Shoalhaven City Council

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Planning Agreement Policy

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1. Policy Purpose

The purpose of this Policy is to:

- Set out Council's policies and procedures relating to the use of planning agreements under section 7.4 of the *Environmental Planning and Assessment Act 1979*.
- Meet the requirements of the Planning Secretary's Practice Note for planning agreements.

2. Objectives

2.1. Policy Statement

The objectives of this Policy are as follows:

- To meet the requirement of the Practice Note.
- To set out the Council's policies and procedures on its use of planning agreements and when Council may consider entering into a planning agreement.
- To establish a clear, transparent, ethical, efficient, fair, consistent and accountable framework governing the use of planning agreements by the Council.
- To promote an enhanced and more flexible development contributions system for Council.
- To align the negotiation and use of planning agreements by the Council with applicable standards of public sector probity and good governance.
- To align the use of planning agreements by the Council with the Council's corporate planning and strategic planning goals and to promote the attainment of those goals.
- In appropriate circumstances, to enable the provision of development contributions above those required to address the direct impact of a particular development on neighbouring land and the wider community.

3. Definitions

Term	Meaning
Affordable housing	Has the same meaning as in section 1.4(1) of the EPA Act.
Contributions plan	Means the Shoalhaven Contributions Plan 2026, as amended from time to time.
Council	means Shoalhaven City Council.
Dedication of land	Includes dedication of: (a) land in stratum (whether or not within a building), (b) lots in a strata plan, (c) interests in land such as but not limited to easements and rights of way.
Developer	Means a person who has:

	(a) sought a change to an environmental planning instrument, or (b) made or proposes to make a development application or an application for a complying development certificate (including a person who has made or proposes to make an application to modify a development consent), or (c) entered into an agreement with or is otherwise associated with, a person to whom paragraph (a) or (b) applies.
Development Contributions Advisory Group	Means Council's internal governance body consisting of senior and executive staff.
Development application	Has the same meaning as in section 1.4(1) of the EPA Act
Development 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 any other material public benefit, or any combination of them, to be used for or applied towards a public purpose.
Direction	Means the *Environmental Planning Assessment (Planning Agreements) Direction 2019* made by the Minister for Planning under section 7.9 of the EPA Act dated 28 February 2019.
EPA Act	Means the *Environmental Planning and Assessment Act* 1979 (NSW).
Environmental planning instrument	Has the same meaning as in the EPA Act.
Explanatory note	Means an explanatory note relating to a planning agreement required by section 205 of the Regulation.
ICAC Audit Tool	Means the *Development Assessment Internal Audit Tool* published by the Independent Commission Against Corruption dated April 2010 in so far as it applies to planning agreements.
Instrument change	Means the making, amendment or repeal of an environmental planning instrument to which a planning proposal relates.
Land value capture	Means a public financing mechanism implemented through planning agreements by which the Council captures for the community's benefit a share of the increase in the unimproved land value arising from: (a) an instrument change which facilitates development, plus associated or consequential changes to a development control plan, or (b) the granting of a development consent which allows development to exceed development standards or other development controls under the LEP or another environmental planning instrument.
LEP	Means *Shoalhaven Local Environmental Plan 2014*.
LGA	Means local government area.

LG Act	Means the *Local Government Act 1993* (NSW).
Local infrastructure contribution	Means a condition of development consent imposed under section 7.11 of the EPA Act requiring the payment of a monetary contribution or the dedication of land free of cost or under section 7.12 requiring the payment of a levy.
Modification application	Means an application under section 4.55 or 4.56 of the EPA Act to modify a development consent.
Part 6 certificate	Means a certificate under Part 6 of the EPA Act.
Planning agreement	Has the same meaning as in section 7.4(1) of the EPA Act.
Planning proposal	Has the same meaning as in section 3.33(1) of the EPA Act.
Practice note	Means the *Planning Agreements Practice Note 2025* published by the Planning Secretary, a copy of which is available on the NSW Planning Portal website.
Public	Includes a section of the public.
Public benefit	Means the benefit enjoyed by the public as a consequence of a development contribution made by a developer under a planning agreement.
Public facilities	Means public infrastructure, facilities, amenities and services.
Public purpose	Has the same meaning as in section 7.4(2) of the EPA Act.
Regulation	Means the *Environmental Planning and Assessment Regulation 2021*.
Surplus value	The value of the developer's contribution under a planning agreement for an infrastructure item in the contributions plan, less the value of development contributions that are or could have been required to be made under: (a) Section 7.11 of the EPA Act for that item, or (b) Section 7.12 of the EPA Act, in respect of the development the subject of the agreement.
Planning agreement application fee or planning agreement fee	Means the respective fee specified in Council's Fees and Charges for the relevant stage of the planning agreement process.
VPA Officer	Means a Council officer having the function of negotiating a proposed planning agreement on behalf of Council but does not include a person having the function of assessing a planning proposal or a development application or modification application.
Work	Means the physical result of carrying out a work with respect to land.

4. Roles and Responsibilities

A planning agreement is a voluntary agreement between a planning authority and a developer that allows a developer to provide public benefits relating to public services and amenities.

The public benefits that will typically be funded through monetary contributions include (but are not limited to) new or upgraded public parks and open space, new or upgraded community facilities and libraries, new or upgraded public footpaths, and improvements to local roads and traffic management facilities, drainage basins/water quality infrastructure and the provision of affordable housing.

Planning agreements will ordinarily relate to development the subject of planning proposals or development applications that will or are likely to require the provision of or increase the demand for public facilities in the Council's area. While this usually arises in relation to greenfield projects or residential growth areas, Council will consider any planning agreement proposals that otherwise are consistent with this Policy.

