



# Voluntary Planning Agreements

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**For more information contact the Planning, Environment and Development Group**

Administrative Centre, Bridge Road, Nowra • **Telephone (02) 4429 3111** • Fax (02) 4422 1816 • PO Box 42 Nowra 2541  
Southern District Office – Deering Street, Ulladulla • **Telephone (02) 4429 8999** • Fax (02) 4429 8939 • PO Box 737  
Ulladulla

[Council@shoalhaven.nsw.gov.au](mailto:Council@shoalhaven.nsw.gov.au) • [www.shoalhaven.nsw.gov.au](http://www.shoalhaven.nsw.gov.au)

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## 1. INTRODUCTION

1.1 This Policy sets out Shoalhaven City Council's policy and procedures relating to Planning Agreements under the *Environmental Planning and Assessment Act 1979*.

1.2 This Policy was adopted by resolution of the Council on 25<sup>th</sup> March, 2008.

1.3 In this Policy, the following terminology is used:

*Act* means the *Environmental Planning and Assessment Act 1979*;

*development application* has the same meaning as in the Act;

*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;

*instrument change* means a change to an environmental planning instrument to enable a development application to be made to carry out development the subject of a Planning Agreement;

*planning benefit* means a development contribution that confers a net public benefit, that 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;

*public facilities* means public infrastructure, facilities, amenities and services;

*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 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;

*Regulation* means the *Environmental Planning and Assessment Regulation 2000*;

*surplus value* means the value of the developer's provision under a Planning Agreement less the sum of the value of public works required to be carried out by the developer under a condition imposed under s80A(1) of the Act and the value of development contributions that are or could have been required to be made under s94 or s94A of the Act in respect of the development the subject of the agreement.

1.4 The Purposes of this Policy are:

- (a) To establish a framework governing the use of Planning Agreements by the Council;

- (b) To ensure that the framework so established is efficient, fair, transparent and accountable;
- (c) To enhance planning flexibility in the Council's area through the use of planning agreements,
- (d) To enhance the range and extent of development contributions made by development towards public facilities in the Council's area;
- (e) To set out the Council's specific policies on the use of Planning Agreements; and
- (f) To set out procedures relating to the use of Planning Agreements within the Council's area;

1.5 The Council's Planning Agreements framework consists of the following:

- a) The provisions of Part 7, Division 7.1, Subdivision 2 of the Act.
- b) The provisions of Division 1A of Part 4 of the Regulation; and
- c) This Policy.

1.6 This Policy is not legally binding. However, it is intended that the Council and all persons dealing with the Council in relation to Planning Agreements will follow this Policy to the fullest extent possible.

1.7 It is intended that this Policy will be periodically updated. The up-dates may cover additional matters to those covered in this Policy or provide more detailed information or guidance on specific matters covered in this Policy.

## **2. POLICY ON THE USE OF PLANNING AGREEMENTS**

### **Council's Strategic Objectives for the use of Planning Agreements**

2.1 The Council's strategic objectives with respect to the use of Planning Agreements include:

- (a) To provide an enhanced and more flexible development contributions system for the Council, which achieves net planning benefits from development wherever possible and appropriate;
- (b) To adopt innovative approaches to the provision of infrastructure that reflects a balance of environmental standards, community expectations and funding priorities;
- (c) To ensure that developers make appropriate development contributions towards the cost of the provision and management of public facilities within the Council's area;
- (d) To supplement or replace, as appropriate, the application of section 7.11 and section 7.12 of the Act to development;

- (e) To give all stakeholders in development greater involvement in determining the type, standard and location of public facilities and other public benefits;
- (f) To allow the community, through the public participation process under the Act, to gain an understanding as to the redistribution of the costs and benefits of development in order to realise community preferences for the provision of public benefits; and
- (g) To increase certainty for the community, developers and Council in respect to infrastructure and development outcomes.

### **Fundamental Principles Governing the Use of Planning Agreements**

2.2 The Council's use of Planning Agreements will be governed by the following principles:

- (a) Planning decisions may not be bought or sold through Planning Agreements;
- (b) Development that is unacceptable on planning grounds will not be permitted because of planning benefits offered by developers that do not make the development acceptable in planning terms;
- (c) 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;
- (d) The Council will not use Planning Agreements for any purpose other than a proper planning purpose;
- (e) The Council will not seek benefits under a Planning Agreement that are unrelated to particular development;
- (f) The Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed Planning Agreement;
- (g) The Council will not improperly rely on its statutory position in order to extract unreasonable public benefits from developers under Planning Agreements; and
- (h) Where the Council has a commercial stake in development the subject of an agreement, it will take appropriate steps to ensure that it avoids a conflict of interest between its role as a planning authority and its interest in the development.

