

Dated 19 August 2015

## Planning agreement

Parties

**Parramatta City Council (Council)**  
(ABN 49907174773)

**Bunnings Properties Pty Ltd (Developer)**  
(ABN 46 006 557 662)

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Planning agreement dated 19 August 2015

**Parties** Parramatta City Council (ABN 49907174773)  
of 30 Darcy Street, Parramatta, NSW, 2150  
(Council)

Bunnings Properties Pty Ltd (ABN 46 006 557 662) of 11 Shirley Street, Rose Hill,  
NSW, 2142 (Developer)

## Introduction

- A** On 7 January 2014 the Developer lodged the Modification Application with Council.
- B** The Modification Application seeks to modify the Development Consent to incorporate an updated Vegetation Management Plan.
- C** The Modification Application was accompanied by an offer by the Developer to enter into this Agreement to make the Monetary Contribution toward the carrying out of bush regeneration works by Council, if the Consent is modified and other matters are satisfied.
- D** The Monetary Contribution is offered in recognition of the fact that the civil works contractor engaged by the Developer undertook unauthorised land clearing without the Developers knowledge or consent and that bushland regeneration works funded by this agreement will help offset the environmental impact of the clearing.
- A** This Agreement describes the payment and provides for the manner in which, and the terms upon which, the Developer is to provide the Monetary Contribution.

## It is agreed

### 1 Definitions and interpretation

#### 1.1 Definitions

In this Agreement:

- (1) **Act** means the *Environmental Planning and Assessment Act 1979* (NSW);
- (2) **Agreement** means this document, including any schedule or annexure to it, signed by the parties;
- (3) **Business Day** means a day that is not a Saturday, Sunday or any other day which is a public holiday or a bank holiday in the place where an act is to be performed or a payment is to be made;
- (4) **Council's Discretion** means:
  - (a) the Council's power to make any law; or
  - (b) the Council's exercise of any statutory power or discretion;
- (5) **Development** means the development described in Item 2;

- (6) **Development Consent** means the consent to DA/709/2011 which authorises the carrying out of the Development on the Land and any modification to it, and any subsequent development consent;
- (7) **Development Contribution** means the Monetary Contribution.
- (8) **Governmental Agency** means any government and any governmental body whether:
- (a) legislative, judicial or administrative;
  - (b) a department, commission, authority, tribunal, agency or entity;
  - (c) commonwealth, state, territorial or local;
- but does not include a governmental body in respect of any service or trading functions as distinguished from regulatory or fiscal functions;
- (9) **Land** means the land described in Item 1;
- (10) **Legislation** means the Act and the *Local Government Act 1993* (NSW);
- (11) **Modification Application** means a modification application made under of s96(2) of the Act on 7 January 2014 to modify the Development Consent;
- (12) **Monetary Contribution** means an unendorsed bank cheque for \$92,885 payable to the Council;
- (13) **Regulations** means the *Environmental Planning and Assessment Regulation 2000* (NSW); and
- (14) **Required Works** means works required to be carried out as a Condition of Development Consent which is not identified in this Agreement or the Vegetation Management Plan lodged with the Modification Application.

## 1.2 Interpretation

- (1) Reference to:
- (a) one gender includes the others;
  - (b) the singular includes the plural and the plural includes the singular;
  - (c) a person includes a body corporate;
  - (d) a party includes the party's executors, administrators, successors and permitted assigns;
  - (e) a thing includes the whole and each part of it separately;
  - (f) a statute, regulation, code or other law or a provision of any of them includes:
    - (i) any amendment or replacement of it; and
    - (ii) another regulation or other statutory instrument made under it, or made under it as amended or replaced;

- (g) dollars means Australian dollars unless otherwise stated; and
  - (h) an Item is to an item in the Schedule 1.
- (2) "Including" and similar expressions are not words of limitation.
  - (3) Where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have a corresponding meaning.
  - (4) Headings and any table of contents or index are for convenience only and do not form part of this Agreement or affect its interpretation.
  - (5) A provision of this Agreement must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of the Agreement or the inclusion of the provision in the Agreement.
  - (6) If an act must be done on a specified day which is not a Business Day, it must be done instead on the next Business Day.

