

Planning Agreement

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Planning Agreement

Dated

Parties

1. **Hurstville City Council** of 16-32 MacMahon St, Hurstville NSW 2220 (**Council**).
2. **Earljest Pty Ltd** of 8 Appaloosa Circuit Blairmount NSW (**Developer**).

Background

- A. Earljest Pty Ltd (**Developer**) is the holder of Concept Plan Approval MP 10_0101 (**Concept Approval**) for a mixed-use residential and retail development at 21 – 35 Treacy Street, Hurstville NSW (**the Land**).
- B. The Developer has made an application (MP10_0101 MOD 2) pursuant to 75W of the *Environmental Planning and Assessment Act 1979* (as amended) (**Act**) to modify the Concept Approval (**Modification Application**) which, if approved, will result in changes to the Concept Approval including an increase in gross residential floor area, an increase in indicative building envelope, changes to basement and ground floor levels, changes to the gross retail floor space, and changes to the car parking provision and layout. The total number of dwellings will increase by 45.
- C. MP10_0101 MOD 2 is accompanied by an offer by the Developer to enter into a Planning Agreement within the meaning of s.93F of the Act.
- D. The Developer has offered to provide to the Council a monetary benefit in the form of a monetary contribution of \$540,000 in total (**the VPA Contribution**) upon the issue of the Occupation Certificate for the completed development, subject to approval of MP10_0101 MOD 2 on terms that are satisfactory to the Developer.
- E. The VPA Contribution shall be in addition to any developer contributions that will also be payable in accordance with s.94 of the Act.
- F. The public purpose that the VPA Contribution shall be applied towards is [insert description of public works, public purpose or public infrastructure]. Alternatively, the Parties may subsequently agree upon another suitable public purpose within the meaning of s.93F(2) of the Act.

Operative provisions

1. Defined meanings

The definitions and interpretation clause at the back of this document sets out and explains the defined terms used in this document and the rules of interpretation that apply.

2. Planning agreement under the Act

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

3. Application of this Document

3.1 This document applies to:

- (a) the Land; and
- (b) the Concept Approval.

4. Operation of this Document

4.1 This document takes effect on the date it is executed by both parties.

4.2 This Planning Agreement will only be entered into by the Developer if the Modification Application is approved without the imposition of any condition(s) requiring (or which have the consequence of requiring) the deletion of any of the proposed dwellings.

5. Contributions

5.1 Section 94 is not excluded in respect of the Development.

5.2 Section 94A is excluded in respect of the Development.

5.3 Section 94EF is not excluded in respect of the Development.

6. Monetary Contribution

6.1 The Developer agrees to provide a payment of \$540,000 (the **VPA Contribution**) to Council prior to the issue of the occupation certificate for the development.

6.2 The parties agree that the VPA Contribution is to be used by Council exclusively towards the provision of public works to [insert description of public works, purpose or infrastructure]. Alternatively, the Parties may subsequently agree upon another suitable public purpose for the expenditure of the VPA Contribution within the meaning of s.93F(2) of the Act.

7. Registration of this Document

7.1 The parties agree to promptly do all things that are necessary for Council to procure the registration of this document in the relevant folio of the Register for the Land in accordance with section 93H of the Act and in accordance with this clause 7.1.

7.2 The Developer will obtain all consents to the registration of this document on the title to the Land as required by Land and Property Information.

7.3 The Developer must within 20 Business Days of execution of this document produce to the Council:

- (a) any letters of consent necessary for the registration of this document and any other documents that may be required by the Registrar-General;
- (b) a copy of the production slip number as evidence that the certificate of title has been produced to Land and Property Information for the purpose of the registration of the document; and
- (c) a bank cheque for the registration fees payable in relation to the registration of this document on the title to the Land.

7.4 The parties must promptly comply with any requisitions that may be raised with regard to registration of this document from Land and Property Information.