### **Circumstances in Which Council Will Consider Negotiating a Planning Agreement**

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

### **Specific Purposes of Planning Agreements**

2.4 The Council may consider negotiating a Planning Agreement with a developer to:

- (a) Compensate 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) Address a deficiency in the existing provision of public facilities in the Council's area;
- (d) Achieve recurrent funding in respect of public facilities;
- (e) Prescribe inclusions in the development that meet specific planning objectives of the Council;
- (f) Monitor the planning impacts of development; and
- (g) Secure planning benefits for the wider community.

### **Acceptability Test to be Applied to all Planning Agreements**

2.5 The Council will apply the following test in order to assess the desirability of the possible outcome of a proposed Planning Agreement:

- (a) Is the Planning Agreement directed towards a proper or legitimate planning purpose having regard to its statutory planning controls and other adopted planning policies and the circumstances of the case?
- (b) Does the Planning Agreement result in a public benefit?
- (c) Does the Planning Agreement provide for a reasonable means of achieving the relevant purpose?
- (d) Can the Planning Agreement be taken into consideration in the assessment of the relevant rezoning application or development application?
- (e) Will the Planning Agreement produce outcomes that meet the general values and expectations of the community and protect the overall public interest?
- (f) Does the Planning Agreement promote the Council's strategic objectives in relation to the use of Planning Agreements?
- (g) Does the Planning Agreement conform to the fundamental principles governing the Council's use of Planning Agreements?
- (h) Are there any relevant circumstances that may operate to preclude the Council from entering into the proposed Planning Agreement?

## **Consideration of Planning Agreements in Relation to Instrument Changes and Development Applications**

- 2.6 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, the 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.

## **Application of section 7.11 and section 7.12 to Development to Which a Planning Agreement Relates**

- 2.7 The Council has no general policy on whether a Planning Agreement should exclude the application of section 7.11 or section 7.12 of the Act to development to which the agreement relates. This is a matter for negotiation between the Council and a developer having regard to the particular circumstances of the case.
- 2.8 However, where the application of section 7.11 of the Act to development is not excluded by a Planning Agreement, the Council will generally not agree to a provision allowing benefits under the agreement to be taken into consideration in determining a development contribution under section 7.11.

## **Application of Clause 4.6 of Shoalhaven LEP 2014 or Shoalhaven LEP (Jerberra Estate) 2014 to Development to Which a Planning Agreement Relates**

- 2.9 The Council will not agree to a provision in a Planning Agreement requiring the benefit provided by the developer under the agreement to be used to justify a dispensation from applicable local environmental plan development standards under clause 4.6 of the relevant local environmental plan, unless the Council is of the opinion that the subject matter of the proposed Planning Agreement addresses the matters specifically required to be addressed under that clause in relation to the dispensation sought.  
*Note: Similar provisions may apply under State Environmental Planning Policy No.1 – Development Standards (SEPP 1) to a small number of areas deferred from Shoalhaven Local Environmental Plan 2014 and to which a Planning Agreement relates.*

## **Form of Development Contributions Under a Planning Agreement**

- 2.10 The form of a development contribution to be made under a proposed Planning Agreement will be determined by the particulars of the Planning Agreement having regard to the instrument change or development application to which the proposed Planning Agreement relates.

## **Standard Charges**

- 2.11 Wherever possible, the Council will seek to standardise development contributions sought under Planning Agreements in order to streamline negotiations and provide fairness, predictability and certainty for developers. This, however, does not prevent

public benefits being negotiated on a case by case basis, particularly where planning benefits are also involved.

### **Recurrent Charges**

2.12 The Council may request developers, through a Planning Agreement, to make development contributions towards the recurrent costs of public facilities. Where the public facility primarily serves the development to which the Planning Agreement relates or neighbouring development, the arrangement for recurrent funding may be in perpetuity. However, where the public facility or public benefit is intended to serve the wider community, the Planning Agreement will 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.

### **Pooling of Development Contributions**

2.13 Where a proposed Planning Agreement provides for a monetary contribution by the developer, the Council may seek to include a provision permitting money paid under the agreement to be pooled with money paid under other Planning Agreements or by other developer contributions and applied progressively for the different purposes under those agreements or contributions, subject to the specific requirements of the relevant agreements. Pooling may be appropriate to allow public benefits, particularly essential infrastructure, to be provided in a fair, equitable and timely way.

### **Methodology for Valuing Public Benefits Under a Planning Agreement**

2.14 Unless otherwise agreed, where the benefit under a Planning Agreement is the provision of land for a public purpose, the Council will generally seek to value the benefit on the basis of the estimated amount of compensation to which the Developer would be entitled under *the Land Acquisition (Just Terms Compensation) Act 1991* upon the compulsory acquisition of the land.

2.15 Unless otherwise agreed: Where the benefit under a Planning Agreement is the carrying out of works for a public purpose, the Council will generally seek to value the benefit on the basis of the estimated value of the completed works determined using the method that would be ordinarily adopted by a quantity surveyor.

### **Credits and Refunds**

2.16 The Council 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 the Council's area.

### **Time When Developer's Obligations Arise Under a Planning Agreement**

2.17 The Council will generally require a Planning Agreement to provide that the developer's obligations under the agreement take effect when the first development consent operates in respect of development that is the subject of the agreement.



## **Implementation**

- 2.18 The Council will require a Planning Agreement to provide for matters that relate to implementation of the proposed works, 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 any work required by the Planning Agreement to be undertaken by the developer;
  - (c) The manner in which a work is to be handed over to the Council; and
  - (d) The manner in which a material public benefit is to be made available for its public purpose in accordance with the Planning Agreement.

## **Monitoring and Review of a Planning Agreement**

- 2.19 The Council will continuously monitor the performance of the developer's obligations under a Planning Agreement.
- 2.20 The Council will require the Planning Agreement to contain a provision establishing a mechanism under which the performance and milestones contained under the Planning Agreement are periodically reviewed with the involvement of all parties.
- 2.21 The Council may appoint an officer to supervise the implementation of the works that are the subject of the Planning Agreement.

## **Modification or Discharge of the Developer's Obligations Under a Planning Agreement**

- 2.22 The Council may agree to a provision in a Planning Agreement permitting the developer's obligations under the agreement to be modified or discharged where the modification or discharge is linked to the following circumstances:
- (a) The developer's obligations have been fully carried 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 the 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) Other material changes affecting the operation of the Planning Agreement have occurred; and
  - (f) The Council and the developer otherwise agree to the modification or discharge of the agreement.

2.23 Such a provision will require the modification or revocation of the Planning Agreement in accordance with the Act and Regulation.

### **Assignment and Dealings by the Developer**

2.24 The Council will require every Planning Agreement to provide that the Developer may not assign its rights or obligations under the agreement nor have any dealing in relation to the land the subject of the agreement unless, in addition to any other requirements of the agreement:

- (a) The Council has given its consent to the proposed assignment or dealing;
- (b) The developer has, at no cost to the Council, first procured the execution by the person with whom it is dealing of all necessary documents in favour of the 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 Agreement.

### **Provision of Security Under a Planning Agreement**

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

### **Preparation of the Planning Agreement**

2.26 The Council will ordinarily prepare a Planning Agreement relating to a particular application for a planning instrument change or development application.

2.27 In the interests of process efficiency, the Council uses an approved standard form of Planning Agreement on which every Planning Agreement is based. That document reflects the policies and procedures set out in this document.

### **Council's Costs of Negotiating, Entering Into, Monitoring and Enforcing a Planning Agreement**

2.28 The Council will generally require a Planning Agreement to make provision for payment by the developer of the Council's costs of and incidental to:

- (a) Negotiating, preparing and entering into the agreement;
- (b) Enforcing the agreement.

2.29 In particular cases, the Council may require the Planning Agreement to make provision for a development contribution by the developer towards the on-going administration of the agreement.

### **Notations on Planning Certificates Under section 10.7 of the Act**

2.30 The Council will generally require a Planning Agreement to contain an acknowledgement by the developer that the Council may, in its absolute discretion, make a notation under section 10.7(5) of the Act about a Planning Agreement on any certificate issued under section 10.7 of the Act relating to the land the subject of the agreement or any other land.

### **Registration of Planning Agreements**

2.31 The Council will generally require a Planning Agreement to contain a provision requiring the developer to agree to registration of the agreement pursuant to section 7.6 of the Act if the requirements of that section are satisfied.

### **Dispute Resolution**

2.32 The Council will generally require a Planning Agreement to provide for mediation of disputes between the parties to the agreement before the parties may exercise any other legal rights in relation to the dispute.

### **Hand-over of works**

2.33 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 consent (which certificate 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 an appropriate Council officer.

2.34 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.

### **Management of Land or Works after Hand-Over**

2.35 If a Planning Agreement provides for the developer, at the developers 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 2.18).