### **1.3 Parties**

- (1) If a party consists of more than 1 person, this Agreement binds each of them separately and any 2 or more of them jointly.
- (2) An obligation, representation or warranty in favour of more than 1 person is for the benefit of them separately and jointly.
- (3) A party which is a trustee is bound both personally and in its capacity as a trustee.

## **2 Planning agreement under the Act**

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

## **3 Application of this Agreement**

- 3.1 This Agreement applies to the Land and to the Development.

## **4 Operation of this Agreement**

- 4.1 This document, when unsigned by the parties and attached to the Modification Application lodged by the Developer with the Council, is an irrevocable offer from the Developer to the Council to enter into this Agreement if the Council approves the Modification Application on conditions acceptable to the Developer, in the Developer's absolute discretion.
- 4.2 This Agreement commences on the latest date on which any of the following occur:
  - (1) the Council or the Land and Environment Court modifies the Development Consent in accordance with the Modification Application and on conditions acceptable to the Developer, in its absolute discretion; and
  - (2) all the parties have signed this Agreement.

## **5 Development Contribution to be made by the Developer**

5.1 The Developer must make the Development Contribution as follows:

- (1) pay the Monetary Contribution to the Council by bank cheque within 20 business days of the commencement of this Agreement.

## **6 Application of the Monetary Contribution by the Council**

6.1 The Council must apply the Monetary Contribution towards the carrying out of bush regeneration works at Ponds Creek Reserve, located at 15 Sturt Street, Dundas, and must do so within 36 months of receiving the Monetary Contribution from the Developer.

6.2 Following completion of the works described in clause 6.1, Council must provide to the Developer a report certifying that the Monetary Contribution was spent on the works in clause 6.1 and specifying the amount, if any, of the Monetary Contribution which remains unspent.

6.3 In the event that Council does not apply the Monetary Contribution (or the whole of it) as required under clause 6.1, Council must refund the Monetary Contribution or any unspent part of it to the Developer.

## **7 Dispute resolution**

7.1 If a dispute arises in connection with this Agreement, a party to the dispute must give to the other party to the dispute notice specifying the dispute and requiring its resolution under this clause (**Notice of Dispute**).

7.2 The chief executive officers of each party, or their respective authorised senior representatives, must confer within 3 days after the Notice of Dispute is given to try to resolve the dispute and must negotiate in good faith for this purpose.

7.3 If the dispute is not resolved within 7 days after the Notice of Dispute is given to the other party or parties, a party at any time may commence proceedings in a Court of competent jurisdiction in relation to any dispute or claim arising under or in connection with this Agreement, or to enforce this Agreement.

7.4 Having regard to the time for payment of the Development Contribution as set out in clause 5.1, the parties agree that it is unnecessary for this Agreement to require the provision of a bond or guarantee.

## **8 Confidentiality**

8.1 The terms of this Agreement are not confidential. This Agreement may be exhibited by either party.

8.2 If requested by a party, the other party must:

- (1) not issue, publish or authorise any media release, advertisement or publicity concerning this Agreement without obtaining the prior written consent of the other party; and
- (2) ensure that its officers, employees, agents, contractors and related companies do the same.

## **9 Approvals and consent**

- 9.1 Each party may conditionally or unconditionally give or withhold its approval or consent in its absolute discretion unless this Agreement expressly provides otherwise.

## **10 Severability**

- 10.1 If any provision in this Agreement is unenforceable, illegal or void or makes this Agreement or any part of it unenforceable, illegal or void, then that provision is severed and the rest of this Agreement remains in force.

## **11 No fetter**

- 11.1 The parties:

- (1) acknowledge that the Council is a consent authority, having statutory rights and obligations under the Legislation;
- (2) do not intend this Agreement to fetter Council's Discretion.

- 11.2 If, contrary to the parties' intention, any provision in this Agreement is held by a court of competent jurisdiction to constitute an unlawful fetter on Council's Discretion:

- (1) the parties must take all practical steps, including the execution of any further documents, to ensure that the objective of this clause 11 is substantially satisfied; and
- (2) if clause 11.2(1) cannot be achieved without unlawfully fettering Council's Discretion, the relevant provision is severed and the rest of this Agreement remains in force.

