

DEED OF PLANNING AGREEMENT

PARTIES

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

and

Guy Lorello 185F Burwood Road, Burwood ("Developer")

BACKGROUND

- A. The Developer was granted the development consent on 26 July 2016.
- B. The Developer has lodged the Modification Application to the development consent.
- C. The Developer has offered under the Modification Application to provide a Monetary Contribution for a public purpose.

OPERATIVE PROVISIONS

1. OPERATION OF THIS AGREEMENT

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

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

2. PLANNING AGREEMENT UNDER THE ACT

This agreement is a planning agreement:

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

3. APPLICATION OF THIS AGREEMENT

This agreement applies to both the Land and the Development.

4. DEFINITIONS AND INTERPRETATION

4.1 In this agreement the following definitions apply:

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

Developer: Initial Here Council: Initial Here

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.

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

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

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

Development Application has the same meaning as in the Act.

Development Consent means the Development Consent granted by Council in favour of the Developer, DA 131/2016

Monetary Contribution means a monetary contribution in the sum of \$49,500 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 the land contained in certificate of title folio identifiers:

Site address No 185F Burwood Road, Burwood described as Lot 12 in DP 16560.

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

Modification Application means the application submitted by the Developer on 29/7/16 under section 96 of the Act to amend the Development Consent.

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

Regulation means the Environmental Planning and Assessment Regulation 2000.

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

- (a) Headings are inserted for convenience only and do not affect the interpretation of this agreement.
- (b) A reference in this agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- (c) If the day on which any act, matter or thing is to be done under this agreement is not a business day, the act, matter or thing must be done on the next business day.
- (d) A reference in this agreement to dollars or \$ means Australian dollars and all amounts payable under this agreement are payable in Australian dollars.

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- (e) A reference in this agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- (f) A reference in this agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- (g) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this agreement.
- (h) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (i) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- (j) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
- (k) References to the word 'include' or 'including are to be construed without limitation.
- (l) A reference to this agreement includes the agreement recorded in this agreement.
- (m) A reference to a party to this agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.
- (n) Any schedules and attachments form part of this agreement.

5. DEVELOPMENT CONTRIBUTIONS TO BE MADE UNDER THIS AGREEMENT

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

6. APPLICATION OF THE DEVELOPMENT CONTRIBUTIONS

Council will use its reasonable endeavours to ensure that the Monetary Contribution is used to provide and expand public parking supply, however, Council is under no obligation to do so and may use that contribution for improving the quality of the existing public parking, on the upgrade of infrastructure facilities or the provision of services in any other part of the Burwood Local Government Area.

7. APPLICATION OF S94 AND S94A OF THE ACT TO THE DEVELOPMENT

This agreement does not exclude the application of section 94, section 94A and section 94EF of the Act to the Development.

8. REGISTRATION OF THIS AGREEMENT

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

9. DEVELOPER WARRANTIES

The Developer warrants to Council that:

- (1) It is able to fully comply with its obligations under this agreement;
- (2) It has full capacity to enter into this agreement; and

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- (3) There is no legal impediment to it entering into this agreement, or performing the obligations imposed on it under this agreement.

10. ASSIGNMENT AND SECURITY

10.1 Prohibition

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

10.2 Assignment of the Land

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

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

11. DISCRETION

11.1 Consent authority

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

11.2 Agreement does not fetter discretion

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

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

11.3 Severance of provisions

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

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contracted out of a provision or exercised a Discretion under this agreement, then to the extent of this agreement is not to be taken to be inconsistent with the Law.

11.4 No obligations

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

12. DISPUTE RESOLUTION

12.1 Notice of Dispute

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

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

12.2 Consultation between the Representatives

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

12.3 Exclusivity of dispute resolution procedure

- (1) Both parties must adhere to the dispute resolution procedure set out in this agreement.
- (2) The only time that either party may depart from the dispute resolution procedure set out in this clause is when urgent interlocutory relief is required to restrain a breach or threatened breach of this agreement.

