

10.10 Policy (Review) - Planning Agreements.DOC

POLICY NAME: DRAFT REVIEW PLANNING AGREEMENTS

POLICY REF: P05

MEETING ADOPTED: 22 February 2007
Resolution No. 2220207/032

POLICY HISTORY:



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OBJECTIVE

The objective of this policy is to set out Ballina Shire Council's policy and procedures relating to planning agreements under s93F of the *Environmental Planning and Assessment Act 1979*.

BACKGROUND

~~On 6 May 2005 the Environmental Planning and Assessment Amendment (Development Contributions) Bill 2005 was passed by the NSW Parliament. The EP & A Act was amended to extend the way in which development contributions may be collected and used.~~ Voluntary Planning Agreements ~~can now be used as~~ **are** a means for councils to obtain contributions for public purposes. This policy establishes a framework for planning agreements in Ballina Shire.

~~Reasons why a planning agreement may benefit a developer and the Council~~

There are a number of reasons why the Council and a developer might consider negotiating a planning agreement. These include:

- the ability to ensure that particular development produces targeted public benefits, including to compensate for the loss of an existing public amenity, service, resource or asset caused by the development, or to meet the demands created by the development for new public facilities,
- development consent conditions, including those imposed under s94 of the Act, are often ill-equipped to produce such benefits, as they are primarily designed to mitigate the external impacts of development on surrounding land and communities,
- circumstances where a developer and the Council wish the certainty of an agreement up front as to the amount of s94 contributions payable in relation to development, in accordance with existing s94 contributions plans,
- developers are increasingly appreciating how their own developments benefit from the provision of targeted public facilities, and accordingly are seeking greater involvement in determining the type, standard and location of such facilities,
- negotiation tends to promote co-operation and compromise over conflict, and can provide a more effective means for public participation in planning decisions,
- agreements provide a flexible means of achieving tailored development outcomes and targeted public benefits,
- agreements can provide enhanced and more flexible infrastructure funding opportunities for planning authorities.

DEFINITIONS

Refer to clause 1.2 of this policy for the definition of a number of terms included in this policy.

SCOPE OF POLICY

This policy applies to:

- Council employees
- Councillors
- Community members
- Council owned-businesses
 - Property Development
- Committees of Council
- Consultants/Contractors
- Property owners and developers

RELATED DOCUMENTATION

Related documents, policies and legislation include:

- Local Government Act
- Environmental Planning and Assessment Act
- Council Code of Conduct

POLICY

1. Introduction

1.1 This Policy was adopted by resolution of the Council on [] .

1.2 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,

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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.

1.3 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,
- (f) to set out procedures relating to the use of planning agreements within the Council's area.

1.4 The Council's planning agreements framework consists of the following:

- (a) the provisions of Subdivision 2 of Division 6 of Part 4 of the Act,
- (b) the provisions of Division 1A of Part 4 of the Regulation, and
- (c) this Policy.

1.5 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.

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

Council's Strategic Objectives for the use of Planning Agreements

- 1.7 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,
 - (b) more particularly, to supplement or replace, as appropriate, the application of s94 and s94A of the Act to development,
 - (c) to allow the community, through the public participation process under the Act, to agree to the redistribution of the costs and benefits of development in order to realise community preferences for the provision of public benefits.
 - (d) to adopt innovative and flexible approaches to the provision of infrastructure in a manner that is consistent with:
 - the Council's adopted management plan,
 - the *Ballina Local Environmental Plan 1987* (or any applicable replacement local environmental plan),
 - the Council's Sustainability Strategy,
 - all applicable Development Control Plans,
 - the Lennox Head Strategic Plan,
 - the Lennox Head Structure Plan, and
 - the Wardell Strategic and Land Use Plan,
 - (e) to provide or upgrade infrastructure to appropriate levels that reflect and balance environmental standards, community expectations and funding priorities, and
 - (f) to provide certainty for the community, developers and Council in respect to infrastructure and development outcomes.

