

PLANNING AGREEMENT

PARTIES

Burwood Council of Suite 1, Level 2, 1-17 Elsie Street Burwood, New South Wales (**Council**).

and

Wilga St Properties Pty Limited ACN 142 469 010 of Suite 1, 21 Conder Street Burwood, New South Wales (**Proprietor**).

and

Magnas Property Group Pty Limited ACN 106 154 107 of Suite 1, 21 Conder Street Burwood in the State of New South Wales (**Developer**).

Background

- A. On 7 December 2010, the Council granted Development Consent (DA/164/2009) to carry out the Development on the Land.
- B. The Developer has sought to vary the Development Consent and has lodged a section 96(1A) Application to modify the consent in respect of DA/164/2009.
- C. The section 96 (1A) Application was accompanied by an offer by the Developer to enter into this Agreement to make Development Contributions towards the Public Facilities if the modification of consent was granted.

Operative Provisions

1. Planning Agreement under the Act

The Parties agree that this Agreement is a planning agreement governed by Subdivision 2 of Division 6 of Part 4 of the Act.

2. Application of this Agreement

This Agreement applies to both the Land and the Development.

3. Operation of this Agreement

This Agreement shall operate from the date of the approval by the Council of the section 96 Application which has been lodged by the developer seeking to modify the terms of the consent for DA/164/2009. Any approval given by the Council for the modification of the consent for DA/164/2009 shall not come into effect until this Agreement is executed.

4. Definitions and interpretation

4.1 In this Agreement the following definitions apply:

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

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

Development means DA/164/2009 issued by the Council in respect of the property known as 17 Wilga Street Burwood.

Development Application has the same meaning as in the Act.

Development Consent has the same meaning as in the Act.

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

GST has the same meaning as in the GST Law.

GST Law has the meaning given to that term in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any other Act or regulation relating to the imposition or administration of the GST.

Land means Lot A in Deposited Plan 963481 and Lot 2 in Deposited Plan 621923, know as 17 Wilga Street Burwood.

Monetary Contribution means \$120,600.00

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

Public Facility means car parking within the Burwood Town Centre for use by the public.

Regulation means the *Environmental Planning and Assessment Regulation 2000*.

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

- (a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
- (b) A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- (c) If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.
- (d) A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
- (e) A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- (f) A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- (g) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
- (h) An expression importing a natural person including any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (i) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- (j) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and reference to any gender denotes the other genders.
- (k) References to the word 'include' or 'including' are to be construed without limitation.
- (l) A reference to this Agreement includes the agreement recorded in this Agreement.

- (m) A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.
- (n) Any schedules and attachments form part of this Agreement.

5. Development Contributions to be made under this Agreement

- 5.1 The Developer will pay to the Council a monetary contribution at the sum of one hundred and twenty thousand, and six hundred dollars (\$120,600.00) on the date of the execution of this Agreement.
- 5.2 The Developer and/or the Proprietor must deliver to Council a bank cheque in a form acceptable to the Council for the amount of the monetary contribution on the date of the execution of this Agreement.

6. Application of the Development Contributions

- 6.1 The monetary contributions paid by the Proprietor and/or the Developer under this Agreement will be used by Council to develop Public Facilities.
- 6.2 The Public Facilities will:
 - (a) not be provided to coincide with the conduct or completion of the Development;
 - (b) be constructed at a time determined by Council at its absolute discretion;
 - (c) be available for use by the general public and will not be restricted for use by patrons of the Development.

7. Application of section 94 and section 94A of the Act to the Development

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

8. Acknowledgements

- 8.1 The Developer and the Proprietor acknowledge that Council may include a notation on Planning Certificates under section 149(5) of the Act in relation to this Agreement.
- 8.2 The parties acknowledge that Council is a consent authority with statutory rights and obligations pursuant to the terms of the Act and other legislation.

9. Review of this Agreement

If a party believes that there is a need to review this Agreement, the party must give notice in writing to the other party requesting review (the Review Notice). If the parties agree upon the outcome of the review then each party shall endeavour to modify this Agreement consistent with that outcome.

10. Dispute resolution

- 10.1 If a party believes that there is a dispute in respect of this Agreement then:
 - (a) the party must give notice in writing to the other party stating that there is a dispute (the Dispute Notice); and
 - (b) the Dispute Notice must outline:
 - (i) what the party believes the dispute to be;

- (ii) what the party wants to achieve;
- (iii) what the party believes will settle the dispute; and
- (iv) who will be the party's representative to negotiate the dispute.