12.4 Settlement of Dispute

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

13. DEFAULT IN PERFORMANCE

13.1 Events of Default

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

Developer: Initial Here Council: Initial Here

13.2 Consequences of Events of Default

Without limiting any other provision of this agreement, the parties may enforce this agreement in any Court of competent jurisdiction.

For the avoidance of doubt, nothing in this agreement prevents:

- (1) 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; or
- (2) 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.

14. NOTICES

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

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

Council

Attention: Michael Gerard McMahon

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

Fax Number: 02 9911 9900

Email: mgm@burwood.nsw.gov.au

Developer

Attention: Guy Lorello

Mob: 0425 111 111

E-mail: guy@rhburwood.com.au

14.2 If a party gives the other party three (3) business days notice of a change of its address or fax number, any notice, consent, information, application, communication or request is only given or made by that other party if it is delivered, posted or faxed to the latest address or fax number.

14.3 Any notice, consent, information, application, communication or request is to be treated as given or made at the following time:

- (1) If delivered to a person's address, on the day of delivery if a business day, otherwise on the next business day.
- (2) If sent by pre-paid mail, on the third business day after posting.

- (3) If transmitted by facsimile or other electronic means to a person's address and a correct and complete transmission report is received, on the day of transmission if a Business Day, otherwise on the next Business Day.

14.4 For the purpose of this clause, the address of a person is the address set out in this agreement or other address of which that person may from time to time give notice to each other person.

15. APPROVALS AND CONSENT

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

16. COSTS

16.1 The Developer must reimburse Council for all costs incurred by Council arising out of the negotiation, preparation, execution of this agreement.

16.2 All stamp duty (including fines, penalties and interest, payable in connection with this agreement and any instrument executed or any transaction evidenced by this agreement must be borne by the Developer.

17. ENTIRE AGREEMENT

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

18. FURTHER ACTS

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

19. GOVERNING LAW AND JURISDICTION

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

20. JOINT AND INDIVIDUAL LIABILITY AND BENEFITS

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

21. SEVERABILITY

If a clause or part of a clause of this Agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and

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

22. AMENDMENT

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

23. WAIVER

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

24. GST

24.1 Any consideration expressed in this agreement is, unless otherwise specified, GST exclusive and does not include any amount for, or on account of, GST.

24.2 If any supply under or in connection with this agreement constitutes a taxable supply made for GST exclusive consideration, the supplier may, subject to issuing a tax invoice, recover from the recipient of the supply an amount on account of the GST payable in respect of the taxable supply (GST amount).

The GST amount is:

- (i) equal to the value of the supply calculated in accordance with GST Act multiplied by the applicable GST rate; and
- (ii) payable at the same time and in the same manner as any monetary consideration for the supply concerned but no later than the end of the tax period to which the GST payable on the relevant taxable supply is attributable under the GST Act.

The supplier of a taxable supply made under or in connection with this agreement must issue a tax invoice for the supply in accordance with the GST Act to the recipient of the supply.

24.3 Despite any other provision of this agreement, any amount payable under or in connection with this agreement, which is payable by reference to a cost, expense or amount paid or incurred by a party will be reduced by an amount equal to any input tax credit to which that party, or the representative member of a GST group of which the party is a member, is entitled in respect of that cost, expense or amount.

24.4 Words and expressions used in this clause have the meaning given to them in the GST Act.

25. COUNTERPARTS

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

EXECUTION PAGE

Executed as a deed

Dated:

Signed for and on behalf of **Burwood Council** by its attorney, **Michael Gerard McMahon**, under power of attorney dated 6 July 2011 registered book 4615 number 590, in the presence of:)
)
)
)
)
)

.....
Signature of Witness

.....
Signature of Attorney

.....
(Print) Name of Witness

Michael Gerard McMahon
.....
(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.

