

Voluntary Planning Agreement

13 August 2014

Liverpool City Council
ACN 84 181 182 471

Daniel Biordi
and
Francesca Biordi
and
Lorenzo Biordi

Newcastle

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Agreement

Date

Parties

First party

Name Liverpool City Council (**Council**)
ABN 84 181 182 471
Address Level 2, 33 Moore Street, Liverpool NSW
2170

Second party

Name Daniel, Francesca and Lorenzo Biordi



Background

- A. The Developers own the Land.
- B. The Developers propose to carry out the Development.
- C. The Development Application has been made by Gilbert Blandin de Chalain of B. de C. Environmental P/L for and on behalf of the Developers.
- D. The Developers have made no proposal to include car parking facilities within the Development. There is currently no onsite car parking and vehicular access to the Land is restricted under the DCP.
- E. The Developers seek to make a monetary contribution to the Council in order to satisfy the increased demand for car parks as a result of the Development.
- F. The Developers have made an offer to enter into a planning agreement with Council and the Council has accepted the offer. The Parties wish to formalise that arrangement by entering into this Agreement in accordance with s93F of the Act.

Operative part

The Parties agree, in consideration of, among other things, the mutual promises contained in this Agreement as follows:

1 Definitions and interpretation

1.1 Definitions

In this Agreement, unless context indicates a contrary intention:

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

Construction Certificate means a construction certificate as defined under s109C of the Act.

CPI means the "Consumer Price Index: All Groups Index Number" for Sydney available from the Australian Bureau of Statistics.

DCP means the Liverpool Development Control Plan 2008

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

Developers means Daniel, Francesca and Lorenzo Biordi.

Development means the commercial development proposed on the Land, which will include demolition of the existing two storey building and construction of a seven storey commercial building as described in the Development Application.

Development Application means development application DA 490/2013 dated 2 May 2013.

Development Consent has the same meaning as in the Act.

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.

Insolvent means the occurrence of any of the following:

- (a) a Party is liquidated, whether compulsorily or voluntarily (other than for the purpose of amalgamation or reconstruction whilst solvent);
- (b) a Party becomes unable to pay its debts as they fall due;
- (c) a Party enters into any arrangement with creditors;
- (d) a Party becomes subject to external administration within the meaning of Chapter 5 of the *Corporations Act 2001* (Cth), including having a receiver or administrator appointed over all or any part of its assets; or
- (e) anything analogous (such as analogous bankruptcy processes), or having a substantially similar effect to the events specified in clauses (a) to (d), occurs in relation to a Party, including the court appointment of a receiver.

Land means Lots 1 and 2 DP 504760, being the property located at 220-230 Northumberland Street, Liverpool.

LEP means Liverpool City Local Environment Plan 2008.

LPI means Land and Property Information NSW or any similar department established from time to time.

Modification means the grant of any Modification Application under s96 of the Act.

Modification Application means an application to modify a Development Consent under s96 of the Act.

Monetary Contribution means the monetary contribution to be paid by the Developers to the Council in accordance with clause 5(a) of this Agreement.

Occupation Certificate means an occupation certificate as defined under s 109C of the Act, including an interim Occupation Certificate or a final Occupation Certificate.

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

Register means the Torrens Title register maintained under the NSW *Real Property Act 1900*.

Regulation means the *Environmental Planning and Assessment Regulation 2000* (NSW).

1.2 General

In this Agreement the following definitions apply:

- (a) a reference to this Agreement or another instrument includes any variation or replacement of any of them;
- (b) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (c) the singular includes the plural and vice versa;
- (d) the word "person" includes a firm, a body corporate, an unincorporated association or an authority;
- (e) A reference to a person includes a reference to the person's executors, administrators, successors, substitutes (including, without limitation, persons taking by novation) and assigns;
- (f) a reference to anything (including, without limitation, any amount) is a reference to the whole and each part of it and a reference to a group of persons is a reference to all of them collectively, to any two or more of them collectively and to each of them individually;
- (g) "include" or "including" when introducing a list of items does not limit the meaning of the words to which the list relates to those items or to items of a similar kind;
- (h) if a Party is required to do something, that includes a requirement to cause that thing to be done. If a Party is prohibited from doing anything, it is also prohibited from doing or omitting to do anything which allows or causes that thing to be done;
- (i) a reference to a statute, ordinance, code or law includes a state ordinance code or law of the Commonwealth of Australia;

