

Planning Agreement

Burwood Council

ABN 84 362 114 428

and

BRD Apartments Pty Ltd

ACN 168 722 736

2A-8 Burwood Road, Burwood



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PARTIES

THIS PLANNING AGREEMENT is made on 13 March 2018.

BETWEEN:

- (1) **Burwood Council** ABN 84 362 114 428 of Suite 1, Level 2, 1-17 Elsie Street, Burwood NSW (Council).
- (2) **BRD Apartments Pty Limited** ACN 168 722 736 of Unit 5, 37 Roberts Street, Strathfield NSW (Developer).

Council Initial:

Developer Initial:

BACKGROUND

- (A) The Developer is the owner of the Land.
- (B) The Land fronts Burwood Road, Esher Lane and Webbs Lane, Burwood.
- (C) Esher Lane a single carriage roadway.
- (D) Esher Lane, between Esher Street and Webbs Lane, is scheduled for road widening, as identified in:
 - (1) Burwood LEP 2012 (Land Acquisition Map).
 - (2) Section 94A Contributions Plan For the Burwood Local Government Area (Excluding Burwood Town Centre), Adopted 24 July 2012.
- (E) On or about 23 December 2015 the Council granted development consent for Development Application No.DA 205/2014 comprising demolition works and the construction of a 9 storey mixed use development comprising 2 commercial and retail premises and 50 residential apartments over 2 basement car parking levels.
- (F) On or about 10 February 2017 the Council granted approval for a section 96 modification application associated with Development Application No.DA 205/2014 for the excavation and construction of an additional basement car parking level, taking the total number of basement car parking levels to 3.
- (G) On or about 3 July 2017 the Council granted approval for a section 96 modification application associated with Development Application No.DA 205/2014 resulting in, amongst other changes, a reduction in the number of apartments from 50 to 48 and the reconfiguration of the built form associated with the Esher Lane frontage.
- (H) On or about 4 August 2017 the Developer lodged a section 96 modification application associated with Development Application No.DA 205/2014 seeking approval for an additional residential storey comprising 6 residential apartments plus an additional 3 bedroom apartment located on the uppermost level, replacing an area of communal open space.
- (I) The Developer has prepared and submitted, in connection with the Modification Application:
 - (1) a statement of environmental effects and accompanying plans.
 - (2) a written request seeking an exception to the 'height of building' development standards set out in clause 4.3 of the Burwood LEP 2012.
 - (3) a written request seeking an exception to the 'floor space ratio' development standards set out in clause 4.4 of the Burwood LEP 2012.
 - (4) a written request seeking an exception to the 'floor space ratio' development standards set out in clause 4.4A of the Burwood LEP 2012.

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(J) The Developer has also prepared and submitted, in connection with the Modification Application, an offer by the Developer to Council to enter into this Agreement seeking approval for an additional 0.3:1 FSR over the maximum FSR for the Land, in exchange for providing the Public Benefits set out in this Agreement, comprising:

- (1) a monetary contribution to Council for Public Facilities.
- (2) the dedication of part of the land fronting Esher Lane to Council to facilitate the widening of Esher Lane (**Road Dedication Land**) for the purposes of creating a dual carriage roadway; and

subject to the terms of this Agreement.

(K) As contemplated by section 93F of the Act, the parties wish to enter into an Agreement to give effect to the proposal made by the Developer.

Council Initial:



Developer Initial:



OPERATIVE PROVISIONS

1. Definitions and Interpretation

1.1 Definitions

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

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

Agreement means this planning agreement.

Approval means any approvals, consents, section 96 modifications, Part 4A certificates or approvals under the Act, certificates, construction certificates, occupation certificates, complying development certificates, permits, endorsements, licences, conditions or requirements (and any variation to them) which may be required by Law for the commencement and carrying out of the Development.

Authority means any government, local government, statutory, public, ministerial, administrative, fiscal or other authority or body, and includes the Joint Regional Planning Panel or such other consent authority as may be lawfully appointed and authorised to grant an Approval, including an accredited certifier defined under the Act.

Burwood LEP 2012 means Burwood Local Environmental Plan 2012.

