

Planning Agreement

Burwood Council

Shoreline Organisation Pty Ltd



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Sydney NSW 2000
Australia

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Ref 3233533

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Planning Agreement

Dated 21 June 2017

Parties

1. **Burwood Council** of Suite 1, Level 2, 1-17 Elsie Street, Burwood NSW (**the Council**)
2. **Shoreline Organisation Pty Ltd** ACN 142 320 661 of 31 Greens Avenue Oatlands NSW (**the Developer**)


Background

- A. The Developer is the owner of the Land.
- B. The Developer made (by its agent) the development application for the Development Consent.
- C. The Developer has the benefit of the Development Consent.
- D. The Land is subject to a maximum Floor Space Ratio of 3:1 under the *Burwood Local Environmental Plan 2012*.
- E. The maximum permitted Gross Floor Area of the land is 3,675m².
- F. The Development Consent is currently for a Development with a Gross Floor Area of 3,669m².
- G. This maximum floor space ratio can be exceeded in certain circumstances — including when a Modification Application is made and there is sufficient merit.
- H. The Developer has made the Modification Application.
- I. The Modification Application seeks to increase the Gross Floor Area of the Development to 4,015m² — which is the equivalent of a Floor Space Ratio of 3.28:1.
- J. If the Modification Application is approved the Developer is prepared to make a Development Contribution in accordance with this Agreement.
- K. The Development Contribution is to be used for or applied towards a public purpose.

Operative provisions

1. Defined meanings

Words used in this Agreement and the rules of interpretation that apply are set out and explained in the definitions and interpretation clause at the back of this Agreement.

Developer: Initial Here 
Version Control: 7 June 2017

Attorney: Initial Here 

2. Status of this Agreement

2.1 Planning Agreement

This Agreement is a planning agreement within the meaning of section 93F(1) of the Act.

2.2 Land

This Agreement applies to the Land.

2.3 Development

This Agreement applies to the Development.

2.4 Effect and obligations

Despite any other provision of this Agreement, the Developer is under no obligation to make the Development Contribution in accordance with this Agreement unless:

- (a) the Development Consent is modified as a consequence of the Modification Application; and
- (b) the relevant circumstances set out in this Agreement as to when the Development Contribution must be made have arisen.

2.5 Security

The Council is satisfied this Agreement provides the enforcement of this Agreement by a suitable means in the event of a breach of this Agreement by the Developer, particularly by:

- (a) the requirement for a Construction Certificate to be withheld by reason of clause 146A of the *Environmental Planning and Assessment Regulation 2000* (NSW) when read in conjunction with clause 4.1(a);
- (b) the provisions of clause 6 and clause 7.

3. Application of other development contribution provisions

3.1 Local infrastructure contributions - general

This Agreement does not exclude the application of section 94 of the Act to the Development.

3.2 Local infrastructure contributions - fixed levies

This Agreement does not exclude the application of section 94A of the Act to the Development.

3.3 Special infrastructure contributions

This Agreement does not exclude the application of section 94EF of the Act.

3.4 Determination of a Development Contribution under s94 of the Act

The benefits under this Agreement are not to be taken into consideration in determining a development contribution under section 94 of the Act.

4. Development Contributions

4.1 Nature, extent and timing

- (a) The Developer must make the Development Contribution in Column 3 of the Table at the point in time set out in Column 5 of the Table.
- (b) Nothing in this Agreement prevents the Developer from electing to make a Development Contribution earlier than it is required to do so.

4.2 Public purpose of the Development Contributions

- (a) Each Development Contribution must be used for or applied towards the relevant public purpose set out in Column 4 of the Table.
- (b) This clause 4.2 has effect after the termination of this Agreement.

5. Making of a monetary Development Contribution

- (a) The Development Contribution is taken to have been made by the Developer when the Council receives the full amount of the contribution payable:
 - (i) in cash; or
 - (ii) by an unendorsed bank cheque; or
 - (iii) by a deposit, by means of electronic funds transfer, of cleared funds into a bank account nominated by the Council.
- (b) The Development Contribution will be taken to have been made when the Council notifies the Developer in writing that the Development Contribution has been received.

6. Registration

6.1 Developer agreement to registration

The Developer agrees to the registration of this Agreement under section 93H of the Act in relation to the Land.

6.2 Registration of this Agreement

- (a) The parties agree to promptly do all things necessary for the Owner and/or Developer to procure the registration of this Planning Agreement in the relevant folio of the Register for the Land in accordance with section 93H of the Act in accordance with this clause 6.2.
- (b) The Developer will obtain all consents to the registration of this document on the title to the land as required by Land and Property Information.
- (c) The Developer must within 20 Business Days of execution of this document produce to the Council:
 - (i) Any letters of consent necessary for the registration of this document and any other documents that may be required by the Registrar-General;

- (ii) A copy of the production slip number as evidence that the certificate of title has been produced to the Land and Property Information for the purpose of the registration of the document; and
- (iii) A bank cheque for the registration fees payable in relation to the registration of this document on the title to the Land.
- (d) The parties must promptly comply with any requisitions that may be raised with regard to registration of this document from Land and Property Information.
- (e) Subject to clause 6.2(c)(ii) and 6.2(c)(iii) the Developer will register this document on the Land.
- (f) The Developer will notify the Council following registration of this document by the Developer.