- 10.2 Within fifteen (15) business days of a Dispute Notice served, the representatives of each of the parties must meet in order to resolve the dispute.
- 10.3 Both parties must adhere to the dispute resolution procedure set out in this Agreement. The only time that either party may depart from the dispute resolution procedure set out in this clause is when urgent interlocutory relief is required to restrain a breach or threatened breach of this Agreement.
- 10.4 If the parties cannot resolve the dispute after adhering to the dispute resolution procedure set out in this Agreement then either party may seek any other avenues available to it in order to resolve the dispute.

11. Enforcement

- 11.1 This Agreement may be otherwise enforced by either party in any court of competent jurisdiction.
- 11.2 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.
- 11.3 The rights of the Council expressly provided for herein are cumulative and in addition to and not exclusive of the rights of the Council existing at law or which the Council would otherwise have available to it.

12. Notices

- 12.1 Any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:
- (a) Delivered or posted to that Party at its address set out below.
 - (b) Faxed to that Party at its fax number set out below.
 - (c) Email to that Party at its email address set out below.

Council

Attention: The General Manager

Address: Suite 1, Level 2, 1-17 Elsie Street Burwood 2134

Post: PO Box 240, Burwood NSW 1805

Fax Number: 9911 9900

Email: council@burwood.nsw.gov.au

Developer

Attention: John Mouawad

Address: Suite 1, 21 Conder Street Burwood 2134

Fax Number: 9745 1661

Email: john@nascon.net.au

- 12.2 If a party gives the other Party three (3) business days notice of a change of its address or fax number, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.
- 12.3 Any notice, consent, information, application or request is to be treated as given or made at the following time:
- (a) If it is delivered, when it is left at the relevant address.
 - (b) If it is sent by post, two (2) business days after it is posted.
 - (c) If it is sent by fax, as soon as the sender receives from the sender's fax machines a report of an error-free transmission to the correct fax number.
- 12.4 If any notice, consent, information, application or request is delivered, or an error-free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5.00pm on that day on the place of the Party to whom it is sent, its is to be treated as having been given or made at the beginning of the next business day.

13. Approvals and consent

Except as otherwise set out in this Agreement, and subject to any statutory obligations, a Party may give or withhold an approval or consent to be given under this Agreement in that Party's absolute discretion and subject to any conditions determined by the Party. A Party is not obligated to give its reasons for giving or withholding consent or for giving consent subject to conditions.

14. Assignment and dealings

The Proprietor and the Developer agrees that this Agreement shall be binding upon the Proprietor and the Developer and upon their respective transferees, assignees or successors.

15. Costs

The Proprietor and/or the Developer shall bear the Council's costs directly related, and incidental, to negotiating, preparing, executing, stamping and registering the Agreement.

16. Entire Agreement

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

17. Further acts

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

18. 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.

19. Joint and individual liability and benefits

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

20. No fetter

Nothing in this Agreement shall be constructed as requiring Council to do anything that would cause it to be in breach of any of its obligations at law, and without limitation, nothing shall be constructed as limiting or fettering in any way the exercise of any statutory discretion or duty.

21. Representations and warranties

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

22. Severability

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

23. Modification

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.

24. Waiver

The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Agreement, does not amount to a waiver of any obligations of, or breach of obligations by, another Party. A waiver by a Party is only effective if it is in writing. A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

25. GST

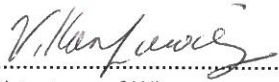
If any Party reasonably decides that it is liable to pay GST on a supply made to the other Party under this Agreement and the supply was not priced to include GST, then the recipient of the supply must pay an additional amount equal to the GST on that supply.

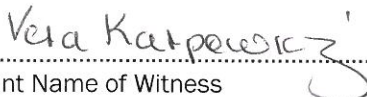
26. Confidentiality

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.

EXECUTED AS AN AGREEMENT

Signed for and on behalf of **Burwood Council**
by its attorney, Michael Gerard McMahon,
under power of attorney dated 18 April 2012
registered book 4615 number 590, in the
presence of:


.....
Signature of Witness


.....
Print Name of Witness


.....
Signature of Attorney

Michael Gerard McMahon
.....
Print Full Name of Attorney

Level 2, 1-17 Elsie Street, Burwood
New South Wales, 2134
.....
Print Address

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

On behalf of Magnas Property Group Pty Limited:

Magnas Property Group Pty Limited (ACN 106 154 107) executed this agreement pursuant to section 127
of the Corporations Act in the presence of:


.....
Signature of Director/Secretary

JOHN MOUAWAD
.....
Print Full Name of Director/Secretary

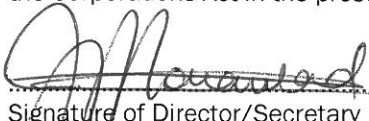
28.8.12
.....
Date


.....
Signature of Witness

JULIE SALIBA
.....
Print Name of Witness

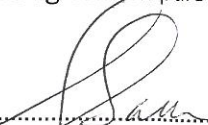
On behalf of Wilga St Properties Pty Limited:

Wilga St Properties Pty Limited (ACN 142 469 010) executed this agreement pursuant to section 127 of
the Corporations Act in the presence of:


.....
Signature of Director/Secretary

JOHN MOUAWAD
.....
Print Full Name of Director/Secretary

28.8.12
.....
Date


.....
Signature of Witness

JULIE SALIBA
.....
Print Name of Witness

Explanatory Note

Planning Agreement for the provision of monetary contribution in lieu of Visitor Parking spaces at 17 Wilga Street, Burwood

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

1. Parties

The parties to the Planning Agreement are:

- (1) Burwood Council (**Council**)
- (2) Wilga St Properties Pty Limited (**Proprietor**)
- (3) Magnas Property Group Pty Limited (**Developer**)

2. Description of Subject Land

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

Folio Identifiers: A/963481 and 2/621923
Location: 17 Wilga Street, Burwood

3. Description of Proposed Change to Development

An application has been made under Section 96 of the EP&A Act 1979 to modify an approved development consent (being DA 164/2009) in a manner which deletes the approved four (4) Visitor Parking spaces.

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

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

The offer made by the **Proprietor** and **Developer** as set out in the Planning Agreement is based on the parking provision of Burwood Council's Development Control Plan (DCP) Part 36 and is consistent with that provision.

The intent of the Planning Agreement is to ensure that the parking needs of the incoming population into the Burwood local government area are met.

The monetary contributions to be provided by the **Proprietor** and **Developer** under the Planning Agreement is an amount of \$120,600.00

5. Assessment of the Merits of the Planning Agreement

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

5.1 The planning purposes served by the Planning Agreement

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

The Planning Agreement serves the following planning purpose:

The monetary contributions paid by the **Proprietor** and **Developer** under this Planning Agreement will be used by **Council** to develop public carparking facilities within the Burwood Town Centre.

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

The planning provision enabling monetary contributions in lieu of parking on-site is contained within Council's DCP Part 38, a publically exhibited document which was adopted by the Burwood Town Centre Planning Administrator. The mechanism allows the aggregation of funds by Council for the provision of efficient and sensitively located public carparking facilities.

5.2 Promotion of the public interest

[Section 25E(2)(a) of the EP&A Regulation 2000]

The Planning Agreement promotes the public interest by:

Ensuring the orderly use and development of land by ensuring that the location and design of public carparking facilities function effectively and safely. The Planning Agreement provides for the provision of public carparking in lieu of private-use Visitor Parking.

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

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

5.3 Promotion of the Council's charter

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

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

Council undertakes to provide *adequate, equitable and appropriate services for the community*. The Planning Agreement provides the monetary resources for Council to assist in the provision of additional public carparking and ensure that those *facilities are managed efficiently and effectively*. Council is the *custodian and trustee of public assets* and has a responsibility to *effectively plan for, account for, and manage the assets*.

Council undertakes to involve *councillors, members of the public, users of facilities and services, and council staff* in its activities. The Planning Agreement process provides an opportunity for the community and stakeholders to be involved and interested people are invited to make comment during the exhibition

period. The public exhibition and the consideration of this matter at Council meetings is intended to *keep the local community informed*.

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

5.4 Capital Works Program

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

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

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

Signatories:

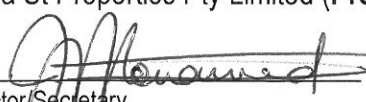
Burwood Council (**Council**)


General Manager

Michael McMahon
Print Name of General Manager

31/8/12
Date

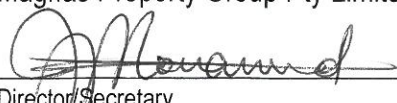
Wilga St Properties Pty Limited (**Proprietor**)


Director/Secretary

JOHN MOUAWAD
Print Name of Director/Secretary

28.8.12
Date

Magnas Property Group Pty Limited (**Developer**)


Director/Secretary

JOHN MOUAWAD
Print Name of Director/Secretary

28.8.12
Date