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

Dedicate means the transfer of the fee simple of the Road Dedication Land to the Council.

Development means the development of the Land in accordance with:

- (a) Development Application No.DA 205/2014,
- (b) Modification Application in relation to Development Application No.DA 205/2014 approved on or about 10 February 2017,
- (c) Modification Application in relation to Development Application No.DA 205/2014 approved on or about 30 June 2017, and
- (d) Modification Application, the subject of this Agreement.

Development Consent means the consent granted to Development Application No. DA 205/2014.

Explanatory Note means the Explanatory Note set out in **Schedule 3** of this 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.

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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.

Just Terms Act means the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW)

Land means the whole of the Land described in the certificates of title previously known as Lots 40, 41 and 42 in DP 1216986, and now Lot 2308 in DP 1233213 known as 2A-8 Burwood Road, Burwood.

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.

Modification Application means the modification application lodged with Council on or about 4 August 2017 in relation to Development Application No. DA 205/2014.

Monetary Contribution means the sum set out in No. 1 in Column 2 of **Schedule 1** of this Agreement.

Public Benefits mean:

- (a) Monetary Contribution, and
- (b) Road Dedication,

as set out in **Schedule 1** of this Agreement.

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

Road Construction means works by, or on behalf of, the Council which are reasonably required to facilitate the widening of Esher Lane to form a trafficable road, and the provision of a pedestrian footpath on the southern side of Esher Lane adjoining the Development.

Road Dedication means the dedication to the Council of the Road Dedication Land which is valued in the sum set out in No. 2 in Column 2 of **Schedule 1** of this Agreement.

Road Dedication Land means that part of the Land to be dedicated to Council identified in **Schedule 2** of this Agreement.

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

1.2 Interpretation

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

- (a) headings are for convenience only and do not affect interpretation.

Council Initial:



Developer Initial:



- (b) **"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 Agreement) is to that document as varied, novated, ratified, supplemented or replaced from time to time.
- (f) 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.
- (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 Agreement, and a reference to this 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 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 Agreement or which was not contemplated at the time of entering into this 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 Agreement.

2. Planning Agreement under the Act

The Parties acknowledge and agree that this Agreement is a planning agreement within the meaning of section 93F of the Act and is governed by Part 4 of the Act.

3. Application of this Agreement

The Agreement applies to the Land and the Development.

Council Initial:



Developer Initial:



4. Operation of this Agreement

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

5. Monetary Contribution

5.1 Payment

- (a) The Developer must, upon the Council granting consent for the Modification Application, pay the Monetary Contribution to the Council in accordance with No. 1 of Column 3 of Schedule 1 of this Agreement.

5.2 No trust

- (a) Nothing in this Agreement creates any form of trust arrangement or fiduciary duty between the Council and the Developer. Following receipt of the Monetary Contribution, the Council is not required to separately account for the Monetary Contribution or to report to the Developer regarding expenditure of the Monetary Contribution.

5.3 Expenditure by the Council

- (a) The Council will, in its absolute discretion, use and apply the funds comprising the Monetary Contribution towards the Public Facilities.
- (b) The Public Facilities will:
 - (i) not be provided to coincide with the conduct or completion of the Development;
 - (ii) be constructed at a time determined by the Council at its absolute discretion;
 - (iii) be available for use by the general public and will not be restricted for use by owners, occupiers or patrons of the Development.

Council Initial:



Developer Initial:



5.4 Monetary Contributions to be made under this Agreement

- (a) The payment of the Monetary Contribution will be by way of the delivery of a bank cheque to the Council which must be:
 - (i) made payable to the Council; and
 - (ii) in a form acceptable to the Council.

6. Road Dedication Land

6.1 Obligations to Transfer

- (a) The Developer shall use its best endeavours to effect the Road Dedication and dedicate the Road Dedicated Land as public road pursuant to the *Roads Act 1993* (NSW) and the *Real Property Act 1900* (NSW) upon the Council granting consent for the Modification Application free of cost to the Council.
- (b) The Road Dedication is taken to have been made (and made free of cost) if the Road Dedication Land is dedicated to the Council and vests in the Council as public road under the *Roads Act 1993* (NSW) and the *Real Property Act 1900* (NSW).
- (c) A reference to the granting of consent for the Modification Application is a reference to the Modification Application as lodged by the Developer with the Council or as otherwise modified with the approval of both the Developer and the Council.
- (d) The Developer and the Council acknowledge and agree that, should the Modification Application not be approved by Council, the Agreement is terminated.