2.36 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.

### **Public use of Privately-Owned Facilities**

2.37 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 agreement in that regard.

- 2.38 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. PROCEDURES RELATING TO THE USE OF PLANNING AGREEMENTS**

#### **Council's Negotiation System**

- 3.1 The Councils negotiation system for Planning Agreements aims to be efficient, predictable, transparent and accountable.
- 3.2 The system seeks to ensure that the final negotiation of Planning Agreements runs in parallel with applications for instrument changes or development applications.
- 3.3 The system is based on principles of fairness, co-operation, full disclosure, early warning, and agreed working practices and timetables.

#### **When Should a Planning Agreement be Negotiated?**

- 3.4 The Council will publicly notify a Planning Agreement as part of and in the same manner as and contemporaneously with the application for the planning instrument change or the development application to which it relates.
- 3.5 The Planning Agreement must therefore be negotiated and documented before it is publicly notified as required by the Act and Regulation.
- 3.6 The Council prefers that a Planning Agreement is negotiated before lodgement of the relevant application and that it accompanies the application on lodgement.

#### **Who Will Negotiate a Planning Agreement on Behalf of the Council?**

- 3.7 A Council officer or officers with appropriate delegated authority from the General Manager will negotiate a Planning Agreement on behalf of the Council and where necessary the Planning Agreement will be reported to Council for endorsement.

#### **Separation of the Councils Planning Assessment and Negotiation Roles**

- 3.8 The Council will, in all cases, ensure that the person who undertakes the assessment of the application to which a Planning Agreement relates for the purpose of determining the application or reporting on it to the Council is not the same person or a subordinate of the person who negotiated the Planning Agreement on behalf of the Council.

#### **Involvement of Independent Third Parties in the Negotiation Process**

- 3.9 The Council will encourage the appointment of an independent person to facilitate or otherwise participate in the negotiations or aspects of it, particularly 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 confidential 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; and
- (e) Dispute resolution is required under a Planning Agreement.

### **Key steps in the Negotiation Process**

3.10 The negotiation of a Planning Agreement will generally involve the following key steps:

- (a) Before lodgement of the relevant application by the developer, the parties will decide whether to negotiate a Planning Agreement;
- (b) The parties will then appoint a person to represent them in the negotiations;
- (c) The parties will also appoint a third person to attend and take minutes of all negotiations;
- (d) The parties will also decide whether to appoint an independent person to facilitate or otherwise participate in the negotiations or aspects of it;
- (e) The parties will also agree on a timetable for negotiations and the protocols and work practices governing their negotiations;
- (f) The parties will then identify the key issues for negotiation and undertake the negotiations;
- (g) If agreement is reached, the Council will prepare the proposed Planning Agreement and provide a copy of it to the developer;
- (h) The parties will undertake further negotiation on the specific terms of the proposed Planning Agreement;
- (i) Once agreement is reached on the terms of the proposed Planning Agreement, the developer will be required to execute the agreement;
- (j) The developer may then make the relevant application to the Council accompanied by a copy of the proposed agreement; and
- (k) The parties may be required to undertake further negotiations and, hence, a number of the above steps, as a result of the public notification and inspection of the Planning Agreement or its formal consideration by the Council in connection with the relevant application, may need to be repeated including publicly renotifying the agreement.

### **Public Notification of Planning Agreements**

- 3.11 A Planning Agreement must be publicly notified and available for public inspection for a minimum period of 28 days.
- 3.12 The Council will publicly notify the Planning Agreement as part of and in the same manner as and contemporaneously with the development application or the planning instrument change to which it relates.
- 3.13 Where the application to which a Planning Agreement relates is required by or under the 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.
- 3.14 Where the application to which a Planning Agreement relates is permitted by or under the Act or Regulation to be publicly notified and available for public inspection for a period of less than 28 days, the Council will publicly notify the application and make it available for public inspection for a minimum period of 28 days.
- 3.15 The Council will publicly re-notify and make available for public inspection a proposed Planning Agreement and the application to which it relates if, in the Council's opinion, a material change is made to the terms of the agreement or the application 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 and inspection of the agreement or the application, or their formal consideration by the Council, or for any other reason.

### **When is a Planning Agreement Required to be Entered Into?**

- 3.16 A Planning Agreement is entered into when it is signed by all of the parties.
- 3.17 A Planning Agreement can be entered into at any time after the agreement is publicly notified in accordance with the Act and Regulation.
- 3.18 The Council will usually require a Planning Agreement to be entered into as a condition of granting development consent to the development to which the agreement relates.