

Planning Agreement

16 Railway Parade, Burwood NSW

Burwood Council (the Council)

ABN 84 362 114 428

and

Nascon Asset Pty Ltd (the Developer)

ACN 606 100 323

PLANNING AGREEMENT

PARTIES

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

(the **Council**)

and

Nascon Asset Pty Ltd ACN 606 100 323 of Suite 1, 17 Wilga Street, Burwood in the State of New South Wales 2134

(the **Developer**)

Developer: Initial Here



Council: Initial Here



Version Control: 5 April 2018

Background:

- A. The Land is situated at 16 Railway Parade Burwood NSW 2134.
- B. On 8 April 2016, Development Application No. 45/2016 was submitted by the Developer to the Council for development consent for development to be carried out on the Land for the purpose of demolition of existing buildings and construction of a mixed commercial and residential building over basement car parking.
- C. The development site comprises 687m²
- D. The Developer is the registered proprietor of the Land.
- E. As contemplated by section 93F of the Act, the parties wish to enter into a Planning Agreement with respect to the 9.9% increase in FSR for the Land contemplated by the Development upon the Development Consent.

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 93F of the Act and is governed by Part 4 of the Act.

2. Application of this Planning Agreement

This Planning Agreement applies to the Land and the Development Consent.

3. Operation of this Planning Agreement

3.1 This Planning Agreement takes effect on the date of this Planning Agreement after execution by all parties, subject to clause 3.2.

3.2 This Planning Agreement will remain in force until:

- (i) it is terminated by operation of law; or
- (ii) all obligations are performed or satisfied; or
- (iii) the Sunset Date is reached; or
- (iv) the Development Consent is surrendered in accordance with the Act; or
- (v) it is otherwise discharged or terminated in accordance with the terms of this Planning Agreement.

3.3 This Planning Agreement shall operate from the date of execution by all parties of this Planning Agreement.

4. Definitions and interpretation

4.1 In this Planning Agreement the following definitions apply:

Developer: Initial Here  Council: Initial Here 

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

Approval means any approvals, consents, section 96 modifications, Part 4A certificates or 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 or the Development Consent.

Authority means any government, local government, statutory, public, ministerial, administrative, fiscal or other authority or body, and includes the Joint Regional 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.

Business Day means any day except Saturday or Sunday or a day which is a public holiday in Sydney.

Construction Certificate means a certificate issued under Part 4A of the *Environmental Planning and Assessment Act 1979* (NSW) approving building work to be carried out on the Land for the whole or part of the work consented to under the Development Consent on the Land.

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 of the Land in accordance with the Development Application No. 45/2016 as made by the Developer and as a result of any conditions of Development Consent.

Development Consent means the consent granted in connection with Development Application No. 45/2016.

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

Dispute Notice means a notice issued by either party to the other party where there is a dispute in respect of this Planning Agreement.

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 Lots 1-20 in SP2082 and known as 16 Railway Parade Burwood NSW 2134.



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 \$755,700 (seven hundred and fifty five thousand, seven hundred dollars) excluding GST representing \$1100.00 x 687m².

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

Planning Agreement means this Planning Agreement.

Public Benefit means the Monetary Contribution.


Public Amenities means the augmentation or improving of open space, community facilities, or other public amenities as determined by the Council.

Sunset Date means the date on which the Development Consent lapses.

4.2 In the interpretation of this Planning 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 Planning Agreement.
- (b) A reference in this Planning 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 Planning Agreement is not a business day, the act, matter or thing must be done on the next business day.
- (d) A reference in this Planning Agreement to dollars or \$ means Australian dollars and all amounts payable under this Planning Agreement are payable in Australian dollars.
- (e) A reference in this Planning 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 Planning 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 Planning 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.

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- (l) A reference to this Planning Agreement includes the agreement recorded in this Planning Agreement.
- (m) A reference to a party to this Planning 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 Planning Agreement.

5. Development Contributions to be made under this Planning Agreement

- 5.1 The Developer will pay to the Council the Monetary Contribution after Development Consent and prior to the issue of the Construction Certificate for the Development.
- 5.2 The payment of the Monetary Contribution will be by way of the delivery of a bank cheque to the Council which must be:
 - (a) made payable to the Council; and
 - (b) in a form acceptable to the Council.
- 5.3 The Developer covenants and agrees not to make an application for the issue of any Construction Certificate until the Monetary Contribution required to be made to the Council hereunder has been paid.
- 5.4 Subsequent to payment of the Monetary Contribution, in the event the Development Consent is not taken up by the Developer or an application for the issue of the Construction Certificate is refused, Council will refund the amount of the Monetary Contribution to the Developer within 14 days of notice being given to Council by the Developer of such event.
- 5.5 Notwithstanding any refund of the Monetary Contribution pursuant to clause 5.4 of this Planning Agreement, the Planning Agreement shall continue to have effect.

