

# PLANNING AGREEMENT

## PARTIES

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

and

HGA Capital Pty Ltd ABN 19 621 202 551 of 4103/2 Quay Street, Haymarket NSW 2000 in the State of New South Wales (**Developer**).

## Background:

- A. The Developer is the registered proprietor of the Land.
- B. The Land is situated at 17 Deane Street, Burwood.
- C. On 2 March 2017, Development Application No. 27/2017 was submitted by the Developer to the Council for development consent for development to be carried out on the Land for the purpose of a mixed use development comprising retail premises, 36 residential apartments, 101 hotel rooms and a child care centre.
- D. Development Application No. 27/2017 was accompanied by an offer by the Developer to enter into this Agreement to make a monetary contribution towards the provision, augmentation or improvement of open space, community facilities, and other public facilities as determined by the Council if the Development Consent is granted.
- E. As contemplated by section 7.4 of the Act, the parties wish to enter into this Planning Agreement with respect to the 10% increase in floor space ratio for the Land contemplated by the Development if the Development Consent is granted.

## Operative Provisions

### 1. Planning Agreement under the Act

The Parties acknowledge and agree that this Planning Agreement is a planning agreement within the meaning of section 7.4 of the Act and is governed by Part 7 of the Act.

### 2. Application of this Planning Agreement

This Agreement applies to:

- (a) the Land; and
- (b) the Development.

### 3. Operation of this Planning Agreement

- 3.1 The parties are to execute this Agreement immediately following the grant by the Council of the Notice of Determination for Development Application No. 27/2017.
- 3.2 This Planning Agreement shall operate from the date of execution of this Planning Agreement.

### 4. Definitions and interpretation

- 4.1 In this Agreement the following definitions apply:

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

**Approval** means any approvals, consents, section 4.55 modifications, Part 6 certificates or approvals under the Act, certificates, construction certificates, occupation certificates, complying development certificates, permits, endorsements, licences, conditions or requirements (and any variation to them) which may be required by this Planning Agreement or the Development Consent.

**Authority** means any government, local government, statutory, public, ministerial, administrative, fiscal or other authority or body, and includes the 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.

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

**Construction Certificate** means a certificate issued under Part 6 of the *Environmental Planning and Assessment Act 1979* (NSW) approving building work to be carried out on the Land for the whole or part of the work consented to under the Development Consent on the Land.

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

**Development** means the development of the Land in accordance with the Development Application No. 27/2017 as made by the Developer and as a result of any conditions of Development Consent.

**Development Consent** means the consent granted in connection with Development Application No. 27/2017.

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

**GST** has the 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 GST.

**Land** means Lot 1 in Deposited Plan 1215989 situated at and known as 17 Deane Street, 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.

**Monetary Contribution** means the sum of \$1,208,550 excluding GST representing \$1,750 x 690.6m<sup>2</sup>.

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

**Planning Agreement** means this Planning Agreement.

**Public Benefit** means the Monetary Contribution.

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

4.2 In the interpretation of this Planning 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 Planning Agreement.
- (b) A reference in this Planning 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 Planning Agreement is not a business day, the act, matter or thing must be done on the next business day.
- (d) A reference in this Planning Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
- (e) A reference in this Planning Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- (f) A reference in this Planning 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 Planning Agreement.
- (h) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (i) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- (j) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and 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 Planning Agreement includes the agreement recorded in this Planning Agreement.
- (m) A reference to a party to this Planning 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 Planning Agreement.

## **5. Development Contributions to be made under this Planning Agreement**

- 5.1 The Developer will pay to the Council the Monetary Contribution after Development Consent and prior to the issue of any Construction Certificate for the Development.
- 5.2 The payment of the Monetary Contribution will be by way of the delivery of a bank cheque to the Council which must be:
  - (a) made payable to the Council; and
  - (b) in a form acceptable to the Council.
- 5.3 The Developer covenants and agrees not to make an application for the issue of any Construction Certificate until the Monetary Contribution required to be made to the Council hereunder has been paid.
- 5.4 Subsequent to payment of the Monetary Contribution, in the event the Development Consent is not taken up by the Developer or an application for the issue of the Construction Certificate is refused, the Council will refund the amount of the Monetary Contribution to the Developer within 14 days of notice being given to the Council by the Developer of such event.
- 5.5 Notwithstanding any refund of the Monetary Contribution pursuant to clause 5.4 of this Agreement, the Planning Agreement shall continue to have effect.
- 5.6 In the event the Development Consent expires, is abandoned, is surrendered, or ceases to have effect, the Planning Agreement will also expire and cease to have effect and from that point on not be binding on any party. In such circumstances the Council will do all things reasonably necessary, including the execution of any documents to enable the Developer to remove any caveat and the notation of this Planning Agreement on the title to the Land.