.....
Signature of Guy Lorello

.....
Signature of Witness

.....
Date

.....
(Print) Name of Witness

EXPLANATORY NOTE

Planning Agreement for the provision of Monetary Contribution in lieu of shortfall of onsite parking at 185F Burwood Road, Burwood Under Section 93F of the Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act)

1. PARTIES

The parties to the Planning Agreement are:

- (1) Burwood Council (Council)
- (2) Guy Lorello (Developer)

2. DESCRIPTION OF SUBJECT LAND

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

Lot 12 DP 16560

Location: 185F Burwood Road, Burwood NSW

3. DESCRIPTION OF PROPOSED CHANGE TO DEVELOPMENT

The Developer has lodged a section 96 Application to modify Development Consent No. 131/2015 – 185F Burwood Road, Burwood - Alterations & Additions to existing building to create a two level boarding house by the deletion of one (1) car parking space that was approved as part of the above mentioned development.

4. SUMMARY OF OBJECTIVES, NATURE AND EFFECT OF THE PLANNING AGREEMENT

The intent of the Planning Agreement is to ensure that the parking needs of the incoming population into the Burwood Local Government Area are met.

The Monetary Contribution to be provided by the Developer under the Planning Agreement is an amount of \$ 49, 500.00 in lieu of the additional car parking spaces otherwise required.

5. ASSESSMENT OF THE MERITS OF THE PLANNING AGREEMENT

5.1 The planning purposes served by the Planning Agreement

The Planning Agreement serves the following planning purpose:

The Monetary Contributions paid by the Developer under this Planning Agreement will be used by Council to develop public car parking facilities within the Burwood Town Centre.

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

The Burwood Development Control Plan (BDCP) provides that in the Burwood Town Centre, if a developer is unable to provide the required parking on site because it is a difficult site (which is also described in the BDCP), Council can use its discretion to allow for a monetary contribution to be made in lieu pursuant to provisions pursuant to Section 3.7 Transport and Parking in Centres and Corridors of Burwood Development C P3 - Other parking not provided on site.

In respect to the subject Section 96 application the Council has determined that the site having a total site area of 137.9m² and being constrained by an existing building is a small difficult site by virtue of the fact that imposed conditions on the DA and compliance with BCA

requirements it is difficult to retain the one car parking space on the site as approved as it would considerably reduce the amount of the commercial space that can be retained at ground level detrimentally affecting the functionality and viability of the Real Estate Agency that has been operating on the site for some 36 years.

The Monetary Contribution received in lieu of the onsite parking shortfall will be used to develop public carparking facilities within the Burwood Town Centre.

5.2 Promotion of the public interest

The Planning Agreement promotes the public interest by:

Ensuring the orderly use and development of the Land by ensuring that the location and design of public car parking facilities function effectively and safely. The Planning Agreement provides for the provision of public car parking in lieu of private onsite parking.

The Planning Agreement promotes one (1) or more of the objects of the EP&A Act as follows:

- (i) The proper management and development of the 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.

The VPA would seek to provide public car parking, being made available to the general public, in place of resident/staff parking within a private development, which would only be available to the private premises. In this way, the VPA results in a public benefit

5.3 Promotion of the Council's charter

The Planning Agreement promotes one (1) 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]:

Council undertakes to provide adequate, equitable and appropriate services for the community. The Planning Agreement provides the monetary resources for Council to assist in the provision of additional public car parking and ensure 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.

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 are intended to keep the local community informed.

Council seeks to ensure that it acts consistently and without bias, which is why Council's provisions for Planning Agreements which allow for contributions in lieu of parking is set out in its Development Control Plan.

5.4 Capital Works Program

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

Council has in place a capital works program, but the program does not, to date, identify additional public car parking facilities within the Burwood Town Centre. The capital works program is subject to annual review and any proposal for additional public car parking would be initiated where sufficient funds are available