6.3 Release and discharge of this Agreement

- (a) The Council must promptly do all things reasonably required by the Developer and Owner to release and discharge this document with respect to any part of the Land (such that this document is no longer registered by the Registrar-General under section 93H of the Act in relation to that part of the Land) upon:

termination of the document under clause 8;

- (b) The Developer and Owner are released and discharged from their obligations under this document upon termination under clause 8.

7. Transfer, assignment or novation

7.1 Consent for transfer of the Land

- (a) The Developer must not transfer the Land or any part of the Land to any person without the consent of the Council.
- (b) This clause 7.1 does not apply to:
 - (i) the conversion part of the Site into association property (within the meaning of the *Community Land Management Act 1989*);
 - (ii) the conversion of part of the Site into common property (within the meaning of the *Strata Schemes Management Act 1996*); or
 - (iii) the transfer of a Service Lot or Final Lot.

7.2 Consent for assignment or novation of this Agreement

- (a) The Developer must not assign or novate to any person its rights or obligations under this Agreement without the consent of the Council.
- (b) For avoidance of doubt, this clause 7.2 does not preclude the transfer of any part of the Land.

7.3 The giving of consent by the Council

- (a) The Council must give the Council's consent under clause 7.1(a) or clause 7.2(a) if:

- (i) the Developer has, at no cost to the Council, first procured the execution by the person to whom:
 - (A) the land will be transferred; or
 - (B) the rights or obligations under this Agreement are to be assigned or novated,
 a deed of novation on reasonable terms (being a deed generally in terms of the Novation Deed); and
 - (ii) reasonable evidence has been produced to show that the transferee, assignee or novatee is reasonably capable of performing its obligations under this Agreement; and
 - (iii) the Developer is not in Material Breach of this Agreement.
- (b) The Council, on giving consent under clause 7.3(a), must enter into the deed of novation referred to in clause 7.3(a)(i).
- (c) In this clause 7.3 **Material Breach** means:
- (i) if the breach is capable of being remedied, a material breach that has not been remedied; and
 - (ii) if the breach is not capable of being remedied, a material breach for which the Developer has compensated the Council such that the Council is in the same financial position as it would have been had the breach not taken place (and if, in these circumstances, such a compensation amount is nil, the breach is taken not to be a material breach).

7.4 No requirement for consent when Agreement is registered

Clause 7.1 and clause 7.2 do not apply in connection with the transfer of the whole or any part of the Land if this Agreement is, at the time of transfer, Registered on Title.

7.5 Novation Deed deemed to apply in certain circumstances

If the whole or any part of the Site is transferred without a Novation Deed being entered into (**Transferred Land**), and this Agreement is registered on the title of the Transferred Land, then this Agreement is deemed to include the provisions of the Novation Deed as if it had been entered into:

- (a) by the person who has ceased to own the Transferred Land (who is taken to be the Existing Developer in the Novation Deed);
- (b) by the person who has become the owner of the Transferred Land (who is taken to be the New Developer in the Novation Deed); and
- (c) by the Council,

on the basis that:

- (d) the Effective Date is either:
 - (i) if the New Developer was not a party to the Agreement until the transfer of the Transferred Land, the date that the New Developer become a Party under section 93H(3) of the Act; or

- (ii) if the New Developer was a party prior to the transfer of the Transferred Land, the date that the Existing Developer provides the New Developer with an instrument, in registrable form, that (when registered) will effect the transfer of the title to the Transferred Land from the Existing Developer to the New Developer.

8. Termination

8.1 Termination of this Agreement

The Developer may terminate this Agreement by giving written notice to the Council in either of the following circumstances:

- (a) if this Agreement is executed prior to a determination being made in relation to the Modification Application being made and:
 - (i) the Modification Application is refused; or
 - (ii) the Developer withdraws the Modification Application; or
- (b) the Developer has made the Development Contribution required under this Agreement.

8.2 Consequences of the termination of this Agreement

- (a) If this Agreement is terminated under clause 8.1 the parties are released and discharged from their obligations under this Agreement, excepting the Developers obligation pursuant to clause 10 of this Agreement which survives termination.
- (b) Any right or obligation of any party that is expressed to operate or have effect on or after the completion, expiration or termination of this Agreement for any reason, will not merge on the occurrence of that event but will remain in full force and effect.

9. Dispute resolution

9.1 Notice of Dispute

If a party claims that a dispute has arisen under this document (**Claimant**), it must give written notice to the other party (**Respondent**) stating the matters in dispute and designating as its representative a person to negotiate the dispute (**Claim Notice**). No party may start court proceedings (except for proceedings seeking interlocutory relief) in respect of a dispute unless it has first complied with this clause 9.1.