## **6. Application of the Development Contribution**

- 6.1 The Monetary Contribution paid by the Developer under this Planning Agreement will be used by the Council to develop and provide 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 the 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 7.11 and section 7.12 of the Act to the Development**

This Planning Agreement does not exclude the application of:

- (a) section 7.11 or section 7.12 of the Act;
- (b) any affordable Housing Levy;
- (c) any other monetary contributions;

in connection with Development Application No. 27/2017. Benefits under the Agreement are not to be taken into account in determining a development contribution under section 7.11 or section 7.12 of the Act.

## **8. Registration of this Agreement**

### **8.1 The Developer further covenants with the Council:**

- (a) that prior to the issue of any Construction Certificate for the Development, or within such further time as the parties hereto agree, they shall do all things reasonably necessary to obtain the consent to the registration of this Planning Agreement over the title to the Land pursuant to section 7.6 of the Act from all persons who have an interest in the Land;
- (b) that forthwith after receiving the consents specified in subclause (a) hereof they shall cause this Planning Agreement to be registered on the title of the Land;
- (c) that if this Agreement is not registered on the title to the Land, and if the Developer should propose to sell the Land or any part thereof then it shall:
  - (i) within seven (7) days of listing the Land or any part thereof for sale, either through an agent or privately, notify the Council of such intention;
  - (ii) as a condition of any sale, require that the incoming purchaser enter into with the Council a like agreement to this present Planning Agreement in which substantially the same covenants as set out herein shall apply;
  - (iii) within seven (7) days of exchange of contracts for the sale, notify the Council of the sale and provide the Council with a copy of the contract;
  - (iv) within twenty one (21) days of receipt from the Council of a replacement agreement between the Council and the purchaser substantially in the form of this Planning Agreement, have it executed by the purchaser and return it to the Council;
  - (v) that if this Planning Agreement is not registered on the title to the Land, and if the Developer should propose otherwise than by sale to transfer or assign its interest in the Land or any part thereof to a transferee or assignee, then it shall before effecting such assignment or transfer have the incoming transferee or assignee enter into an agreement with the Council substantially

in the form of this Planning Agreement insofar as concerns the interest assigned or transferred and shall provide same to the Council.

- 8.2 The Developer further covenants and agrees with the Council that pending the registration of this Agreement on the title of the Land as required by clause 8.1, the Council shall be entitled to register a caveat at Land & Property Information over the title to the Land to protect its interest therein pursuant to this Agreement

## **9. Acknowledgements**

- 9.1 The Developer acknowledges that the Council may include a notation on Planning Certificates under section 10.7 of the Act in relation to this Planning Agreement.
- 9.2 The parties acknowledge that the Council is a consent authority with statutory rights and obligations pursuant to the terms of the Act and other legislation.

## **10. Dispute resolution**

- 10.1 If a party believes that there is a dispute in respect of this Planning 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 being 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 Planning 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 Planning Agreement.
- 10.4 If the parties cannot resolve the dispute after adhering to the dispute resolution procedure set out in this Planning Agreement then either party may seek any other avenues available to it in order to resolve the dispute.

## **11. Enforcement**

- 11.1 This Planning Agreement may be otherwise enforced by either party in any court of competent jurisdiction.
- 11.2 For the avoidance of doubt, nothing in this Planning Agreement prevents:

- (a) a party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Planning Agreement or any matter to which this Planning Agreement relates; and
- (b) the Council from exercising any function under the Act or law relating to the enforcement of any aspect of this Planning Agreement or any matter to which this Planning 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 Planning Agreement is only given or made if it is in writing and sent in one of the following ways:

- (a) Delivered or posted to that party at its address set out below.
- (b) Faxed to that party at its fax number set out below.
- (c) 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: (02) 9911 9900  
Email: [council@burwood.nsw.gov.au](mailto:council@burwood.nsw.gov.au)

### **Developer**

Attention: Frank Fan  
Director, HGA Capital Pty Ltd  
Address: 4103/2 Quay Street  
Haymarket, 2000  
NSW  
Phone Number: 0433 181 852  
Fax Number: (02) 9283 5377  
Email: [frank.fan@hgagroup.com.au](mailto:frank.fan@hgagroup.com.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 machine 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, it 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 Planning Agreement, and subject to any statutory obligations, a party may give or withhold an approval or consent to be given under this Planning 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 Developer agrees that this Planning Agreement shall be binding upon the Developer and upon their respective transferees, assignees or successors.