6.2 Date of Transfer

- (a) The Parties acknowledge and agree that at the date of this Agreement the Road Dedication Land is not contained in a separate legal Lot to the Land, and cannot be transferred to the Council until the Land is subdivided to create the Road Dedication Land as a separate legal Lot capable of transfer.
- (b) The Developer will prepare at its own cost and lodge all documents necessary to have the Road Dedication Land created as a separate Lot with the Land and Property Information.
- (c) The Developer and the Council agree and warrant that they will do all things necessary and sign all documents required to facilitate the subdivision of the Land and the subsequent dedication of the Road Dedication Land.
- (d) The Developer and the Council acknowledge and agree that the Road Dedication must occur prior to the time set out in Item No. 2, Column 3 of Schedule 1.

6.3 Obligation Limited to Dedication and Transfer

- (a) The Parties acknowledge and agree that the Developer's obligations set out in this clause 6 are strictly limited to the dedication and transfer of the Road Dedication Land and preclude any and all associated road works (whether relating to Road Construction, alignment, signage, relocation of services, etc).

Council Initial:



Developer Initial:



6.4 Notification by Developer to the Council

- (a) The Developer must provide the Council with written notice of its anticipated completion of the Development and readiness for the Road Construction, at least three (3) months' in advance of the anticipated issue of Occupation Certificate or completion of the Development, whichever occurs first.

6.5 Developer's Further Obligations

- (a) The Developer warrants that there will be no utilities or services (e.g. sewerage, electricity) within the area of the Road Dedication Land (underground and above ground), at the time of the Road Dedication that may preclude, or affect, the Road Construction.
- (b) The Developer agrees to take all measures within its reasonable power to ensure the area of the Road Dedication Land is free from obstructions, construction materials and vehicles associated with the Development, hoarding and the like, from the date of commencement of the Road Construction by the Council.
- (c) The Developer must, at its own expense, reinstate any Road Construction works where the damage or destruction is the result of:
 - (i) any neglect, act or omission of the Developer or its employees, consultants or agents relating to any part of the Road Construction under this Agreement; or
 - (ii) the use or occupation by the Developer or its employees, consultants or agents, Developer's representatives or any other contractor of the Developer, of any part of the Road Dedication Land.

7. Application of the Act to the Development

- (a) This Agreement does not exclude the application of:
 - (i) sections 94 and 94A of the Act;
 - (ii) any Affordable Housing Levy;
 - (iii) any other monetary contributions;in connection with the Development.
- (b) The obligations of the Developer under this Agreement involve a contribution to or provision of public amenities and services over and above those which would otherwise be imposed under section 94 and section 94A of the Act ('the benefits'). The benefits are not to be taken into consideration by the Council in determining contributions under s94 and s94A of the Act.

8. Registration of Agreement

8.1 Land ownership / Mortgagees consent

The Developer represents and warrants that:

Council Initial:



Developer Initial:



- (a) it is the registered proprietor of the Land; and
- (b) it has obtained the consent of all persons that have an interest in the Land prior to executing this Agreement.

8.2 Registration of Agreement

- (a) The Developer agrees it will procure the registration of this Agreement under the *Real Property Act 1900 (NSW)* in the relevant folios of the register for the Land in accordance with section 93H of the Act prior to the issue of any Interim or Final Occupation Certificate for the Development.
- (b) The Developer at its own expense will, prior to the execution of this Agreement, take all practical steps and otherwise do anything that Council reasonably requires, to procure:
 - (i) the consent of each person who:
 - (A) has an estate or interest in the Land registered in the Land; and
 - (B) is seized or possessed of an estate or interest in the Land; and
 - (ii) the execution of any documents; and
 - (iii) the production of the relevant duplicate certificates of title;