7.5 Subject to clause 7.3(b) and clause 7.3(c) the Council will register this document on the Land.

7.6 The Council will notify the Developer following registration of this document by the Council.

8. Release and discharge of Document by Council

The Council must promptly do all things reasonably required by the Developer to release and discharge this document with respect to any part of the Land (such that this document is no longer registered by the Registrar-General under section 93H of the Act in relation to that part of the Land) upon the earlier of:

- (a) termination of the document under clause 9,
- (b) the occurrence of any of the release and discharge events in clause 100.

9. Termination of Document

Either party may terminate this document if:

- (a) the document commences, but the Development Consent issued for the Development lapses or is declared void or invalid;
- (b) the Development Consent issued for the Development is surrendered.

10. Release and discharge

The Developer is released and discharged from its obligations under this document upon termination under clause 9.

11. Dispute Resolution

11.1 Notice of Dispute

If a party claims that a dispute has arisen under this document (**Claimant**), it must give written notice to the other party (**Respondent**) stating the matters in dispute and designating as its representative a person to negotiate the dispute (**Claim Notice**). No party may start court proceedings (except for proceedings seeking interlocutory relief) in respect of a dispute unless it has first complied with this clause 11.1.

11.2 Response to Notice

Within 10 business days of receiving the Claim Notice, the Respondent must notify the Claimant of its representative to negotiate the dispute

11.3 Negotiation

The nominated representative must:

- (a) meet to discuss the matter in good faith within 5 business days after service by the Respondent of notice of its representative;
- (b) use reasonable endeavours to settle or resolve the dispute within 15 business days after they have met.

11.4 Further Notice if Not Settled

If the dispute is not resolved within 15 business days after the nominated representatives have met, either party may give to the other a written notice calling for determination of the dispute (**Dispute Notice**) by mediation under clause 11.5.

11.5 Mediation

If a party gives a Dispute Notice calling for the dispute to be mediated:

- (a) the parties must agree to the terms of reference of the mediation within 5 business days of the receipt of the Dispute Notice (the terms will include a requirement that the mediation rules of the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply);
- (b) the Mediator will be agreed between the parties, or failing document within 5 business days of receipt of the Dispute Notice, either party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator;
- (c) the Mediator appointed pursuant to this clause 11.5 must:
 - (i) have reasonable qualifications and practical experience in the area of the dispute; and
 - (ii) have no interest or duty which conflicts or may conflict with his function as mediator, he being required to fully disclose any such interest or duty before his appointment;
- (d) the Mediator will be required to undertake to keep confidential all matters coming to his knowledge by reason of his appointment and performance of his duties;
- (e) the parties must within 5 business days of receipt of the Dispute Notice notify each other of their representatives who will be involved in the mediation;
- (f) the parties agree to be bound by a mediation settlement and may only initiate judicial proceedings in respect of a dispute which is the subject of a mediation settlement for the purpose of enforcing that mediation settlement;
- (g) in relation to costs and expenses:

- (i) each party will bear their own professional and expert costs incurred in connection with the mediation; and
- (ii) the costs of the Mediator will be shared equally by the parties unless the Mediator determines a party has engaged in vexatious or unconscionable behaviour in which case the Mediator may require the full costs of the mediation to be borne by that party.

11.6 Litigation

If the dispute is not finally resolved in accordance with this clause 11, either party is at liberty to litigate the dispute.

11.7 Continue to perform obligations

Each party must continue to perform its obligations under this document, despite the existence of a dispute.

12. Enforcement

12.1 This document may be enforced by either party in any court of competent jurisdiction in the State of New South Wales.

12.2 The parties agree that the requirement for the Developer to provide the Monetary Contribution is a restriction on the issue of an occupation certificate in accordance with section 109H(2) of the Act.

13. Notices

13.1 Any notice, consent, information, application or request that must or may be given or made to a party under this document 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;

Council

Attention: General Manager
 Address: 16-32 MacMahon St, Hurstville NSW 2220
 Fax Number: +61 2 9330 6223

Developer

Attention: Will Morgan
 Address: Henlia 24 Pty Ltd
 ATF Hurstville Unit Trust
 Level 37, Chifley Tower
 2 Chifley Square
 Sydney NSW 2000

Fax Number: +61 2 8080 2399

- 13.2 If a party gives the other party 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.
- 13.3 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, 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.
- 13.4 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 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.