9.2 Response to Notice

Within 10 business days of receiving the Claim Notice, the Respondent must notify the Claimant of its representative to negotiate the dispute.

9.3 Negotiation

The nominated representative must:

- (a) meet to discuss the matter in good faith within 5 business days after service by the Respondent of notice of its representative;

- (b) use reasonable endeavours to settle or resolve the dispute within 15 business days after they have met.

9.4 Further Notice if Not Settled

If the dispute is not resolved within 15 business days after the nominated representatives have met, either party may give to the other a written notice calling for determination of the dispute (**Dispute Notice**) by mediation under clause 9.5.

9.5 Mediation

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

- (a) the parties must agree to the terms of reference of the mediation within 3 business days of the receipt of the Dispute Notice (the terms will 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 3 business days of receipt of the Dispute 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 9.5 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 function as mediator, he being required to fully disclose any such interest or duty before his appointment;
- (d) the Mediator will be required to undertake to keep confidential all matters coming to his knowledge by reason of his appointment and performance of his duties;
- (e) the parties must within 5 business days of receipt of the Dispute 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;
- (g) must convene and attend the mediation within 21 days of the date of the Dispute Notice;
- (h) in relation to costs and expenses:
 - (i) each party will bear their 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 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.

9.6 Litigation

If the dispute is not finally resolved in accordance with this clause 9, either party is at liberty to litigate the dispute.

9.7 Continue to perform obligations

Each party must continue to perform its obligations under this document, despite the existence of a dispute.

10. General provisions

10.1 Costs

- (a) The Developer is to pay to the Council the Council's reasonable costs of preparing, negotiating, executing and stamping this Agreement, and any document related to this Agreement within 7 days of a written demand by the Council for such payment.
- (b) The amount referred to in clause 10(a) is subject to a cap of \$5,000.

10.2 GST

- (a) If GST is payable by a supplier (or by the representative member for a GST group of which the supplier is a member) on any supply made under or in relation to this Agreement, the recipient must pay to the supplier an amount (**GST Amount**) equal to the GST payable on the supply. The GST Amount is payable by the recipient in addition to and at the same time as the net consideration for the supply.
- (b) If a party is required to make any payment or reimbursement, that payment or reimbursement must be reduced by the amount of any input tax credits or reduced input tax credits to which the other party (or the representative member for a GST group of which it is a member) is entitled for any acquisition relating to that payment or reimbursement.
- (c) This clause 10.2 is subject to any other specific agreement regarding the payment of GST on supplies.

10.3 Duties

The party at law to pay stamp duty, must promptly, within the initial applicable period prescribed by law, pay any duty payable in relation to the execution, performance and registration of this Agreement, or any agreement or document executed or effected under this Agreement.

10.4 Assignment

A party must not transfer any right or liability under this Agreement without the prior consent of each other party, except where this Agreement provides otherwise.

10.5 Notices

- (a) Any notice to or by a party under this Agreement must be in writing and signed by the sender or, if a corporate party, an authorised officer of the sender.
- (b) Any notice may be served by delivery in person or by post or transmission by facsimile to the address or number of the recipient specified in this provision or most recently notified by the recipient to the sender.

Addresses or numbers for notices:

The Council

Burwood Council
Suite 1
Level 2, 1-17 Elsie Street
Burwood NSW 2134
Fax: 9911 9900

The Developer

Shoreline Organisation Pty Ltd

PO Box 315
Hunters Hill NSW 2110
Fax: Not applicable.

- (c) Any notice is effective for the purposes of this Agreement upon delivery to the recipient or production to the sender of a facsimile transmittal confirmation report before 4.00pm local time on a day in the place in or to which the written notice is delivered or sent or otherwise at 9.00am on the next day following delivery or receipt.
- (d) A notice to the Developer must be given in relation to each of the persons who are identified as the Developer in clause 10.5(b).

10.6 Governing law and jurisdiction

- (a) This Agreement is governed by and construed under the law in the State of New South Wales.
- (b) Any legal action in relation to this Agreement against any party or its property may be brought in any court of competent jurisdiction in the State of New South Wales.
- (c) Each party by execution of this Agreement irrevocably, generally and unconditionally submits to the non-exclusive jurisdiction of any court specified in this provision in relation to both itself and its property.

10.7 Amendments

This Agreement may be amended or revoked by further agreement in writing signed by the parties (including by means of a further planning agreement).

10.8 Third parties

This Agreement confers rights only upon a person expressed to be a party and not upon any other person.

10.9 Pre-contractual negotiation

This Agreement:

- (a) expresses and incorporates the entire agreement between the parties in relation to its subject matter, and all the terms of that agreement; and
- (b) supersedes and excludes any prior or collateral negotiation, understanding, communication or agreement by or between the parties in relation to that subject matter or any term of that agreement.

10.10 Further assurance

Each party must execute any document and perform any action necessary to give full effect to this Agreement, whether before or after performance of this Agreement.