4.1. Provisions – When planning agreements may be appropriate

The Contributions Plan should predict the expected types of development in the LGA and the demand for additional public amenities and public services to meet the expected development in the period covered by the plan. The local infrastructure contribution rates specified in the plan relate to the development predicted by the plan and the cost of providing new or additional public facilities to meet the demands of that development.

From time to time, Council receives planning proposals and development applications and modification applications with objections under clause 4.6 of the LEP that are often beyond the predictions and funding outcomes of the Contributions Plan. The Council will seek to enter into planning agreements with developers in these circumstances to obtain development contributions to meet the generated demand for public facilities or affordable housing.

Council may also seek or agree to enter into a planning agreement with a developer where:

- The demand for public facilities is not covered adequately or at all by the Contributions Plan and cannot be addressed through local infrastructure contributions.
- The demand for public facilities is outside of the permissible scope of local infrastructure contributions or affordable housing contributions under the EPA Act (e.g., natural environment conservation or enhancement; or the relocation/replacement/repair of public assets in connection with proposed new development).
- It is appropriate from a planning perspective to address local infrastructure and affordable housing requirements in connection with proposed new development at the planning proposal stage.
- Council and a developer agree to the provision of additional or different public benefits than those addressed the Contributions Plan, such as the dedication of land or ongoing maintenance of infrastructure.
- Council and a developer agree that the developer may deliver one or more works contained in the Contributions Plan works schedule instead of paying monetary local infrastructure contributions towards the works pursuant to a development consent.
- A planning agreement provides for affordable housing contributions and is entered into in connection with a development application or proposed development application.

- Recurrent funding for the maintenance of public facilities or land is required.
- Where community benefits from the unearned increment to developers in land value increases, associated with significant planning proposals or development applications, and a land value capture contribution is considered appropriate.

4.2. Provisions – The planning agreement process

This subsection outlines the planning agreement process for a planning proposal and a development application/complying development or modification applications. Refer to the flow chart at Appendix 1 for additional guidance.

Planning agreements should be negotiated before the relevant development application is determined or the instrument change takes effect so that the draft planning agreement is publicly notified alongside the relevant development application and planning proposal. As far as practicable, the Council will seek to ensure that the process for negotiation, assessment and public notification of a planning agreement runs in parallel with the process for public exhibition, assessment and determination of a development application, or the public exhibition of a planning proposal and making of an instrument change.

Phase 1: Initial consideration

Before the lodgement of the relevant development application or modification application or request for a planning proposal by the developer, Council's VPA Officer, landowner and the developer will meet to discuss the proposal. To commence this process and prior to the meeting, the applicant must submit the planning agreement application form and pay the relevant planning agreement application fee.

The parties will discuss whether it would be appropriate to negotiate a planning agreement, considering the key commercial issues relating to the proposal as well as the criteria in Section 4.1.1 - 4.1.2 and Appendix 2 of this Policy.

Council's VPA Officer will seek internal Council stakeholder feedback regarding the proposal. The proposal and Council's VPA Officer's recommendation will then be considered by Council's Development Contributions Advisory Group, where it will be determined if the proposal is accepted in principle (with or without adjustments) or rejected. The applicant will be advised accordingly.

If the proposal is rejected, the applicant may resubmit a revised proposal. Each resubmission will require the completion of a new planning agreement application form and payment of the relevant planning agreement application fee.

Phase 2: Negotiation

Following the in-principle acceptance of the proposal, the VPA Officer and the developer may commence negotiations in relation to the key commercial issues. Payment of the relevant planning agreement fee will be required, and the following established and agreed between parties:

- Whether any independent third parties need to be engaged for the negotiation and assessment for the planning agreement,
- Who will represent the developer and landowner in the negotiations.

- A timetable for negotiations.

If agreement is reached on commercial terms, the following will occur:

- The developer must give the Council a letter of offer to enter into the planning agreement with the Council, pursuant to section 7.7(3) of the EPA Act. Refer to the letter of offer requirements in Council's letter of offer template.
- Council will arrange for the preparation of the planning agreement and explanatory note on its template[1] at the developer's cost, based on the content of the above letter of offer. The planning agreement must conform to the Council's currently publicly available template with such modifications as may be required in the particular circumstances. In preparing the draft planning agreement document, the parties are to negotiate any other relevant terms of the planning agreement.

When the VPA Officer is satisfied with the terms of the draft planning agreement, the developer is to provide the Council with an irrevocable letter of offer that is consistent with Council's letter of offer template and expressly offers to enter into that version of the planning agreement attached to the offer. If required by the Council, the version of the planning agreement attached to the further letter of offer is to be signed by the developer and any landowner.

This version of the letter of offer and the draft planning agreement will be referred to the Development Contributions Advisory Group by the VPA Officer for endorsement to proceed to Phase 3.

The negotiation phase is to be completed within six months, or the process will be terminated.

Phase 3: Reporting and Notification

The VPA Officer will report the draft VPA to Council for endorsement to progress to public notification, unless:

- The contributions that are under the planning agreement:
  - Consist of work and/or dedication land that are listed in the Contributions Plan and s7.11 contributions are not excluded, or
  - Consist of work and/or dedication of land that are listed in the Contributions Plan and s7.11 contributions are excluded, but only in relation to s7.11 contributions for the same works item or category of infrastructure as the works and land to be provided under the planning agreement, and
- The planning agreement does not involve a s7.11 or s7.12 contribution credit or refund, and
- The planning agreement does not involve maintenance or recurrent funding or has maintenance or recurrent funding that is considered minor, is agreed between parties, and is supported or necessitated via a policy of Council or a plan or study required for the development (e.g., a vegetation management plan).

If the planning agreement relates to a planning proposal, the draft planning agreement:

- Is to be reported to a Council meeting, together with the planning proposal, prior to proceeding to a Gateway Determination under section 3.34 of the Act, and

[1] The planning agreement template is consistent with section 7.4 of the EPA Act.