- 11.3 If:

- (1) the Legislation permits the Council to contract out of a provision of that Legislation or gives the Council power to exercise Council's Discretion; and
- (2) the Council has in this Agreement contracted out of a provision or exercised Council's Discretion, then to that extent this Agreement is to be regarded as consistent with the Legislation.

## **12 Goods and services tax**

### **12.1 Definitions**

In this clause 12:

- (1) **GST** means GST as defined in *A New Tax System (Goods and Services Tax) Act 1999* as amended (**GST Act**) or any replacement or other relevant legislation and regulations; and
- (2) words or expressions used in this clause which have a particular meaning in the **GST law** (as defined in the GST Act, and also including any applicable legislative determinations and Australian Taxation Office public rulings) have the same meaning, unless the context otherwise requires.

## 12.2 No taxable supply

The parties believe that there is no GST liability in respect of the grant of the Development Consent by Council or the payment or provision of the Development Contribution because:

- (1) to the extent that the Development Contribution is a monetary contribution:
  - (a) it is not consideration for the modification of the Development Consent by Council in accordance with section 81-5(2) of the GST Act; and
  - (b) the payment of a monetary Developer's Contribution is not a supply by the Developer under section 9-10(4) of the GST Act; and
- (2) to the extent to which the Development Contribution is a non-monetary contribution:
  - (a) it is not consideration for the modification of the Development Consent by Council in accordance with section 82-10(1) of the GST Act; and
  - (b) the modification of the Development Consent is not consideration for the supply of the non-monetary Development Contribution under section 82-5 of the GST Act.

## 12.3 If supply is a taxable supply

Despite clause 12.2, to the extent that the Commissioner of Taxation, a court or tribunal determines that any supply made under or in connection with this Agreement is a taxable supply, the GST exclusive consideration otherwise to be paid or provided for that taxable supply is increased by the amount of any GST payable in respect of that taxable supply and that amount must be paid at the same time and in the same manner as the GST exclusive consideration is otherwise to be paid or provided. A party's right to payment under this clause is subject to a valid tax invoice being delivered to the recipient of the taxable supply.

## 13 Further assurance

- 13.1 Each party must promptly at its own cost do all things (including executing and if necessary delivering all documents) necessary or desirable to give full effect to this Agreement.

## 14 Entire understanding

- 14.1 Subject to clause 14.2, this Agreement:
  - (1) is the entire agreement and understanding between the parties on everything connected with the subject matter of this Agreement; and
  - (2) supersedes any prior agreement or understanding on anything connected with that subject matter.
- 14.2 The explanatory note prepared in relation to this Agreement under clause 25E(1) of the *Environmental Planning and Assessment Regulation 2000* (NSW) may be used to assist in construing this Agreement.



## **15 Variation**

- 15.1 An amendment or variation to this Agreement is not effective unless it is in writing and signed by the parties.

## **16 Waiver**

- 16.1 A party's failure or delay to exercise a power or right does not operate as a waiver of that power or right.
- 16.2 The exercise of a power or right does not preclude either its exercise in the future or the exercise of any other power or right.
- 16.3 A waiver is not effective unless it is in writing.
- 16.4 Waiver of a power or right is effective only in respect of the specific instance to which it relates and for the specific purpose for which it is given.

## **17 Costs and outlays**

- 17.1 Each party must pay its own costs and outlays connected with the negotiation, preparation and execution of this Agreement.
- 17.2 The Developer must pay all stamp duty and other government imposts payable in connection with this Agreement and all other documents and matters referred to in this Agreement when due or earlier if requested in writing by the Council.

## **18 Notices**

- 18.1 A notice or other communication connected with this Agreement (**Notice**) has no legal effect unless it is in writing.
- 18.2 In addition to any other method of service provided by law, the Notice may be:
- (1) sent by prepaid ordinary post to the address for service of the addressee, if the address is in Australia and the Notice is sent from within Australia;
  - (2) sent by prepaid airmail to the address for service of the addressee, if the address is outside Australia or if the Notice is sent from outside Australia;
  - (3) sent by facsimile to the facsimile number of the addressee; or
  - (4) delivered at the address for service of the addressee.
- 18.3 A certificate signed by a party giving a Notice or by an officer or employee of that party stating the date on which that Notice was sent or delivered under clause 18.2 is prima facie evidence of the date on which that Notice was sent or delivered.
- 18.4 If the Notice is sent or delivered in a manner provided by clause 18.2, it must be treated as given to and received by the party to which it is addressed:
- (1) if sent by post from within Australia to an address in Australia, on the 2<sup>nd</sup> Business Day (at the address to which it is posted) after posting;

- (2) if sent by post to an address outside Australia or sent by post from outside Australia, on the 5<sup>th</sup> Business Day (at the address to which it is posted) after posting;
- (3) if sent by facsimile before 5pm on a Business Day at the place of receipt, on the day it is sent and otherwise on the next Business Day at the place of receipt; or
- (4) if otherwise delivered before 5pm on a Business Day at the place of delivery, upon delivery, and otherwise on the next Business Day at the place of delivery.

18.5 Despite clause 18.4(3):

- (1) a facsimile is not treated as given or received unless at the end of the transmission the sender's facsimile machine issues a report confirming the transmission of the number of pages in the Notice;
- (2) a facsimile is not treated as given or received if it is not received in full and in legible form and the addressee notifies the sender of that fact within 3 hours after the transmission ends or by 12 noon on the Business Day on which it would otherwise be treated as given and received, whichever is later.

18.6 If a Notice is served by a method which is provided by law but is not provided by clause 18.2, and the service takes place after 5pm on a Business Day, or on a day which is not a Business Day, it must be treated as taking place on the next Business Day.

18.7 A Notice sent or delivered in a manner provided by clause 18.2 must be treated as validly given to and received by the party to which it is addressed even if:

- (1) the addressee has been liquidated or deregistered or is absent from the place at which the Notice is delivered or to which it is sent; or
- (2) the Notice is returned unclaimed.

18.8 Council's address for service and facsimile number are:

Name : Parramatta City Council  
Attention : The Chief Executive Officer  
Address : 30 Darcy Street, Parramatta, NSW, 2150  
Facsimile no : 9806 5917

18.9 Developer's address for service and facsimile number are:

Name : Bunnings Properties Pty Ltd  
Attention : General Manager  
Address : 11 Shirley Street, Rose Hill, NSW, 2142  
Facsimile no : (02) 9846 7530

18.10 A party may change its address for service or facsimile number by giving Notice of that change to each other party.

18.11 If the party to which a Notice is intended to be given consists of more than 1 person then the Notice must be treated as given to that party if given to any of those persons.

18.12 Any Notice by a party may be given and may be signed by its solicitor.

## **19 Governing law and jurisdiction**

19.1 The law of New South Wales governs this Agreement.

19.2 The parties submit to the non-exclusive jurisdiction of the courts of New South Wales and of the Commonwealth of Australia.

## Schedule 1

Item 1      **Land**

Lot 3 DP 1177708, 316 Victoria Road, Rydalmere, NSW, 2116

Item 2      **Development**

Development Application No. DA/709/2011 determined by Council on 14 June 2012, granting Development Consent to:

*Three lot Torrens title subdivision with earthworks and retaining walls, construction of a Bunnings Warehouse on proposed Lot 1 with associated signage and carparking.*

Including the following modifications of the Development Consent:

- DA/709/2011/A
- DA/709/2011/B
- DA/709/2011/C
- DA/709/2011/D
- DA/709/2011/F
- DA/709/2011/G

**Executed as an agreement.**


Signed for and on behalf of **Parramatta City Council** ABN 49907174773 by its authorised representative in the presence of:

  
Signature of witness

Katherine Bates  
Name of witness  
(BLOCK LETTERS)


  
Signature of authorised representative

S. C. DYER  
Name of authorised representative  
(BLOCK LETTERS)

  
Scott Lloyd  
Lord Mayor

26 Church St Parramatta.  
Address of witness

Executed by **Bunnings Properties Pty Ltd**  
(ABN 46 006 557 662) in accordance with  
section 127 of the *Corporations Act 2001*:

  
Director/company secretary

David Wilkinson Senior  
Name of director/company secretary  
(BLOCK LETTERS)

  
Director

WILLEM PRUYS  
Name of director  
(BLOCK LETTERS)