to enable the registration of this Agreement under the *Real Property Act 1900 (NSW)* in the relevant folios of the register for the Land in accordance with section 93H of the Act; and
- (c) The Developer, at its own expense, will take all practical steps, and otherwise do everything that the Council reasonably requires:
 - (i) to procure the lodgement of this Agreement with the Registrar-General as soon as reasonably practicable after the Agreement is entered into by the Parties but in any event, no later than 20 Business Days after that date;
 - (ii) to procure the registration of this Agreement by the Registrar-General either in relevant folios of the register for the Land; or in the General Register of Deed if this Agreement relates to land not under the *Real Property Act 1900 (NSW)* as soon as reasonably practicable after the Agreement is lodged for registration but, in any event, no later than 20 Business Days after the date on which the Developer lodges this Agreement with the Registrar-General.


8.3 Release and discharge of Agreement

The Council agrees to do all things reasonably required by the Developer to release and discharge this Agreement with respect to any part of the Land upon the Developer satisfying all of the Public Benefits obligations of this Agreement in respect of that part of the Land.

8.4 Lodgment of Caveat by Council

- (a) Until such time as registration of this Agreement on the Certificates of Title to the Land, the Developer agrees that Council may lodge any caveat reasonably necessary

Council Initial: 

Developer Initial: 

to prevent any dealing with the Land or any part of it in a manner which is inconsistent with this Agreement.

- (b) If Council lodges a caveat in accordance with this clause, then the Council will do all things reasonably required to ensure that the caveat does not prevent or delay either the registration of this Agreement or any related Dealing with the Land. The Council will promptly, following registration of this Agreement, do all things reasonably required to remove the caveat from the title to the Land.

9. Dealing with the Land

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

10. GST

10.1 Interpretation

In this clause 10:

- (a) Words and expressions which are not defined in this Agreement but which have a defined meaning in GST Law have the same meaning as in the GST Law.

10.2 Consideration GST exclusive

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

10.3 Payment of GST - additional payment required

- (a) If GST is payable by an entity (**Supplier**) in respect of any supply made under this Agreement (**Relevant Supply**), then the party required under the other provisions of this Agreement to provide the consideration for that Relevant Supply (**Recipient**) must pay an additional amount to the Supplier (**GST Amount**), as calculated under clause 10.3(b).
- (b) To the extent that the consideration to be provided by the Recipient for the Relevant Supply under the other provisions of this 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 10.3 in addition to and at the same time as the first part of the consideration is provided for the Relevant Supply.

Council Initial:



Developer Initial:



10.4 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 10.3. The Recipient can withhold a payment of the GST Amount until the Supplier provides a tax invoice.

10.5 Adjustment event

If an adjustment event arises in respect of a taxable supply made by a Supplier under this Agreement, the amount payable by the Recipient under clause 10.3 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.

10.6 Reimbursements

Where a party is required under this 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 10.3 in respect of the reimbursement.

11. Default

11.1 Notice

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 that 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.

11.2 Reasonable Time

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 or causes a public nuisance or raises other circumstances of urgency or emergency.

11.3 Suspension of time-dispute

If a party disputes the Default Notice it may refer that dispute to dispute resolution under clause 12 of this Agreement.

12. Dispute Resolution

12.1 Notice of Dispute

If a party claims that a dispute has arisen under this Agreement (**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

Council Initial:



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court proceedings (except for proceedings seeking interlocutory relief) in respect of a dispute unless it has first complied with clauses 12.1 – 12.3.

12.2 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.

12.3 Negotiation

- (a) The nominated representative must:
 - (i) meet to discuss the matter in good faith within 5 business days after service by the Respondent of notice of its representative; and
 - (ii) use reasonable endeavours to settle or resolve the dispute within 15 business days after they have met.

12.4 Litigation

If the dispute is not finally resolved in accordance with Clause 12.3, either party is at liberty to litigate the dispute.

13. Notices

- (a) Any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:
 - (i) delivered or posted to that Party at its address set out below; or
 - (ii) faxed to that Party at its fax number as set out below; or
 - (iii) emailed to that Party at its email address as set out below.

