

PLANNING AGREEMENT

Parties

Burwood Council of Suite 1, Level 2, 1-17 Elsie Street Burwood in the State of New South Wales
(Council)

and

Builtcom Developments 8 Pty Ltd (ACN 637 532 471) of 60 Burwood Rd, Burwood, in the State of
New South Wales (Developer)

and

Builtcom Properties 8 Pty Ltd (ACN 613 815 473) of 60 Burwood Rd, Burwood, in the State of New
South Wales (Owner)

Background

- A. The Owner is the registered proprietors of the Land.
- B. On 12 July 2016, the previous developer made a Development Application to the Council for Development Consent to carry out the demolition and construction of a 19 storey mixed use development comprising 3 levels of commercial suites, 16 levels of residential containing 58 apartments above basement parking on the Land.
- C. The Developer is prepared to make Development Contributions towards the Public Facilities as the Development consent is granted to the Development Application being DA no. 98/2016.

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 the Land, the Development Application and the Development

3. Operation of this Agreement

3.1 This Agreement commences on the date of execution by the Parties.

4. Definitions and Interpretation

4.1 In this Agreement the following definitions apply:

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

Construction Certificate has the same meaning as in the Act.

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 Consent granted to Development Application No. 98/2016.

Development Application has the same meaning as in the Act.

Development Consent has the same meaning as in the Act.

Development Contribution means the Monetary Contribution.

GST has the same meaning as in the GST Law.

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 the GST.

Land means Lots A, B, C and D in DP 415890, known as 9, 11, 13 and 15 George Street, Burwood.

Monetary Contribution means the sum of \$601, 315 (six hundred and one thousand, three hundred and fifteen dollars) representing \$1,100.00 x 546.65m².

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

Planning Certificates means any certificate or certificates with the meaning of section 10.7 of the Act.

Public Certificates means any certificate or certificates with the meaning of section 10.7 of the Act.

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

Regulation means the Environmental Planning and Assessment Regulation 2000.

4.2 In the interpretation of the 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 an 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 replaces.
- (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 includes any company, trust, partnership, joint venture, association, body corporate or government 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 denoted the singular denotes the plural. A word which denotes the plural denotes the singular, and a 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 this 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 must pay to council the Monetary Contribution prior to the issue of the first Construction Certificate for the Development.
- 5.2. The payment of the Monetary Contribution will be the way of 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

6. Application of the Development Contributions

6.1 The Council acknowledges and agrees that the Monetary Contribution paid by the Developer under this Agreement will be used by the 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 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.

6.3 Notwithstanding any other provisions of this Agreement, the parties acknowledge and agree that nothing in this Agreement in any way fetters or attempts to fetter the discretion of the council in the performance of its obligations

7. Application of section 7.11 and section 7.12 of the Act to the Development

7.1 The Agreement does not exclude the application of:

- (a) section 7.11 or section 7.12 of the Act;
- (b) section 7.24 of the Act; or
- (c) any affordable housing levy

In connection with development application 98/2016. Benefits under this Agreement are not to be taken into account in determining a Development Contribution under section 7.11 or section 7.12.

7.2 The obligations of the Developer under this Agreement involve a contribution to or provision of Public Facilities over and above those which would otherwise be imposed under section 7.11 or section 7.12 of the Act (benefits). The benefits are not to be taken into consideration by the Council in determining contributions under section 7.11 and section 7.12 of the Act.

8. Registration of this Agreement

8.1 The parties will take all practical steps to procure:

- (a) The consent of each person who:
 - i. has an estate or interest in the Land registered under the Real Property Act 1990 (NSW); or
 - ii. is seized or possessed of an estate or interest in the land; and
- (b) the execution of any documents; and
- (c) 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 7.6 of the Act.

8.2. The Parties will take all practical steps 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.

8.3 If this Agreement is not registered on the title of the Land, and if any of The Owner should propose to sell the Land or any part of the Land then The Owner and Developer must:

- (a) within seven (7) days of listing the Land or any part of the Land for sale, either through an agent or privately, notify the council of such intention;
- (b) as a condition of sale, require that the incoming purchaser enter into with Council a similar agreement to this Agreement.
- (c) Within seven (7) days of exchange of contracts, notify the Council of the sale and provide the Council with a copy of the contract of sale;
- (d) Within twenty one (21) days of receipt from the Council of a replacement agreement between the council and the purchaser substantially of the same as this Agreement, have it executed by the purchaser and return it to the Council;

8.4 If any of The Owner propose to transfer or assign any of their interests in the Land, other than by sale the prior to effecting the assignment or transfer the relevant Owner will have the incoming transferee or assignee enter into an agreement with the Council substantially in the form of this Agreement.

8.5 The Owner and Developer agree 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 NSW Land & Property Information over the title to the Land.

8.6 The Parties are to do such things as are reasonably necessary to remove any notation relating to this Agreement from the title of the Land once the Developer has completed its obligations under this agreement or this Agreement is terminated or otherwise comes to an end for any other reason.

9. Acknowledgements

9.1 The Owner and developer acknowledge that the Council may include a notation on Planning Certificates under section 10.7(5) of the Act in relation to this Agreement until this Agreement is no longer in force.

- 9.2 The parties acknowledge that the Council is a consent authority with statutory rights and obligations pursuant to the Act and other relevant legislation.

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 proposes to do to 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 The parties must adhere to the dispute resolution procedure set out in this Agreement. The only time that a 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 Without limiting any other provision of this Agreement, the parties may enforce this Agreement 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 Environment Court to enforce any aspect of this Agreement or any matter to which this Agreement relates; or
 - (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.

12. Notices

- 12.1 Any notice given under this Agreement
- (a) must be in writing and signed by a person authorised to do so by the sender and
 - i) delivered or posted to that Party at its address set out in this Agreement, or if the intended recipient has previously given the sender notice of a change of address for the purpose of notices that then notice must be addressed to the intended recipient at the last address notified by the intended recipient to the sender; or

- ii) faxed to that Party at its fax number set out in this Agreement, and subject to the sender holding a transmission report by the machine from which the facsimile was successfully sent; or
- iii) emailed to that Party at its email address set out in this Agreement

Council

Attention: The General Manager

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

Fax Number: 9911 9900

Email: council@burwood.nsw.gov.au

Developer and Owner

Attention: Builtcom Developments 8 Pty Ltd

Address: 60 Burwood Rd, Burwood NSW 2134

Fax Number: N/A

Email: ahuang@builtcom.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, is only given or made by that other Party if it is delivered, posted or faxes to the latest address or fax number.
- 12.3 Any notice, 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, 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, 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 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

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 obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

14. Assignment and dealings

- 14.1 This agreement may be assigned or novated by The Owner and/or developer in accordance with any dealings The Owner and/or developer may have with respect to their interests in the Land without requiring The Owner or developer to obtain Council's Approval in respect of either the dealing or the assignment or the novation of this Agreement.
- 14.2 Council agrees to execute any deeds or assignment or novation or other documents necessary to assign, novate or otherwise transfer all of The Owner and/or Developer's rights and obligations under the Agreement to a successor as contemplated by the agreement.

15. Costs

The Developer agrees to pay its own costs directly related and incidental to negotiation, preparing, executing, stamping and registering this Agreement, including any costs of lodging / removing caveats on the title to the Land.

16. Entire agreement

This Agreement contains the entire agreement between the Parties about its subject matter and this Agreement supersedes all prior discussions, representations, agreements and understandings between the parties in connection with the subject matter.

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 and is to be interpreted according to the Laws in force in New South Wales. The parties submit to the non-exclusive jurisdiction of the courts operating in New south Wales.

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 2 or more persons binds them jointly and each of them individually, and any benefit in favour of 2 or more persons in for the benefit of them jointly and each of them individually.

20. No fetter

- a) Nothing in this 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 construed as limiting or fettering in any way the exercise of any statutory discretion or duty
- b) If, contrary to the operation of this clause, any provision of this Agreement is held by a Court of competent jurisdiction to constitute an unlawful fetter on any discretion of the Council, the Parties agree:

- i. they will take all practicable steps, including the execution of any further documents, to ensure the objectives of this Agreement are substantially satisfied, and
- ii. in the event that any provision of this Agreement cannot be achieved without giving rise to an unlawful fetter on the discretion of the Council, the relevant provision is to be severed and the remainder of this Agreement has full force and effect.

21. 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.

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 obligation of, or breach of obligation 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 is given. It is not to be taken as an implied waiver of any 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 recipient of the supply must pay an additional amount equal to the GST on that supply.

26. Explanatory Note

- a) The appendix contains the Explanatory Note relating to this Agreement required by clause 25E of the regulation.
- b) Pursuant to clause 25E(7) of the Regulation, the Parties agree that the Explanatory Note is not to be used to assist in construing this Agreement.

Execution Page

EXECUTED AS AN AGREEMENT

Signed for and on behalf of **Burwood Council** by)
its attorney, **Tommaso Briscese**, under)
power of attorney dated 29 May 2019 registered)
book 4760 number 381, in the presence of:)

.....
Signature of Witness

.....
(Print) Name of Witness

.....
Signature of Attorney

Tommaso Briscese
.....
(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.

Signed on behalf of **Developer**

Builtcom Developments 8 Pty Ltd ACN 637 532 471)
executed this agreement pursuant of section 127)
Of the Corporations Act in the presence of:)

.....
Signature of Director/Secretary

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

.....
Signature of Director

.....
Print Name of Director

Signed on behalf of **Owner**

Builtcom Properties 8 Pty Ltd ACN 613 815 473)
executed this agreement pursuant of section 127)
Of the Corporations Act in the presence of:)

.....
Signature of Director/Secretary

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

.....
Signature of Director

.....
Print Name of Director