- (j) a reference to a body, whether statutory or not which ceases to exist or whose powers or functions are transferred to another body is a reference to the body which replaces it or which substantially succeeds to its powers or functions;
- (k) no rule of construction applies to the disadvantage of a Party because that Party was responsible for the preparation of this Agreement;
- (l) any capitalised term used, but not defined in this Agreement, will have the meaning ascribed to it under, and by virtue of, the Act;
- (m) headings are inserted for convenience only and do not affect the interpretation of this Agreement;
- (n) 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;
- (o) 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;
- (p) a reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars;
- (q) a reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced;
- (r) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement;
- (s) a reference to this Agreement includes the agreement recorded in this Agreement; and
- (t) any schedules and attachments form part of this Agreement.

2 Planning agreement under the Act

The Parties agree that this Agreement is a planning agreement within the meaning of s93F of the Act.

3 Application of this Agreement

This Agreement applies to:

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

4 Operation of this Agreement

This Agreement operates on and from the date of this Agreement.

5 Contributions to be made under this Agreement

- (a) Prior to the issue of any Construction Certificate for the Development, the Developers will pay to the Council a monetary contribution calculated in accordance with clause 5(b).
- (b) The Monetary Contribution will be \$235,445.00 or an amount determined in accordance with the following formula, whichever is the greater:

$$\$235,445.00 \times \frac{\text{CPI at the time of payment}}{\text{CPI at the date of this Agreement}}$$
- (c) The Developers must pay the Monetary Contribution to the Council prior to the issue of a Construction Certificate for any part of the Development.
- (d) The Monetary Contribution will be taken to have been made when the Developers provide to the Council a bank cheque for the Monetary Contribution in favour of the Council.

6 Application of s94, s94A and s94EF of the Act to the Developers

- (a) Sections 94, 94A and 94EF of the Act will apply to the Development and any future development of the Land.
- (b) Benefits under this Agreement are excluded from being taken into consideration under s94(6) of the Act and its application to the Development and any future development of the Land.

7 Public Purpose

The Parties acknowledge and agree that the Monetary Contribution is made for the purpose of providing public car parking in the Liverpool Local Government Area.

8 Registration of this Agreement

8.1 *Developers' Interest*

- (a) The Developers represent and warrant that they are the registered proprietors of the Land.

8.2 *Registration of this Agreement*

- (a) The Developers agree that they 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 s93H of the Act at their cost.
- (b) The Developers at their own expense will, promptly after this Agreement comes into operation, take all practical steps, and otherwise do anything that the Council reasonably requires, to procure:
 - (i) the consent of each person who:

- (A) has an estate or interest in the Land; or
 - (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 in accordance with this
clause 8.2.
- (c) The Developers at their own expense, will take all practical steps, and otherwise do anything that the Council reasonably requires:
- (i) to procure the lodgement of this Agreement with the Registrar-General as soon as reasonably practicable after this Agreement comes into operation but in any event, no later than 90 business days after that date; and
 - (ii) to procure the registration of this Agreement by the Registrar-General in the relevant folios of the Register for the Land as soon as reasonably practicable after this Agreement is lodged for registration.
- (d) The Council will provide a release and discharge of this Agreement so that it may be removed from the folios of the Register for the Land (or any part of it) provided the Council is satisfied the Developers have duly fulfilled their obligations under this Agreement and is not otherwise in default of any of the obligations under this Agreement.

8.3 Caveat

- (a) The Developers acknowledge and agree that:
- (i) when this Agreement is executed by the Developers, the Council is deemed to have acquired, and the Developers are deemed to have granted, an equitable estate and interest in the Land for the purposes of s74F(1) of the NSW *Real Property Act 1900* and consequently the Council will have a sufficient interest in the Land in respect of which to lodge with the LPI a caveat notifying that interest;
 - (ii) they will not object to the Council lodging a caveat in the relevant folio of the Register for the Land nor will they seek to remove any caveat lodged by the Council provided the caveat does not prevent registration of any dealing or plan other than a transfer.
- (b) The Council must, at the Developers' cost, register at the LPI a withdrawal of any caveat in respect of the Land within 5 business days after the Developers comply with clause 8.2(a) and must not lodge any other caveats on the titles to any of the Land, providing the withdrawal of the caveat will only apply in respect of such parts of the Land in respect of which registration of this Agreement is procured.

