

Planning Agreement

180-186 Burwood Road and 7-9 Burleigh Street, Burwood

Parties

Burwood Council [ABN 84 362 114 428] of Suite 1, Level 2, 1-17 Elsie Street Burwood in the State of New South Wales

(Council)

and

Giant Project Group Pty Ltd [ACN 607 857 714] of Level 10, 11-15 Dean Street, Burwood in the State of New South Wales (registered office 47-49 Buckley Street, Marrickville)

(Developer)

T. 02 8014 5879
M. 0409 221 884
E. law@projectlawyers.com.au

Piccadilly Tower
Level 21, 133 Castlereagh Street
Sydney NSW 2000

Project Lawyers Pty Ltd
ABN 34 608 111 404



Background

- A The Land is situated at 180-186 Burwood Road and 7-9 Burleigh Street, Burwood NSW.
- B The Developer is the registered proprietor of the Land.
- C On 28 July 2016 a Development Application was submitted by the Developer to Council for Development Consent for development to be carried out on the Land for the purpose of the demolition of the existing buildings and the construction of a mixed use development comprising commercial, residential and serviced apartments over basement car parking on the Land.
- D The Developer has prepared and submitted, in connection with the Development Application:
- (a) a statement of environmental effects and accompanying plans.
 - (b) a written request under clause 4.6 of the Burwood LEP 2012 seeking an exception to the 'height of building' development standards set out in clause 4.3 of the Burwood LEP 2012.
 - (c) a written request under clause 4.6 of the Burwood LEP 2012 seeking an exception to the 'floor space ratio' development standards set out in clause 4.4 of the Burwood LEP 2012.
 - (d) a written request under clause 4.6 of the Burwood LEP 2012 seeking an exception to the 'floor space ratio' development standards set out in clause 4.4A of the Burwood LEP 2012.
- E The Developer has also prepared and submitted, in connection with the Development Application, an offer by the Developer to enter into this Planning Agreement seeking approval for an additional 0.6:1 floor space ratio (FSR) over the maximum FSR for the Land, equating to a variation of 10%, in exchange for making a Development Contribution towards the Public Facilities if the Development Application is granted.
- F As contemplated by section 7.4 of the Act, the parties wish to enter into a Planning Agreement with respect to the 10% increase in FSR for the Land associated with the Development Application.

Operative Provisions

1. Definitions and Interpretation

1.1 Definitions

The following words have the corresponding meanings for the purposes of this Planning Agreement:

Act means the *Environmental Planning and Assessment Act 1979 (NSW)*, as amended, and includes any regulations made under the Act.

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Approval means any approvals, consents, section 4.55 modifications, Part 6 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 Independent Hearing Assessment 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 for Saturday or Sunday or a day which is a public holiday in Sydney.

Construction Certificate means a certificate issued under Part 6 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 as made by the Developer and any conditions of consent imposed by the Development Consent.

Development Application means Development Application No.D103/2016 lodged with Council on or about 28 July 2016.

Development Consent means the consent granted in connection with the Development Application.

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

Explanatory Note means the Explanatory Note set out in **Schedule 1** of this Planning Agreement.

Force Majeure means any physical or material restraint beyond the reasonable control of the Party claiming force majeure.

GST has the meaning as in the GST Law.

GST law has the same 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 land described in the certificate of title Lot 100 DP1046417 and Lot 2 DP741809

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 \$1,076,988.00 (one million and seventy-six thousand and nine hundred and eighty eight dollars), inclusive of GST (if applicable), representing \$1,100.00 x 979.08 sqm.

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

1.2 Interpretation

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

- (a) headings are for convenience only and do not affect interpretation.
- (b) a reference to "person" includes an individual, the estate of an individual, a corporation, an Authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust.
- (c) a reference to a party includes that party's executors, administrators, successors and permitted assigns, including persons taking by way of novation.
- (d) a reference to a party to the Agreement includes a reference to servants, representatives, agents, and contractors of the party.
- (e) a reference to a document (including this Planning Agreement) is to that document as varied, novated, ratified, supplemented or replaced from time to time.
- (f) 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.
- (g) a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender.
- (h) a reference to a party, clause, schedule, exhibit, attachment or annexure is a reference to a party, clause, schedule, exhibit, attachment or annexure to or of this Planning Agreement, and a reference to this Planning Agreement includes all schedules, exhibits, attachments and annexures to it.
- (i) if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning.