10.11 Continuing performance

- (a) The provisions of this Agreement do not merge with any action performed or document executed by any party for the purposes of performance of this Agreement.
- (b) Any representation in this Agreement survives the execution of any document for the purposes of, and continues after, performance of this Agreement.
- (c) Any indemnity agreed by any party under this Agreement:
 - (i) constitutes a liability of that party separate and independent from any other liability of that party under this Agreement or any other agreement; and
 - (ii) survives and continues after performance of this Agreement.

10.12 Waivers

Any failure by any party to exercise any right under this Agreement does not operate as a waiver and the single or partial exercise of any right by that party does not preclude any other or further exercise of that or any other right by that party.

10.13 Remedies

The rights of a party under this Agreement are cumulative and not exclusive of any rights provided by law.

10.14 Severability

Any provision of this Agreement which is invalid in any jurisdiction is invalid in that jurisdiction to that extent, without invalidating or affecting the remaining provisions of this Agreement or the validity of that provision in any other jurisdiction.

10.15 Counterparts

This Agreement may be executed in any number of counterparts, all of which taken together are deemed to constitute one and the same document.

10.16 Party acting as trustee

If a party enters into this Agreement as trustee of a trust, that party and its successors as trustee of the trust will be liable under this Agreement in its own right and as trustee of the trust. Nothing releases the party from any liability in its personal capacity. The party warrants that at the date of this Agreement:

- (a) all the powers and discretions conferred by the deed establishing the trust are capable of being validly exercised by the party as trustee and have not been varied or revoked and the trust is a valid and subsisting trust;
- (b) the party is the sole trustee of the trust and has full and unfettered power under the terms of the deed establishing the trust to enter into and be bound by this Agreement on behalf of the trust and that this Agreement is being executed and entered into as part of the due and proper administration of the trust and for the benefit of the beneficiaries of the trust; and

- (c) no restriction on the party's right of indemnity out of, or lien over, the trust's assets exists or will be created or permitted to exist and that right will have priority over the right of the beneficiaries to the trust's assets.
- (d) where more than one person is bound by this Agreement as the Developer any right that is capable of being exercised by the Developer under this Agreement may only be exercised by those persons jointly and each person who is a Developer may, at its absolute discretion, decline to exercise such a right.

10.17 Where more than one person is the Developer

- (a) Where more than one person is bound by this Agreement as the Developer, any right that is capable of being exercised by the Developer under this Agreement may only be exercised by those persons jointly and each person who is a Developer may, at its absolute discretion, decline to exercise such a right.
- (b) Clause 10.17(a) does not apply to a right that may be exercised by:
 - (i) a Developer; or
 - (ii) two or more persons who are each a Developer (but not all persons who are a Developer) acting jointly,
 without any prejudice to the other persons who are a Developer.
- (c) The provisions of clause 10.17(a) and clause 10.17(b) have effect subject to:
 - (i) any written agreement between the parties concerned (which may be in the form of a deed under clause 7.3(a)(i)); and
 - (ii) clause 9.
- (d) This clause 10.17 does not prevent the Council from taking action against any person who is a Developer under this Agreement in respect of any breach of this Agreement.

10.18 Validity of this Agreement

If this Agreement or any part of it becomes unenforceable or invalid as a result of any change to a law, the parties are to co-operate and do all things necessary to ensure that an enforceable agreement of the same or similar effect to this Agreement is entered into.

10.19 Review of this Agreement

- (a) The parties may review this Agreement if either party is of the opinion that any change of circumstance has occurred, or is imminent, that materially affects the operation of this Agreement.
- (b) For the purposes of this clause 10.19(a), the relevant changes include (but are not limited to) any change to a law that restricts or prohibits or enables the Council or any other planning authority to restrict or prohibit any aspect of the Development.
- (c) For the purposes of addressing any matter arising from a review of this Agreement, the parties must use all reasonable endeavours to agree on and implement appropriate amendments to this Agreement.
- (d) A failure by a party to agree to take action requested by the other Party as a consequence of a review referred to in clause 10.19(a) is not a breach of this Agreement and is not able to be dealt with under clause 9.

11. Definitions and interpretation

11.1 Definitions

In this Agreement unless the context otherwise requires:

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

Agreement or **this Agreement** means this Deed and includes any schedules, annexures and appendices to this Deed;

Approval includes approval, consent, licence, permission or the like;

Authority means the Commonwealth or New South Wales government, a Minister of the Crown, a government department, a public authority established by or under any Act, a council or county council constituted under the *Local Government Act 1993*, or a person or body exercising functions under any Act including a commission, panel, court, tribunal and the like;

Business Day means a day that is not a Saturday, Sunday, public holiday or bank holiday in New South Wales;

Claims includes actions, proceedings, suits, causes of action, arbitration, verdicts and judgments either at law or in equity or arising under a statute, debts, dues, demands, claims of any nature, costs and expenses;

Construction Certificate has the same meaning as in the Act;

Development means the Development that is the subject of the Development Consent;

Development Consent means the development consent (for the time being) known as 22/2014, granted by the Council under the Act;