8.4 Release and Discharge

- (a) The Council agrees to provide a release and discharge of this Agreement in accordance with any request made by the Developers provided:
 - (i) The Developers have paid the Monetary Contribution; and
 - (ii) The Developers are not otherwise in default of any of their obligations under this agreement.
- (b) On providing a release and discharge of this Agreement, the Council agrees to execute any documents necessary to remove the notification of this Agreement from the Register, to the extent of the release and discharge.

9 Review of this Agreement

This Agreement may be reviewed or modified by the agreement of the Parties using their best endeavours and acting in good faith.

10 Dispute Resolution

10.1 Dispute

If any dispute arises out of this Agreement (**Dispute**) a Party to the Agreement must not commence any court or arbitration proceedings unless the Parties to the Dispute have complied with the following paragraphs of this clause, except where a Party seeks urgent interlocutory relief.

10.2 Notice of Dispute

A Party to this Agreement claiming that a dispute has arisen out of or in relation to this Agreement must give written notice (**Notice**) to the other Party to this Agreement specifying the nature of the dispute.

10.3 Dispute Resolution

If the Parties do not agree within seven days of receipt of the Notice (or such further period as agreed in writing by them) as to:

- (a) the dispute resolution technique (e.g. expert determination) and procedures to be adopted;
- (b) the timetable for all steps in those procedures; and
- (c) the selection and compensation of the independent person required for such technique,

the Parties must mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales, as published by the Law Society of New South Wales from time to time, and the President of the Law Society of New South Wales or the President's nominee will select the mediator and determine the mediator's remuneration.

11 Enforcement and Security

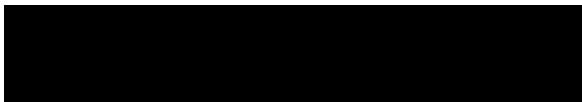
11.1 *Restriction on the issue of Certificates*

In accordance with s109F of the Act and clause 146A of the Regulation the obligation to pay the Monetary Contribution must be satisfied prior to the issue of a Construction Certificate for any part of the Development.

11.2 *General Enforcement*

- (a) Without limiting any other remedies available to the Parties, this Agreement may be enforced by any Party in any Court of competent jurisdiction.
- (b) Nothing in this Agreement prevents:
 - (i) 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
 - (ii) the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Agreement or any matter to which this Agreement relates.

12 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
 - (ii) faxed to that Party at its fax number set out below,
 - (iii) emailed to that Party at its email address set out below:
 - (A) Council Liverpool City Council
Attention: General Manager
Address: Level 2, 33 Moore Street, Liverpool NSW
 2170
Phone 1300 362 170
Fax No. 02 9821 9333
Email: lcc@liverpool.nsw.gov.au
 - (B) Developers Daniel, Francesco and Lorenzo Biordi

Fax No.
Email
- (b) If a Party gives the other Party three 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 Party if it is delivered, posted or faxed to the latest address or fax number.

- (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, two 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.
- (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, or if on a business day, after 5:00 pm 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

The Parties acknowledge that:

- (a) 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;
- (b) a Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions;
- (c) this Agreement does not impose any obligation on a consent authority to:
 - (i) grant development consent; or
 - (ii) exercise any function under the Act in relation to a change in an environmental planning instrument.

14 Assignment and Dealings

The Developers may not transfer, assign or dispose of the whole or any part of their right, title or interest in the Land (present or future) or in the Development to another person (**Transferee**), unless before they sell, transfer or dispose of that right, title or interest:

- (a) The Developers satisfy the Council, acting reasonably:
 - (i) that the proposed Transferee is financially capable of complying with the Developers' obligations under this Agreement; and
 - (ii) the Council's interests will not be diminished or fettered in any way;
- (b) The Transferee delivers to the Council a novation deed signed by the Transferee in a form and of such substance as is acceptable to the

Council, containing provisions under which the Transferee agrees to comply with all the outstanding obligations of the Developers under this Agreement;

- (c) Any default by the Developers under any provisions of this Agreement have been remedied by the Developers or waived by the Council on such conditions as the Council may determine; and
- (d) The Developers and the Transferee pay the Council's reasonable costs in relation to the assignment.

15 Costs

The Developers agree to pay or reimburse Council all reasonable costs incurred in connection with:

- (a) the negotiation, preparation and execution of this Agreement; and
- (b) advertising and exhibition of this Agreement in accordance with the Act, within three business days after receipt of a notice from the Council as to the amount of those costs.

