliver to Council a bank cheque in a form acceptable to the Council for the amount of the Monetary Contribution.
- 5.3 Execution of this Agreement and payment of the Monetary Contribution shall occur prior to the issue of any Construction Certificate with respect to the Development.
- 5.4 The Developer covenants and agrees with the Council not to make or permit an application for the issue of any Construction Certificate until the payment required to be made to the Council hereunder has been paid.

## **6. Application of the Development Contributions**

- 6.1 The Monetary Contribution paid by the Developer under this Agreement will be used by Council to develop its Public Facility.
- 6.2 The Public Facility will:
  - (a) not be provided to coincide with the conduct or completion of the Development;
  - (b) be constructed at a time determined by Council at its absolute discretion;
  - (c) be available for use by the general public and will not be restricted for use by patrons of the Development.

## **7. Application of Section 94 and Section 94A of the Act to the Development**

This Agreement does not exclude the application of section 94 or section 94A of the Act to the Development. Benefits under the Planning Agreement are not to be taken into account in determining a development contribution under section 94 or section 94A.

## **8. Registration of this Agreement**

- 8.1 The Proprietor further warrants and covenants with the Council:
  - (a) that he has the consent to the registration of this Agreement over the title to the Land pursuant to section 93H of the Act from all persons who have an interest in the Land;
  - (b) that prior to the issue of any Construction Certificate for the Development, he 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, the Developer must not assign any interest in the Land or any part thereof unless:
  - (i) Council consents to the assignment (acting reasonably); and
  - (ii) the proposed assignee has entered into an agreement to the satisfaction of Council under which the assignee agrees to be bound by terms equivalent to the terms of this Agreement; and
  - (iii) the Developer is not in breach of any terms of this Agreement.

8.2 The 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 Management Authority over the title to the Land to protect its interest therein pursuant to this Agreement

## **9. Acknowledgements**

9.1 The Developer acknowledges that Council may include a notation on Planning Certificates under section 149(5) of the Act in relation to this Agreement.

9.2 The parties acknowledge that 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 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 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 Agreement.

10.4 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.

## **11. Enforcement**

11.1 This Agreement may be otherwise enforced by either party in any court of competent jurisdiction.

- 11.2 For the avoidance of doubt, nothing in this Agreement prevents:
- (a) a party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Agreement or any matter to which this Agreement relates; and
  - (b) the Council from exercising any function under the Act or law relating to the enforcement of any aspect of this Agreement or any matter to which this 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 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: Suite 1, Level 2, 1-17 Elsie Street Burwood 2134  
Post: PO Box 240, Burwood NSW 1805  
Fax Number: 9911 9900  
Email: council@burwood.nsw.gov.au

### **Developer**

Attention: James Trung Vinh Ngo  
Address: 14 Burwood Road Burwood 2134  
(mail to PO Box 1168, Burwood NSW 2134)  
Fax Number: 9747 1288  
Email: jamesngo@dentalnet.com.au

- 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 machine a report of an error-free transmission to the correct fax number.

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 on 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 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 obligated to give its reasons for giving or withholding consent or for giving consent subject to conditions.

### **14. Assignment and Dealings**

The Developer agrees that this Agreement shall be binding upon the Developer and upon any respective transferees, assignees or successors.

### **15. Costs**

The Developer shall bear the Council's costs directly related, and incidental, to negotiating, preparing, executing, stamping and registering the Agreement, including any costs of lodging/removing caveats on the title to the Land.

### **16. 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.

### **17. 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.

### **18. Governing Law and Jurisdiction**

This 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 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.

### **20. No Fetter**

Nothing in this 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 Agreement and comply with their obligations under the Agreement and that entry into this Agreement will not result in the breach of any law.

**22. 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.

**23. Modification**

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

**24. 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.

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

**26. GST**

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 does not include any amount for 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 Agreement, any amount payable under this 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 Agreement are not confidential and this Agreement may be treated as a public document and exhibited or reported without restriction by any party.

- 28.** Once the Council is satisfied that the Developer has fully complied with all of his 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 Council will do all things reasonably necessary, including the execution of any documents to enable the Proprietor to remove any caveat and the notation of this Planning Agreement on the title to the Land.



EXECUTED AS A DEED

Signed for and on behalf of **Burwood Council** by its attorney, **Bruce Gordon Macdonnell**, under power of attorney dated 29 November 2017 registered book 4736 number 451, in the presence of:

.....  
Signature of Witness

.....  
(Print) Name of Witness

.....  
Date

.....  
Signature of Attorney

Bruce Gordon Macdonnell  
.....  
(Print) 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.

Signed by **James Trung Vinh Ngo** in the presence of:

.....  
Signature of Witness

.....  
(Print) Name of Witness

.....  
Date

.....  
Signature

James Trung Vinh Ngo  
.....  
(Print) Name