- (j) A reference to the word "include", "includes" or "including" is to be interpreted without limitations.
- (k) the Explanatory Note set out in this Planning Agreement is not to be used to assist in construing the Agreement.
- (l) a reference to "\$" or "dollar" is to Australian currency.

1.3 Compliance with New Laws

If a Law is changed or a new Law comes into force (both referred to as "New Law"), and the Developer is obliged by the New Law to perform certain works or pay an amount which it is required to do in accordance with this Planning Agreement or which was not contemplated at the time of entering into this Planning Agreement, then, to the extent that the relevant obligation is required under the New Law and the Agreement, compliance with the New Law will constitute compliance with the relevant obligation under this Planning Agreement.

2. 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.

3. Application of this Planning Agreement

The Planning Agreement applies to the Land.

4. Operation of this Planning Agreement

- (a) This Planning Agreement takes effect on the date of this Planning Agreement after execution by both parties, subject to clause 4(b).
- (b) This Planning Agreement will remain in force and effect until:
 - (a) it is terminated by operation of Law; or
 - (b) all obligations are performed or satisfied; or
 - (c) the Development Consent is surrendered in accordance with the Act; or
 - (d) it is otherwise discharged or terminated in accordance with the terms of this Planning Agreement.
- (c) If a legal challenge to the Development Consent by a third party results in the Development Consent being rendered invalid or otherwise unenforceable, then the Developer may, in their absolute discretion, either terminate this Planning Agreement or request the Council to consider changes to its terms.

5. Monetary Contribution

5.1 Monetary Contributions to be made under this Agreement

- (a) 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.

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- (b) 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.
- (c) 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.
- (d) 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.
- (e) Notwithstanding any refund of the Monetary Contribution pursuant to clause 5.1 of the Planning Agreement, the Planning Agreement shall continue to have effect.

5.2 Application of the Monetary Contribution

- (a) The Monetary Contribution paid by the Developer under this Agreement will be used by the Council to develop and provide Public Facilities.
- (b) 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;
 - (c) be available for use by the general public and will not be restricted for use by owners, occupiers or patrons of the Development.

6. Application of the Act to the Development

This Planning Agreement does not exclude the application of:

- (a) sections 7.11 and 7.12 of the Act;
- (b) any Affordable Housing Levy;
- (c) any other monetary contributions;

in connection with the Development Application. Benefits under this 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.

7. Registration of this Planning Agreement

7.1 The Developer further covenants with the Council:

- (a) that prior to the issue of any Construction Certificate issued in connection with the Development Application, 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 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 Council a like agreement to this present Planning Agreement in which substantially the same covenants as set out herein shall apply;
 - (iii) within seven (7) days of exchange of contracts, 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 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 substantially in the form of this Planning Agreement insofar as concerns the interest assigned or transferred and shall provide same to the Council.

7.2 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 7, the Council shall be entitled to register a caveat at the Land & Property Management Authority over the title to the Land to protect its interest therein pursuant to this Planning Agreement.

8. Dealing with the Development Property

The Parties acknowledge and agree that nothing in this Planning Agreement abrogates, fetters or in any way prevents the Developer from selling, transferring, assigning, subdividing, mortgaging, charging, encumbering or otherwise dealing with any part of the Land .



9. GST

9.1 Interpretation

In this clause 9 words and expressions which are not defined in this Planning Agreement but which have a defined meaning in GST Law have the same meaning as in the GST Law.

9.2 Consideration GST exclusive

Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this Planning Agreement are exclusive of GST.