6. Application of the Development Contributions

- 6.1 The Monetary Contribution paid by the Developer under this Planning Agreement will be used by the Council to develop and provide Public Amenities.
- 6.2 The Public Amenities will:
 - (a) not coincide with the conduct or completion of the Development;
 - (b) be constructed at a time determined by the 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

- 7.1 This Planning Agreement does not exclude the application of:
 - (a) section 94 or section 94A of the Act;
 - (b) any affordable Housing Levy;

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- (c) any other monetary contributions;

in connection with Development Application No. 149/2014. Benefits under the Planning Agreement are not to be taken into account in determining a development contribution under section 94 or section 94A of the Act.

8. Registration of this Planning Agreement

8.1 The Developer further covenants with the Council:

- (a) that prior to the issue of any Construction Certificate for the Development, 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 93H 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 Planning Agreement to be registered on the title of the Land;
- (c) that if this Planning Agreement is not registered on the title to the Land, and if the 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 the Council a like agreement to this present Planning Agreement in which 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 in the form of this Planning Agreement, have it executed by the purchaser and return it to the Council;
 - (v) that if this Planning Agreement is not registered on the title to the Land, and if the 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 in the form of this Planning Agreement insofar as concerns the interest assigned or transferred and shall provide same to the Council.

- 8.2 The Developer further covenants and agrees with the Council that pending the registration of this Planning 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 Planning Agreement



9. Acknowledgements

- 9.1 The Developer acknowledges that the Council may include a notation on Planning Certificates under section 149(5) of the Act in relation to this Planning 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.
- 9.3 The parties acknowledge and agree that the Monetary Contribution is voluntarily offered by the Developer to the Council as part of this Planning Agreement.

10. Dispute resolution

- 10.1 If a party believes that there is a dispute in respect of this Planning 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 any 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.

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Council: Initial Here



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: Suite 1, Level 2, 1-17 Elsie Street Burwood 2134
Post: PO Box 240, Burwood NSW 1805
Fax Number: (02) 9911 9900
Email: council@burwood.nsw.gov.au

Developer

Attention: Nascon Asset (John Mouawad)
Address: Suite 1/17 Wilga Street Burwood
Post: Suite 1/17 Wilga Street Burwood 2134
Fax Number: (02) 9745 1661
Email: john@nascon.net.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.

Developer: Initial Here



Council: Initial Here



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

15. Costs

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

16. Entire Planning 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 affect, 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.

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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. 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 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.

Developer: Initial Here



Council: Initial Here



- 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 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 Developer to remove any caveat and the notation of this Planning Agreement on the title to the Land.

Developer: Initial Here




Council: Initial Here



EXECUTED AS AN AGREEMENT

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

EMILY JACKLEY
(Print) Name of Witness

01/05/2018
Date


Signature of Attorney


Bruce Gordon MacDonnell

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

Address


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

Signed by **Nascon Asset Pty Ltd** ACN 606 100 323)
under section 127 of the *Corporations Act* 2001 (Cth) by:)
)


Signature of Director/Secretary

John Mosawad
Print Full Name of Director/Secretary

20. 7. 18
Date


Signature of Director

Magdalie Mosawad
Print Name of Director

PLANNING AGREEMENT - Explanatory Note

Environmental Planning and Assessment Regulation 2000 (NSW) (EP&A Regulation 2000)

Planning Agreement for the provision of monetary contribution for public benefit at 16 Railway Parade BURWOOD NSW

Under Section 93F of the *Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act)*

1. Parties

The parties to the draft Planning Agreement are:

(1) Burwood Council (the Council)

(the Owners)

(2) Nascon Asset Pty Ltd ACN 606 100 323

(the Developer)

2. Description of Subject Land

The land to which the draft Planning Agreement relates is as follows:

Folio Identifiers: Lots 1-20 SP2082 (Land)

Location: 16 Railway Parade BURWOOD NSW

The Owners are the registered proprietors of the Land.

3. Description of Proposed Development

The Developer has lodged a development application for the Land which proposes the construction of a mixed commercial and residential building over basement car parking. The application includes a voluntary draft planning agreement for material and financial contribution to Council as a public benefit as part of the application seeking approval for bonus gross floor space of 687m² of residential floor space above what the Burwood LEP would normally allow overall. The proposed development is documented in the Development Application.