### **15. Costs**

15.1 The Developer shall bear the Council's costs directly related, and incidental to negotiating, preparing, executing, stamping and registering the Planning Agreement, including any costs of lodging/removing caveats on the title to the Land.

15.2 The Developer will pay the Council's reasonable legal costs not exceeding \$5,000.00 (five thousand dollars) directly related, and incidental to negotiating, preparing, executing, stamping and registering the Planning Agreement and of drafting, registering and removing caveats on the title to the Land.

### **16. Entire Agreement**

This Planning Agreement contains everything to which the Parties have agreed in relation to the matters it deals with. No party can rely on an earlier document, or anything said or done by another party, or by a director, officer, agent or employee of that party, before this Planning 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 Planning Agreement and all transactions incidental to it.

## **18. Governing law and jurisdiction**

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

## **19. Joint and individual liability and benefits**

Except as otherwise set out in this Planning Agreement, any agreement, covenant, representation or warranty under this Planning Agreement by two (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 Planning Agreement shall be construed 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 Planning Agreement and comply with their obligations under the Planning Agreement and that entry into this Planning Agreement will not result in the breach of any law.

## **22. Severability**

If a clause or part of a clause of this Planning 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 Planning Agreement, but the rest of this Planning Agreement is not affected.

## **23. Modification**

No modification of this Planning Agreement will be of any force or effect unless it is in writing and signed by the parties to this Planning Agreement.

## **24. Waiver**

The fact that a party fails to do, or delays in doing, something the party is entitled to do under this Planning 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. Explanatory note**

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

## **26. GST**

- 26.1 All words in this clause which are also defined in the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* ("the GST Act") have a corresponding meaning to that in the GST Act.
- 26.2 The consideration for any supply under this Planning Agreement excludes GST.
- 26.3 Where a party to this Planning Agreement is taken to have made a supply to another party, the recipient of that supply must, in addition to the consideration payable for the supply and when paying the consideration for the supply, also pay to the maker of the supply an amount equal to the GST payable in respect of that supply. The recipient of a supply must also pay the GST payable in respect of a supply for which no monetary consideration is payable when the maker of the supply demands payment.
- 26.4 The maker of a supply must give the recipient a tax invoice in the form required by the GST Act at the same time it receives payment from the recipient of the GST payable for that supply.
- 26.5 Despite any other provision of this Planning Agreement, any amount payable under this Planning Agreement, which is calculated by reference to an amount paid or incurred by a party to this Planning Agreement, is reduced by the amount of any input tax credit to which that party or a member of its GST Group is entitled in respect of that amount.

## **27. Confidentiality**

The terms of this Planning Agreement are not confidential and this Planning Agreement may be treated as a public document and exhibited or reported without restriction by any party.

## **28. Release from Planning Agreement**

Once the Council is satisfied that the Developer has fully complied with all of its obligations under this Planning Agreement, the Council agrees to provide a full release and discharge of this Planning Agreement with respect of the whole of the Land. In such circumstances the Council will do all things reasonably necessary, including the execution of any documents to enable the Developer to remove any caveat and the notation of this Planning Agreement on the title to the Land.

**EXECUTED AS AN AGREEMENT**

Signed for and on 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:

.....  
Signature of Witness

.....  
(Print) Full Name of Witness

.....  
Date

.....  
Signature of Attorney

Bruce Gordon Macdonnell  
.....  
(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 HGA Capital Pty Ltd:**

HGA Capital Pty Ltd (ABN 19 621 202 551) executed this agreement pursuant to section 127 of the  
Corporations Act in the presence of:

.....  
Signature of Director/Secretary

.....  
(Print) Full Name of Director/Secretary

.....  
Date

.....  
Signature of Director

.....  
(Print) Full Name of Director