9.3 Payment of GST - additional payment required

- (a) If GST is payable by an entity (**Supplier**) in respect of any supply made under this Planning Agreement (**Relevant Supply**), then the party required under the other provisions of this Planning Agreement to provide the consideration for that Relevant Supply (**Recipient**) must pay an additional amount to the Supplier (**GST Amount**), as calculated under clause 9.3(b).
- (b) To the extent that the consideration to be provided by the Recipient for the Relevant Supply under the other provisions of this Planning Agreement is a payment of money, the Recipient must pay to the Supplier an additional amount equal to the amount of the payment multiplied by the rate of GST for that Relevant Supply.
- (c) To the extent that the consideration payable by the Recipient is a taxable supply made to the Supplier by the Recipient, no additional amount shall be payable by the Recipient to the Supplier on account of the GST payable on that taxable supply.
- (d) The Recipient will pay the GST Amount referred to in this clause 9.3 in addition to and at the same time as the first part of the consideration is provided for the Relevant Supply.

9.4 Tax invoice

The Supplier must deliver a tax invoice to the Recipient before the Supplier is entitled to payment of the GST Amount under clause 9.3. The Recipient can withhold a payment of the GST Amount until the Supplier provides a tax invoice.

9.5 Adjustment event

If an adjustment event arises in respect of a taxable supply made by a Supplier under this Planning Agreement, the amount payable by the Recipient under clause 9.3 will be recalculated to reflect the adjustment event and a payment will be made by the Recipient to the Supplier or by the Supplier to the Recipient as the case requires.

9.6 Reimbursements

Where a party is required under this Planning Agreement to pay or reimburse an expense or outgoing of another party, the amount to be paid or reimbursed by the first party will be the sum of:

- (a) the amount of the expense or outgoing less any input tax credits in respect of the expense or outgoing to which the other party, or to which the representative member for a GST group of which the other party is a member, is entitled; and
- (b) any additional amount payable under clause 9.3 in respect of the reimbursement.

10. Dispute Resolution

10.1 Reference to Dispute

If a dispute arises between the parties in relation to this agreement, the parties must not commence any Court proceedings relating to the dispute unless the parties have complied with this clause, except where a party seeks urgent interlocutory relief.

10.2 Notice of Dispute

The party wishing to commence the dispute resolution process, must give written notice (**Notice of Dispute**) to the other parties of:

- (a) The nature of the dispute,
- (b) The alleged basis of the dispute, and
- (c) The position which the party issuing the Notice of Dispute believes is correct.

10.3 Representatives of Parties to Meet

- (a) The representatives of the parties must promptly (and in any event within 10 Business Days of the Notice of Dispute) meet in good faith to attempt to resolve the notified dispute.
- (b) The parties may, without limitation:
 - (i) resolve the dispute during the course of that meeting,
 - (ii) agree that further material or expert determination in accordance with clause 10.6 about a particular issue or consideration is needed to effectively resolve the dispute (in which event the parties will, in good faith, agree to a timetable for resolution; or
 - (iii) agree that the parties are unlikely to resolve the dispute and, in good faith, agree to a form of alternative dispute resolution (including expert determination, arbitration or mediation) which is appropriate for the resolution of the relevant dispute.

10.4 Further Notice if Not Settled

If the dispute is not resolved within 10 Business Days after the nominated representatives have met, either party may give to the other a written notice calling for determination of the dispute (Determination Notice) by mediation under clause 10.5 or by expert determination under clause 10.6.

10.5 Mediation

If a party gives a Determination Notice calling for the dispute to be mediated:

- (a) The parties must agree to the terms of reference of the mediation within 10 Business Days of the receipt of the Determination Notice (the terms shall include a requirement that the mediation rules of the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply;
- (b) The mediator will be agreed between the parties, or failing agreement within 10 Business Days of receipt of the Determination Notice, either Party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator;
- (c) The mediator appointed pursuant to this clause 10.5 must:
 - (i) Have reasonable qualifications and practical experience in the area of the dispute; and
 - (ii) Have no interest or duty which conflicts or may conflict with his or her function as a mediator he or she being required to fully disclose any such interest or duty before his or her appointment;
- (d) The mediator shall be required to undertake to keep confidential all matters coming to his or her knowledge by reason of his or her appointment and performance of his or her duties;
- (e) The parties must within 10 Business Days of receipt of the Determination Notice notify each other of their representatives who will be involved in the mediation;
- (f) The parties agree to be bound by a mediation settlement and may only initiate judicial proceedings in respect of a dispute which is the subject of a mediation settlement for the purpose of enforcing that mediation settlement; and
- (g) In relation to costs and expenses:
 - (i) Each party will bear its own professional and expert costs incurred in connection with the mediation; and
 - (ii) The costs of the mediator will be shared equally by the parties unless the mediator determines that a party has engaged in vexatious or unconscionable behaviour in which case the mediator may require the full costs of the mediation to be borne by that party.

10.6 Expert determination

If the dispute is not resolved under clause 10.3 or clause 10.5, or the parties otherwise agree that the dispute may be resolved by expert determination, the parties may refer the dispute to an expert, in which event:

- (a) The dispute must be determined by an independent expert in the relevant field:
 - (i) Agreed upon and appointed jointly by the parties; and

Developer 1: Initial Here  Attorney: Initial Here 

- (ii) In the event that no agreement is reached or no appointment is made within 10 Business Days of the agreement to refer the dispute to an expert, appointed on application of a party by the then President of the Law Society of New South Wales;
- (b) The expert must be appointed in writing and the terms of the appointment must not be inconsistent with this clause;
- (c) The determination of the dispute by such an expert will be made as an expert and not as an arbitrator and will be in writing and contain the reasons for the determination;
- (d) The expert will determine the rules for the conduct of the process but must conduct the process in accordance with the rules of natural justice;
- (e) Each party will bear its own costs in connection with the process and the determination by the expert and will share equally the expert's fees and costs; and
- (f) Any determination made by an expert pursuant to this clause is final and binding upon the parties except unless:
 - (i) Within 20 Business Days of receiving the determination, a party gives written notice to the other party that it does not agree with the determination and commences litigation; or
 - (ii) The determination is in respect of, or relates to, termination or purported termination of this agreement by any party, in which event the expert is deemed to be giving a non-binding appraisal.

10.7 Litigation

If the dispute is not *finally* resolved in accordance with this clause 10, then either party is at liberty to litigate the dispute.

10.8 No suspension of contractual obligations

Subject to any interlocutory order obtained under clause 10.1, the referral to or undertaking of a dispute resolution process under this clause 10 does not suspend the parties' obligations under this agreement.

11. Enforcement

11.1 Default

- (a) In the event a party considers another party has failed to perform and fulfil an obligation under this agreement, it may give notice in writing to the other party (**Default Notice**) giving all particulars of the matters in respect of which it considers default has occurred and by such notice require the default to be remedied within a reasonable time not being less than 21 days.
- (b) In determining a reasonable time, regard must be had to both the nature of the default and the work or other action required to remedy it and whether or not the

continuation of the default constitutes a public nuisance or raises other circumstances of urgency or emergency.

- (c) If a party disputes the Default Notice it may refer the dispute to dispute resolution under clause 10 of this agreement.

11.2 Restriction on the issue of Certificates

In accordance with section 6.8 of the Act and clause 146A of the Regulation the obligation to pay the Monetary Contributions under this agreement must be satisfied prior to the issue of a Construction Certificate for the Development or any part of the Development.

11.3 General Enforcement

- (a) Without limiting any other remedies available to the parties, this agreement may be enforced by any party in any Court of competent jurisdiction.
- (b) Nothing in this agreement prevents:
- (i) 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
 - (ii) the Council from exercising any function under the Act or any other Act or Law relating to the enforcement of any aspect of this agreement or any matter to which this agreement relates.

12. Acknowledgements

The 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.

13. Notices

- (a) 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) emailed 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 NSW 2134

Post: PO Box 240, Burwood NSW 1805

Fax Number: (02) 9911 9900

Developer 1: Initial Here 

Attorney: Initial Here 

Email: council@burwood.nsw.gov.au

Developer

Attention: George Elias

Address: Level 10, 11-15 Deane Street, Burwood NSW 2134

Post: As above.