4. Summary of Objectives, Nature and Effect of the draft Planning Agreement

[Clause 25E(1)(a) of the EP&A Regulation 2000]

The intent of the draft Planning Agreement is to ensure that public benefits are provided in the form of provision, augmentation or improvement of open space, community facilities or other public amenities as proposed by the development application and determined by Council.

The draft Planning Agreement is proposed to require a monetary contribution for an amount of \$755,700.00 (excluding GST) being \$1100.00 (excluding GST) per square metre (687m²) of GFA in excess of the permitted GFA limit for the development payable after development consent is granted and before issue of a Construction Certificate.

5. Assessment of the Merits of the draft Planning Agreement

[Clause 25E (1)(b) of the EP&A Regulation 2000]

5.1 The planning purposes served by the draft Planning Agreement

[Clause 25E(2)(e) of the EP&A Regulation 2000]

The draft Planning Agreement serves the following planning purpose:

- The monetary contributions paid by the **Developer** under this draft Planning Agreement will be used by **Council** to provide, augment, or improve open space, community facilities, or other public facilities as determined by Council.

Whether the draft Planning Agreement provides for a reasonable means of achieving that purpose:

- (i) Council has conducted an Urban Design Study which revealed that in parts of the Burwood Town Centre, including the area in which the subject land is located, there is some potential for a maximum increase of 10% in FSR. The study also identified public benefit requirements in the Commercial Core (Area 1) and Middle Ring (Area 2).
- (ii) The draft Planning Agreement will secure a considerable material benefit to the public as the Council is to use, or put the monetary contribution towards, the provision of material benefits such as civil infrastructure, public domain upgrades and facilities for the Burwood Town Centre, which will not only benefit the users and those in the immediate vicinity of the Burwood Town Centre but the wider Burwood population. This is considered to be a substantial public benefit and the draft Planning Agreement achieves this objective of delivering the benefit.

5.2 Promotion of the public interest

[Clause 25E(2)(a) and (c) of the EP&A Regulation 2000]

The draft Planning Agreement promotes the public interest by:

- Ensuring the orderly use and development of land by ensuring that public benefits are provided where a development site achieves additional FSR.

The draft Planning Agreement promotes one or more of the objects of the EP&A Act as follows:

- (i) The proper management and development of land for the purpose of promoting the social and economic welfare of the community and a better environment;
- (ii) The provision and co-ordination of community services and facilities; and
- (iii) Opportunities for public involvement and participation in environmental planning and assessment.

5.3 Promotion of the Council's charter

[Clause 25E(2)(d) of the EP&A Regulation 2000]

The draft Planning Agreement promotes one or more of the elements of Council's charter under Section 8 of the *Local Government Act 1993* (NSW) as follows [italicised sections come directly from the Charter]:

- (i) Council undertakes to provide *adequate, equitable and appropriate services for the community*. The draft Planning Agreement provides the monetary resources to assist Council in the provision of civil infrastructure, public domain upgrades and facilities for the augmentation, or improvement of open space, community facilities, and other public facilities for the Burwood Town Centre and ensures that those *facilities are managed efficiently and effectively*. Council is the *custodian and trustee of public assets* and has a responsibility to *effectively plan for, account for, and manage the assets*.

- (ii) Council undertakes to involve *councillors, members of the public, users of facilities and services, and council staff* in its activities. The draft Planning Agreement process provides an opportunity for the community and stakeholders to be involved and interested people are invited to make comment during the exhibition period. The public exhibition and the consideration of this matter at Council meetings is intended to *keep the local community informed*.

5.4 Capital Works Program

[Clause 25E(2)(f) of the EP&A Regulation 2000]

Whether Council has a capital works program, and if so, whether the draft Planning Agreement conforms with or promotes that capital works program:

- Council has in place a capital works program, but the program does not, to date, identify public benefits within the Burwood Town Centre.
- Council has prepared a Burwood Community Facilities and Open Space Study which identifies works and improvements to community facilities and open space to be carried out as a direct result of the Urban Design Study. These are known as public benefits. This study will inform the capital works program as it is reviewed annually where those public benefits will be included within the capital works program including when and where sufficient funds are available.

5.5 Whether the draft Planning Agreement specifies that certain requirements must be complied with before a construction certificate is issued.

The draft Planning Agreement provides that the Monetary Contribution be paid prior to the issue of a construction certificate for the proposed development.