Fundamental Principles Governing the use of Planning Agreements

- 1.8 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,

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- (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 allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed planning agreement,
- (f) the Council will not improperly rely on its statutory position, or otherwise act improperly, in order to extract unreasonable public benefits from developers under planning agreements, and will ensure that all parties involved in the planning agreement process are dealt with fairly, and without impropriety or appearance of improper conduct,
- (g) if the Council has a commercial stake in development the subject of a agreements, 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

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

Acceptability test to be applied to all planning agreements

1.10 The 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 the circumstances of the case?
- (b) does the proposed planning agreement provide for a reasonable means of achieving the relevant purpose?
- (c) can the proposed planning agreement be taken into consideration in the assessment of the relevant rezoning application or development application?
- (d) will the planning agreement produce outcomes that meet the general values and expectations of the community and protect the overall public interest?
- (e) does the proposed planning agreement promote the Council's strategic objectives in relation to the use of planning agreements?

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- (f) does the proposed planning agreement conform to the fundamental principles governing the Council's use of planning agreements?
- (g) 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

1.11 Where an application is made by a developer for:

- (a) an instrument change, or
- (b) a development consent,

and there is a proposed planning agreement which relates to that application, the Council will, in exercising its functions under the Act, consider:

- (c) whether the proposed planning agreement is relevant to the application and hence may be considered in connection with the application, and
- (d) if so, the proper planning weight to be given to the proposed planning agreement.

Application of s94 and s94A to Development to which a Planning Agreement Relates

1.12 The Council has no general policy on whether a planning agreement should exclude the application of s94 or s94A 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.

1.13 However, where the application of s94 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 94.

Form of Development Contributions under a Planning Agreement

1.14 The form of a development contribution to be made under a proposed planning agreement will be determined by the particulars of the instrument change or development application to which the proposed planning agreement relates.

Standard Charges

1.15 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.

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Recurrent Charges

- 1.16 The Council may request developers, through a planning agreement, to make development contributions towards the recurrent costs of public facilities.

Pooling of Development Contributions

- 1.17 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 and applied progressively for the different purposes under those agreements, 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 and equitable way.

Methodology for Valuing Public Benefits under a Planning Agreement

- 1.18 Unless otherwise agreed in a particular case, 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.
- 1.19 Unless otherwise agreed in a particular case, 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.
- 1.20 Where the benefit under a planning agreement is the provision of a material public benefit, the Council and the developer negotiate the manner in which the benefit is to be valued for the purposes of the agreement.

Credits and Refunds

- 1.21 The 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 the Council's area.

Time when Developer's Obligations Arise under a Planning Agreement

- 1.22 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.

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Implementation Agreements

- 1.23 In appropriate cases, the Council may require a planning agreement to provide that before the 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 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,
 - (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

- 1.24 The Council will continuously monitor the performance of the developer's obligations under a planning agreement.
- 1.25 The 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 of the agreement.
- 1.26 The Council will require the planning agreement to contain a provision requiring the parties to use their best endeavours to agree on a modification to the agreement having regard to the outcomes of the review.

Modification or discharge of the developer's obligations under a planning agreement

- 1.27 The Council will generally only 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) the Council and the developer otherwise agree to the modification or discharge of the agreement.
- 1.28 Such a provision will require the modification or revocation of the planning agreement in accordance with the Act and Regulation.

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Assignment and Dealings by the Developer

- 1.29 The Council will require every planning agreement to provide that the Developer may not to 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 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 planning agreement, and
 - (b) the Developer is not in breach of this planning agreement.

Provision of Security under a Planning Agreement

- 1.30 The Council **may will/will not** require a planning agreement to make provision for security by the developer of the developer's obligations under the agreement.

~~*[Delete whichever is inapplicable]~~

- 1.31 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.

~~[Delete this subclause if no security is required or amend this subclause to provide for a different form of security.]~~

Preparation and Form of the Planning Agreement

- 1.32 The Council and the developer will, in each particular case, decide who will prepare a planning agreement.

~~1.33 However, the Council will generally require the planning agreement to be in or to the effect of the standard form planning agreement contained in the Annexure to this Policy.~~

Council's Costs of Negotiating, Entering into, Monitoring and Enforcing a Planning Agreement

- 1.34 The Council will generally require a planning agreement to make provision for payment by the developer of the Councils costs of and incidental to:
- (a) negotiating, preparing and entering into the agreement,
 - (b) enforcing the agreement.
- 1.35 The amount to be paid by the developer will be determined by negotiation in each case. However as a general rule, the Council considers that whether the planning agreement relates to an application by the developer for an instrument change, or s to a development application, in each case it is fair and reasonable that the developer will pay the whole of the Council's costs.

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- 1.36 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 Certificates under s149(5) of the Act

- 1.37 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 s149(5) of the Act about a planning agreement on any certificate issued under s149(2) of the Act relating to the land the subject of the agreement or any other land.

Registration of Planning Agreements

- 1.38 The Council and the developer will negotiate in each particular case whether a planning agreement is 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.

Dispute Resolution

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

Hand-over of Works

- 1.40 The Council will generally not accept the hand-over 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.
- 1.41 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

- 1.42 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 will generally require the parties to enter into a separate implementation agreement in that regard (see paragraph 2.18 of this Policy).
- 1.43 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.

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Public use of Privately-Owned Facilities

- 1.44 If a planning agreement provides for the developer to make a privately-owned facility available for public use, the Council will generally require the parties to enter into a separate implementation agreement in that regard (see paragraph 2.18 of this Policy).
- 1.45 Such an agreement may, subject to the Council's agreement, provide for payment to the developer of a reasonable fee by a member of the public who desires to use the relevant facility
- 1.46 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.

PROCEDURES RELATING TO THE USE OF PLANNING AGREEMENTS

Council's Negotiation System

- 1.47 The Council's negotiation system for planning agreements aims to be efficient, predictable, transparent and accountable.
- 1.48 The system seeks to ensure that the negotiation of planning agreements runs in parallel with applications for instrument changes or development applications.
- 1.49 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?

- 1.50 The Council is required to ensure that a planning agreement is publicly notified as part of and in the same manner as and contemporaneously with the application for the instrument change or the development application to which it relates.
- 1.51 The planning agreement must therefore be negotiated and documented before it is publicly notified as required by the Act and Regulation.
- 1.52 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?

- 1.53 A Council officer with appropriate delegated authority will negotiate a planning agreement on behalf of the Council.
- 1.54 The councillors will not be involved in the face to face negotiation of the agreement.

Separation of the Council's Commercial and Planning Assessment Roles

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

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of the planning agreement on behalf of the Council in its capacity as landowner, developer or financier.

Role of the governing body of the Council in relation to development applications to which planning agreements relate

1.56 The governing body of the Council will, in all cases, determine development applications to which planning agreements relate.

Involvement of Independent Third Parties in the Negotiation Process

1.57 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,
- (e) dispute resolution is required under a planning agreement.

1.58 The costs of the independent person will be borne equally between the parties to the planning agreement.

Key Steps in the Negotiation Process

1.59 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

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- (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
- (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.

Public notification of planning agreements

- 1.60 A planning agreement must be publicly notified and available for public inspection for a minimum period of 28 days.
- 1.61 As mentioned, the Council is required to ensure that a planning agreement is publicly notified as part of and in the same manner as and contemporaneously with the application for the instrument change or the development application to which it relates.
- 1.62 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.
- 1.63 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.
- 1.64 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?

- 1.65 A planning agreement is entered into when it is signed by all of the parties.
- 1.66 A planning agreement can be entered into at any time after the agreement is publicly notified in accordance with the Act and Regulation.
- 1.67 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.

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

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required to record in the register the date an agreement was entered into and a short description of the agreement (including any amendment).

1.68 The Council will make the following available for public inspection (free of charge) during ordinary office hours:

- (a) the planning agreement register kept by the Council,
- (b) copies of all planning agreements (including amendments) that apply to the area of the Council,
- (c) copies of the explanatory notes relating to those agreements or amendments.

REVIEW

The Planning Agreements policy is to be reviewed ~~annually~~/every four years/~~within one year of the election of a new Council~~/within xx months of the end of the year.

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annexure

1