

ATTACHMENTS DISTRIBUTED UNDER SEPARATE COVER

CCL 25/05/21 - ADOPTION OF THE PLANNING AGREEMENT POLICY 2021

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**CCL 25/05/21 - ADOPTION OF THE PLANNING AGREEMENT
POLICY 2021**

ITEM-47 **Attachment A:** Planning Agreement Policy 2021

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Policy

Planning Agreement Policy 2021

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Part A Preliminary

1 Purpose

- 1.1 This Policy (Policy) sets out City of Newcastle's (CN's) approach to planning agreements, in keeping with the provisions of the *Environmental Planning and Assessment Act 1979* (NSW) (the Act) and the *Environmental Planning and Assessment Regulation 2000* (NSW) (the Regulation).

2 Scope

- 2.1 This Policy applies to planning agreements that Council may enter into with a developer who requests changes to the Newcastle Local Environmental Plan (LEP) through a Planning proposal or has made, or proposes to make, a Development application or application for a complying development certificate for land within the City of Newcastle Local Government Area (LGA).

3 Objectives

- 3.1 The objectives of this policy are:
- (a) To establish a fair, transparent and accountable framework governing the use of planning agreements by CN officers and Council.
 - (b) To facilitate flexible and innovative delivery of public infrastructure, facilities, works services and social amenities in line with CN strategic planning objectives for planning proposals, development applications and/or complying development certificates.
 - (c) To provide a means for stakeholders in development to have greater involvement in the delivery of appropriate public benefits identified by strategic planning plans and policies.
 - (d) To facilitate public participation and allow the community to gain an understanding of the benefits of planning agreements for the provision of public benefit.

4 Principles

- 4.1 Council is committed to:

Accountability and transparency

- (a) Planning decisions will not be unduly influenced by planning agreements;
- (b) Council will not allow planning agreements to improperly fetter the exercise of its functions under the Act, Regulation or any other Act or law;

Commitment to the community

- (c) Planning agreements will be underpinned by proper strategic land use planning and support the local strategic planning framework, including CN's Community Strategic Plan (CSP), Newcastle Local Strategic Planning Statement (LSPS), Newcastle Local Housing Strategy (LHS) and other relevant adopted plans, policies and strategies;
- (d) Development that is unacceptable on planning grounds will not be permitted regardless of public benefits offered by developers;

Fairness

- (e) Council will not seek benefits under a planning agreement that are wholly unrelated to a development;
- (f) When considering a development or Instrument change, Council will not give undue weight to a planning agreement;
- (g) Council will not allow the interests of individuals or small groups to demand benefits, which otherwise outweigh the public interest;

- (h) Council will not take advantage of an imbalance of bargaining power with the developer, for example, it will not improperly rely on its statutory position in order to extract unreasonable public benefits under a planning agreement;
- (i) Planning agreements will not be used as a means of general revenue raising or to overcome revenue shortfalls.

Part B Introduction

5 Legislative Framework

- 5.1 Part 7, Division 7.1, Subdivision 2 of the Environmental Planning and Assessment Act 1979 (the Act) provides the legislative framework for planning agreements considered.
- 5.2 Part 4, Division 1A of the Environmental Planning and Assessment Regulation 2000 (the Regulation) has further requirements relating to the form and subject matter of planning agreements, making, amending and revocation of planning agreements, giving public notice and other procedural arrangements relating to planning agreements.

Note:

This policy should be read in conjunction with the NSW Department of Planning, Industry and Environment's *Planning Agreements Practice Note - February 2021*. This Practice Note provides detailed guidance on the negotiation, administration and making of planning agreements.

Part C – Use of planning agreements

6 Circumstances in which Council may consider entering into a planning agreement

- 6.1 Council may consider entering into a planning agreement in the following instances (this is not an exhaustive list):
 - a) Major development sites or precincts that are owned by a single land-owner or a consortium of land-owners.
 - b) Where the developer has a direct incentive, such as bringing forward potential development, to be involved in the delivery of community infrastructure.
 - c) Where the developer wants to provide community infrastructure in addition to, or at a higher standard than, what has been specified under the Contributions plan.
 - d) Where Council and the developer agree to a different and better or more innovative outcome than can be achieved through imposing direct or indirect contributions. This may include the provision of publicly viewable and/or accessible art.
 - e) Where a proposed development has not been anticipated by Council thus works and facilities to cater for this development have not been identified. A planning agreement can be prepared to specifically target the needs of the development.
 - f) Where necessary infrastructure identified in an adopted contributions plan will be brought forward, or infrastructure not identified in such a plan, that achieves a net public benefit, will be delivered.

7 Land use planning and development objectives that can be addressed by Planning agreements

- 7.1 The following matters may be addressed through planning agreements (this is not an exhaustive list):
- a) the demands created by the development for public amenities, public services, transport and other infrastructure;
 - b) conservation or enhancement of the natural environment;
 - c) provision of affordable housing;
 - d) any deficiency in the provision of public facilities in the City of Newcastle LGA;
 - e) inclusions in the development that meet specific planning objectives of CN;
 - f) source of funds for recurrent expenditure relating to the provision of public amenities or public services, affordable housing or transport or other infrastructure;
 - g) monitoring the planning impacts of development;
 - h) securing planning benefits for the wider community.

8 Acceptability test to be applied to all planning agreements

- 8.1 CN officers will assess the planning agreement against the test below, which is generally an applicable test, for determining the acceptability of a planning agreement.
- 8.2 The acceptability test requires that planning agreements:
- a) Are directed towards legitimate planning purposes, that can be identified in the statutory planning controls and other adopted planning strategies and policies applying to development;
 - b) Provide for the delivery of infrastructure or public benefits not wholly unrelated to the development;
 - c) Produce outcomes that meet the general values and expectations of the public and protect the overall public interest;
 - d) Provide for a reasonable means of achieving the desired outcomes and securing the benefits;
 - e) Protect the community against adverse planning decisions.

Note:

Planning agreements that seek to change the purpose, use or ownership of CN land, including the dedication of land to Council, will involve consultation with relevant internal stakeholders, including CN's Asset Advisory Committee if deemed appropriate.

9 Preparation and form of a planning agreement

- 9.1 The developer must prepare a planning agreement relating to a particular application for an Instrument change, Development application or complying development certificate which reflects Council's policy and CN's procedures adhere to all relevant legislation and pays relevant fees prescribed by Council's adopted fees and charges.

10 Preparing a draft planning agreement on behalf of Council

- 10.1 CN officers will liaise with the developer and prepare a draft planning agreement on behalf of Council. Councillors are not involved in discussions with the developer on the planning agreement.

11 Separation of CN's commercial and planning assessment roles

- 11.1 If CN has a commercial interest in the subject matter of a planning agreement as a landowner, developer or financier, we will ensure that the person who assesses the application to which a planning agreement relates is not the same person, or a subordinate of the person, who negotiated the terms of the planning agreement on behalf of Council.

12 Public comment on planning agreements prior to adoption by Council

- 12.1 CN encourages the public to make submissions on planning agreements. This will allow Council to better understand local needs and permit fine tuning of the planning obligations set out in any planning agreement.
- 12.2 Council will consider any submissions received during the formal exhibition period. If the draft planning agreement is substantially changed because of the submissions received during the exhibition period, the draft planning agreement and explanatory note may be required to be re-exhibited.
- 12.3 Public submissions received during the exhibition period will be reported to the elected Council with the draft planning agreement when the planning agreement is reported for final endorsement.

13 Application of section 7.11 and section 7.12 Local Infrastructure Contributions to development to which a planning agreement relates

- 13.1 The use of a planning agreement does not exclude the application of section 7.11 or section 7.12 Local Infrastructure Contributions to a development to which the agreement relates, unless otherwise agreed to by Council.

Annexure A - Definitions

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

CEO means Chief Executive Officer of the City of Newcastle and includes their delegate or authorised representative.

References to the Chief Executive Officer are references to the General Manager appointed under the *Local Government Act 1993* (NSW).

Contributions Plan means a contributions plan approved under section 7.18 of the Act for the purpose of requiring contributions under section 7.11 or 7.12 of the Act.

Council means the elected Council.

City of Newcastle (CN) means Newcastle City Council.

Developer means a person who has sought a change to an environmental planning instrument (which includes the making, amendment or repeal of an instrument (s7.4(11)), or who has made or proposes to make a development application, or who has entered into a planning agreement with or is otherwise associated with such a person.

Development application has the same meaning as in the EP&A Act.

Explanatory note means a written statement that provides details of the objectives, nature, effect and merits of a planning agreement, or an amendment to or revocation of a planning agreement to be used for or applied towards a public purpose.

Instrument change means a change to an environmental planning instrument (e.g. the Newcastle Local Environment Plan) to facilitate a development the subject of a planning agreement.

Development or Infrastructure contribution means the provision made by a developer under a planning agreement, being a monetary contribution, the dedication of land free of cost or the provision of a material public benefit to be used for or applied towards a public purpose.

Net public benefit is a benefit that exceeds the benefit derived from measures that would address the impacts of particular development on surrounding land or the wider community.

Nominated Project manager means the nominated Council officer who will be involved in reviewing the draft planning agreement and oversees implementation of the planning agreement.

Planning agreement is a voluntary agreement between the Council and a landowner or developer who seeks an amendment to the planning controls for land or who seeks approval for a proposed development. The developer may be required to dedicate land free of cost, pay a monetary contribution, or provide any other material public benefit, or any combination of them, to be used for or applied towards a public purpose under a planning agreement.

Planning authority has the same meaning as in Division 7.1 of Part 7 of the EP&A Act, and means:

- a) a council, or
- b) the Minister for Planning, or
- c) the Planning Ministerial Corporation, or
- d) a development corporation (within the meaning of the Growth Centres (Development Corporations) Act 1974), or
- e) a public authority.

Planning benefit means a development contribution that confers a net public benefit.

Planning obligation means an obligation imposed by a planning agreement on a developer requiring the developer to make a development contribution.

Planning proposal has the same meaning as in the EP&A Act.

Practice Note means the Planning Agreement Practice Note, published by the Department of Planning, Industry and Environment – February 2021.

Public benefit means the benefit enjoyed by the public as a consequence of a development contribution.

Public facilities means public infrastructure, amenities and services.

Public purpose means any purpose that benefits the public, including by not limited to a purpose specified in section 7.4 of the Act.

Regulation means the Environmental Planning and Assessment Regulation 2000.

Unless stated otherwise, a reference to a section or clause is a reference to a section or clause of this Policy.

Annexure B - Policy Authorisations

Function	Position Number / Title

Document Control

Policy title	Planning agreements Policy 2021
Policy owner	Manager Regulatory, Planning and Assessment
Policy expert/writer	Senior Urban Planner
Prepared by	Regulatory, Planning and Assessment
Approved by	Council
Date approved	Pending endorsement
Policy approval form reference	ECM#
Commencement Date	To be completed by Legal
Next revision date (date policy will be revised)	To be completed by Legal
Termination date	To be completed by Legal (one year post revision date)
Version	Version 1
Category	Governance
Keywords	Planning agreement, Section 7.11, Section 7.12, infrastructure contributions
Details of previous versions	Planning agreements Policy 2009 (ECM # 2966029) Planning agreements Policy 2009 (2014 Update), (ECM # 4223156)
Legislative amendments	Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulations, 2000
Relevant strategic direction	Open and Collaborative Leadership
Relevant strategy	
Relevant legislation/codes (reference specific sections)	This policy supports CN's compliance with the following legislation: – Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulation, 2000

Other related policies/ documents/ strategies	Planning Agreement Procedure
Related forms	Planning Agreement Template
Required on website	Yes
Authorisations	

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**CCL 25/05/21 - ADOPTION OF THE PLANNING AGREEMENT
POLICY 2021**

ITEM-47 **Attachment B:** Planning Agreement Policy 2009

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The City of Newcastle

Policy

Planning Agreements 2009

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The City of Newcastle
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Policy Amendments

Date	Nature of Revision
December 2009	No previous versions
May 2014	Minor Amendments

Planning Agreements 2009

Policy title	Planning Agreements Policy 2009
Policy owner	Manager Strategic Planning Services
Prepared by	Strategic Planning Services
Approved by	Council
Date approved	27 May 2014
Commencement Date	27 May 2014
Version	Version 2
Category	Plans of Management
Keywords	Planning agreement, 94
Revision date	2016
Amendments	Version 1 – December 2009 Version 2 – May 2014
Relevant strategic direction	Liveable and Distinctive Built Environment
Relevant legislation/codes	Environmental Planning and Assessment Act 1979, Environmental Planning and Assessment Regulations, 2000
Related policies/documents	NA
Related forms	NA
Authorisations	Functions authorised under this policy including Council Officers authorised to perform the function.

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1.0 Introduction

1.1 Name of this policy

This Policy is known as the Newcastle City Council Planning Agreements Policy (Policy). It sets out Newcastle City Council's policy and procedures relating to planning agreements under the Environmental Planning and Assessment Act 1979.

1.2 Commencement of this policy

The Policy was adopted by resolution of Council on 15 December 2009.

1.3 Terms and definitions used in this policy

In this Policy, the following terminology is used:

Act means the Environmental Planning and Assessment Act 1979.

Contribution Plan means a contribution plan approved under section 94EA of the Act for the purpose of requiring contributions under section 94 or 94A of the Act.

Council means The City of Newcastle.

Developer is a person who has sought a change to an environmental planning instrument (which includes the making, amendment or repeal of an instrument (s93F(11)), or who has made or proposes to make a development application, or who has entered into an agreement with or is otherwise associated with such a person.

Development application has the same meaning as in the Environmental Planning and Assessment Act 1979.

Development contribution means the kind of provision made by a developer under a planning agreement, being a monetary contribution, the dedication of land free of cost or the provision of a material public benefit.

Explanatory note means a written statement that provides details of the objectives, nature, effect and merits of a planning agreement, or an amendment to or revocation of a planning agreement.

Instrument change means a change to an environmental planning instrument to facilitate a development the subject of a planning agreement.

Net public benefit is a benefit that exceeds the benefit derived from measures that would address the impacts of particular development on surrounding land or the wider community.

Planning benefit means a development contribution that confers a net public benefit.

Planning obligation means an obligation imposed by a planning agreement on a developer requiring the developer to make a development contribution.

Practice Note means the Practice Note on Planning Agreements published by the former Department of Infrastructure Planning and Natural Resources (July 2005).

Public includes a section of the public.

Public benefit is the benefit enjoyed by the public as a consequence of a development contribution.

Public facilities mean public infrastructure, facilities, amenities and services.

Public purpose means any purpose that benefits the public, including by not limited to a purpose specified in section 93F (s) of the Act.

Regulation means the Environmental Planning and Assessment Regulation 2000.

1.4 Policy purpose

The objectives of this policy are:

- (a) To establish a fair, transparent and accountable framework governing the use of planning agreements by Council
- (b) To broaden the range and extent of development contributions made by developers towards public facilities in the Council's area.
- (c) To set out the Council's specific policies and procedures relating to the use of planning agreements within the Council's Local Government Area
- (d) To give all stakeholders in development greater involvement in determining the type, standard and location of public facilities and other public benefits
- (e) To facilitate public participation and to allow the community to gain an understanding of the benefits of appropriate planning agreements for the provision of public benefit.
- (f) Where applicable to achieve outcomes from development which ensure that the public has full access to the City's public natural assets.

1.5 Legal Context

The current legal and procedural framework for planning obligations is set out in Subdivision 2 of Division 6 of Part 4 of the Act and Division 1A of Part 4 of the Regulation.

A Practice Note titled "Planning Agreements" dated July 2005 has been issued by the Department of Planning for the purposes of clause 25B of the Regulation. While Council is not legally bound to follow the Practice Note, Council will be guided by it. Should there be any inconsistency between this policy and the Practice Note, this policy will prevail.

1.6 When may Council enter into a planning agreement?

Section 93F of the Act sets out the circumstances under which a planning agreement may be entered into. It provides that a planning agreement may be made between a planning authority, such as The City of Newcastle (or two or more planning authorities) and a person (the developer):

- (a) Who has sought a change to an environmental planning instrument (such as a planning proposal); or
- (b) Who has made or proposes to make a development application; or
- (c) Who has entered into an agreement with or is otherwise associated with a person in one of the above two categories.

1.7 What are the mandatory requirements of a planning agreement?

Section 93F of the Act requires planning agreements to include provisions specifying:

- (a) A description of the land to which the agreement applies
- (b) A description of the change to the environmental planning instrument to which the agreement applies or the development to which the agreement applies
- (c) The nature and extent of the provision to be made by the developer under the agreement, the time or times by which the provision is to be made and the manner by which the provision is to be made,
- (d) In the case of development, whether the agreement exclude (wholly or in part) or does not exclude the application of section 94, 94A or 94EF of the Act to the development,
- (e) If the agreement does not exclude the application of section 94 to the development , whether benefits under the agreement are or are not to be taken into consideration in determining a development contribution under section 94
- (f) Mechanism for the resolution of disputes under the agreement.
- (g) The enforcement of the agreement by a suitable means, such as the provision of a bond or guarantee, in the event of a breach of the agreement by the developer.

Clause 25E(1) of the Regulation requires that an explanatory note must accompany a planning agreement that:

- (a) Summarises the objectives, nature and effect of the proposed agreement, amendment or revocation, and
- (b) That contains an assessment of the merits of the proposed agreement, amendment or revocation, including the impact (positive or negative) on the public or any relevant section of the public.

2.0 Policy on the Use of Planning Agreements

2.1 Principles governing the use of planning agreements

The Council's use of planning agreements will be governed by the following principles:

- (a) Planning decisions will not be bought or sold through planning agreements.
- (b) 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.
- (c) The council will not use planning agreements for any purpose other than a proper planning purpose.
- (d) Development that is unacceptable on planning grounds will not be permitted because of public benefits offered by developers.
- (e) The council will not seek benefits under a planning agreement that are wholly unrelated to a particular development.
- (f) When considering a development or instrument change, the Council will not take into consideration any public facility or public benefits proposed in the planning agreement that are wholly unrelated to the application.
- (g) When considering a development or instrument change, the Council will not give undue weight to a planning agreement.
- (h) The council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed planning agreement.
- (i) The council will not improperly rely on its position in order to extract unreasonable public benefits from developers under planning agreements.

2.2 Circumstances in which Council will consider negotiating a planning agreement

Council, in its complete discretion, may negotiate a planning agreement in connection with any application by the developer for an instrument change or for development consent relating to any land in Council's area.

2.3 What matters will the Council consider?

The matters that the Council may consider in any such negotiation may include, but are not limited to the following:

- (a) compensation for the loss of, or damage to, a public amenity, service, resource or asset caused by the development through its replacement, substitution, repair or regeneration
- (b) meet the demands created by the development for new public infrastructure, amenities and services
- (c) achieve the provision of affordable housing
- (d) address a deficiency in the existing provision of public facilities in Council's area
- (e) achieve recurrent funding in respect of public facilities

- (f) prescribe inclusions in the development that meet specific planning objectives of Council
- (g) monitor the planning impacts of development
- (h) secure planning benefits for the wider community.

2.4 Acceptability test to be applied to all planning agreements

Council will apply the following test in order to assess the desirability of a proposed planning agreement:

- (a) Is the proposed planning agreement directed towards a proper or legitimate planning purpose having regard to its statutory planning controls and other adopted planning policies and strategies and the circumstances of the case?
- (b) Does the proposed planning agreement provide for a reasonable means of achieving the relevant purpose and outcomes and securing the benefits?
- (c) Can the proposed planning agreement be taken into consideration in the assessment of the relevant instrument change or development application?
- (d) Will the proposed planning agreement produce outcomes that meet the general values and expectations of the public and protect the overall public interest against planning harm?
- (e) Does the proposed planning agreement promote Council's objectives in relation to the use of planning agreements as set out in this policy?
- (f) Does the proposed planning agreement conform to the principles governing Council's use of planning agreements as set out in this Policy?
- (g) Are there any relevant circumstances that may operate to preclude Council from entering into the proposed planning agreements?
- (h) Will the proposed planning agreement provide public benefits that bear a relationship to the development?

2.5 Consideration of planning agreements for instrument changes and development applications

When exercising its functions under the Act in relation to an application by a developer for an instrument change or a development consent to which a proposed planning agreement relates, Council will consider to the fullest extent permitted by law:

- (a) Whether the proposed planning agreement is relevant to the application and hence may be considered in connection with the application, and
- (b) If so, the proper planning weight to be given to the proposed planning agreement.

2.6 Application of section 94 and section 94A to development to which a planning agreement relates

Council has no general policy on whether a planning agreement should exclude the application of Section 94 or section 94A of the Act to development which the agreement relates. This is a matter for negotiation between Council and a developer having regard to the particular circumstances of the case.

2.7 Recurrent charges

Planning agreements may require a developer to make contributions towards the recurrent costs of public facilities. Details regarding recurrent charges will need to be negotiated between the developer and the planning authority and documented within the draft agreement.

Where the public facility or public benefit is intended to serve the wider community, the planning agreement may require the developer to make contributions towards the recurrent costs of the facility until a public revenue stream is established to support the on-going costs of the facility.

2.8 Pooling of development contributions

Where a proposed planning agreement provides for a monetary contribution by the developer, Council may seek to include a provision permitting money paid under the agreement to be pooled with money paid under other planning agreements and applied progressively for the different purposes under those agreements. Pooling may be appropriate to allow public benefits to be provided in a fair, equitable and timely way.

2.9 Methodology for valuing public benefits under a planning agreement

Unless otherwise agreed in a particular case, public benefits will be valued as follows:

Provision of land for a public purpose

Where the benefit under a planning agreement is the provision of land for a public purpose, the value of the benefit will be determined by an independent valuer who is experienced in valuing land in New South Wales (and who is acceptable to Council), on the basis of a scope of work which is prepared by Council. All costs of the independent valuer in carrying out such a valuation will be borne by the developer.

Carrying out of works for a public purpose

Where the benefit under a planning agreement is the carrying out of works for a public purpose, the value of the benefit will be determined by an independent quantity surveyor (who is acceptable to Council), on the basis of the estimated value of the completed works being determined using the method that would be ordinarily be adopted by a quantity surveyor. Council will prepare the scope of work for the independent quantity surveyor. All costs of the independent quantity surveyor in carrying out this work will be borne by the developer.

Material public benefit

Where the benefit under a planning agreement is the provision of a material public benefit, Council and the developer will negotiate the manner in which the benefit is to be valued for the purposes of the agreement.

2.10 Credits and Refunds

Council generally will not agree to a planning agreement providing for the surplus value under a planning agreement being refunded to the developer or offset against development contributions required to be made by the developer in respect of other development in Council's area.

2.11 Implementation Agreements

In appropriate cases, Council may require a planning agreement to provide that before development the subject of the agreement is commenced, the parties are to enter into an implementation agreement that provides for matters such as:

- (a) the times at which and, if relevant, the period during which, the developer is to make provision under the planning agreement
- (b) the design, technical specification, and standard of work required by the planning agreement to be undertaken by the developer
- (c) the manner in which work is to be handed over to Council
- (d) the manner in which a material public benefit is to be made available for its public purpose in accordance with the planning agreement
- (e) the management of maintenance of land or works following handover to Council.

There may be some circumstances where the parties are not able to resolve some of these matters at the time the agreement is entered into, particularly if the agreement accompanies an application for an instrument change. If this is the case, Council may require the planning agreement to be contingent upon Council and the developer(s) entering into an implementation agreement at a later date, on terms satisfactory to the Council.

2.12 Monitoring and reviewing of planning agreements

Council will continuously monitor the performance of the developer's obligations under a planning agreement. This may include Council requiring the developer (at their cost) to report periodically to Council on its compliance with obligations under the planning agreement.

Council will require the planning agreement to contain a provision establishing a mechanism under which the planning agreement is periodically reviewed with the involvement of all parties. This will include a review of the developer's performance under the agreement.

Council will require the planning agreement to contain a provision requiring the parties to use the best endeavours to agree on a modification to the agreement having regard to the outcomes of the review.

2.13 Modification and discharge of the developer's obligations

Council will generally only agree to a provision in a planning agreement permitting the developer's obligation under the agreement to be modified or discharged where the modification or discharge is linked to the following circumstances:

- (a) the developers obligations have been fully carried out in accordance with the agreement

- (b) the developer has assigned the developer's interest under the agreement in accordance with its terms and the assignee has become bound to Council to perform the developer's obligations under the agreement
- (c) the development consent to which the agreement relates has lapsed
- (d) the performance of the planning agreement has been frustrated by an event beyond the control of the parties
- (e) Council and the developer otherwise agree to the modification for discharge of the agreement.

Such a provision will require the modification or revocation of the planning agreement in accordance with the Act and Regulation.

2.14 Assignment and dealings by the developer

Council will require every planning agreement to provide that the developer may not assign its rights or obligations under the agreement nor have any dealings in relation to the land the subject of the agreement unless, in addition to any other requirements of the agreement:

- (a) Council has given its consent to the proposed assignment or dealing
- (b) the developer has, at no cost to Council, first secured the execution by the person, with whom it is dealing of all necessary documents in favour of Council by which that person agrees to be bound by the agreement as if they were a party to the original agreement, and
- (c) the developer is not in breach of the planning agreement.

2.15 Provision of security under a planning agreement

The Council will generally require a planning agreement to make provision for security to cover the developer's obligations under the agreement. The form of security will generally be an unconditional bank guarantee from an Australian Bank in favour of the Council to the full value of the developer's obligations under the planning agreement and on terms otherwise acceptable to Council.

2.16 Preparation and form of a planning agreement

The developer will prepare a planning agreement relating to a particular application for an instrument change or development application which reflects the policies and procedures set out in this document. All planning agreements are to be accompanied by an explanatory note. An example is set out in **Appendix 2**.

2.17 Council's cost of negotiating, entering into, monitoring and enforcing a planning agreement

Council will require a planning agreement to make provision for payment by the developer of Council's costs and incidental to:

- (a) negotiating and entering into the agreement
- (b) enforcing and monitoring the agreement.

The amount to be paid by the developer will be determined by negotiation in each case.

2.18 Notifications on certificates

The Council will require a planning agreement to contain an acknowledgement by the developer that the Council will make a notation under s149(2) of the Act relating to the land that is the subject of the agreement or any other land associated with the agreement.

2.19 Registration of planning agreements

The Council may require a planning agreement to contain a provision requiring the developer to agree to registration of the agreement pursuant to s93H of the Act if the requirements of that section are satisfied.

2.20 Dispute resolution

The Council will require a planning agreement to provide for mediation of disputes between the two parties (at their own cost) before the parties may exercise any other legal rights in relation to the dispute.

2.21 Hand-over of works

The Council will generally not accept the hand-over of a public work carried out under a planning agreement unless the developer furnishes to the Council a certificate to the effect that the work has been carried out and completed in accordance with the agreement and any applicable development consents (which may, at the Council's discretion, be a final occupation certificate, compliance certificate or a subdivision certificate) and, following the issue of such a certificate to the Council, the work is also certified as complete by a Council building surveyor or engineer.

The Council will also require the agreement to provide for a defects liability period during which any defects must be rectified at the developer's expense.

2.22 Management of land or works after hand-over

If a planning agreement provides for the developer, at the developer's cost, to manage or maintain land that has been dedicated to the Council or works that have been handed-over to the Council, the Council may require the parties to enter into a separate implementation agreement in that regard (see 2.14).

The failure of the parties to reach agreement in relation to management and maintenance of the land or works may be dealt with under the dispute resolution provisions of the planning agreement.

2.23 Public use of privately-owned facilities

If a planning agreement provides for the developer to make a privately-owned facility available for public use, the Council may require the parties to enter into a separate implementation agreement in that regard (see 2.14).

The failure of the parties to reach agreement in relation to management and maintenance of the land or works may be dealt with under the dispute resolution provisions of the planning agreement.

3.0 Procedures Relating to the Use of Planning Agreements

3.1 Introduction

Council's negotiation system for planning agreements aims to be efficient, transparent and accountable. Council will seek to ensure that negotiations of planning agreements run in parallel with applications for instrument changes or development applications so as not to unduly delay ordinary planning processes.

3.2 When should a planning agreement be negotiated?

Council prefers that a planning agreement is negotiated before lodgement of the relevant application and that it accompanies the application on lodgement.

3.3 Who will negotiate a planning agreement on behalf of Council?

Council officers will negotiate a planning agreement on behalf of Council. Councillors will not be involved in the face-to-face negotiation of the agreement.

3.4 Separation of Council's commercial and planning assessment roles

If Council has a commercial interest in the subject matter of a planning agreement as a landowner, developer or financier, Council will ensure that the person who assesses the application to which a planning agreement relates is not the same person, or a subordinate of the person, who negotiated the terms of the planning agreement on behalf of Council in its capacity as landowner, developer or financier.

3.5 Involvement of independent third parties in the negotiation process

Council may appoint an independent person to facilitate or otherwise participate in the negotiation of a planning agreement, or aspects of it, such as where:

- (a) an independent assessment of a proposed instrument change or development application is necessary or desirable
- (b) factual information requires validation in the course of negotiations
- (c) sensitive financial or other information must be verified or established in the course of negotiations
- (d) facilitation of complex negotiations are required in relation to large projects or where numerous parties or stakeholders are involved, or
- (e) dispute resolution is required under a planning agreement.

The cost of the independent person will be borne by the developer.

3.6 Process to entering into a planning agreement

The negotiation of a planning agreement will generally involve the following key steps:

- 1 Prior to lodgement of the relevant application by the developer, the Council and Developer (and any other relevant person) will decide whether to negotiate a planning agreement.
- 2 This matter will be reported to a Meeting of Council where Council will formally decide whether to commence negotiations on a planning agreement.
- 3 The parties will then appoint a person to represent them in the negotiations and also appoint a third person to attend and take minutes of all negotiations.
- 4 The parties will decide whether to appoint an independent person to facilitate or otherwise participate in the negotiations or aspects of it, and appoint such a person.
- 5 The parties will also agree on a timetable for negotiations and the protocols and work practices governing their negotiations.
- 6 The parties will then identify the key issues for negotiation and undertake the negotiations, including any negotiations or consultations with relevant public authorities.
- 7 If agreement is reached, the developer will prepare the proposed planning agreement including the explanatory note and provide a copy to Council.
- 8 The parties may undertake further negotiations on the specific terms of the proposed planning agreements.
- 9 Once agreement is reached on the terms of the proposed planning agreement, the developer will be required to execute the agreement.
- 10 The developer may then make the relevant application to Council accompanied by a copy of the proposed agreement.

Parties may be required to undertake further negotiations and, hence, a number of the above steps may need to be repeated as a result of the public notification process or its formal consideration by the Council in connection with the relevant application.

3.7 Public notification of planning agreements

In accordance with the Act, a planning agreement must be publicly notified and available for public inspection for a minimum period of 28 days. The Council may decide to notify a planning agreement for a longer period.

The Council will also notify the application to which a planning agreement relates.

Council will publicly re-notify and make available for public inspection a revised planning agreement and application to which it relates, if in the Council's opinion, a material change is made to the terms of the agreement after it has been previously publicly notified and inspected. Such a change may arise as a consequence of public submissions made in respect of the previous public notification, or the formal consideration by the Council or any other reason.

3.8 Public comment on planning agreements

The Council encourages the public to make submissions on planning agreements. This will allow the Council to better understand local needs and permit fine tuning of the planning obligations set out in any planning agreement.

Public submissions on draft planning agreement notifications will be assessed by the Council when it considers whether it should enter the proposed planning agreement.

3.9 When is a planning agreement required to be entered into?

Council will require a planning agreement to be entered into as a condition of consent to which the agreement relates. Where a planning agreement relates to an instrument change, the agreement will need to be entered into prior to the granting of any development consent that relies on the instrument change.

A planning agreement is entered into when it is signed off by all of the parties

A planning agreement can be entered into at any time after the agreement is publicly notified in accordance with the Act and Regulation.

3.10 Planning Agreement Register

The Council is required to keep a register of planning agreements applying to land within the Council's area, whether or not the Council is a party to a planning agreement. The Council is required to record in the register the date an agreement was entered into and a short description of the agreement (including any amendment).

The Council will make the following available for public inspection during ordinary office hours:

- The City of Newcastle Planning Agreements Policy 2009
- the planning agreement register kept by the Council
- copies of all planning agreements (including amendments) that apply to the area of the Council
- copies of the explanatory notes relating to those agreements or amendments.

Council will also make the planning agreement register available to the public on its website.

Appendix 1 – Planning Agreement Template

(Between Council and Developer)

PLANNING AGREEMENT

Parties

of , New South Wales (**Council**)
and
of , New South Wales (**Developer**).

Background

(For Development Applications)

- A. On, , the Developer made a Development Application to the Council for Development Consent to carry out the Development on the Land.
- B. That Development Application was accompanied by an offer by the Developer to enter into this Agreement to make Development Contributions towards the Public Facilities if that Development consent was granted.

(For Changes to Environmental Planning Instruments)

- A. On, , the Developer made an application to the Council for the Instrument Change for the purpose of making a Development Application to the Council for Development Consent to carry out the Development on the Land.
- B. The Instrument Change application was accompanied by an offer by the Developer to enter into this Agreement to make Development Contributions towards the Public Facilities that Development Consent was granted.
- C. The Instrument Change was published in NSW Government Gazette No. on and took effect on .
- D. On, , the Developer made a Development Application to the Council for Development Consent to carry out the Development on the Land.

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

[Specify the land to which the Agreement applies and the development to which it applies]

3 Operation of this Agreement

[Specify when the Agreement takes effect and when the Parties must execute the Agreement]

4 Definitions and interpretation

1.1 In this Agreement the following definitions apply:

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

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

Development means

Development Application has the same meaning as in the Act.

Development Consent has the same meaning as in the Act.

Development Contribution means a monetary contribution, the dedication of land free of cost or the provision of a material public benefit.

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.

Instrument Change means Local Environmental Plan .

Land means Lot DP , known as .

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

Public Facilities means .

Regulation means the Environmental Planning and Assessment Regulation 2000.

1.2 In the interpretation of this 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 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.
- (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 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 Agreement.
- (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 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 the 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

[Specify the development contributions to be made under the agreement; when they are to be made; and the manner in which they are to be made]

6 Application of the Development Contributions

[Specify the times at which, the manner in which and the public purposes for which development contributions are to be applied]

7 Application of s94 and s94A of the Act to the Development

[Specify whether and to what extent s94 and s94A apply to development the subject of this Agreement]

8 Registration of this Agreement

[Specify whether the Agreement is to be registered as provided for in s93H of the Act]

9 Review of this Agreement

[Specify whether, and in what circumstances, the Agreement can or will be reviewed and how the process and implementation of the review is to occur].

10 Dispute Resolution

[Drafting Note 10: Specify an appropriate dispute resolution process]

11 Enforcement

[Specify the means of enforcing the Agreement]

12 Notices

1.3 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:

- (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.
- (c) Emailed to that Party at its email address set out below.

Council

Attention:

Address:

Fax Number:

Email:

Developer

Attention:

Address:

Fax Number:

Email:

1.4 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.

1.5 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.

1.6 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 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**
[Specify any restrictions on the Developer's dealings in the land to which the Agreement applies and the period during which those restrictions apply]
- 15 Costs**
[Specify how the costs of negotiating, preparing, executing, stamping and registering the Agreement are to be borne by the Parties]
- 16 Entire agreement**
This Agreement 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 Agreement 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 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 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 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 is for the benefit of them jointly and each of them 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**
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 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 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.

Execution

Dated:

Executed as an Agreement:

Appendix 2 – Explanatory Note Template

Environmental Planning and Assessment Regulation 2000
(Clause 25E)

Explanatory Note

Draft Planning Agreement

Under s93F of the Environmental Planning and Assessment Act 1979

- 1 Parties**

(Planning Authority)
(Developer)
- 2 Description of Subject Land**
- 3 Description of Proposed Change to Environmental Planning Instrument/Development Application**
- 4 Summary of Objectives, Nature and Effect of the Draft Planning Agreement**
- 5 Assessment of the Merits of the Draft Planning Agreement**
- 6 The Planning Purposes Served by the Draft Planning Agreement**
- 7 How the Draft Planning Agreement Promotes the Objects of the Environmental Planning and Assessment Act 1979**
- 8 How the Draft Planning Agreement Promotes the Public Interest**

For Planning Authorities:

- (a) Development Corporations - How the Draft Planning Agreement Promotes its Statutory Responsibilities
- (b) Other Public Authorities - How the Draft Planning Agreement Promotes the Objects (if any) of the Act under Which it is Constituted
- (c) Councils – How the Draft planning Agreement Promotes the Elements of the Council’s Charter
- (d) All Planning Authorities – Whether the Draft Planning Agreement Conforms with the Authority’s Capital Works Program

The Impact of the Draft Planning Agreement on the Public or Any Section of the Public

Other Matters

Signed and Dated by All Parties

ATTACHMENTS DISTRIBUTED UNDER SEPARATE COVER

**CCL 25/05/21 - ADOPTION OF THE PLANNING AGREEMENT
POLICY 2021**

ITEM-47 **Attachment C:** Department of Planning, Industry and Environment
Practice Note - 2021

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Planning agreements

Practice note – February 2021



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Preface

Planning agreements

A planning agreement is a voluntary agreement or other arrangement between a planning authority and a developer, who has:

- sought a change to an environmental planning instrument; or
- made or proposes to make a development application or application for a complying development certificate,

under which the developer is required to:

- dedicate land free of cost;
- pay a monetary contribution;
- provide any other material benefit; or
- provide any combination of the above,

to be used for or applied towards a public purpose.

This practice note provides guidance on matters relating to planning agreements, often referred to as voluntary planning agreements or VPAs. It sets out the statutory framework for planning agreements and other matters such as the fundamental principles governing their use.

Legislative and regulatory framework

Part 7 Division 7.1 Subdivision 2 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) provides the legislative framework for planning agreements.

Part 4 Division 1A of the *Environmental Planning and Assessment Regulation 2000* (the EP&A Regulation) has further requirements relating to the form and subject matter of planning agreements, making, amending and revocation of planning agreements, giving public notice and other procedural arrangements relating to planning agreements.

About this practice note

This practice note is made for the purposes of clause 25B of the EP&A Regulation to assist parties in the preparation of planning agreements.

Planning authorities are not required to apply this practice note, when finalising proposed planning agreements which have been publicly notified pursuant to section 7.5 (1) of the EP&A Act, but not finalised before the issue of this practice note. However, planning authorities may choose to consider parts of the practice note when finalising these planning agreements.

This practice note replaces the previous 'Practice Note – Planning Agreements' issued by the Director General of the then Department of Infrastructure, Planning, and Natural Resources in July 2005.

How to use this practice note

The practice note is structured as follows:

Part 1 provides the rationale for planning agreements.

Part 2 identifies and provides fundamental principles and policy considerations.

Part 3 sets out strategic considerations for when and how planning agreements can be used.

Part 4 provides guidance on the procedures and decision-making for application, negotiation and administration of planning agreements.

Part 5 provides examples of the use of planning agreements.

Affordable Housing Contributions

State Environmental Planning Policy No. 70 - Affordable Housing (Revised Schemes) (SEPP 70) is the enabling mechanism for securing affordable housing contributions through imposing a condition of consent. To secure contributions through this pathway, councils must establish an affordable housing contribution scheme and arrange for the relevant local environmental plan to be amended to authorise the imposition of the condition. *Environmental Planning Assessment (Planning Agreements) Direction 2019* sets out the matters to be considered by council if negotiating a planning agreement which provides for affordable housing.

Mining Projects

This practice note does not apply to planning agreements for mining projects. However, councils can refer to Parts 1, 4 and 5, for appropriate guidance on use, process and governance of those planning agreements.

Terminology

The following terminology is used to convey key concepts in relation to planning agreements:

- **development application** has the same meaning as in the EP&A Act
- **development consent** has the same meaning as in the EP&A Act
- **development contribution** means a contribution made by a developer under a planning agreement, being a monetary contribution, the dedication of land free of cost or the provision of a material public benefit, to be used for or applied towards a public purpose
- **planning authority** has the same meaning as in Division 7.1 of Part 7 of the EP&A Act
- **planning obligation** means an obligation imposed by a planning agreement on a developer requiring the developer to make a development contribution
- **planning proposal** has the same meaning as in the EP&A Act
- **public benefit** is the benefit enjoyed by the public as a consequence of a development contribution
- **public facilities** means public infrastructure, amenities and services

Updates to this practice note

This practice note will be periodically updated. More detailed information or guidance on specific matters in this practice note may also be the subject of future separate practice notes.

Transitional arrangements

This practice note does not apply to a new or amended planning agreement if it:

- has been substantially negotiated when this practice note is published, and
- public notice of the agreement or amendment is given before 1 July 2021.

Part 1 Introduction

1.1 Purpose of planning agreements

Planning agreements are used widely in the planning system as a tool for delivering innovative or complex infrastructure and public benefit outcomes in connection with planning proposals and development applications.

They provide a way for planning authorities and developers to negotiate flexible outcomes in respect of development contributions and enable the NSW planning system to deliver sustainable development while achieving key economic, social and environmental objectives.

Planning agreements enable the provision of development contributions for a variety of public purposes, some of which extend beyond the scope of section 7.11 and 7.12 (local infrastructure contributions), of the EP&A Act. For example, these additional purposes could include the recurrent funding of public facilities provided by councils, the capital and recurrent funding of transport, the protection and enhancement of the natural environment, and the monitoring of the planning impacts of development.

Planning agreements are negotiated between planning authorities and developers in the context of applications for changes to environmental planning instruments (planning proposals) or for consent to carry out development (development applications).

1.2 Rationale for planning agreements

Since the commencement of the *Environmental Planning and Assessment Amendment (Development Contributions) Act 2005*, the use of planning agreements has steadily grown across NSW. There is a range of reasons why the use of planning agreements has become widespread.

- Planning agreements provide a flexible means of achieving tailored development outcomes and focused public benefits, including agreement by communities to the redistribution of the costs and benefits of development.
- Planning agreements can provide enhanced and more flexible infrastructure funding opportunities and better planning implementation.
- Planning agreements allow for the flexible delivery of infrastructure for a development proposal which may have good planning merit but be out of sequence with broader strategic planning processes.

Planning agreements provide a flexible framework under which the planning authorities can share responsibility for the provision of infrastructure in new release areas or in major urban renewal projects. They permit tailored governance arrangements and the provision of infrastructure in an efficient, co-operative and coordinated way.

Part 2 Principles and policy for planning agreements

2.1 Fundamental principles

Planning agreements must be governed by a set of policy principles that ensure transparency, fairness and flexibility of planning decisions. A planning agreement cannot and should not purport to fetter any authority's exercise of statutory functions, in particular the function of a relevant planning proposal authority in relation to a planning proposal, a local plan-making authority in relation to the local environmental plan that gives effect to a planning proposal or the consent authority for a development application.

A planning agreement related to a development application is one of several matters for consideration identified by the EP&A Act when a consent authority is determining a development application. Public benefits offered by developers do not make unacceptable development acceptable.

Planning authorities and developers that are parties to planning agreements should adhere to the following fundamental principles.

- Planning authorities should always consider a development proposal on its merits, not on the basis of a planning agreement.
- Planning agreements must be underpinned by proper strategic land use and infrastructure planning carried out on a regular basis and must address expected growth and the associated infrastructure demand.
- Strategic planning should ensure that development is supported by the infrastructure needed to meet the needs of the growing population.
- A consent authority cannot refuse to grant development consent on the grounds that a planning agreement has not been entered into in relation to the proposed development or that the developer has not offered to enter into such an agreement.
- Planning agreements should not be used as a means of general revenue raising or to overcome revenue shortfalls.
- Planning agreements must not include public benefits wholly unrelated to the particular development.
- Value capture should not be the primary purpose of a planning agreement.

2.2 Public interest and probity considerations

It is critical to consider whether a planning agreement is in the public interest. Generally speaking, the public interest is directed towards ensuring planning controls are imposed fairly for the benefit of the community. In some cases, the public interest may be directed towards the need to mitigate adverse impacts of development on the public domain or towards providing a benefit to the wider community.

Planning agreements are matters of public interest and this is a relevant consideration in negotiating outcomes. The negotiation of planning agreements involves the use of discretion on both sides, allowing planning authorities and developers to consider different values and varying concepts of the public and private interests.

The ability for a planning agreement to wholly or partly exclude the application of other infrastructure contributions gives a planning authority scope to prioritise the items of infrastructure

that is most needed under an agreement. This means that the financial, social and environmental costs and benefits of development can be redistributed through a planning agreement.

However, there is no guarantee that these costs and benefits will be equitably distributed within the community and what may be a specific benefit to one group in the community may be a loss to another group or the remainder of the community. As such, best practice principles, policies and procedures should be implemented as safeguards to protect the public interest and the integrity of the planning process. These are discussed in *Section 2.6 Policies and procedures for planning agreements*.

If probity and public interest are not considered, planning agreements may produce undesirable outcomes, including where:

- A planning authority seeks inappropriate benefits through a planning agreement because of opportunism or to overcome revenue-raising or spending limitations that exist elsewhere.
- A planning authority has not undertaken appropriate infrastructure planning as part of strategic land use planning, resulting in growth being poorly aligned with infrastructure planning and funding, infrastructure demand and costs relating to infrastructure operation.
- There is insufficient analysis of the likely planning impacts of a proposed development because a planning authority is determined to enter into, or to give effect, to a planning agreement.
- A planning authority allows the interests of individuals or small groups to demand benefits, which otherwise outweigh the public interest.
- A planning authority takes advantage of an imbalance of bargaining power between the planning authority and developer, for example by improperly relying on its statutory position in order to extract unreasonable public benefits under a planning agreement.
- A planning authority's ability to make independent decisions is compromised, or its decisions appear to be fettered by a planning agreement.

The potential for misuse also exists where a planning authority, acting as consent authority or in another regulatory capacity for development, is both party to a planning agreement and a development joint venture partner under the agreement, for example as a landowner. Special safeguards, such as the use of an independent third party in the development assessment process, would be appropriate in such circumstances.

Considerations for public participation

Public participation in the planning agreement process is important to ensure the community has an opportunity to provide input in decisions being made relating to public benefit and development. Planning agreements redistribute the costs and benefits of a development, and it is

critical the public can comment on whether they think the balance between development and public benefit is achieved successfully. Public participation processes are discussed in *Section 4.5 Public participation and notification*.

2.3 Value capture

The term value capture is widely used and covers several different practices. This practice note does not attempt to define or discuss them all. In general, the use of planning agreements for the primary purpose of value capture is not supported as it leads to the perception that planning decisions can be bought and sold and that planning authorities may leverage their bargaining position based on their statutory powers.

Planning agreements should not be used explicitly for value capture in connection with the making of

planning decisions. For example, they should not be used to capture land value uplift resulting from rezoning or variations to planning controls. Such agreements often express value capture as a monetary contribution per square metre of increased floor area or as a percentage of the increased value of the land. Usually the planning agreement would only commence operation as a result of the rezoning proposal or increased development potential being applied.

2.4 Relationship with development applications and planning proposals

Development applications

When determining a development application, the consent authority is required by the EP&A Act to take into consideration any relevant planning agreement or draft agreement that the developer has offered to enter into. The consent authority is also required to take into consideration any public submissions made in respect of the development application, which may include submissions relating to a planning agreement.

Planning proposals

The EP&A Act requires a planning proposal authority to state the objectives and outcomes of a planning proposal, and to describe and justify the process by which they will be achieved. The role of a planning agreement in facilitating these objectives or outcomes should be clearly set out in the planning proposal documentation.

Nexus

Development contributions provided for in a planning agreement are not required to bear the same nexus with development as required for section 7.11 local contributions. However, planning agreements should provide for public benefits that are not wholly unrelated to development.

Varying development standards

Benefits provided under a planning agreement must not be exchanged for a variation from a development standard under any circumstances. Variations to development standards under Clause 4.6 of the Standard Instrument LEP must be justified on planning grounds, and the benefit under the agreement should contribute to achieving the planning objective of the development standard.

Conditions of development consent

Planning authorities and developers must make a judgement in each case about whether negotiation of a planning agreement is beneficial and otherwise appropriate. However, planning agreements should not be used to require compliance with or restate obligations imposed by conditions of development consent.

2.5 Acceptability test

Planning agreements should be assessed against the acceptability test below which is a generally applicable test for determining the acceptability of a planning agreement.

The acceptability test requires that planning agreements:

- Are directed towards legitimate planning purposes, which can be identified in the statutory planning controls and other adopted planning strategies and policies applying to development.
- Provide for the delivery of infrastructure or public benefits not wholly unrelated to the development.

- Produce outcomes that meet the general values and expectations of the public and protect the overall public interest.
- Provide for a reasonable means of achieving the desired outcomes and securing the benefits.
- Protect the community against adverse planning decisions.

2.6 Policies and procedures for planning agreements

Councils are strongly encouraged to publish policies and procedures concerning their use of planning agreements. Best practice principles, policies and procedures should be implemented as safeguards to protect the public interest and the integrity of the planning process.

These safeguards are to protect against the misuse of planning discretions and processes, which may seriously undermine good planning outcomes and public confidence in the planning system. They should ensure that planning decisions are made openly, honestly and freely in any given case and fairly and consistently across the board.

Policies applying to the use of planning agreements should:

- Provide a generally applicable test for determining the acceptability of a planning agreement (see *Section 2.5 Acceptability Test*).
- Contain specific measures to protect the public interest and prevent misuse of planning agreements.
- Have published and accessible rules and procedures.
- Provide for effective formalised public participation.
- Extend fairness to all parties affected by a planning agreement.
- Guarantee regulatory independence of the planning authority.

Policies and procedures prepared by planning authorities should incorporate the contents of this practice note and the following considerations:

- How the use of planning agreements aligns with any relevant district and regional strategic plans and policies.
- How the use of planning agreements fits within the context of the planning authority's broader organisational strategic planning and land use planning policies, goals, and strategies.
- The circumstances in which the planning authority would consider entering into a planning agreement.
- The land use planning and development objectives that are sought to be promoted or addressed by the use of planning agreements.
- The role served by planning agreements in the development contributions and infrastructure funding systems of the planning authority.
- The types of development to which planning agreements will ordinarily apply, and how their use may be differentiated between different types of development.
- Whether any thresholds apply to the use of planning agreements in relation to particular types of development or in particular circumstances.
- The matters ordinarily covered by a planning agreement.
- The form of development contributions ordinarily sought under a planning agreement.
- The kinds of public benefits sought.
- The method for determining the value of public benefits.
- When, how and where public benefits will be provided.

- The procedures for negotiating and entering into planning agreements.
- The planning authority's policies on other matters relating to planning agreements, such as review and modification, discharging of the developer's obligations under agreements, dispute resolution and enforcement mechanisms, and payment of costs relating to the preparation, negotiation, execution, monitoring and other administration of agreements.

Part 3 Strategic considerations when using planning agreements

3.1 When to use planning agreements

This section provides guidance and strategic considerations on when to use planning agreements. Planning agreements should meet the considerations set out in Section 2.1 Fundamental principles and Section 2.5 Acceptability test and should fully comply with the specific requirements in these sections. Whether a planning agreement is acceptable and reasonable can only be judged in the circumstances of the case and considering State, regional or local planning policies.

Planning agreements have the potential to be used in a wide variety of circumstances. For example, they may be an appropriate contribution mechanism:

- In major development sites or precincts that are owned by a single landowner or a consortium of landowners.
- Where the developer has a direct incentive, such as bringing forward potential development, to be involved in the delivery of community infrastructure.
- Where the developer wants to provide community infrastructure in addition to, or at a higher standard than, what has been specified under the contributions plan.
- Where a council and the developer negotiate a different and better or more innovative outcome than can be achieved through imposing direct or indirect contributions.
- Where a proposed development has not been anticipated by local council and thus works and facilities to cater for this development have not been identified. A planning agreement can be prepared to specifically target the needs of the development.

Objectives of planning agreements

The objectives of planning agreements will be dictated by the circumstances of each case and the policies of planning authorities in relation to their use. However, as a general indication, planning agreements may be directed towards achieving the following broad objectives:

- Meeting the demands created by the development for new or augmented public infrastructure, amenities and services.
- Securing off-site benefits for the community so that development delivers a net community benefit.
- Compensating for the loss of or damage to a public amenity, service, resource or asset by development through replacement, substitution, repair or regeneration.

Relationship to other contributions mechanisms

Planning agreements should complement other contribution mechanisms. They can be used to deliver infrastructure outcomes for which these contributions are required, or additional public benefit. Planning agreements should not be used as de facto substitutes for contributions plans.

There is a clear legislative, regulatory and policy framework supporting contributions plans which does not apply to planning agreements. Where there is need for public infrastructure across a development area with a range of landowners, a contributions plan is likely to be more appropriate because it simplifies transactions and is underpinned by clear strategic planning.

Planning agreements may be used to overcome past deficiencies in infrastructure provision that would otherwise prevent development from occurring. This may involve the conferring of a public benefit under the agreement.

3.2 Land use and strategic infrastructure planning

This section provides advice on how planning agreements can support broader strategic infrastructure planning, particularly in areas where there is significant growth, and where a planning agreement may be associated with a planning proposal.

Land use planning should occur concurrently with strategic infrastructure planning to ensure that built form provisions and infrastructure contributions deliver both appropriate urban forms and contributions related to the development.

Strategic infrastructure planning should be undertaken regularly and address expected growth, infrastructure demand resulting from this growth, and the apportioned cost of these infrastructure provisions. Planning agreements should be used towards public benefits that are in accordance with the council's infrastructure planning and funding policies and strategies. Planning agreements should not be used as a substitute to proper strategic infrastructure planning.

Local Strategic Planning Statements

Local strategic planning statements set out the 20-year vision for land use in the local area, including how change will be managed into the future. These statements need to align with the regional and district plans, and council's own priorities in the community strategic plan it prepares under the *Local Government Act 1993*. The statements identify the planning priorities for an area and explain how these are to be delivered.

In this regard, local strategic planning statements will identify upfront the strategic planning priorities and infrastructure needs for an area, which should be reflected in planning agreements that demonstrate a comprehensive approach to infrastructure planning and funding.

Impact of planning proposals

There may be circumstances where a developer lodges a planning proposal that was not anticipated at the time the local strategic planning statement was prepared. It is common site-specific planning proposals in locations where development had not been anticipated to be accompanied by offers to enter into planning agreements. While it is appropriate that applications for more intensive development also consider opportunities for public benefit associated with development, this must be in a way that is mutually agreeable between the planning authority and the developer.

Planning authorities must ensure that adequate infrastructure is available to support the development, that the community can be confident in the integrity of the planning decision and that the planning authority is not improperly relying on its statutory role to extract unreasonable contributions.

Site specific planning proposals must not be prioritised on the basis they provide an opportunity for public benefits. Public benefits to be delivered by development should not be wholly unrelated to the development and the costs should be clearly set out and justified in the planning agreement. It is important that planning agreements in relation to planning proposals complement a comprehensive approach to infrastructure planning and funding.

Part 4 Procedures and decision making

4.1 Basic procedures for entering into a planning agreement

Planning agreements may be negotiated between planning authorities and developers in relation to development applications or changes sought by developers to local environmental plans. Where possible, planning agreements should be negotiated between planning authorities and developers before the related development application is determined or the local environmental plan giving effect to the planning proposal is made so that the development application or planning proposal may be exhibited or notified alongside the draft planning agreement. The steps below are provided for general guidance and are indicative only. The actual steps taken in negotiating each specific planning agreement may differ.

Indicative steps for planning agreements

Step 1 Commencement Before making a development application or submitting a planning proposal, the planning authority and developer decide whether to negotiate a planning agreement. In making this decision consideration should be given to this practice note, relevant legislation and any relevant policies. The parties consider whether other planning authorities and other persons associated with the development should be additional parties to the planning agreement, such as the landowner if the landowner is a different person to the developer.

Step 2 Negotiation If an agreement or arrangement is negotiated, it is documented as a draft planning agreement with an accompanying explanatory note. The draft planning agreement should be assessed against the acceptability test outlined in this practice note. The parties should consider how the draft planning agreement will be enforced and when the draft planning agreement will be executed, as this will inform the security provisions and conditions of the agreement. Legal advice should be sought in each case to ensure that the appropriate provisions are included in the planning agreement.

Step 3 Application When the developer makes the application or submits a planning proposal to the relevant authority, it should be accompanied by the draft planning agreement that has been signed by the developer and the explanatory note.

Step 4 Notification Relevant public authorities are consulted and the application or planning proposal, draft planning agreement and explanatory note are publicly notified in accordance with the EP&A Act and EP&A Regulation. Any amendments required to the application or planning proposal and draft agreement as a result of submissions received are made. If necessary, the amended application, draft planning agreement and explanatory note are re-notified.

Step 5 Assessment The draft planning agreement and public submissions are considered in the determination of the related application. The weight given to the draft planning agreement and public submissions is a matter for the relevant authority acting reasonably.

Step 6 Execution The draft planning agreement is either executed before the relevant application is determined or not long after the application is determined.

4.2 Offer and negotiation

Offer to enter into a planning agreement

The EP&A Act does not define what constitutes an 'offer' for the purpose of section 7.7(3) of the EP&A Act. However, an offer should:

- Be in writing.
- Be addressed to the planning authority to whom it is made.
- Be signed by or on behalf of all parties to the proposed planning agreement other than the planning authority to whom the offer is made.
- Outline in sufficient detail the matters required to be included in a planning agreement as specified in s7.4 (3) of the EP&A Act to allow proper consideration of the offer by the planning authority.
- Address in sufficient detail any relevant matters required to be included in an offer as specified in any applicable planning agreements policy published by the planning authority to whom the offer is made to allow proper consideration by the planning authority.
- Outline in sufficient detail all other key terms and conditions proposed to be contained in the planning agreement to allow proper consideration by the planning authority.

A consent authority cannot refuse to grant development consent on the grounds that a planning agreement has not been entered into in relation to the proposed development or that the developer has not offered to enter into such an agreement.

However, if a developer has offered to enter into a planning agreement in connection with the development application or a change to an environmental planning instrument, then a consent authority is authorised to require a planning agreement to be entered into in the terms of the offer as a condition of development consent.

Efficient negotiation systems

Planning authorities, particularly councils, should implement fast, predictable, transparent and accountable negotiation systems for planning agreements. Negotiation of planning agreements should not unnecessarily delay ordinary planning processes and should run in parallel with applications to change environmental planning instruments or development applications. This includes through pre-application negotiation in appropriate cases. Negotiation should be based on principles of co-operation, full disclosure, early warning, and agreed working practices and timetables.

Involvement of independent third parties

Independent third parties can be used in a variety of situations involving planning agreements. Planning authorities and developers are encouraged to make appropriate use of them during negotiation, including where:

- An independent assessment of a proposed change to an environmental planning instrument or development application is necessary or desirable.
- Factual information requires validation.
- Sensitive financial or other confidential information must be verified or established in the course of negotiations.
- Facilitation of complex negotiations is required for large projects or where numerous parties or stakeholders are involved.
- Dispute resolution is required.

Dispute resolution

Different kinds of dispute resolution mechanisms may suit different disputes, and this should be reflected in a planning agreement. For example, mediation may be suitable to deal with disputes arising from grievances, while expert determination may be suitable to resolve disputes of a technical nature and arbitration may be suitable for resolving commercial disputes.

4.3 Costs and charges

Costs

There is no comprehensive policy on the extent to which a planning authority may recover costs for negotiating, preparing, executing, registering, monitoring, enforcing and otherwise administering planning agreements. Wherever possible, planning authorities and developers should negotiate and agree costs at the earliest opportunity.

GST considerations

Both parties to a planning agreement have a potential GST liability and they should obtain advice in every case on whether a potential GST liability attaches to the agreement.

Recurrent costs and maintenance payments

Planning agreements may require developers to make contributions towards the recurrent costs of facilities that primarily serve the development to which the planning agreement applies or neighbouring development in perpetuity. However, where the facilities are intended to serve the wider community, planning agreements should only require the developer to make contributions towards the recurrent costs of the facility until a public revenue stream is established to support the on-going costs of the facility.

4.4 Registration and administration

Standard form planning agreements

Planning authorities are encouraged to publish and use standard form planning agreements or standard clauses for inclusion in planning agreements in the interests of process efficiency.

Documentation of planning agreements

The parties to a planning agreement should agree on which party is to draft the agreement to avoid duplication of resources and costs.

Councils are required to keep and make available a register of planning agreements. The register should be made available online or incorporated into the online planning register of the planning authority's website.

Monitoring and review of planning agreements

Planning authorities should use standardised systems to monitor the implementation of planning agreements in a systematic and transparent way. This may involve co-operation by different parts of planning authorities.

Monitoring systems should enable information about the implementation of planning agreements to be made readily available to public agencies, developers and the community. Planning agreements should contain a mechanism for their periodic review that should involve the participation of all parties.

Security for enforcement of developer's obligations

Parties should consider the means by which a planning agreement may be enforced. The most suitable means of enforcement may depend on:

- The circumstances of the planning agreement.
- The nature and extent of the developer's obligations under the planning agreement.
- The planning authority's reasonable assessment of the risk and consequences of non-performance.

Tying the performance of the developer's obligations to the issuing of construction, subdivision or occupation certificates may provide a suitable means of enforcing planning agreement obligations in some cases. The EP&A Act and the EP&A Regulation restrict the issuing of a construction certificate, subdivision certificate or occupation certificate by a certifier until any preconditions to the issuing of the certificate specified in a planning agreement have been complied with. Where adopting this approach, consideration should be given to including provisions to allow a developer to provide a financial security, such as a bond or bank guarantee, if they subsequently seek release of a certificate before completing the required obligations. This will avoid the need to amend the planning agreement.

Financial security, such as a bond or bank guarantee, can be a suitable means of enforcement where a planning agreement requires the carrying out of works or the dedication of land by the developer. Financial security can be called on by the planning authority in the event of default, coupled with step-in rights by the planning authority. The value of the financial security should relate to the potential costs that may be incurred by the planning authority in carrying out the relevant works obligations of the developer in the event of default by the developer.

Financial security or additional financial security may also be appropriate where the developer seeks to postpone obligations under a planning agreement to a time later than the time originally specified for performance. An amendment to the planning agreement would ordinarily be required in such circumstances unless the planning agreement already makes provision for such an arrangement.

Registration on title

Registration is important to inform people of the existence of a planning agreement affecting the land and for the enforcement of a planning agreement. Registration on title may bind future owners of the land to the agreement.

To ensure that the intention of the parties to register the planning agreement is not defeated, the developer should get written agreement to the registration from each person with an estate or interest in the land to which the planning agreement applies. This should be provided to the planning authority as a precondition to the execution of the planning agreement.

Provision should be made in a registered planning agreement about when the notation of the planning agreement on the title to land can be removed. For example, when:

- The developer has complied with the obligations under the planning agreement in respect of a part of the land and the notation of the planning agreement will be removed from that part of the land.
- Land the subject of the planning agreement is subdivided and titles for new lots are created and the developer has complied with all relevant planning agreement obligations relating to the subdivision.
- Additional valuable security for performance of the planning agreement acceptable to the planning authority is provided by the developer in exchange for removal of the registration of the planning agreement from the title to land.

Discharge of developer's obligations

Planning agreements should not impose obligations on developers indefinitely. Planning agreements should set out the circumstances in which the parties agree to discharge the developer's obligations under the agreement.

4.5 Public participation and notification

Planning agreements must be publicly notified and made available for public inspection before they can be entered into.

The EP&A Regulation requires that the notification of a proposed planning agreement occurs at the same time as the planning proposal or development application, or if this is not practicable, as soon as possible after.

The terms of the planning agreement and its proposed public benefits should be clearly shown as part of consultation material. This will help the community make a fully informed decision on the overall proposal.

Planning agreements must be accompanied by an explanatory note to assist the public in understanding the agreement. Other types of consultation material are encouraged in addition to the explanatory note. This might include additional written material, diagrams or plans.

Amendment to proposed planning agreement after public notification

Any material changes that are proposed to be made to a planning agreement after a public notice has been given should be subject to renotification if the changes would materially affect:

- How any of the matters specified in section 7.4 of the EP&A Act are dealt with by the planning agreement.
- Other key terms and conditions of the planning agreement.
- The planning authority's interests or the public interest under the planning agreement.
- Whether a non-involved member of the community would have made a submission objecting to the change if it had been publicly notified.

4.6 Explanatory notes

Planning agreements are legal documents and may not be easily understood by the public. An explanatory note can help the public understand a planning agreement and facilitate informed discussion. The EP&A Regulation requires that an explanatory note is provided with the public notice of a planning agreement.

In practice, the explanatory note can be prepared by one of the parties but should be reviewed and agreed on by any other party to the agreement.

The explanatory note must help the broader community to simply and clearly understand what a planning agreement is proposing, how it delivers public benefit, and why it is acceptable and in the public interest. It should be easy to understand, written in plain English and address all considerations outlined in this practice note.

The explanatory note must:

- Identify how the agreement promotes the public interest.
- Identify whether the agreement conforms with the planning authority's capital works program, if any.
- State whether the agreement specifies that certain requirements of the agreement must be

complied with before a construction certificate, occupation certificate or subdivision certificate is issued.

It should be possible for a person to be able to readily understand the nature of the development proposed and the public benefits to be provided. The explanatory note should indicate timing of delivery and should include maps, diagrams and other material to help explain what is proposed.

An explanatory note must summarise the objectives, nature and effect of the proposed agreement and contain an assessment of the merits of the proposed agreement, including the impact on the public or relevant section of the public.

Part 5 Examples of the use of planning agreements

Planning agreements have the potential to be used in a wide variety of planning circumstances and to achieve many different planning outcomes. Their use will be dictated by the circumstances of individual cases and the policies of planning authorities. Accordingly, it is not possible to set out all the circumstances in which a planning agreement may be appropriately entered into.

Below are some examples of the potential scope and application of planning agreements.

Compensation for loss or damage caused by development

Planning agreements can provide for development contributions that compensate for increased demand on the use of a public amenity, service, resource or asset that will or is likely to result from the carrying out the development.

For example, development may result in the loss of or increased impact on the provision of public open space, public car parking, public access, water and air quality, bushland, wildlife habitat or other natural areas.

The planning agreement could impose planning obligations directed towards replacing, substituting, or restoring the public amenity, service, resource or asset to an equivalent standard to that existing before the development is carried out.

In this way, planning agreements can offset development impacts that may otherwise be unacceptable.

Meeting demand created by development

Planning agreements can also provide for development contributions that meet the demand for new public infrastructure, amenities and services created by development. For example, development may create a demand for public transport, drainage services, public roads, public open space, streetscape and other public domain improvements, community and recreational facilities.

The public benefit provided under the agreement could be the provision, extension or improvement of public infrastructure, amenities and services to meet the additional demand created by the development. An agreement may be used to meet the requirements set out in a contributions plan in relation to certain land, or, potentially in the case of a large development area being delivered by one or a small number of developers, provide public amenities and services in lieu of preparing a contributions plan.

Prescribing inclusions in development

Planning agreements can be used to secure the implementation of particular planning policies by requiring development to incorporate particular elements that confer a public benefit.

Examples include agreements that require the provision of public facilities, open space or the retention of urban bushland. Agreements may also require development, in the public interest, to meet aesthetic standards, such as design excellence.

Providing benefits to the wider community

Planning agreements can also be used to secure the provision of broader benefits for the wider community. Broader benefits provided through planning agreements involve an agreement between a developer and a planning authority to allow the wider community to share in benefits

resulting from the development. The benefit may be provided in conjunction with planning obligations or other measures that address the impacts of the development on surrounding land or the wider community.

Alternatively, the benefit could wholly or partly replace such measures if the developer and the planning authority agree to a redistribution of the costs and benefits of development in order to allow the wider community, the planning authority and the developer to realise their specific preferences for the provision of public benefits.

Broader benefits may take the form of additional or better-quality public facilities than is required for a particular development. Alternatively, benefits may involve the provision of public facilities that, although not strictly required to make the development acceptable in planning terms, are not wholly unrelated to the development.

Recurrent funding

Planning agreements may provide for public benefits that take the form of development contributions towards the recurrent costs of infrastructure, facilities and services. Such benefits may relate to the recurrent costs of items that primarily serve the development to which the planning agreement applies or neighbouring development. In such cases, the planning agreement may establish an endowment fund managed by a trust, to pay for the recurrent costs of the relevant item.

For example, a planning agreement may fund the recurrent costs of water quality management in respect of development that will have a demonstrated impact on a natural watercourse that flows through or nearby to the development.

Broader benefits may also take the form of interim funding of the recurrent costs of infrastructure, facilities and services that will ultimately serve the wider community. The planning agreement would only require the developer to make such contributions until a public revenue stream is established to support the on-going costs of the facility.

Biodiversity offsetting

A planning agreement may make provision with respect to the offset of the impact on biodiversity values of proposed development, including by the retirement of biodiversity credits in accordance with the *Biodiversity Conservation Act 2016* (see section 7.18 of that Act).