Development Contribution means any of the following:

- (a) a monetary contribution;
- (b) a dedication of land free of cost; or
- (c) the provision of any other material public benefit,

provided for in this Agreement and described in Schedule 1;

Encumbrance includes any mortgage or charge, lease, (or other right of occupancy) or profit a prendre;

Floor Space Ratio means floor space ratio within the meaning of the LEP;

Gross Floor Area means gross floor area within the meaning of the LEP;

GST has the meaning given by section 195-1 of the *A New Tax System (Goods and Services Tax) Act (1999)* (Cth);

Item means the relevant or indicated item in the Table;

Land means Lot 1 DP 592417 (also known as 27-29 Burwood Road);

Note: A site plan is set out in Sheet 1 of Schedule 2

LEP means the *Burwood Local Environmental Plan 2012*;

Material Breach — see clause 7.3(c);

Modification Application means the application by the Developer to modify the Development Consent to increase the gross floor area of the Development to 4,015m²;

Novation Deed means the draft deed in Annexure A;

Real Property Act means the *Real Property Act 1900* (NSW);

Registration on Title means the registration of this Agreement under section 93H of the Act in the folio of the Register kept under the Real Property Act in relation to the Dedicated Land, and **Registered on Title** refers to the state of the Agreement being so registered;

Regulation means the *Environmental Planning and Assessment Regulation 2000* (NSW);

Service Lot means a lot that is created for one or more of the following purposes:

- (a) to be dedicated or otherwise transferred to the Council;
- (b) for any public utility undertaking (within the meaning of the Standard Instrument);
- (c) for roads, open space, recreation, environmental conservation, water cycle management or riparian land management,

but does not include a lot which is intended to be further subdivided by or on behalf of the Developer but does include association property within the meaning of the *Community Land Development Act 1989* used for a purpose mentioned in (c) above;

Standard Instrument means the standard instrument for a principal local environmental plan set out in the *Standard Instrument (Local Environmental Plans) Order 2006* as at the date of this Agreement;

Table means the table set out in Schedule 1;

Work means:

- (a) when a reference to an object, the physical result of any building, engineering or construction work in, on, over or under land; and
- (b) when a reference to activity, activity directed to produce the physical result of any building, engineering or construction work in, on, over or under land.

11.2 Interpretation

- (a) In this Agreement unless the context otherwise requires:
 - (i) clause and subclause headings are for reference purposes only;
 - (ii) the singular includes the plural and vice versa;
 - (iii) words denoting any gender include all genders;
 - (iv) reference to a person includes any other entity recognised by law and vice versa;

- (v) a reference to a party means a party to this Agreement, including their successors and assigns and a person bound by the Agreement under section 93H(3) of the Act;
- (vi) where a word or phrase is defined its other grammatical forms have a corresponding meaning;
- (vii) any reference to any agreement or document includes that agreement or document as amended at any time;
- (viii) the use of the word **includes** or **including** is not to be taken as limiting the meaning of the words preceding it;
- (ix) the expression **at any time** includes reference to past, present and future time and the performance of any action from time to time;
- (x) an agreement, representation or warranty on the part of two or more persons binds them jointly and severally;
- (xi) an agreement, representation or warranty on the part of two or more persons is for the benefit of them jointly and severally;
- (xii) any ambiguities in the interpretation of this Agreement shall not be construed against the drafting party.
- (xiii) reference to an exhibit, annexure, attachment or schedule is a reference to the corresponding exhibit, annexure, attachment or schedule in this Agreement;
- (xiv) reference to a provision described, prefaced or qualified by the name, heading or caption of a clause, subclause, paragraph, schedule, item, annexure, exhibit or attachment in this Agreement means a cross reference to that clause, subclause, paragraph, schedule, item, annexure, exhibit or attachment;
- (xv) when a thing is required to be done or money required to be paid under this Agreement on a day which is not a Business Day, the thing must be done and the money paid on the immediately following Business Day; and
- (xvi) reference to a statute includes all regulations and amendments to that statute and any statute passed in substitution for that statute or incorporating any of its provisions to the extent that they are incorporated.
- (b) Nothing in this Agreement is to be taken to require the Council to do anything that would cause it to be in breach of any of its statutory obligations.
- (c) Nothing in this Agreement requires the Developer to produce any or a particular number of Final Lots, or produce the Final Lots in any particular order.

11.3 No joint venture, etc

Unless otherwise stated:

- (a) nothing in this Agreement creates a joint venture, partnership, or the relationship of principal and agent, or employee and employer between the parties; and
- (b) no party has the authority to bind any other party by any representation, declaration or admission, or to make any contract or commitment on behalf of any other party or to pledge any other party's credit.

11.4 No obligation to grant or modify a Development Consent

- (a) This Agreement does not impose an obligation on any public authority to grant or modify any Development Consent.
- (b) For avoidance of doubt, clause 11.4(a) does not affect any obligation of a consent authority (under section 79C(1)(a)(iia) of the Act) to take this Agreement into consideration.