14. Approvals and consent

Except as otherwise set out in this document, and subject to any statutory obligations, a party must act promptly and reasonably in giving or withholding an approval or consent to be given under this document.

15. Costs

The parties will each bear their own costs of negotiating, preparing and execution of this document. The Developer will bear any costs associated with its stamping and registration.

16. Entire Agreement

This document 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 document 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 document and all transactions incidental to it.

18. Governing law and jurisdiction

This document 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 document, any document, covenant, representation or warranty under this document 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.

20. No fetter

Nothing in this document will 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 will 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 document and comply with their obligations under the document and that entry into this document will not result in the breach of any law.

22. Severability

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

23. Modification

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

24. Waiver

The fact that a party fails to do, or delays in doing, something the party is entitled to do under this document, 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 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 document 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. Definitions and interpretations

26.1 Definitions

In this document the following definitions apply:

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

Concept Approval means Concept Plan Approval MP 10_0101 for a mixed-use residential and retail development at 21 – 35 Treacy Street, Hurstville NSW.

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 21 – 35 Treacy Street, Hurstville NSW.

Modification Application means the application MP10_0101 MOD 2 made by the Developer pursuant to 75W of the *Environmental Planning and Assessment Act 1979* (as amended) (**Act**) to modify the Concept Approval.

VPA Contribution means a payment of \$540,000 by the Developer to Council in accordance with the conditions set out in this Planning Agreement.

26.2 Interpretation

In the interpretation of this document, 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 document 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 document is not a business day, the act, matter or thing must be done on the next business day;
- (d) a reference in this document to dollars or \$ means Australian dollars and all amounts payable under this document are payable in Australian dollars;
- (e) a reference in this document 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 document 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 document;

- (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 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 document includes the agreement recorded in this document;
- (m) a reference to a party to this document 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 document.

Executed as an agreement

The common seal of Hurstville City Council
was affixed under a resolution passed by Council
on
in the presence of:

General Manager

Mayor

Signed on behalf of **Henlia 24 Pty Ltd** by:

Secretary/Director

Director

Print name

Print name

Schedule 1 – Requirements under section 93F of the Act

The parties acknowledge and agree that the table set out below provides for certain terms, conditions and procedures for the purpose of the document complying with the Act.

Requirement under the Act	This document
<p>Planning instrument and/or development application – (section 93F(2))</p> <p>The Developer has:</p> <p>(a) sought a change to an environmental planning instrument;</p> <p>(b) made, or proposes to make, a Development Application;</p> <p>(c) entered into an agreement with, or is otherwise associated with, a person, to who paragraph (a) or (b) applies.</p>	<p>(a) No.</p> <p>(b) Yes.</p> <p>(c) No.</p>
<p>Description of land to which this document applies – (section 93F(3)(a))</p>	The Land as defined in clause 26.1.
<p>Description of change to the environmental planning instrument to which this document applies and/or the development to which this document applies – (section 93F(3)(b))</p>	The Development as defined in clause 26.1.
<p>The scope, timing and manner of delivery of contribution required by this document – (section 93F(3)(c))</p>	See clause Error! Reference source not found.
<p>Applicability of sections 94 and 94A of the Act – (section 93F(3)(d))</p>	The application of section 94 is not excluded in respect of the Development. The application of section 94A of the Act is excluded in respect of the Development.
<p>Applicability of section 94EF of the Act – (section 93F(3)(d))</p>	The application of section 94EF of the Act is not excluded in respect of the Development.
<p>Consideration of benefits under this document if section 94 applies – (section 93F(5))</p>	No.
<p>Mechanism for Dispute Resolution – (section 93F(3)(f))</p>	See clause 11.
<p>Enforcement of this document – (section 93F(3)(g))</p>	See clauses Error! Reference source not found. , 7 and 12.
<p>No obligation to grant consent or exercise functions – (section 93F(10))</p>	See clause 19.