Council

Attention: The General Manager
Address: Suite 1, Level 2, 1-17 Elsie Street, Burwood NSW
Post: P.O. Box 240, Burwood NSW 1805
Facsimile: 02 9911 9900
Email: council@burwood.nsw.gov.au

Developer

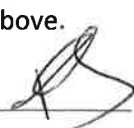
Attention: Mr Pierre Sleiman
Address: Unit 5, 37 Roberts Street, Strathfield NSW

Post: As above.

Council Initial:



Developer Initial:



Facsimile: N/A

Email: pierre@sleiman.com.au

- (b) If a Party gives another Party 3 Business Days notice of a change of its address, fax number or email address, any notice, consent, information, application, or request is only given or made by that other Party if it is delivered, posted, faxed or emailed to the latest address, fax number or email.
- (c) Any notice, consent, information, application or request is to be treated as given or made at the following time:
 - (i) if it is delivered, when it is left at the relevant address;
 - (ii) if it is sent by post, 2 Business Days after it is posted;
 - (iii) 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;
 - (iv) if it is sent by email, 2 Business Days after it is emailed.
- (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. Enforcement in relation to the Dedication of the land

14.1 Agreement under the Just Terms Act

- (a) Subject to clause 14.2, if the Developer does not dedicate the land required to be dedicated under this Agreement:

- (i) at the time at which it is required to be dedicated; or
- (ii) at any point after that time,

the Developer consents to the Council compulsorily acquiring that land for compensation in the amount of \$1 without having to follow the pre-acquisition procedure under the Just Terms Act.

- (b) Clause 14.1(a) is an agreement for the purposes of section 30 of the Just Terms Act.

14.2 Limitations on that agreement

The Council may only acquire land pursuant to clause 14.1 if to do so is reasonable having regard to the circumstances surrounding the failure by the Developer to dedicate the land required to be dedicated under this Agreement.

Council Initial:



Developer Initial:



14.3 Ancillary obligations

- (a) If, as a result of the acquisition referred to in clause 14.1, the Council must pay compensation to any person other than the Developer, the Developer must reimburse the Council for that amount, upon a written request being made by the Council.
- (b) The Developer indemnifies and keeps indemnified, the Council against all claims made against the Council under the Just Terms Act as a result of any acquisition by the Council of the whole or any part of the Dedicated Land under clause 14.1(a).
- (c) The Developer is to promptly do all things necessary, and consents to the Council doing all things necessary, to give effect to this clause 14, including:
 - (i) signing any documents or forms;
 - (ii) producing certificates of title to the Registrar-General under the Real Property Act 1900 (NSW); and
 - (iii) paying the Council's reasonable costs arising under this clause 14.

15. Enforcement

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

15.2 For the avoidance of doubt, nothing in this Agreement prevents:

- (a) a party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Agreement or any matter to which this Agreement relates; and
- (b) the Council from exercising any function under the Act or law relating to the enforcement of any aspect of this Agreement or any matter to which this Agreement relates.

15.3 The rights of the Council expressly provided for herein are cumulative and in addition to and not exclusive of the rights of the Council existing at law or which the Council would otherwise have available to it.

16. General

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

16.2 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 Agreement and all transactions incidental to it, including giving an approval or consent.

Council Initial: 

Developer Initial: 

16.3 Governing Law and Jurisdiction

This Agreement is governed by the law of New South Wales. The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them. The Parties will not object to the exercise of jurisdiction by those courts on any basis.

16.4 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 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.

16.5 No fetter

Nothing in this 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 Agreement is to be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

16.6 Representations and warranties

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

16.7 Severability

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

16.8 Release and Discharge

- (a) To the extent the Developer has:
 - (i) satisfied all of its obligations under this Agreement; or
 - (ii) satisfied all of its obligations under this Agreement in respect of a part of the Land; or
 - (iii) the Agreement no longer applies as a consequence of any event referred to in clause 4(b) of this Agreement;
- the Council will provide a release and discharge of this Agreement with respect to all or any part of the Land, as the case may be:
- (iv) if the Developer requests a partial release and discharge of this Agreement for the purpose of selling part of the Land as a developed Lot; or

Council Initial:

Developer Initial:

- (v) if the Developer requests a partial release and discharge of this Agreement in connection with the completion of a sale contract for a developed Lot; or
- (vi) if the Developer requests a partial release and discharge of this Agreement to effect the transfer of part of Land to the Council or any other authority pursuant to this Agreement.
- (b) 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 16.8.