11.5 No breach, etc of a Development Consent

Despite any other provision of this Agreement, this Agreement does not require, allow or preclude anything from being done if by so doing it would cause the Developer to:

- (a) be in breach; or
 - (b) not fulfil a requirement,
- of a Development Consent or Approval.

11.6 Explanatory Note

In accordance with clause 25E(7) of the *Regulations* the explanatory note must not be used to assist in construing this Agreement.

Schedule 1 – Development Contributions

(Clause 4 and Clause 11.1)

Table

Column 1 Item Number	Column 2 Name	Column 3 Description	Column 4 Public purpose	Column 5 When contribution is required
Monetary contribution				
1	Bonus development monetary contribution	<p>A monetary contribution equal to \$1,100 for each additional square metre of Gross Floor Area of the Development above 3,675m²</p> <p>Note: If the modification application is approved in the terms sought by the Developer, there will be an additional 340m² of Gross Floor Area. This would result in a monetary contribution of \$374,000.</p>	Open space, community facilities, public services or other public infrastructure.	<p>Immediately prior to:</p> <ul style="list-style-type: none"> the issue of a Construction Certificate; or modified Construction Certificate (whichever occurs first). <p>after the Development Consent is modified as a consequence of the Modification Application</p>

Developer: Initial Here
Version Control: 7 June 2017

Attorney: Initial Here


Schedule 2 – Drawings

(Clause 11)

Sheet 1: Site plan



Executed as a deed.

Signed for and on behalf of **Burwood Council** by
its attorney dated 6 July 2011 registered book
4615 number 590
in the presence of:



Signature of Witness




Signature of Attorney Michael Gerard McMahon

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



Print name


Executed on behalf of **Shoreline Organisation
Pty Ltd ACN 142 320 661** in accordance with
s127(1) of the *Corporations Act 2001* (Cth) by:




Secretary/Director- SIGNATURE OF WITNESS



Print name



SOLE Director + SECRETARY



Print name

Annexure A – Draft Deed of Novation

Deed of Novation

Burwood Council

[Insert name of existing developer]

[Insert name of new developer]

Deed of Novation

Dated

Parties

1. **Burwood Council** of Suite 1, Level 2, 1-17 Elsie Street, Burwood NSW (**the Council**)
2. **[Insert name of existing developer]** ACN [insert ACN] of [insert address] (**the Existing Developer**)
3. **[Insert name of new developer]** ACN [insert ACN] of [insert address] (**the New Developer**)

Background

- A. The Council and the Existing Developer have entered into the Agreement.
- B. The Existing Developer intends to transfer **[Insert title reference(s)]** to the New Developer.

[If, as a result of the transfer, the Existing Developer will no longer own any of the Site:]

- C. The Existing Developer has agreed to transfer the Rights and Obligations to the New Developer.
- D. The Council has consented to the transfer of the Existing Developer's Rights and Obligations to the New Developer and the parties have agreed to enter into this Deed to give effect to their common intentions.

[If, as a result of the transfer, the Existing Developer will still own part of the Site:]

- C. The New Developer has agreed to accept the Rights and Obligations as a Developer under the Agreement.
- D. The Council has consented to the transfer of the relevant land to the New Developer and the inclusion of the New Developer as a Developer party to the Agreement and the parties have agreed to enter into this Deed to give effect to their common intentions.

Operative provisions

1. Defined meanings

Words used in this Agreement and the rules of interpretation that apply are set out and explained in the definitions and interpretation clause at the back of this Agreement.

2. Novation

[If, as a result of the transfer, the Existing Developer will no longer own any of the Site:]

With effect on and from the Effective Date:

- (a) The New Developer is substituted for the Existing Developer under the Agreement as if the New Developer had originally been a party to the Agreement instead of the Existing Developer and all references in the Agreement to the Existing Developer in any capacity must be read and construed as if they were references to the New Developer; and
- (b) The New Developer is bound by, and must comply with, the provisions of the Agreement and the obligations imposed on the Existing Developer by the Agreement and the New Developer enjoys all the rights and benefits of the Existing Developer under the Agreement (even if an obligation, right or benefit, arose or accrued before the Effective Date).

[If, as a result of the transfer, the Existing Developer will still own part of the Site:]

With effect on and from the Effective Date:

- (a) The New Developer is taken to be a party to the Agreement and the definition of Developer in clause 11.1 of the Agreement is taken to include the New Developer; and
- (b) The New Developer is bound by, and must comply with, the provisions of the Agreement and the obligations imposed on the Developer by the Agreement and the New Developer enjoys all the rights and benefits of the Developer under the Agreement (even if an obligation, right or benefit, arose or accrued before the Effective Date).

3. Consent

[If, as a result of the transfer, the Existing Developer will no longer own any of the Site:]

With effect on and from the Effective Date, the Council:

- (a) consents to the New Developer being substituted for Existing Developer on the terms outlined at clause 2 of this Deed;
- (b) accepts the assumptions by the New Developer of all the liabilities of the Existing Developer under the Agreement instead of those liabilities being liabilities of the Existing Developer; and
- (c) agrees to be bound by the terms of the Agreement in every way as if the New Developer were a party to the Agreement instead of the Existing Developer.

[If, as a result of the transfer, the Existing Developer will still own part of the Site:]

With effect on and from the Effective Date, the Council:

- (d) consents to the New Developer becoming a Developer under the terms of the Agreement as outlined at clause 2 of this Deed;
- (e) agrees to be bound by the terms of the Agreement in every way as if the New Developer were a party to the Agreement.

4. Release and Indemnity

[If, as a result of the transfer, the Existing Developer will no longer own any of the Site:]

4.1 Release and Discharge (the Council)

On and from the Effective Date, the Council releases the Existing Developer from all Rights and Obligations and from all Claims that it may have against the Existing Developer under or in respect of the Agreement.

4.2 Release and Discharge (the Existing Developer)

On and from the Effective Date, the Existing Developer releases the Council from all its obligations under the Agreement and from all Claims that it may have against the Council under or in respect of the Agreement.

4.3 Indemnity

On and from the Effective Date, the New Developer indemnifies the Existing Developer from and against all Liabilities and Claims that it may have against the Existing Developer in respect of the Agreement.

[Omit clause 4 if, as a result of the transfer, the Existing Developer will still own part of the Site]

5. Representations and Warranties

5.1 Power

Both of the Existing Developer and the New Developer represent and warrant to the Council and to each other that:

- (a) it is an individual or corporation validly existing under the laws of Australia;
- (b) if it is a corporation – that it has the corporate power to enter into and perform its obligations under this Deed and has taken all necessary corporate action to authorise execution, delivery and performance of this Deed;
- (c) this Deed is valid and binding upon it and is enforceable against it in accordance with its terms; and
- (d) if it is a corporation – that no application or order has been made for the winding up or liquidation of it, no action has been taken to seize or take possession of any of its assets, there are no unsatisfied judgments against it and it is able to pay its debts as and when they come due and payable.

5.2 Reliance by the Council

The Existing Developer and the New Developer each acknowledge that the Council has entered into this Deed in reliance on the representations and warranties detailed in clause 5.1.

6. General provisions

6.1 Developer Costs

The Existing Developer and the New Developer must pay their own costs in relation to:

- (a) the negotiation, preparation, execution, performance, amendment or registration of, or any consent given or made; and
- (b) the performance of any action by that party in compliance with any liability arising, under this Deed, or any agreement or document executed or effected under this Deed, unless this Deed provides otherwise.

6.2 The Council's Costs

The Existing Developer and the New Developer are jointly and severally responsible for Council's reasonable legal costs in relation to the negotiation, preparation and execution of this Deed, but are not otherwise liable for the Council's costs in relation to the:

- (a) performance, amendment or registration of, or any consent given or made; and
- (b) the performance of any action by that party in compliance with any liability arising, under this Deed, or any agreement or document executed or effected under this Deed, unless this Deed provides otherwise.

6.3 GST

If any payment made by one party to any other party under or relating to this Deed constitutes consideration for a taxable supply for the purposes of GST or any similar tax, the amount to be paid for the supply will be increased so that the net amount retained by the supplier after payment of that GST is the same as if the supplier was not liable to pay GST in respect of that supply. This provision is subject to any other agreement regarding the payment of GST on specific supplies, and includes payments for supplies relating to the breach or termination of, and indemnities arising from, this Deed.

6.4 Duties

- (a) The New Developer must promptly, within the initial applicable period prescribed by law, pay any duty payable in relation to the execution, performance and registration of this Deed, or any agreement or document executed or effected under this Deed.
- (b) The New Developer indemnifies Council and the Existing Developer against any loss incurred by any other party in relation to any duty specified in this provision, whether through default by the New Developer under this provision or otherwise.

6.5 Assignment

A party must not transfer any right or liability under this Deed without the prior consent of each other party, except where this Deed provides otherwise.

6.6 Notices

- (a) Any notice may be served by delivery in person or by post or transmission by facsimile to the address or number of the recipient specified in this provision or most recently notified by the recipient to the sender.

[Insert address for notices for each of the parties]

- (b) Any notice to or by a party under this Deed must be in writing and signed by either:
 - (i) the sender or, if a corporate party, an authorised officer of the sender; or
 - (ii) the party's solicitor.
- (c) Any notice is effective for the purposes of this Deed upon delivery to the recipient or production to the sender of a facsimile transmittal confirmation report before 4.00pm local time on a day in the place in or to which the written notice is delivered or sent or otherwise at 9.00am on the next day following delivery or receipt.

6.7 Governing law and jurisdiction

- (a) This Deed is governed by and construed under the law in the State of New South Wales.
- (b) Any legal action in relation to this Deed against any party or its property may be brought in any court of competent jurisdiction in the State of New South Wales.
- (c) Each party by execution of this Deed irrevocably, generally and unconditionally submits to the non-exclusive jurisdiction of any court specified in this provision in relation to both itself and its property.

6.8 Amendments

Any amendment to this Deed has no force or effect, unless effected by a document executed by the parties.

6.9 Third parties

This Deed confers rights only upon a person expressed to be a party, and not upon any other person.

6.10 Pre-contractual negotiation

This Deed:

- (a) expresses and incorporates the entire agreement between the parties in relation to its subject matter, and all the terms of that agreement; and
- (b) supersedes and excludes any prior or collateral negotiation, understanding, communication or agreement by or between the parties in relation to that subject matter or any term of that agreement.

6.11 Further assurance

Each party must execute any document and perform any action necessary to give full effect to this Deed, whether before or after performance of this Deed.

6.12 Continuing performance

- (a) The provisions of this Deed do not merge with any action performed or document executed by any party for the purposes of performance of this Deed.
- (b) Any representation in this Deed survives the execution of any document for the purposes of, and continues after, performance of this Deed.
- (c) Any indemnity agreed by any party under this Deed:

- (i) constitutes a liability of that party separate and independent from any other liability of that party under this Deed or any other agreement; and
- (ii) survives and continues after performance of this Deed,

6.13 Waivers

Any failure by any party to exercise any right under this Deed does not operate as a waiver and the single or partial exercise of any right by that party does not preclude any other or further exercise of that or any other right by that party.

6.14 Remedies

The rights of a party under this Deed are cumulative and not exclusive of any rights provided by law.

6.15 Severability

Any provision of this Deed which is invalid in any jurisdiction is invalid in that jurisdiction to that extent, without invalidating or affecting the remaining provisions of this Deed or the validity of that provision in any other jurisdiction.

6.16 Counterparts

This Deed may be executed in any number of counterparts, all of which taken together are deemed to constitute one and the same Deed.

6.17 Party acting as trustee

If a party enters into this Deed as trustee of a trust, that party and its successors as trustee of the trust will be liable under this Deed in its own right and as trustee of the trust. Nothing releases the party from any liability in its personal capacity. The party warrants that at the date of this Deed:

- (a) all the powers and discretions conferred by the deed establishing the trust are capable of being validly exercised by the party as trustee and have not been varied or revoked and the trust is a valid and subsisting trust;
- (b) the party is the sole trustee of the trust and has full and unfettered power under the terms of the deed establishing the trust to enter into and be bound by this Deed on behalf of the trust and that this Deed is being executed and entered into as part of the due and proper administration of the trust and for the benefit of the beneficiaries of the trust; and
- (c) no restriction on the party's right of indemnity out of or lien over the trust's assets exists or will be created or permitted to exist and that right will have priority over the right of the beneficiaries to the trust's assets.

7. Definitions and interpretation

7.1 Definitions

In this Deed unless the context otherwise requires:

Claims includes actions, proceedings, suits, causes of action, arbitration, verdicts and judgments either at law or in equity or arising under a statute, debts, dues, demands, claims of any nature, costs and expenses.

Agreement means the voluntary planning agreement between the Council and the Existing Developer dated [insert date], a copy of which is annexed to this Deed as Annexure A.

Deed means this Deed and includes any Annexures to this Deed.

Effective Date means the date upon which the Existing Developer provides the New Developer with an instrument, in registrable form, that (when registered) will effect the transfer of the title to the land from the Existing Developer to the New Developer.

GST means any tax, levy, charge or impost implemented under the *A New Tax System (Goods and Services Tax) Act (GST Act)* or an Act of the Parliament of the Commonwealth of Australia substantially in the form of, or which has a similar effect to, the GST Act;

Liabilities include all liabilities (whether actual, contingent or prospective), losses, damages, costs and expenses of whatever description.

Rights and Obligations means all of the rights, benefits and obligations imposed or conferred on the Existing Developer by the Agreement.

7.2 Interpretation

In this Deed unless the context otherwise requires:

- (a) clause and subclause headings are for reference purposes only;
- (b) the singular includes the plural and vice versa;
- (c) words denoting any gender include all genders;
- (d) reference to a person includes any other entity recognised by law and vice versa;
- (e) where a word or phrase is defined its other grammatical forms have a corresponding meaning;
- (f) any reference to a party to this Deed includes its successors and permitted assigns;
- (g) any reference to any agreement or document includes that agreement or document as amended at any time;
- (h) the use of the word **includes** or **including** is not to be taken as limiting the meaning of the words preceding it;
- (i) the expression **at any time** includes reference to past, present and future time and the performance of any action from time to time;
- (j) an agreement, representation or warranty on the part of two or more persons binds them jointly and severally;
- (k) an agreement, representation or warranty on the part of two or more persons is for the benefit of them jointly and severally;
- (l) any ambiguities in the interpretation of this Deed shall not be construed against the drafting party; and
- (m) reference to an exhibit, annexure, attachment or schedule is a reference to the corresponding exhibit, annexure, attachment or schedule in this Deed.

Executed as a deed.

[Insert relevant attestation clauses]

[Insert the executed planning agreement that is the subject of the novation as Annexure A]