16 Entire Agreement

This Agreement constitutes the entire agreement of the Parties about its subject matter and supersedes all previous agreements, understandings and negotiations on that 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. The Parties submit to the nonexclusive 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.

Without preventing any other method of service, any document in an action may be served on a Party by being delivered or left at that Party's address in clause 12.

19 Joint and individual liability and benefits

- (a) 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.

- (b) For the avoidance of doubt the obligations imposed upon the Developers in this Agreement bind each of Daniel Biordi, Francesca Biordi and Lorenzo Biordi individually.

20 No fetter

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.

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

- (a) The Parties acknowledge that under and by virtue of s93F(4) of the Act, any provision of this Agreement is not invalid by reason only that there is no connection between the Development and the object of the expenditure of any money required to be paid by that provision.
- (b) The Parties agree that to the extent permitted by Law, this Agreement prevails to the extent of its inconsistency with any Law.
- (c) 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.
- (d) 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 and is in accordance with the provisions of the Act.

24 Waiver

- (a) 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.
- (b) A waiver by a Party is only effective if it is in writing.
- (c) 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.

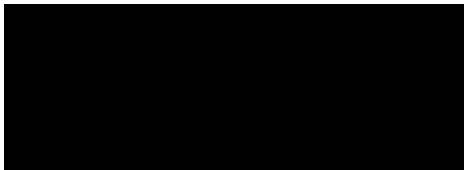
25 Goods and Services Tax

- (a) Words and expressions which are not defined in this Agreement but which have a defined meaning in the GST Law have the same meaning as in the GST Law.
- (b) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this Agreement are exclusive of GST.
- (c) If GST is imposed on any supply made under or in accordance with this Agreement, the Developers must pay the GST or pay to the Council an amount equal to the GST payable on or for the taxable supply, whichever is appropriate in the circumstances.

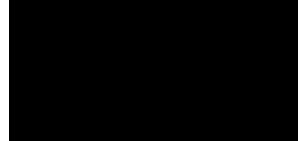
26 Counterparts

This Agreement may be executed in any number of counterparts. All counterparts taken together constitute one instrument.

Signed by **Francesco Biordi** in the)
presence of:)
)



Signature of witness

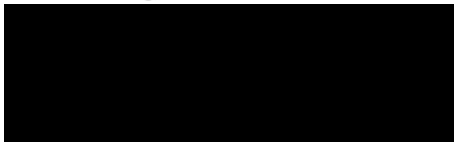


Signature of Francesco Biordi

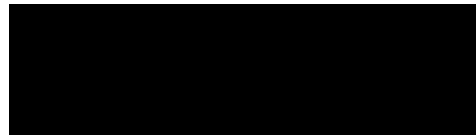
Julie Dannaoui

Print name of Witness

Signed by **Lorenzo Biordi** in the)
presence of:)
)



Signature of witness



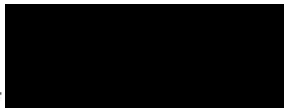
Signature of Lorenzo Biordi

Julie Dannaoui

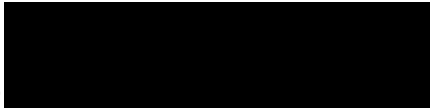
Print name of Witness

Executed as an Agreement

Executed for and on behalf of **Liverpool City Council** by its authorised delegate in accordance with a resolution passed at a duly convened meeting held on XXX XXX in the presence of:



Signature of witness



Signature of representative

Deborah Cuthbertson

Full name of witness (print)

Earl Wulff

Full name of representative (print)

Executive Asst.

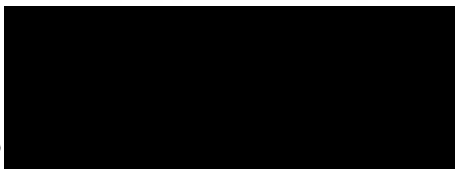
Position of witness (print)

CEO

Position of representative (print)

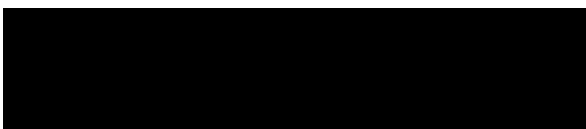
Signed by **Daniel Biordi** in the presence of:

)
)
)



Signature of Witness

**JOHN PAUL PACCHIAROTTA
SOLICITOR
CAMPBELLTOWN**



Signature of Daniel Biordi

.....

Print name of Witness