16.9 Modification, Review and Replacement

- (a) No modification of this Agreement will be of any force or effect unless it is in writing and signed by the Parties to this Agreement.
- (b) The Parties agree that this Agreement may be reviewed or modified in the circumstances using their best endeavours and acting in good faith, and in accordance with this clause 16.9.
- (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 16.9.

16.10 Waiver

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

16.11 Confidentiality

The Parties agree that the terms of this Agreement are not confidential and this Agreement may be treated as a public document and exhibited or reported without restriction by any Party.

16.12 Assignment and Novation

- (a) This Agreement may be assigned or novated by the Developer in accordance with any dealings the Developer may have with respect to its 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 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.

16.13 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.

Council Initial:



Developer Initial:



- (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.

16.14 Costs

Each party is responsible for the payment of its own legal costs and expenses in connection with the preparation, execution and enforcement of this Agreement, unless otherwise agreed between the Parties or as may be ordered by a Court of competent jurisdiction.

16.15 Counterparts

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

16.16 Effect of Scheduled terms and conditions

The parties agree to comply with the terms and conditions contained in the Schedules as if those rights and obligations were expressly set out in full in the operative parts of this Agreement.

Council Initial:



Developer Initial:



Execution Page

Dated: 13 March 2018

Executed as an Agreement

Signed by **BRD
Apartments Pty Ltd
(ACN 168 722 736)**
under s.127(1) of the
Corporations Act 2001

N/A
sign

office (director)

full name


sign

office (director or secretary) SOLE

PIERRE SLEIMOV
full name

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


Witness

EMILY JACKLEY
full name


Signature of Attorney

Bruce Gordon Macdonnell
full name

SCHEDULE 1 - PUBLIC BENEFITS

Overview

The Developer is to pay, dedicate or complete, as the case may be, the Public Benefits under this Agreement strictly in accordance with the table below.

	Column 1	Column 2	Column 3
Item	Public Benefit	Value	Due date for Payment, Dedication or Completion
1.	Monetary Contribution	\$405,350.00	Payment to Council by the Developer on the date upon which the Council grants consent for the Modification Application.
2.	Road Dedication of the Road Dedication Land	\$0.00	Dedication to Council within 12 weeks from the date upon which Council grants consent for the Modification Application and prior to the issuing of any Occupation Certificate for the Development.
	Total:	\$405,350.00	

Calculation of Monetary Contribution and Public Benefits Generally

The Modification Application seeks approval for a revised GFA of **4,040.2**, which is **368.5** sqm above the allowable GFA (3,671.7 sqm) under the Burwood LEP 2012.

For the additional GFA of **368.5 sqm**, the Developer has relied upon the \$1,100 rate per square metre equating to \$405,350.00 (368.5 sqm x \$1,100.00). This represents the Monetary Contribution.

