

GEORGES RIVER COUNCIL

EXTRAORDINARY MEETING

Tuesday, 13 December 2016

Environment and Planning

CON029-16	Voluntary Planning Agreement offer by Shanghai Lihua Hurstville Pty Ltd and SLH 108 Pty Ltd in relation to a Planning Proposal for 108, 112 and 124 Forest Road and 1-3 Wright Street, Hurstville (Report by Executive Strategic Planner, Nerida Stores)	2
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Environment and Planning

Item: CON129-16 Voluntary Planning Agreement offer by Shanghai Lihua Hurstville Pty Ltd and SLH 108 Pty Ltd in relation to a Planning Proposal for 108, 112 and 124 Forest Road and 1-3 Wright Street, Hurstville

Author: Executive Strategic Planner, Nerida Stores

Directorate: Environment and Planning

Matter Type: Environment and Planning

Recommendation

- (a) That Council accept the written offer dated 7 December 2016 from Shanghai Lihua Hurstville Pty Ltd and SLH 108 Pty Ltd to enter into a Voluntary Planning Agreement in relation to the Planning Proposal PP2014/0004 which seeks amendments to Hurstville LEP 2012 at 108, 112 and 124 Forest Road and 1-3 Wright Street, Hurstville, which will deliver the following public benefits (summarised) over and above the usual Section 94 Contributions applicable to the development:
1. the Developer will provide a monetary contribution of \$3,775,750 within 28 days of the date of the Instrument Change is gazetted.
 2. the Developer will dedicate the Dedication Land for the purpose of road widening, at no cost to Council, if the Instrument Change is gazetted. The timing of the dedication of the land and the construction of the road is still to be agreed between the parties.
- (b) That Council delegate authority to the General Manager to negotiate the specific terms of the Voluntary Planning Agreement, and to subsequently exhibit a draft of the Voluntary Planning Agreement in accordance with the relevant provisions of the Environmental Planning and Assessment Act 1979, and if a Gateway is issued by the Department of Planning and Environment for the Planning Proposal.
- (c) That Council delegate authority to General Manager to:
1. Authorise any minor changes to the draft Voluntary Planning Agreement following public exhibition, provided that those changes do not diminish the value or nature of the public benefits to be delivered as identified in (a) above;
 2. Subsequently enter into the Voluntary Planning Agreement on behalf of Council; and
 3. Any land to be dedicated to Council, other land for the purposes of a road, under the terms of the Voluntary Planning Agreement is to be classified as Operational Land in accordance with the provisions of Section 31(2) of the Local Government Act 1993.

Executive Summary

1. Council is in receipt of a Letter of Offer dated 7 December 2016 (Attachment 1) and an attached Heads of Agreement (Attachments 2) outlining the terms of the offer, from Shanghai Lihua Hurstville Pty Ltd and SLH 108 Pty Ltd (the Developer) to enter into a Voluntary Planning Agreement (VPA) in relation to a Planning Proposal at 108, 112 and 124 Forest Road and 1-3 Wright Street, Hurstville. The VPA will deliver additional public benefits over and above the usual Section 94 contributions applicable to the development.
2. The Public benefits are listed as follows:

- a) the Developer will provide a cash contribution of \$3,775,750 for the provision of public amenities and public services within 28 days of the date of the Instrument Change is gazetted.
 - b) the Developer will dedicate the Dedication Land for the purpose of road widening, at no cost to Council, if the Instrument Change is gazetted. The timing of the dedication of the land and construction of the road is still to be agreed between the parties.
3. The Heads of Agreement states that the parties agree to work together in good faith and to use their best endeavours to negotiate and reach agreement on the terms of the VPA in accordance with the Heads of Agreement by 28 February 2016. Also it provides that the Developer must pay all of Council’s reasonable legal costs in the preparation, drafting and negotiation of the Heads of Agreement and VPA.
4. The Public Benefits have been assessed against Council’s Policy on Planning Agreements (Policy) and are considered to be satisfactory in respect of the Acceptability Test under the Policy.
5. Therefore it is recommended that Council accept the Letter of Offer dated 7 December 2016 and the attached Heads of Agreement dated 5 December 2016 which outlines the terms of the offer to enter into a Voluntary Planning Agreement with the Developer in respect the Planning Proposal PP2014/0004 at 108, 112 and 124 Forest Road and 1-3 Wright Street, Hurstville.

Background

6. The Developer lodged a Planning Proposal with Council seeking amendments to Hurstville LEP 2012 in relation to the zoning, building heights and floor space ratio for the subject site at 108, 112 and 124 Forest Road and 1-3 Wright Street, Hurstville.



Figure 1: Aerial photo of the subject site

7. The Planning Proposal is the subject of a separate report to Council within this Agenda. The report follows IHAP’s consideration of the Planning Proposal at its meeting of 24 November 2016. The report recommends that Council endorse the forwarding of the Planning Proposal to the NSW Department of Planning and Environment to request a Gateway Approval for an amendment to the Hurstville LEP 2012 in relation to Nos. 108, 112 and 124 Forest Road and Nos 1 and 3 Wright Street, Hurstville to:
- i. rezone Nos 108 and 112 Forest Road Hurstville from B2 - Local Centre Zone to B4 – Mixed Use Zone;

- ii. rezone Nos 1 - 3 Wright Street, Hurstville from R3 - Medium Density Residential Zone to B4 - Mixed Use Zone;
- iii. increase the height of buildings for Nos 108 and 112 Forest Road and 1 and 3 Wright Street, Hurstville to 34.5m;
- iv. increase the height of buildings for No 124 Forest Road, Hurstville to 46.5m;
- v. increase the maximum floor space ratio for Nos 108 and 112 Forest Road and Nos 1 and 3 Wright Street, Hurstville to 4:1;
- vi. amend the Lot Size Map (Sheet LSZ_008) to remove Nos. 1 and 3 Wright Street Hurstville from its application and consistent with the B4 - Mixed Use zone; and
- vii. amend Clause 4.4A of HLEP 2012 to include a provision that requires a minimum non-residential FSR of 0.5:1 for the subject site.

Voluntary Planning Agreement – terms of offer

8. The Developer has negotiated with Council via the General Manager's Office the terms of a Letter of Offer to enter into a Voluntary Planning Agreement (VPA).
9. The Developer has submitted a Letter of Offer dated 7 December 2016 (Attachment 1) to Council to enter into a VPA in relation to the Planning Proposal PP2014/0004 and which refers to an attached Heads of Agreement (Attachment 2). The Heads of Agreement outlines the terms of the offer, which delivers additional public benefits over and above the usual Section 94 contributions applicable to the development.
10. The Heads of Agreement between the Developer and Council has been entered into in good faith and, should the offer be accepted by Council, each party is to use their best endeavours to negotiate and reach agreement on the terms of the VPA in accordance with the Heads of Agreement by 28 February 2017.
11. The Public Benefits are listed as follows:
 - the Developer will provide a cash contribution of \$3,775,750 within 28 days of the date of the Instrument Change is gazetted.
 - the Developer will dedicate the Dedication Land (as shown in Annexure A of the Heads of Agreement) for the purpose of road widening, at no cost to Council, if the Instrument Change is gazetted. The land is approximately a 2 metre wide strip of land, approximately 98 metres in length, fronting Forest Road, between Wright Street and Hudson Street. The timing of the dedication of the land and construction of the road is still to be agreed between the parties.
12. The above public benefits have been assessed in regards to the Acceptability Test contained in Council's VPA policy as follows:

Does the Planning Agreement:	Assessment
(a) Satisfy the statutory requirements for planning agreements contained in the Act and Regulation?	<p>The Letter of Offer and Heads of Agreement outlining the terms of the offer from the Developer do not form 'a <i>planning agreement</i>' under the terms of the Act and Regulations. As such they don't need to fully satisfy the statutory requirements of the Act and Regulations.</p> <p>The purpose of the Letter of Offer and Heads of Agreement is to outline the general terms on which the Planning Agreement will be based. Hence at this initial stage the general terms should meet the requirements of Section 93F(2), which describes what a public</p>

	<p>purpose includes (without limitation) on which Planning Agreements can be based. Section 93F(2) describes a public purpose (without limitation) as follows:</p> <ul style="list-style-type: none"> (a) <i>the provision of (or the recoupment of the cost of providing) public amenities or public services,</i> (b) <i>the provision of (or the recoupment of the cost of providing) affordable housing,</i> (c) <i>the provision of (or the recoupment of the cost of providing) transport or other infrastructure relating to land,</i> (d) <i>the funding of recurrent expenditure relating to the provision of public amenities or public services, affordable housing or transport or other infrastructure,</i> (e) <i>the monitoring of the planning impacts of development,</i> (f) <i>the conservation or enhancement of the natural environment.</i> <p>The key terms of the Heads of Agreement fall under points ‘(a)’ and ‘(c)’ of the listed public purposes above, as they consist of a monetary contributions and dedication of land for road widening.</p> <p>Other legislative requirements for VPAs include, but are not limited to, securities, dispute mechanisms, the application of S94 and/or S94A contributions. In this case the developer has indicated the public benefits included in the Heads of Agreement are over and above the usual Section 94 contributions that will be applicable to the development.</p> <p>Further, in respect to securities and dispute mechanisms, these will be resolved at the drafting stage of the Planning Agreement between the parties.</p> <p>A significant statutory requirement is the public exhibition of the Planning Agreement, once both parties have agreed on its final form and Gateway Approval is provided by the Department for the Planning Proposal. The minimum exhibition period under Section 93G(1) of the Act is 28 days.</p>
<p>(b) Comply with the principles set out in clause 2.3 of this Policy?</p>	<p>Clause 2.3 of the Planning Agreement Policy contains 11 principles as follows:</p> <ul style="list-style-type: none"> 1. <i>planning decisions must not be bought or sold through planning agreements;</i> 2. <i>the Council will not allow planning agreements to improperly fetter the exercise of its functions under the Act, Regulation or any other Act or law;</i> 3. <i>the Council will not use planning agreements for</i>

any purpose other than a proper planning purpose;

- 4. the consideration, negotiation and assessment of a proposed planning agreement will be separate from the consideration of the planning merits of a development application or planning proposal;*
- 5. the Council will not use planning agreements as a means to overcome revenue raising or spending limitations to which it is subject or for other improper purposes;*
- 6. development that is unacceptable on planning grounds will not be permitted because of public benefits offered by developers that do not make the development acceptable on planning grounds;*
- 7. the Council will not seek benefits under a planning agreement that are wholly unrelated to the development;*
- 8. in assessing a development application or planning proposal, the Council will not take into consideration planning agreements that are wholly unrelated to the subject matter of the development application or planning proposal, nor will the Council give disproportionate weight to a planning agreement;*
- 9. the Council will not allow the interests of developers, individuals or interest groups to outweigh the public interest when considering a proposed planning agreement;*
- 10. the Council will not improperly rely on its position in order to extract unreasonable public benefits from developers under planning agreements; and*
- 11. where the Council has a commercial stake in development the subject of a planning agreement, it will take appropriate steps to ensure that it avoids a conflict of interest between its role as a planning authority and its interests in the development.*

Taking the above principles into consideration, Council via the General Manager's Office has negotiated the terms of the Letter of Offer to enter into a Planning Agreement, as contained in the Heads of Agreement.

The Developer will only become obliged to provide the public benefits outlined in the Heads of Agreement should the proposed amendments to Hurstville LEP 2012 (Instrument Change) as recommended to Council

	<p>for the Planning Proposal be gazetted.</p> <p>The monetary contribution and land dedication provide public benefits that are directly in relation to ameliorating impacts of the development brought about by the proposed amendments to zoning, increase in height and FSR.</p>
(c) Be directed towards a proper or legitimate planning purpose ordinarily ascertainable from the statutory planning controls and other adopted planning policies applying to development and the circumstances of the case?	As discussed under item '(a)' above, the proposed public benefits outlined in the Heads of Agreement fall under the description of a public purpose, as described in Section 93F(2) of the Act.
(d) Provide for public benefits that bear a relationship to the development that is not wholly unrelated to the development?	<p>The agreed public benefits under the Heads of Agreement bear relationship to the development, but also provide benefit to the greater public in relation to the following:</p> <ul style="list-style-type: none"> • Improve the road network and traffic flows along Forest Road (the widening of Forest Road between Wright Street and Hudson Street). • Provide key infrastructure works within the Hurstville city Centre. • Improve public amenities and services in the Hurstville City Centre. • Provide community benefits to the local community.
(e) Produce outcomes that meet the general values and expectations of the public and protect the overall public interest?	<p>The general expectations of the public and the protection of the public interest in the case of development, is an expectation that the developer will bear some cost in ameliorating against the impacts their private development of their land will have on its neighbours and the greater community. Whilst Section 94 Plans raise funds for Council to put toward capital projects to mitigate against the impacts of ongoing development, those plans are based on particular predictions made from planning controls in place at the time the plans were published. Planning Agreements are able to step in where particular development was 'unforeseen' by the Section 94 Plan, i.e. where the developer seeks an increase over and above the current development standards contained in a Local Environmental Plan to obtain a greater outcome.</p> <p>The proposed amendments to Hurstville LEP 2012 for the subject site is such a case. The proposal seeks to rezone a portion of the site and seeks increases in the building heights and FSR increases beyond the Hurstville LEP's current standards. As such the public</p>

	<p>benefits contained in the Heads of Agreement, as offered by the Developer, provide further mitigation against the impact of the development commensurate with the uplift sought in the development controls. As such they can be reasonably viewed to be meeting the general values and expectations of the public.</p>
<p>(f) Provide for reasonable means of achieving the relevant purposes and outcomes and securing the benefits?</p>	<p>The terms outlined in the Heads of Agreement provides timelines by which the public benefits are to be delivered. Nevertheless, Section 93F(3)(g) requires a Planning Agreement to contain suitable means of enforcement in the form of a bond or bank guarantee. In drafting the Planning Agreement the parties will negotiate appropriate securities to meet the provisions of Section 93F(3)(g) to ensure the document complies with legislative requirements.</p>
<p>(g) Protect the community's reasonable planning expectations and avoid environmental harm?</p>	<p>As per item '(e)' above the public benefits to be provided under the Planning Agreement will enhance the public domain and provide some amelioration against the impacts of the development. In terms of avoiding environmental harm, this will need to be addressed in the assessment of the future development application.</p>
<p>(h) Ensure the quantum of the public benefit offered is commensurate with the value of the development contributions which the Council considers are reasonably due in the circumstances?</p>	<p>The quantum of the public benefit offered in the Heads of Agreement is considered to be reasonable in the circumstances of case for the following reasons:</p> <ul style="list-style-type: none"> • the proposed Planning Agreement will provide a cash contribution of \$3,775,750 within 28 days of the date of the Instrument Change is gazetted. • the proposed Planning Agreement will dedicate the Dedication Land (as shown in Annexure A of the Heads of Agreement) for the purpose of road widening, at no cost to Council, if the Instrument Change is gazetted. The land is approximately a 2 metre wide strip of land, approximately 98 metres in length, fronting Forest Road, between Wright Street and Hudson Street. The timing of the dedication is still to be agreed between the parties. <p>These contributions are over and above the standard Section 94 liability for the development, which are discussed in the body of this report.</p>

Section 94 Liability

13. The estimated Section 94 liability for the proposed development, as at September Quarter 2016, is as follows:

Residential Component

Dwelling Type	No. Units	Rate	Totals
1 bed	43	\$9,424.50	\$397,427.50
2 bed	130	\$14,645.83	\$1,903,957.90
3 bed	44	\$20,000.00	\$880,000.00
Subtotal 1			\$3,181,385.40

Non-residential Component

Commercial Space	Sqm	Rate	Total
Retail/Commercial	1150	\$159.88	\$183,862.00
Subtotal 2			\$183,862.00

Total Section 94 liability (sub-totals 1 and 2) = \$3,365,247.40

14. With a Section 94 liability of \$3,365,247.40 the VPA offer (excluding the value of the land) at \$3,775,750 is a 112% increase over and above the Section 94 liability, which is significant. In many cases developers tend to just seek a redistribution of the Section 94 liability, such that it benefits their particular development, i.e. internalises the costs. Thus, the offer is considered a reasonable in the circumstances of the case due the amount of uplift to be provided via the Planning Proposal process to rezone a portion of the site and increase the building heights and FSR for portions of the site.

Next Steps

15. Should Council resolve to support the Planning Proposal (reported separately) and VPA Offer, as per the recommendation, the following milestones will need to occur to progress the VPA:
- i. Council will engage Panel Solicitor to Draft VPA
 - ii. Upon receipt of initial draft from Panel Solicitor, copy can be provided to Developer for review.
 - iii. Parties to VPA meet to discuss initial draft and negotiate details of the VPA. This process is circular and may also involve draft being circulated between legal parties representing Parties to the VPA, until both parties are in agreement with final content of the VPA.
 - iv. Once final contents of VPA are agreed, the Draft VPA must be publicly notified for a minimum of 28 days in accordance with the EPA Act and EPA Regulation with the Planning Proposal (subject to a Gateway being issued by the Department of Planning and Environment).
 - v. Following public notification, should no submissions be received objecting the VPA, the VPA can be entered into on behalf of Council by signature of the General Manager.
 - vi. Once entered into, the VPA can be registered on the Title of the land to which it relates.
16. It should be noted that as the VPA relates to the Planning Proposal PP2014/0004, the VPA will proceed with the Planning Proposal process and exhibition of the VPA is subject to a Gateway Approval being issued by the Department of Planning and Environment.

Financial Implications

17. No budget impact for this report.

18. Under the Heads of Agreement the Developer must pay all of Council's reasonable legal costs and disbursements in connection with the preparation, drafting and negotiation of the Heads of Agreement and the VPA. Also any stamp duty payable on this Heads of Agreement is payable by the Developer.
19. The timing for the dedication of the land and the construction of the road will be discussed with the landowner/applicant as part of the preparation of the VPA. Council is to note that there may be financial liability on Council for the construction of the road. The estimated cost of these works is not known at this stage.

File Reference

16/625