- Will only proceed to public notification if the Gateway Determination determines that the planning proposal should proceed.

If the Council resolves to proceed with the planning agreement drafting and negotiation, the Council may also delegate authority to Council's Chief Executive Officer, or his delegate, to negotiate, publicly notify, enter into, and register the planning agreement without further resolution of Council.

If the Council resolution endorses progression to public notification, payment of the relevant planning agreement fee will be required before notification commences.

The VPA will be notified for a period of at least 28 days in conjunction with the public exhibition of the planning proposal or relevant application, and in in accordance with the EPA Act and Regulation. Public submissions that are received during the public notification period will be considered by the VPA Officer. The VPA Officer may negotiate changes to the draft planning agreement having regard to any matters raised.

A planning agreement can generally be entered into at any time after the planning agreement is publicly notified. In some cases, the planning agreement may need to be reported to the Council before progressing to Council's execution. This may be:

- If Council did not delegate finalisation to the CEO or his/her delegate.
- A result of submissions during notification that require reconsideration of the agreement by the Council.
- Where substantive amendments are required following notification of the agreement.
- To report in connection with the Council's determination of the development application or decision to proceed with the planning proposal.

Any resulting changes to the planning agreement through this phase will require a further letter of offer from the developer to be provided which attaches the amended draft planning agreement. Re-notification of the planning agreement may be required.

Phase 4: Execution and implementation

Council will typically require the developer to sign the planning agreement if not undertaken at Phase 2, or provide a further letter of offer, before it determines the development application to which the planning agreement relates, or prior to Council requesting that the Minister make the instrument change referred to in the planning proposal.

If the Council determines the development application before the planning agreement is signed, then the Council will generally require the planning agreement to be entered into as a deferred commencement condition, consistent with the terms of the developer's accepted letter of offer.

Prior to the finalisation of any instrument change referred to in the planning proposal, or before Council makes that instrument change under delegation, the planning agreement must be executed. If the developer refuses to execute a planning agreement consistent with the timeframes above, in accordance with Section 3.35 of the EPA Act, Council may request the Minister not proceed with the instrument change.

A planning agreement is entered into when it is signed by all of the parties. It must also be submitted on the NSW Planning Portal. The Council's Planning Agreements Register, which appears on the NSW Planning Portal and Council's website, contains links to planning

agreements entered into by Council. Execution is to occur within six months of Council's resolution, or the process will be terminated.

Any documents that are required to be provided to Council on commencement of the planning agreement, such as instruments and letters of consents to the registration of a planning agreement or any security, should be provided to Council before the planning agreement is executed by the Council.

Implementation and review is to occur in accordance with the terms of the planning agreement and Appendix 2.

4.3. Implementation

This Policy applies to any planning agreement that the Council enters into or proposes to enter into that applies to land or development within the Shoalhaven LGA, or jointly with another council or other planning authority that applies to land outside the Council's LGA.

A planning agreement can be entered into in connection with a planning proposal, the grant of development consent (including a complying development certificate), or the modification of a development consent.

Council intends to use planning agreements in connection with all of these, including particularly where the impacts of proposed new development cannot be addressed adequately or at all through local infrastructure contributions, or through affordable housing contributions imposed under section 7.32 of the EPA Act.

5. Related Legislation, Policies or Procedures

Subdivision 2 of Division 7.1 of the EPA Act and Division 1 of Part 9 of the Regulation set out the primary legislative framework for planning agreements and what a planning agreement must provide for. Other related legislation, policies and procedures include:

- *Conveyancing Act 1919*
- *Local Government Act 1993*.
- Planning Secretary's Planning Agreements Practice Note 2025.
- Shoalhaven Contributions Plan.
- ICAC Audit Tool.

6. Risk Assessment

Probity

To ensure that the planning agreement negotiations are transparent, consistent, efficient, fair, and accountable and to protect the public interest and integrity of the planning process, the Council will:

- Provide a copy of this Policy to any person who seeks to enter into a planning agreement with Council.
- Publish this Policy on Council's website and promote the general awareness of this Policy.

- Negotiate planning agreements in accordance with this Policy.
- Comply with public notification requirements in the EPA Act and Regulation.
- Ensure appropriate delegations and separation of responsibilities in relation to:
  - The assessment of planning proposals and development applications.
  - The consideration and negotiation of planning agreements.
- Ensure that modifications to approved development must be subject to the same scrutiny as the original development application.
- Ensure that Councillors and Council staff understand their particular role and responsibility, some of which carry the potential for conflicts of interest.
- Take appropriate steps to ensure that it avoids a conflict of interest between its role as a planning authority and its commercial interest in the development.
- Take appropriate steps to ensure that it avoids any other conflicts of interest such as appointing a probity advisor in any other cases where there may be a risk of conflict of interest, or where there is significant public interest.
- Ensure that it will not enter into any contractual arrangement that may fetter Council's statutory discretion or guarantee outcomes that are subject to a separate regulatory processes.
- Ensure that all negotiations with a developer and their consultants are sufficiently documented.

Who will negotiate on behalf of the Council?

The Council will nominate the VPA Officer to be the representative of the Council in all negotiations regarding the key commercial terms of any proposed planning agreement.

The VPA Officer will negotiate a planning agreement on behalf of the Council.

The Councillors will not be involved in the negotiation of the planning agreement; however, a decision on whether the Council will enter into a planning agreement will be made by resolution of the governing body of the Council.

Separation of roles within Council

The Council will ensure that the Council staff responsible for assessing and determining a development application, modification application or planning proposal, to which a planning agreement relates, do not have a role in negotiating or assessing the key commercial terms of the planning agreement.

The VPA Officer will not have any involvement with the:

- Assessment of the development application, modification application or planning proposal to which the proposed planning agreement relates.
- Commercial and development activities of Council, where the development the subject of a planning agreement involves Council development or land.

If any person reporting to the VPA Officer is involved with the draft planning agreement, that person shall be bound by the same provisions of this Policy in respect of interaction with

Council officers assessing the development application, modification application or planning proposal and conflicts of interest.

The Council will ensure that the VPA Officer does not have any conflict of interest, pecuniary or otherwise, within the meaning of Council's Code of Conduct in respect of the subject matter of the planning agreement or the development application, modification application or planning proposal to which it relates.

If the VPA Officer considers that she or he may have such a conflict, that person must immediately advise the Council in writing and a different VPA Officer, or if necessary an independent third party, must be appointed.

Involvement of independent third parties

The Council will encourage the appointment of an independent person to facilitate or participate in the negotiations of a planning agreement in circumstances where:

- An independent assessment of a proposed instrument change, development application or modification application is necessary or desirable.
- There is a risk of conflict of interests.
- Factual information requires validation in the course of negotiations.
- Sensitive financial or other confidential information must be verified or established in the course of negotiations.
- Facilitation of complex negotiations is required in relation to large projects or where numerous parties or stakeholders are involved.
- Dispute resolution is required under a planning agreement.

Procedure relating to development of Council owned land

This Policy is intended to apply as far as practicable to planning proposals relating to Council-owned or controlled land, and to development by or on behalf of the Council on Council owned or controlled land, in the same way as it applies to other land.

In such circumstances, the Council will seek to provide a public benefit in accordance with this Policy by one of the following means:

- Registering a covenant on title under s88D of the *Conveyancing Act 1919*.
- Entering into a planning agreement via a deed poll and registering the agreement on title.
- Making provision in the relevant local environmental plan to require provision of the public benefit in respect of the development of the land.

The Council will generally prefer to register a covenant on title as described above. However, if that is not practicable, the Council will provide for the public benefit by one of the other specified means.

7. Data and Reporting

Council includes in its annual report particulars of compliance with and the effect of planning agreements during the year to which the annual report relates.

A register of any planning agreements that apply to land within the Council's area, whether or not the Council is a party to a planning agreement, is also kept.

Both are published on the NSW Planning Portal and the Council's website.

8. Monitoring and Review

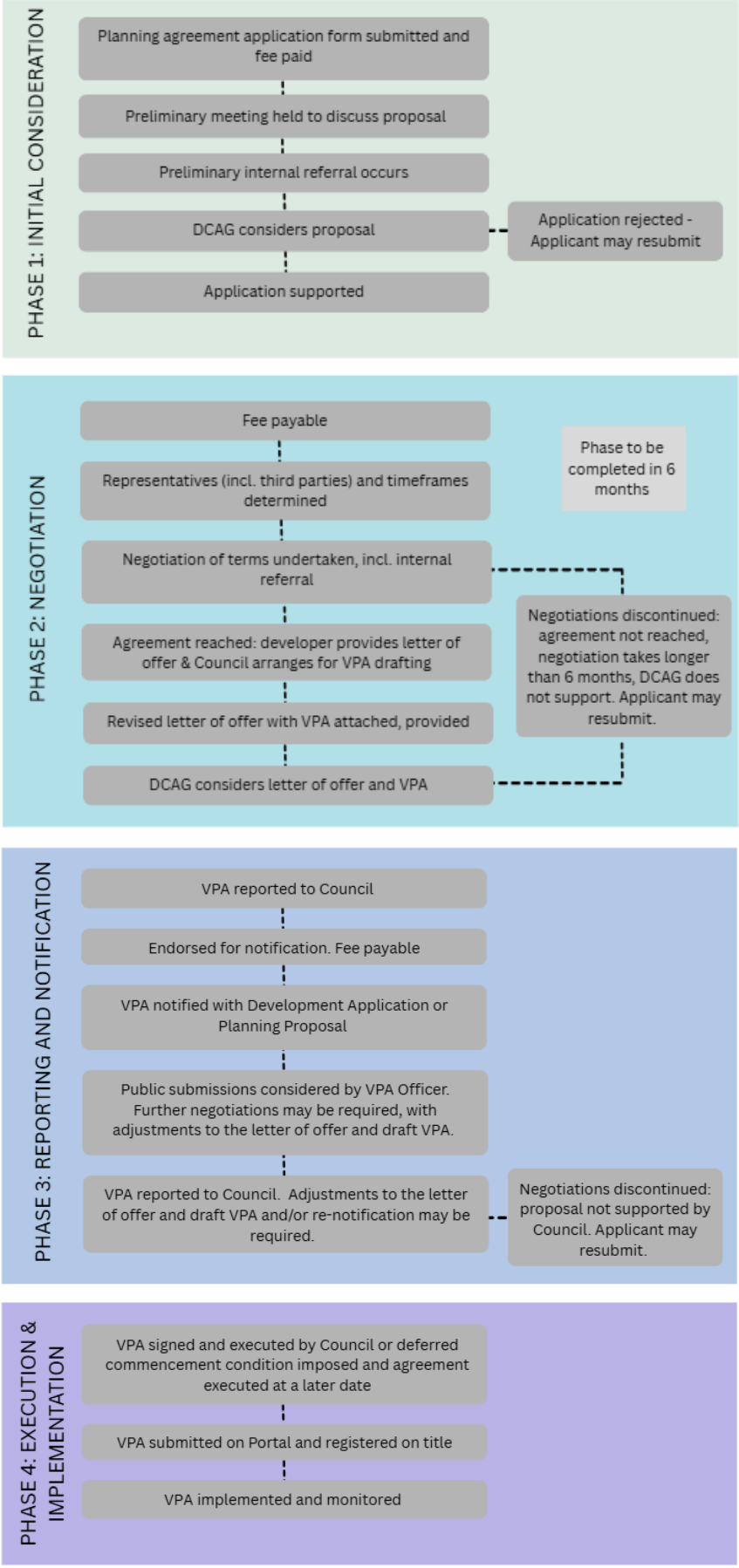
It is intended that this Policy will be periodically reviewed and, depending on the outcome of any review following consideration by Council, may be updated from time to time.

9. Ownership and Approval

9.1. Public Policy

Responsibility	Responsible Owner
Directorate	City Development – Strategic Planning – Policy Planning
Endorsement	Development Contributions Advisory Group
Approval/Adoption	Council

APPENDIX 1: PLANNING AGREEMENT FLOW CHART



APPENDIX 2: TECHNICAL INFORMATION

This attachment provides additional guidance to further outline Council's position and expectations regarding planning agreements. Whilst presented in the key phasing stages, the content may be relevant across the whole process.

Phase 1: Initial consideration

Fundamental principles governing the use of planning agreements

The fundamental principles of a planning agreement are to safeguard the public interest and the integrity of the planning process, as follows:

- 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 development,
- Value capture should not be the primary purpose of a planning agreement.

Additionally, the following principles will govern the Council's use of planning agreements:

- Planning decisions must not be bought or sold through planning agreements,
- The Council will not allow planning agreements to unlawfully or otherwise improperly fetter the exercise of its planning functions under the EPA Act, regulation or any other act or law,
- Planning agreements must be used for a proper planning purpose,
- The decision to negotiate a proposed planning agreement, the terms and the decision whether or not to enter into the planning agreement will be undertaken within council separately from the consideration of the proposed planning agreement as part of the merit assessment of a development application or a planning proposal,
- Development that is unacceptable on planning grounds will not be permitted because of the public benefits offered by a developer under a planning agreement that do not make the development acceptable on planning grounds,
- In assessing a development application or planning proposal, the council will not take into consideration planning agreements that are wholly unrelated to the subject matter of the development application or planning proposal, nor will the council give disproportionate weight to a planning agreement in the assessment process,
- The council will not allow the interests of developers, individuals or interest groups to outweigh the public interest when considering a proposed planning agreement, and

- The council will not improperly rely on its position in order to extract unreasonable public benefits from developers under planning agreements.

Acceptability test to be applied to planning agreements

When considering entering into a planning agreement, Council will apply the following test in order to assess the desirability of the possible outcome of a proposed planning agreement:

- Do the procedures followed by the Council to negotiate and enter into planning agreement, and the terms of the planning agreement, as relevant comply with the relevant requirements of the EPA Act, the Regulation the Direction, ICAC Audit Tool and this Policy?
- Is the planning agreement directed towards legitimate planning purposes ascertainable from the statutory planning controls and other adopted planning policies applying to development and the circumstances of the case?
- Does the planning agreement provide for the delivery of infrastructure or public benefits that are not wholly unrelated to the development?
- Will the planning agreement produce outcomes that meet the general values and expectations of the public and protect the overall public interest?
- Does the planning agreement provide for reasonable means of achieving the relevant outcomes and securing the relevant infrastructure and public benefits?
- Will the planning agreement protect the community against adverse planning decisions?
- Will the planning agreement be registered on title and, if not, has the developer provided alternative satisfactory security in lieu of registration?
- Are there any relevant circumstances that may operate to preclude the Council from negotiating or entering into the proposed planning agreement?

Corporate strategic planning and land use planning context

Planning agreements must fit within the context of the Council's broader organisational strategic planning and land use planning policies, goals, and strategies. This includes (not exclusively) the community strategic plan, community engagement strategy, resourcing strategy, delivery program, operational plan and local strategic planning statement. The Council's use of planning agreements should also align with the Regional Plan for the area.

Planning agreements are one means of enabling the Council to fund and deliver some of the projects and infrastructure identified in the Council's corporate and land use related strategic planning documents. These documents provide guidance to the Council in relation to the planning priorities and projects that it should pursue via planning agreements.

Affordable housing contributions

The Council must comply with the Direction when entering into planning agreements to obtain affordable housing contributions in connection with a development application or proposed development application. Council may seek to negotiate planning agreements where the relevant development application, modification application or planning proposal proposes an increase to the maximum building height or floor space ratio applying to the land.

Council will generally seek monetary development contributions through planning agreements for this purpose, but may seek or agree to the dedication of affordable housing units or the dedication of land for the development of affordable housing units free of cost to the Council or a social housing provider, and other material public benefits on a case by case basis, to meet the demands created by proposed development.

For planning proposals, the Council will also consider the following matters:

- Whether the proposed development to which the planning proposal relates includes, or will include, development for the purpose of affordable housing.
- Whether affordable housing (such as a hostel, boarding house or low-rental residential building) on the land the subject of the planning proposal will be, or has been, demolished.
- The terms of any affordable housing contribution scheme for dedications or contributions set out in or adopted by a local environmental plan.

Monetary contributions in lieu of on-site non-residential parking provision

In addition to section 7.11 contributions or 7.12 levy, Council may consider accepting additional developer contributions instead of providing non-residential parking on the development site in the following areas, as outlined in Shoalhaven Development Control Plan 2014:

- Berry (E1 zoned land)
- Bomaderry Town Centre (MU1 zoned land)
- Nowra CBD (E2 and MU1 zoned land)
- Huskisson Town Centre (E1 and MU1 zoned land)
- Milton (E1 zoned land)
- Ulladulla (E2 and MU1 zoned land)

Applicants who propose deficient non-residential car parking in a development application in the above areas can make an offer to Council to enter into a planning agreement to make a monetary contribution to Council to address the car parking deficiency, which would be considered in the development assessment process. A monetary contribution will not be accepted for residential parking. Additional developer contributions for each deficient non-residential car parking space outside the above areas may also be considered by Council on merit.

Council's criteria for whether it will consider a monetary contribution instead of the provision of on-site parking is as follows:

- A monetary contribution is paid for each deficient parking space (rounded up to the whole), at a rate of $24,723.09 per space. The rate set is not subject to negotiation and will be adjusted at the beginning of each quarter from the commencement of this Policy, according to positive movements in the Consumer Price Index (All Groups Index) for Sydney (CPI) for the previous quarter.
- The deficit will not result in adverse impacts on the road network, including congestion and safety.
- There is a clear public benefit in not providing on site parking spaces.

- A monetary contribution for each deficient non-residential parking space in the part of Nowra CBD bound by North Street, O'Keeffe Avenue, Nowra Lane, Worrigee Street and Berry Street is preferable over provision on site.

The acceptance of monetary contributions instead of on-site parking provision is at the sole discretion of the Council.

Monetary contributions collected for this purpose will be used by Council to fund the coordinated construction of public car parking across the City, in locations that align with Council's parking strategies.

Land dedication

A planning agreement may provide for the dedication of land to Council where the land is required for or in connection with the provision, extension or augmentation of public facilities associated with development the subject of a planning proposal or development application.

Ordinarily, land dedicated to Council under a planning agreement must:

- Serve a genuine planning purpose (e.g., not 'leftover' land).
- Be fit for the purpose for which the land will be dedicated.
- Unless otherwise agreed by Council, be free of encumbrances and dedicated free of cost.

The developer will be responsible for preparing all documents and meeting all costs associated with the dedication of land under a planning agreement.

Where Council agrees in a planning agreement to offset part or all of the value of land dedicated to Council under the agreement against section 7.11 contributions or section 7.12 levies under the EPA Act, the value of the land for offsetting purposes will not exceed the agreed contribution value of the land set out in the planning agreement, which value may be less than its market value determined in accordance with section 56 of the *Land Acquisition (Just Terms Compensation) Act 199*1. Refer to the 'valuing public benefits' section below for more detail regarding land value.

The timing of the dedication of land under a planning agreement will ordinarily be determined by the planning purpose served by the dedication and whether the planning agreement is associated with a planning proposal or a development application.

Phase 2: Negotiation

Valuing public benefits

The EPA Act does not require a planning agreement to set out the dollar value of non-monetary benefits provided by the developer under the agreement; however, valuing non-monetary benefits is helpful in determining the extent of a non-monetary benefit, credits and offsets against local infrastructure contribution or determining the amount of security to be provided.

The Council will decide on a case-by-case basis whether non-monetary benefits provided under a planning agreement are required to be valued.

Where a planning agreement provides for the dedication of land free of cost or acquires land for value, the value for the purposes of the agreement will generally be the market value of the land determined in accordance with Division 4 of Part 3 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW). Where land required to be dedicated under a planning agreement is required to be valued, the Council will engage, at the developer's cost, a suitably

qualified and experienced valuer independent of the parties to provide a written opinion on the estimated value of the relevant land to the Council. The valuer is to be independent of, and at arms-length from, the parties to the planning agreement.

Where a planning agreement provides for the carrying out of works, the value for the purposes of the agreement will be the estimated design and construction costs of the works agreed to by Council. Where works to be provided under a planning agreement are required to be valued, the Council will generally engage, at the developer's cost, a suitably qualified and experienced quantity surveyor independent of the parties to provide a written opinion on the estimated value of the works.

Notwithstanding the above, if the land or works to be valued for the purposes of a planning agreement are included in the works schedule in the Contributions Plan, the value for the purposes of the agreement will be the dollar value stated in the plan, unless the Council otherwise agrees.

Funding for recurrent costs

Recurrent expenditure relating to the provision of public amenities or public services and affordable housing may be applied under a planning agreement.

Where public facilities primarily serve the development to which the planning agreement applies or neighbouring development, Council may require development contributions to be provided towards the recurrent costs of those facilities in perpetuity.

In respect of public facilities that provide 'broader benefits', Council will only require development contributions to be provided towards the recurrent costs of those facilities until a public revenue stream is established to support the ongoing costs of the facility.

Works & Works-in-kind

The Council requires specific provisions to be included in all planning agreements that require the carrying out of works, as contained in the publicly available planning agreement template.

The provisions of a particular planning agreement applying to the carrying out of works are subject to the circumstances of each case, which may require the deletion or modification of some of the provisions contained in the template or the inclusion of other provisions.

There is no legal obligation on the Council to consider or pay a surplus value amount in relation to the works (if applicable) and the Council will not do so under any circumstances.

Security for enforcement and performance

Security for the enforcement of a planning agreement may be achieved using a number of different means or a combination of them, including:

- Registration of the planning agreement on title.
- Requiring the provision of development contributions prior to the issuing of part 6 certificates for the development to which the agreement.
- In the case of a planning proposal, requiring the provision of development contributions prior to or in conjunction with the taking effect of the amendment to the relevant local environmental plan.

- Bonds or bank guarantees.
- Granting and registration of a charge over land in the Council's favour.
- In the case of an obligation for the developer to dedicate land, a provision in the planning agreement providing for the compulsory acquisition by the Council of the relevant land.

In addition to registration of a planning agreement, the Council will generally require the following security for the following types of development contributions under an agreement on and from the date of execution of the planning agreement:

- For monetary development contributions, payment to be tied to the issuing of Part 6 certificates where possible; otherwise, the Council will require a bond or bank guarantee on terms acceptable to the Council to be provided for the full value of the contributions, or a charge encumbering land with sufficient value to secure the payment of the monetary contribution to be registered on the title to the land.
- For the dedication of land, the inclusion of a provision in the planning agreement allowing the compulsory acquisition of the relevant land for $1 in the event the land is not dedicated as required under the planning agreement.
- For the carrying out works:
  - Completion of the works or stages of the works to be tied to the issuing of Part 6 certificates for the development to which the agreement applies, and provision of a bank guarantee in an amount determined by the Council in the circumstances having regard to the construction cost of the work.
  - For works that are not tied to the issuing of a Part 6 certificate, or where the developer seeks to defer the timing for completion of a work, provision of a bank guarantee equal to 115% of the estimated construction cost of the work.
  - Provision of bank guarantee in an appropriate amount not exceeding 10% of the construction cost of a work to secure the defects liability and maintenance obligations relating to the work under the planning agreement, where defects liability and maintenance obligations have not already been secured via conditions of consent.
- If a planning agreement is not registered on title on and from the commencement of the planning agreement, the Council may also require the provision, on commencement of the agreement, of a bond or bank guarantee equal to the full value of all of the development contributions to be provided until such time as the planning agreement is registered.

Credits and offsets

The Council will, on a case by case basis, consider whether contributions under section 7.11 of the EPA Act should be reduced in consideration of the benefits provided under a planning agreement. Typical circumstances where this may occur include, but are not limited to:

- Where a planning agreement requires the provision of a work or land identified in the works schedule in a Contributions Plan but the demand for the work or the land is spread among a number of future developments and other developers have contributed or will contribute towards a proportion of the cost of the work or land item through s7.11 contributions.
- Where a planning agreement requires the provision of a work or land which will wholly or partly replace an item in the works schedule in the Contributions Plan.

- Where a planning agreement requires the provision of a work or land identified in the works schedule in the Contributions Plan and the cost of constructing work, or the value of the land determined in accordance with this Policy, exceeds the amount identified in the Contributions Plan.

Where a planning agreement provides for works or land dedication, Council will usually only consider an offset of section 7.11 monetary contributions relating to the specific works item in the Contributions plan. Council will not support an offset of section 7.11 monetary contributions in a different category of contributions in the Contributions Plan to the works or land being provided (e.g., offsets against open space contributions for road works).

Any difference between the agreed and actual costs of constructing any works in a planning agreement will be to the advantage or disadvantage of the developer. The developer is not entitled to claim any additional credits or reimbursement for the difference between the actual construction costs and the agreed reduction in contributions under section 7.11 of the EPA Act.

Timing of provision of benefits by developer

The timing of when the provision of development contributions are to be made may differ from case to case depending on the particular development. As a general rule, the Council will require development contributions to be provided at the following times:

- For monetary contributions, prior to the issuing of the first Part 6 certificate for the development.
- For the dedication of land, upon the registration of the first plan of subdivision for the development or prior to the issuing of the first Part 6 certificate for the development.
- For carrying out of work, prior to the issuing of the first Part 6 certificate for the development. If the development is staged, the work is to be provided before the first Part 6 certificate for the relevant stage of the development.

Registration

The EPA Act provides for the registration of a planning agreement on the title to land. Upon registration, the planning agreement becomes binding on, and is enforceable against, the owner of the land from time to time (i.e. future owners) as if each owner for the time being had entered into the planning agreement.

Council requires all planning agreements to be registered on the title.

Registration requires the written consent of all persons having a registered interest in the land. Such persons include the registered proprietor, caveators, mortgagees, chargees, lessees and the like. For this reason, the landowner, if different to the developer, will generally be required to be an additional party to the planning agreement.

Phase 3: Reporting and Notification

Public notification

The Regulation requires public notification of the draft planning agreement to occur as part of, and at the same time and in the same way as public exhibition of the planning proposal, development application or modification application unless it is not practicable to do so. In which case, public notification of the planning agreement must occur as soon as practicable.

Where the development application or planning proposal to which a planning agreement relates is required by or under the EPA Act or Regulation to be publicly notified and available for public inspection for a period exceeding 28 days, the Council will publicly notify the planning agreement and make it available for public inspection for that longer period.

Re-notification

A draft planning agreement may be amended by the parties to address any issues arising from submissions that are received or for any other reason. A draft planning agreement should be renotified where changes are made to the draft planning agreement that materially affect:

- How any of the matters specified in section 7.4 of the EPA 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, or
- Whether a non-involved member of the community would have made a submission objecting to the change if it had been publicly notified.

The Council will publicly re-notify a draft planning agreement and the associated development application, modification application or planning proposal to which it relates if, in the Council's opinion, a material change as described above has been made to the terms of the agreement.

The amended draft planning agreement may need to be reported to the Council and if so, the VPA Officer will again assess the merits of the amended draft planning agreement before it is reported to the Council and before any re-notification.

Phase 4: Execution and implementation

Deed poll

The Council will generally require a provision to be included in a planning agreement to the effect that the planning agreement operates as a deed poll in favour of the Council on and from the date of execution by the developer until the date on which the deed is signed by all parties.

Registration

The Council will require the developer and landowner to provide the following documents prior to or immediately upon commencement of the planning agreement:

- An instrument requesting registration of the planning agreement in registrable form identifying the Council as the applicant on the instrument, and
- The landowner's written consent and the written consent of all persons having a registered interest in the land to the registration of a planning agreement.

The Council will lodge the planning agreement for registration. The developer or landowner or both under the planning agreement will be required to meet the Council's costs of and incidental to registering the planning agreement.

The landowner will be required to promptly address any requisitions issued by NSW Land Registry Services relating to the registration that is relevant to the landowner and any interest holders.

Enforcement by Council and dispute resolution

All planning agreements must include procedures for dealing with a breach of the planning agreement. Such provisions will allow the Council to issue a notice of breach requiring the developer to rectify the breach within a specified period. If the developer fails to comply with the notice, the Council may take action to remedy the developer's breach including by calling up any security provided under the planning agreement, stepping in to carry out works, or doing any other thing to remedy the breach.

The Council will generally be required to follow such procedures before it may exercise any rights that it may have at law to commence legal proceedings, except where urgent interlocutory relief is sought.

If a dispute resolution mechanism is triggered, the Council will generally be required to complete the resolution process before it may exercise any rights to commence legal proceedings, except where urgent interlocutory relief is sought.

Expert determination will ordinarily be applicable in relation to disputes about technical or quantifiable matters such as costs and values, designs and specifications and the like, which lend themselves to resolution by independent experts. Mediation will apply in all other cases.

Monitoring and performance reporting by developer

Council requires the developer to provide a periodic performance report that will enable Council to determine the progress of the development to which the planning agreement relates and the developer's compliance with the obligations under the planning agreement. A performance report may typically include a:

- Summary of the status of all the development contributions under the planning agreement, including a list of all development contributions due to be commenced or completed within the next 12 months.
- List of securities provided to the Council under the planning agreement and a statement about the current value of each such security.

Review of planning agreement

A planning agreement should be reviewed periodically. A planning agreement may also need to be reviewed where there has been, or will be, an unexpected change in circumstances that materially affects the operation of the planning agreement. This could include (not exclusively):

- In respect of a planning agreement that is entered into in connection with a planning proposal, where a development standard which can be numerically quantified (such as maximum building height or floor space ratio) exceeds that standard resulting from the gateway determination.
- In respect of a development application, a modification to the determination.

For the purposes of addressing any matter arising from a review of a planning agreement, the parties will be required to use all reasonable endeavours to agree on and implement appropriate amendments to the planning agreement. However, any failure by a party to agree to take action requested by another party as a consequence of a review is not a dispute for the purposes of the planning agreement and is not a breach of the planning agreement.

Amendment of planning agreement

Where the developer or another party to a planning agreement (other than Council) requests an amendment to a planning agreement, they must provide a request in writing and supporting justification to the Council. To commence this process, the applicant must submit the planning agreement application form and pay the relevant planning agreement application fee. Other planning agreement fees are payable through the process.

The Council will consider the request and supporting information in good faith and will liaise with the developer or other party in deciding whether to agree to the amendment. However, the Council may, in its complete discretion, decide whether or not to agree to the amendment or whether to propose a varied or different amendment to meet the circumstances identified.

Where the Council seeks an amendment to a planning agreement, the developer and any other party to the planning agreement must work co-operatively and in good faith with the Council with a view to achieving the amendment.

The Regulation provides that a planning agreement can be amended by agreement between the parties to the planning agreement. Such an amendment must be documented in a deed of variation to be entered into in a form and on terms acceptable to the Council.

Novation and assignment by developer

Unless and until all planning agreement obligations are completed by the developer, the agreement will impose restrictions on:

- The sale or transfer the land to which the planning agreement applies.
- The assignment of the developer's rights or obligations under the planning agreement.
- Novation of the planning agreement.

The Council will not allow any of the above dealings unless it is satisfied that any incoming landowner or developer party will be bound by the provisions of the planning agreement and are capable of performing the obligations under the planning agreement, and that there is no existing unremedied breach of the planning agreement. If a planning agreement is registered on the title to the land the Council may agree that the restrictions referred to above do not apply to a sale or transfer of the land on the basis that any new landowner will be bound by the provisions of the planning agreement.

However, unless and until a deed of novation of the planning agreement is entered into in connection with the sale or transfer, the original developer and landowner parties will continue to be liable and bound by the contractual obligations under the planning agreement until those requirements have been complied with.

Upon request, a standard form of a deed for novation/assignment can be made available.

Discharge of developer from planning agreement

The Council will discharge a developer from its obligations under the planning agreement where all the obligations have been completed in accordance with the planning agreement. The discharge will be effected by means of written correspondence to the developer and take effect according to the terms of the correspondence.

Where the developer's obligations under a planning agreement have not been completed, the Council may discharge a developer from its obligations in the following circumstances:

- In respect of a planning agreement that is entered into in connection with a planning proposal, where the planning proposal authority has requested the Minister for Planning that the matter not proceed,
- In respect of a planning agreement that is entered into in connection with a development application, where the development consent to which the agreement relates has lapsed and the development has not commenced or the development consent surrende.

Administration

Costs related to a planning agreement

The Council requires a developer party to be responsible for all costs and expenses related to a planning agreement. This will include (without limitation) Council's costs and expenses of:

- Preparing, negotiating, executing, registering and stamping a planning agreement.
- An amendment of a planning agreement other than amendment requested by Council.
- Registration or removing registration of a planning agreement from title.
- The dedication of land under a planning agreement, including all costs associated with any subdivision of land necessary to facilitate the dedication.
- Preparing and registering any related instrument on title such as any easements, covenants, restrictions, charges and caveats required or allowed by the planning agreement.
- Any other related document related to the specific planning agreement, such as any deed of novation or assignment.
- Enforcing and remedying a breach of the planning agreement, including costs and expenses incurred by the Council in connection with investigating a non-compliance by the developer and enforcing compliance by the Developer with this Deed (including the costs and expenses of preparing and issuing notices for those purposes).
- Engaging any independent person or service.

Notification on planning certificates

Council's planning agreement template contains an acknowledgement by the developer that the Council may, in its absolute discretion, make a notation about a planning agreement on any certificate issued under section 10.7(5) of the EPA Act relating to the land the subject of the agreement or any other land.

Refunds

There is no legal obligation on the Council to refund to developers monetary contributions paid to the Council under a planning agreement and the Council will not do so under any circumstances.

Where monetary contributions paid under a planning agreement exceed the funds necessary for the public purpose for which they are paid, Council may, in its complete discretion, apply those contributions towards another public purpose having regard to the public interest prevailing at the time.