Fax Number:

Email: George@urbanapartments.com.au

- (b) If a Party gives another Party 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.
- (c) 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, 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.
- (d) 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, after 5pm 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.

14. General

14.1 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, anything said or done by another Party, agent or employee of the Party, before this Planning Agreement was executed, except as permitted by Law.


14.2 Further acts

Each party must promptly sign and 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, including giving an approval or consent.

14.3 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.

Developer 1: Initial Here 

Attorney: Initial Here 

14.4 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 or more persons binds them jointly and each of them individually, and any benefit in favour of two or more persons is for the benefit of them jointly and each of them individually.

14.5 No fetter

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

14.6 Representations and warranties

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

14.7 Severability

- (a) If any part of this Planning Agreement can be read in any 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.
- (b) If any part of this Planning Agreement is illegal, unenforceable or invalid, that part is to be treated as removed from this Planning Agreement, but the rest of this Planning Agreement is not affected.

14.8 Release and Discharge

- (a) To the extent the Developer has:
 - (i) satisfied its obligations under this Planning Agreement; or
 - (ii) the Agreement no longer applies as a consequence of any event referred to in clause 4(b) of this Planning Agreement;

the Council will provide a release and discharge of this Planning Agreement with respect to any part of, or the whole of, the Land.

- (b) To the extent the Developer has :
 - (i) satisfied all of its obligations under this Planning Agreement in respect of that part of the Land; or
 - (ii) the Planning Agreement no longer applies as a consequence of any event referred to in clause 4(b) of this Planning Agreement;

the Council will provide a release and discharge of this Planning Agreement with respect to any part of the Land:



- (iii) if the Developer requests a partial release and discharge of this Planning Agreement for the purpose of selling part of the Development Property; or
 - (iv) if the Developer requests a partial release and discharge of this Planning Agreement in connection with the completion of a sale contract for a Lot forming part of the Development.
- (c) The Council will execute any form, and supply such other information, as is reasonably required to enable the removal of the Agreement from the title to the Land or part of the Land in accordance with this clause 14.8.

14.9 Modification, Review and Replacement

- (a) 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.
- (b) The Parties agree that this Planning Agreement may be reviewed or modified in the circumstances using their best endeavours and acting in good faith, and in accordance with this clause 14.9.
- (c) Any review or modification will be conducted in the circumstances and in the matter determined by the Parties and in accordance with the provisions of the Act and Regulations. For clarity, no such review or replacement shall have any force or effect unless and until formal documents are signed by the Parties in accordance with this clause 14.9.

14.10 Waiver

The fact that a Party fails to do, or delays in doing, something the Party is required or entitled to do under this Planning Agreement, does not amount to a waiver of any obligation by another Party.

14.11 Confidentiality

The Parties agree that 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.

14.12 Assignment and Novation

- (a) This Planning Agreement may be assigned or novated by the Developer in accordance with any dealings the Developer may have with respect to their interests in the Land without requiring the Developer to obtain Council's Approval in respect of either the dealing or the assignment or the novation of this Planning Agreement.
- (b) Council agrees to execute any deeds of assignment or novation or other documents necessary to assign, novate or otherwise transfer all of the Developer's rights and obligations under the Agreement to a successor as contemplated by the agreement.

14.13 Force Majeure

- (a) If a Party is unable by reason of force majeure to carry out wholly or in part its obligations under the Agreement, it must give to the other Party prompt notice of the force majeure with reasonably full particulars.

Developer 1: Initial Here  Attorney: Initial Here 

- (b) The obligations of the Parties so far as they are affected by the force majeure are then suspended during continuance of the force majeure and any further period as may be reasonable in the circumstances.
- (c) The Party giving such notice under this clause must use all reasonable effort and diligence to remove the force majeure or ameliorate its effects as quickly as practicable.
- (d) If the Parties are unable to agree on the existence of an event of force majeure or the period during which the obligations of the Parties are suspended during the continuance of the force majeure, that dispute must be referred for determination under the Agreement.

14.14 Counterparts

This Planning Agreement may be executed in counterparts. All counterparts when taken together are to be taken to constitute one instrument.

15. Costs

- (a) 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.
- (b) 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. Explanatory Note

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

Signing page

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

MELISSA MADONNA
(Print) Name of Witness



Signature of Attorney

Tommaso Briscese
(Print) Full Name of Attorney

Level 2, 1 – 17 Elsie Street, Burwood, New South Wales, 2134
(Print) Address

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

Date 10/9/19

On behalf of Giant Project Group Pty Ltd:

Giant Project Group Pty Ltd
ACN 607 857 714 executed this agreement pursuant to s127 of the Corporations Act



Signature of Director/Secretary

FARAH ELIAS
(Print) Full Name of Director/Secretary

Signature of Director

(Print) Full Name of Director

Date 2-9th - 2019

Schedule 1

Planning Agreement - Explanatory Note

Planning Agreement - Explanatory Note

180-186 Burwood Road and 7-9 Burleigh Street, Burwood

The Developer has submitted a Planning Agreement in connection with Development Application No.D103/2016, lodged with Council on or about 28 July 2016, pertaining to the proposed redevelopment of 180-186 Burwood Road and 7-9 Burleigh Street, Burwood NSW, made pursuant to Section 7.4 of the *Environmental Planning and Assessment Act 1979 (NSW) (EPA Act)* . This is the Explanatory Note accompanying that Planning Agreement, prepared pursuant to Clause 25E of the *Environmental Planning and Assessment Regulation 2000 (NSW) (EPA Regulation)*.

1. Parties

The parties to the Planning Agreement are:

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

and

Giant Project Group Pty Ltd [ACN 607 857 7214] of Level 10, 11-15 Dean Street, Burwood in the State of New South Wales (**Developer**)

2. Description of Subject Land

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

Lot 100 DP1046417, and Lot 2 DP741809

known as 180-186 Burwood Road and 7-9 Burleigh Street, Burwood NSW. The Developer is the registered proprietor of Lot 100 DP 1046417 and Lot 2 DP 741809.

3. Description of Proposed Development

The Developer has lodged a Development Application for the Land which proposes a 19 storey commercial tower (fronting Burwood Road) and a 21 storey mixed use tower (fronting Burleigh Street) comprising 57 residential apartments and 15 serviced apartments, above a podium base over basement car parking for 109 vehicles. The Development Application includes a voluntary planning agreement for financial contribution to Council as a public benefit as part of the Development Application seeking approval for an additional 979.08 sqm of floor space area above what the Burwood LEP would normally allow overall.

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

[Clause 25E(1)(a) of the EPA Regulation]

The intent of the 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 facilities as determined by Council.

The Planning Agreement requires the Developer to make Monetary Contribution to the Council for an amount of **\$1,076,988.00** (one million and seventy-six thousand and nine hundred and eighty

eight dollars), inclusive of GST (if applicable), representing \$1,100.00 per square metre (979.08 sqm) of FSR in excess of the permitted FSR limit for the Land, payable by the Developer prior to the issue of a Construction Certificate for the Development Application.

5. Assessment of the Merits of the Planning Agreement

[Clause 25E(1)(b) of the EPA Regulation]

5.1 The planning purposes served by the Planning Agreement

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[Clause 25E(2)(e) of the EPA Regulation]

The Planning Agreement serves the following planning purpose:

- The Monetary Contribution paid by the Developer under this 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 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 Land is located, there is some potential for a maximum increase of 10% in FSR. Council also has in place a Burwood Community Facilities and Open Space Study which identified public benefit requirements in the Burwood Local Government Area.
- (ii) The 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 Planning Agreement achieves this objective of delivering the benefit.

5.2 Promotion of the public interest and the objects of the EPA Act

[Clause 25E(2)(a) and (c) of the EPA Regulation]

The 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 excess FSR.

The Planning Agreement promotes one or more of the objects of the EPA 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 EPA Regulation]

The 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 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 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 EPA Regulation]

Whether Council has a capital works program, and if so, whether the 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.