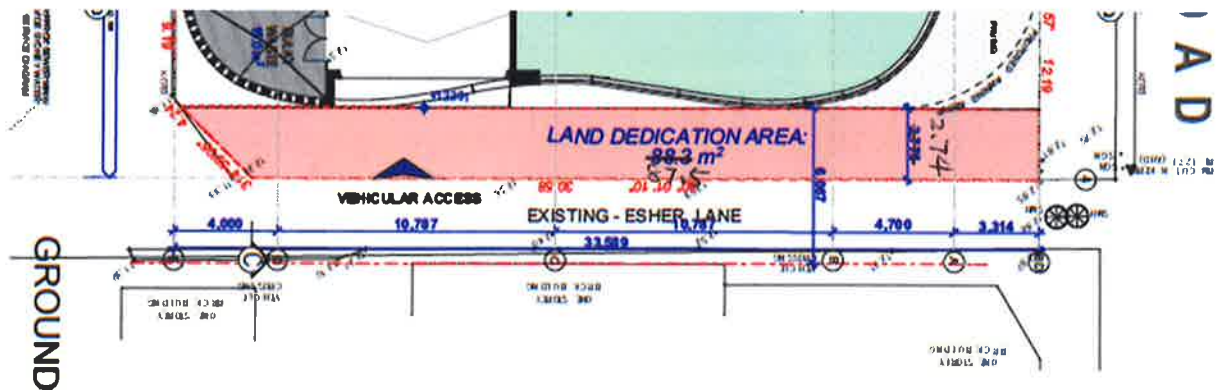
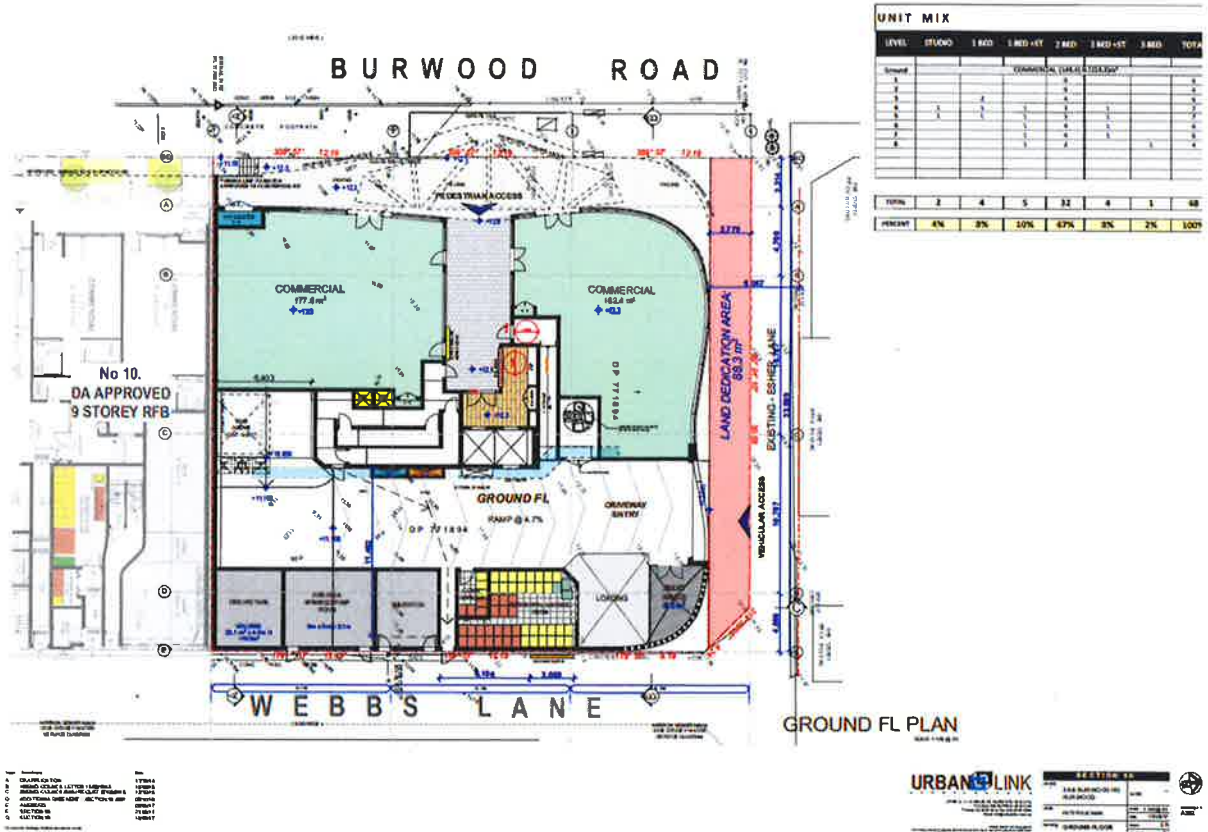
Council Initial:



Developer Initial:



SCHEDULE 2 - ROAD DEDICATION LAND



Council Initial:

[Signature]

Developer Initial:

[Signature]

SCHEDULE 3 - EXPLANATORY NOTE

Explanatory Note

Environmental Planning and Assessment Regulation 2000

(Clause 25E)

Planning Agreement

Under s93F of the *Environmental Planning and Assessment Act 1979 (NSW)* (Act)

1. **Parties**

Burwood Council. ABN 84 362 114 428. 1-17 Elsie Street, Burwood NSW (Council).

BRD Apartments Pty Ltd. ACN 168 722 736. Unit 5, 37 Roberts Road, Strathfield NSW (Developer).

2. **Description of Subject Land**

The subject land means the whole of the Land comprised in the certificate of title formerly Lots 40, 41 and 42 in DP 1216986, now Lot 2308 in DP 1233213.

The Developer is the registered proprietor of the subject land.

3. **Description of Proposed Modification Application**

The development is documented in:

- (a) Development Application No.DA 205/2014.
- (b) Modification Application relating to Development Application No.DA 205/2014 approved on or about 10 February 2017.
- (c) Modification Application relating to Development Application No.DA 205/2014 approved on or about 3 July 2017.
- (d) Modification application relating to Development Application No.DA 205/2014 lodged on 4 August 2017

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

4.1 Summary of Objectives

The objectives of the draft Planning Agreement are to:

- (a) make a Monetary Contribution to Council for the augmentation or improving of open space, community facilities, or other public facilities as determined by the Council, in its absolute discretion.

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Developer Initial:



- (b) dedicate land to Council for the purposes of widening Esher Lane from its current single lane capacity to a dual lane carriageway,

in order to provide a benefit for the public in terms of traffic flow and associated reduction in traffic congestion in and around Esher Lane.

4.2 Nature and Effect of the Draft Planning Agreement

The draft Planning Agreement requires the Developer to provide a Monetary Contribution and:

- (a) the dedicate to Council approximately 87.5 sqm of land for the purposes of widening Esher Lane at some future point in time to be determined by the Council, to facilitate its conversion from a single lane carriageway to a dual lane carriageway.
- (b) The obligations of the Developer, and the costs consequences for the Developer, are over and above those contributions imposed under section 94, section 94A and section 94EF of the Act in connection with the proposed development.

5. Assessment of the Merits of the Draft Planning Agreement

5.1 The Planning Purposes Served by the Draft Planning Agreement

In accordance with section 93F(2) of the Act, the Planning Agreement promotes the following public purposes:

- (a) the provision of (or the recoupment of the cost of providing) transport or other infrastructure relating to land.

5.2 How the Draft Planning Agreement Promotes the Objects of the Act

The draft Planning Agreement promotes the following objects of the Act:

- (a) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment;
- (b) the promotion and co-ordination of the orderly and economic use and development of land;
- (c) the provision of land for public purposes.

The draft Planning Agreement provides for a reasonable means of achieving those purposes.

6. How the Draft Planning Agreement Promotes the Public Interest

6.1 How the Draft Planning Agreement Promotes the Elements of the Council's Charter


The draft Planning Agreement promotes Council's Charter (now Principles) under section 8 of the Local Government Act 1993 (NSW) by:

- (a) the provision of monetary resources to assist Council in the provision of civil infrastructure, public domain upgrades and facilities for the augmentation, or

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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, and

- (b) the provision of adequate, equitable and appropriate services and facilities for the community in the form of providing land for road widening purposes.

6.2 Whether the draft Planning Agreement Conforms with the Council's Capital Works Program

The draft Planning Agreement conforms with Council's Capital Works Program to the extent that it will supplement the Program by providing works and infrastructure.

6.3 Whether the draft Planning Agreement specifies that certain requirements must be complied with before an occupation certificate is issued

The draft Planning Agreement provides that the dedication of land be delivered within 12 weeks from the date upon which Council grants consent for the Modification Application and prior to the issuing of any Occupation Certificate for the Development in accordance with the Act.

7. The Impact of the Draft Planning Agreement on the Public or Any Section of the Public

The draft Planning Agreement impacts on the Public by promoting the Public's interest as outlined above.

8. Other Matters

None.

Council Initial:



Developer Initial:

