

**POLICY NAME:** PLANNING AGREEMENTS

**POLICY REF:** V01

**MEETING ADOPTED:** 25 July 2024  
Resolution No. 250724/14

**POLICY HISTORY:** 230720/25; 250816/20; 280612/26;  
220207/32



**TABLE OF CONTENTS**

**DEFINITIONS ..... 1**

**INTRODUCTION..... 2**

    Purpose ..... 2

    Overview..... 2

    Policy not binding..... 2

    The statutory scheme for PAs ..... 2

    Departmental Practice Notes and Directions..... 2

    Corporate strategic planning context..... 3

    Land use planning context ..... 3

    Development contributions context ..... 3

    Council’s objectives for the use of PAs ..... 4

    Guiding principles for use of PAs ..... 4

**PREPARING PAS..... 5**

    Circumstances when PAs will be negotiated ..... 5

    Form of contributions ..... 5

    Purpose of contributions ..... 5

    Application of s7.11 and s7.12 of the Act to development to which a PA relates ..... 6

    Valuing public benefits ..... 6

    Contributions Plan Credits ..... 6

    Development feasibility ..... 7

    Commencement of PA..... 7

    Recurrent charges ..... 7

    Expenditure of monetary contributions ..... 7

    Indexation ..... 8

    Works contract..... 8

    Principal contractor warranties ..... 8

    Design and specification of works ..... 8

    Access to land ..... 8

    Control of development site ..... 8

    Commencement of works ..... 8

    Inspection of works ..... 9

    Completion and delivery of works ..... 9

    Rectification of defects..... 9

    Works-as-executed plan ..... 9

    Land dedication ..... 9

    Security for performance..... 10

    Step-in rights ..... 11

Registration .....	11
Restriction on dealings.....	11
Insurance.....	12
Indemnity.....	12
Dispute resolution .....	12
Notations on section 10.7 Planning Certificate .....	12
Monitoring and review.....	12
Amendment .....	12
Discharge of PA.....	13
Implementation agreements.....	13
<b>PROCEDURES FOR NEGOTIATING A PA.....</b>	<b>13</b>
Procedures for consideration of PA Proposals .....	13
Preparation and form of PA.....	14
Involvement of independent third parties in negotiation process .....	14
Council's costs of negotiating, entering into, monitoring and enforcing a PA.....	14
Public notification of PAs .....	15
PA register.....	15
<b>PROBITY MATTERS .....</b>	<b>15</b>
Separation of staff responsibilities within the Council .....	15
Involvement of Councillors in PA negotiation process .....	15
<b>REVIEW .....</b>	<b>15</b>

**DEFINITIONS**

In this Policy, the following terminology is used:

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

**CDA** means Complying Development Application.

**Consent Authority** means Council or the applicable Joint Regional Planning Panel.

**Contributions Plan** means a contributions plan (within the meaning of the Act) applying to development to which a PA applies.

**Contributions Plan Credit** means the \$ amount by which value of a public benefit provided for in a PA exceeds a Contribution Plan Requirement.

**Contributions Plan Requirement** means a contribution requirement under a Section 7.11 Contribution or s7.12 of the Act authorised by a Contributions Plan in respect of development to which a PA applies.

**Contributions Plan Value** means the value of works or land provided for in a Contributions Plan.

**Council** means Ballina Shire Council.

**DA** means Development Application.

**Developer**, in relation to a PA, has the same meaning as in s7.4 of the Act.

**Development Application** has the same meaning as in the Act.

**Development Consent** has the same meaning as in the Act.

**MA** means an application to modify a Development Consent.

**Part 4A 6 Certificate** means a construction certificate, an occupation certificate or subdivision certificate within the meaning of Part 4A 6 of the Act.

**Planning Proposal** means a planning proposal within the meaning of Part 3 of the Act.

**Practice Note** means the Planning Agreements Practice Note, February 2021, published by the NSW Department of Planning, Industry and Environment (February 2021), and any subsequent Notes that may be published from time to time by the NSW Department of Planning and Environment.

**Regulation** means the *Environmental Planning and Assessment Regulation 2000* (NSW).

**Section 7.11 Contribution** means a contribution under s7.11 of the Act.

**Section 7.12 Levy** means a levy under s7.12 of the Act.

**PA** means a planning agreement referred to in s7.4 of the Act.

**PA Proposal** means a proposal for a PA made by a Developer to the Council.

**PA Proposal Fee** means the fee payable by the Developer to the Council in relation to a PA Proposal determined by the Council for each financial year in accordance with Part 10 of the *Local Government Act 1993*.

## INTRODUCTION

### Purpose

This Policy set out the Council's policy and procedures relating to PAs under s7.4 of the Act.

The purpose of this Policy is to:

- establish a fair, transparent and accountable framework relating to the Council's use of PAs,
- support innovative and flexible approaches to the delivery of infrastructure and other public benefits consistent with Council's strategic and infrastructure plans,
- ensure participants in the negotiation of PAs understand their roles and responsibilities to maintain the highest standards of probity,
- set out Council's specific policy position and procedures relating to the use of PAs,
- promote public participation and allow the community to gain understanding of the benefits of an appropriate PA.

### Overview

A Planning Agreement is a voluntary agreement or other arrangement between Council and a developer that allows developers to contribute towards a public purpose, including through the dedication of land, provision of monetary contributions, public infrastructure, community facilities or affordable housing, or any other material public benefit.

Planning agreements are separate from but complement the Council's Contributions Plans levied in accordance with section 7.11 and 7.12 of the Act.

Planning agreements provide flexibility to deliver public benefits to manage the impacts of development.

### Policy not binding

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

Where the parties to a proposed PA include other public authorities (such as a Minister for the State or another council), Council will generally seek to apply this Policy as far as practicable in relation to the PA.

### The statutory scheme for PAs

Division 7.1 of Part 7 of the Act establishes a statutory scheme for contributions by developers to planning authorities, including local councils in connection with development. The scheme has compulsory and voluntary elements.

Clause 203 of the Regulation contains further requirements related to the making of voluntary planning agreements. These requirements are not reproduced in this Policy.

### Departmental Practice Notes and Directions

This Policy is generally consistent with the NSW Department of Planning, Industry and Environment *Planning Agreements Practice Note 2021* and the draft *2023 Practice Note*.

The practice note recognises that planning agreements can be complex and there is no standard approach. The practice note may assist parties to prepare planning agreements and must be considered by Council when negotiating or entering into a planning agreement. (cl 203(7) of the Regulation).

When negotiating a planning agreement which provides for affordable housing Council must consider the *Environmental Planning and Assessment (Planning Agreements) Direction 2019*.

### **Corporate strategic planning context**

PAs have an important strategic role supporting the implementation of a Council's Community Strategic Plan through provision of funding and works for key projects.

Prepared in accordance with the *Local Government Act 1993*, Council's corporate strategic planning documents include the Community Strategic Plan (CSP) and Delivery Program / Operational Plan. These documents set out Council's strategic priorities for the Shire supported by financial planning and asset management planning, and the main activities it proposes to undertake to implement the priorities.

The four key directions in Council's CSP are aimed at achieving a:

- Connected Community
- Prosperous Economy
- Healthy Environment
- Engaged Leadership

When preparing a PA, Council will endeavour to achieve outcomes consistent with these key directions.

### **Land use planning context**

PAs also have a strategic role in achieving specific land use planning outcomes envisaged by the adopted CSP. In some circumstances, PAs can provide the mechanism to deliver these outcomes for Shire residents, directly or indirectly.

Some of these desirable outcomes include:

- Assisting disadvantaged groups within our community
- Providing equitable access to a range of community services and facilities
- Providing young people with a range of leisure activities, along with opportunities for personal development
- Providing strategies for older residents to more actively participate in our community
- Providing infrastructure that supports business and delivers economic benefits
- Encouraging technologies and transport options that support work at home or close to home business activities
- Promoting initiatives that improve our natural environment
- Reducing, reusing and recycling our resources, and
- Matching infrastructure with development.

### **Development contributions context**

Council has several development contributions plans incorporating work schedules. Any PA will be prepared in consideration of these plans, particularly with respect to the outcomes proposed.

### **Council's objectives for the use of PAs**

The Council's objectives for using PAs include:

- to enable the adoption of innovative approaches to the delivery of infrastructure, services and other public benefits, including affordable housing opportunities that is consistent with the Council's corporate strategic planning documents and land use planning outcomes,
- to enhance the range and extent of development contributions made to Council by developers for and towards public services and facilities in the Council's area,
- to supplement or replace, as appropriate, the application of s7.11 and s7.12 of the Act to development,
- to fund or provide new, or upgrade existing, infrastructure to appropriate levels that reflect and balance environmental standards, community expectations and funding priorities,
- to provide certainty for the community, developers, and Council in terms of infrastructure and development outcomes,
- to give all stakeholders in development greater involvement in determining the type, standard and location of public facilities and other public benefits,
- to enable the capture of land value uplift resulting from rezoning or variation of a planning control,
- to allow for the impacts of development to be mitigated including through the offset of impact of a proposed development on biodiversity values,
- to allow the community, through the public participation process under the Act, to agree to the redistribution of the costs and benefits of development to realise community preferences for the provision of public benefits.

### **Guiding principles for use of PAs**

The Council's use of PAs will be guided by the following principles:

- planning decisions may not be bought or sold through PAs,
- 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,
- the Council will not allow PAs to improperly fetter the exercise of its functions under the Act, Regulation or any other Act or law,
- the Council will not use PAs for any purpose other than a proper planning purpose,
- the Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed PA;
- the Council will not improperly rely on its statutory position in order to extract unreasonable public benefits from Developers under PAs;
- if the Council has a commercial stake in development the subject of a PA, 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.

## **PREPARING PAS**

### **Circumstances when PAs will be negotiated**

The Act allows PAs to be entered into in connection with:

- Planning Proposals,
- DAs,
- MAs,
- CDAs.

This Policy does not limit the broad circumstances in which the Council may enter into PAs.

The Council is not obliged to negotiate or enter into a PA that is offered by a Developer.

### **Form of contributions**

The Act allows development contributions made under PAs to be in the form of:

- cash payments,
- the dedication of land free of cost,
- material public benefits (such as but not limited to works), or
- any combination of the above.

This Policy does not limit the form of contributions under PAs entered into by the Council.

### **Purpose of contributions**

The Act allows development contributions made under PAs to be used for or applied towards a public purpose.

Public purposes include, without limitation,

- the provision of (or the recoupment of the cost of providing) public amenities or public services,
- the provision of (or the recoupment of the cost of providing) affordable housing,
- the provision of (or the recoupment of the cost of providing) transport or other infrastructure relating to land,
- the funding of recurrent expenditure relating to the provision of public amenities or public services, affordable housing or transport or other infrastructure,
- the monitoring of the planning impacts of development,
- the conservation or enhancement of the natural environment.

Without limiting the types of public benefits that the Council may seek through PAs, the Council may seek public benefits that:

- 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,
- meet the demands created by the development for new public infrastructure, amenities and services,

- address a particular deficiency or deficiencies in the existing provision of public facilities in the Council's area,
- achieve recurrent funding in respect of public facilities,
- prescribe inclusions in the development that meet specific planning objectives of the Council,
- monitor the implementation of development,
- secure planning benefits for the wider community.

### **Application of s7.11 and s7.12 of the Act to development to which a PA relates**

The Council has no general policy on whether a planning agreement should exclude the application of s7.11 or s7.12 of the Act to development to which a PA relates. This is a matter for negotiation between the Council and a Developer having regard to the circumstances of each particular case.

Where the application of s7.11 of the Act to development is not excluded by a planning agreement, the Council will consider, on a case by case basis, the benefits under the planning agreement are to be taken into consideration in determining a Section 7.11 Contributions.

### **Valuing public benefits**

The Act does not require PAs to set out the \$ value of non-monetary benefits provided by developers under PAS. Values need only, and should only, be included in a PA for particular purposes, such as (but not limited to):

- Contribution Plan Credits,
- determining the amount of security.

Where land is dedicated under a PA, the value for the purposes of the PA 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*. The Council may require the Developer, at its cost, to provide the Council with a written opinion on the estimated value of the land by a suitably qualified and experienced valuer.

Where a PA provides for the carrying out of works, the value of the works for the purposes of the PA will generally be the reasonable design and constructions costs agreed to by the Council. The Council may require the Developer, at its cost, to provide the Council with a written opinion on the estimated cost of completion of the works by a suitably qualified and experienced quantity surveyor.

Where a PA provides for the provision of a material public benefit, the Council and the Developer will negotiate the manner in which the benefit is to be valued for the purposes of the PA.

### **Contributions Plan Credits**

The Council will not agree to a refund of a Contributions Plan Credit.

In exceptional circumstances, the Council may consider whether a Contributions Plan Credit may be applied towards offsetting the Developer's obligation to pay a Section 7.11 Contribution or a Section 7.12 Levy in respect of other development in the Council's area.

No Contributions Plan Credit is available for works or land provided for in a PA which are additional to the works or land provided for in the Contributions Plan.



## **Development feasibility**

The Council is committed to ensuring that obligations under PAs that exceed those which could have been imposed under a Contributions Plan do not unreasonably adversely affect development feasibility. This includes obligations relating to development contributions and the provision of security for the performance of obligations.

Where a Developer claims that such PA obligations will adversely affect development feasibility, the onus is on the Developer, at its cost, to submit a development feasibility analysis acceptable to the Council. The Council may require the Developer, at the Developer's cost, to allow a suitably qualified independent person appointed by the Council to review the Developer's feasibility.

Generally, the basis of the feasibility analysis will be based on a residual land value analysis applying to the development site.

The Council may in its discretion agree to modify, reduce or postpone development contributions or security obligations under a PA based on a submitted feasibility analysis.

The Council may require a submitted feasibility analysis to be reviewed periodically or in specified circumstances at the Developer's cost. It may also require a Developer to submit revised feasibility analysis at the Developer's cost.

If a revised or new feasibility analysis established that development feasibility has improved, the Council may 'clawback' development contributions or security obligations.

## **Commencement of PA**

A PA commences when:

- it is signed by all the parties, or
- each separate executed counterparts are exchanged.

## **Recurrent charges**

The Council may request Developers, through a PA, to make development contributions towards the recurrent costs of public facilities. Details regarding recurrent charges will need to be negotiated between Council and the Developer and documented within the PA.

The types of public benefits or circumstances where recurrent funding may be required include, without limitation, the impact of overall life cycle costs for an asset provided under a PA, or the establishment or on-going maintenance obligations in respect to environmental lands or landscaping.

Where the public facility primarily serves the development to which the PA relates or neighbouring development, the arrangement for recurrent funding may be in perpetuity. Where the public facility or public benefit is intended to serve the wider community, the PA will only require the Developer to make contributions towards the recurrent costs of the facility until a sufficient public revenue stream is established to support the ongoing costs of the facility.

## **Expenditure of monetary contributions**

Where more than one Developer under different PAs or pursuant to conditions of Development Consent imposed under s7.11 or s7.12 of the Act pays monetary contributions for a particular public purpose, the Council will pool the contributions and apply them towards the purpose when sufficient funds exist to do so.

The Council may seek to include a provision in a PA permitting money paid under the PA to be pooled with monetary contributions paid under different PAs or pursuant to conditions of Development Consent imposed under s7.11 or s7.12 of the Act and applied towards a different public purposes for which it was required if the Council reasonably considers that the public interest would be better served by applying the monetary contributions towards that other purpose. Pooling may be appropriate to allow public benefits, particularly essential infrastructure, to be provided in a fair and equitable way.

The Council is under no legal obligation, and will not under any circumstances, refund monetary contributions to a Developer that were paid to the Council under a PA which exceed the funds necessary for the public purpose for which they were paid. In such circumstances, the funds will be applied by the Council towards another public purpose in the Council's discretion having regard to the public interest prevailing at the time.

### **Indexation**

All \$ amounts to which development contributions under a PA applies are to be adjusted or indexed in accordance with the method of adjustment or indexation provided for in the Contributions Plan.

If a Contributions Plan does not apply to development contributions under a PA, \$ amounts relating to the contributions will be adjusted or indexed in accordance with the method agreed by negotiation between the Council and the Developer.

### **Works contract**

The Developer will be required to submit to the Council for approval any draft contract with a third party for the carrying out of building or construction works under a PA.

### **Principal contractor warranties**

Upon completion and delivery to the Council of works in under a PA, the Developer will be required to assign to the Council the principal contractor's warranties under building or construction contract.

### **Design and specification of works**

The Developer will be required to obtain the Council's approval to the design and specification of works under a PA.

### **Access to land**

If works under a PA will be carried out on land not owned by the Council, the Developer will be required to allow or procure the owner of the land to allow the Council to enter the land to inspect the works. If works under a PA will be carried out on land owned by the Council, the Council will give the Developer access to the land to undertake to the works.

### **Control of development site**

The Developer will be required to have control of, and responsibility for, the site (whether owned by the Developer, the Council or a third party) on which works are carried out under a PA unless and until the works are completed and delivered to the Council.

### **Commencement of works**

The Developer will be required to give the Council not less than three months of its intention to commence works under a PA.

### **Inspection of works**

The Developer will be required to allow the Council reasonable access to the site on which works are being carried out under a PA upon reasonable notice being given by the Council to enable the Council to inspect the works.

### **Completion and delivery of works**

The Developer will be required to give the Council not less than three months written notice of the date on which it will complete works under a PA. The Council will inspect the works within 30 days of receiving the Developer's notice. The works under a PA will be completed when the Council gives a written notice to the Developer to that effect. Instead of giving a notice to the Developer that works have been completed, the Council may give the Developer a notice stating that the works have not been completed or have not been carried out to an acceptable standard and specifying further works required to enable the Council to give the Developer a notice that the works have been completed.

The Council will assume responsibility for the works completed under a PA on the later to occur of:

- at an agreed date after the Council gives the Developer a notice that the works have been completed, or
- the ownership of the land on which the completed works have been carried out is transferred to the Council.

### **Rectification of defects**

The Developer will be required to agree to a defects liability period and defects rectification for works completed and delivered to the Council under a PA. Ordinarily, the defects liability period will be 12 months or a time otherwise agreed.

### **Works-as-executed plan**

Not later than 30 days after works are completed and delivered to the Council under a PA, the Developer will be required to submit to the Council a full works-as-executed-plan in respect of the works. The Developer will be required to assign or procure the assigning to the Council of the copyright in the plans and specifications of the works.

### **Land dedication**

Land on which a work is required to be carried out under a PA must be dedicated to the Council free of cost upon completion of the work to the Council's satisfaction unless otherwise specified in the PA. Ordinarily, any land which is required to be dedicated or transferred to the Council under a PA must be dedicated or transferred free of encumbrances.

In respect of any dedication or transfer of land to the Council, or the creation of any interest in land in the Council's favour under a PA, the Developer will be responsible for preparing all documents and meeting all costs relating to the following:

- removing an encumbrance on the title,
- creating an interest in land in the Council's favour,
- subdividing land,
- preparing and lodging documents for registration,
- obtaining the consent of any to registration,

- dealing with any requisition from NSW Land Registry Services relating to any dealing lodged for registration.

### **Security for performance**

The security for performance of PA obligations required under a PA is dependent on the type of obligation, as set out below.

#### *Monetary development contributions*

Generally, the appropriate security is to require monetary contributions to be paid before the issuing of a specified kind of Part 6 Certificate under the Act, usually a subdivision certificate or a construction certificate.

In some cases, particularly where the payment of monetary contributions is deferred until after the issuing of a construction certificate, Council may require a financial security such as a bond or bank guarantee or a registered charge over land or assets.

#### *Dedication of land*

Where land is required to be dedicated or transferred to the Council under a PA, the Council will require the landowner to be a party to the PA.

Generally, the dedication or transfer of land under a PA will be tied to the issuing of a specified kind of Part 6 Certificate under the Act, which will usually be a subdivision certificate.

Generally, the landowner will also be required to agree to a provision in the PA allowing the Council to compulsorily acquire the land to be dedicated or transferred under the PA for a nominal sum if the landowner defaults. Compulsory acquisition by the Council is provided for in the *Land Acquisition (Just Terms Compensation) Act 1991*. The provision in the PA will constitute a pre-acquisition agreement between the landowner and the Council for the purposes of that Act.

In some cases, the landowner may be required to give the Council an irrevocable option to purchase land for a nominal sum, or a power of attorney enabling the Council to do such things as may be necessary in the name of the landowner to cause the relevant land to be dedicated or transferred to the Council.

If the landowner does not agree to the above arrangements, Council may require the landowner provide a financial security such as a bond or bank guarantee or a charge over land or assets equal to the full market value of the land.

The landowner will be required to warrant to the Council in the PA that it has done all things necessary to ensure that nothing, including the interests of third parties, prevents the relevant land from being dedicated or transferred to the Council in accordance with the PA.

#### *Works*

The Developer will be required to provide security to the Council for the carrying out of works for an amount determined by the Council. The security must be in the form of a cash deposit, bond or bank guarantee on terms acceptable to the Council.

The amount of the security will be determined by Council based on the estimated value of the works to be carried out by the Developer, along with the risk profile of the works. A bond or bank guarantee must be issued by a financial institution approved by the Council.

The Council at its discretion may require a charge over land or assets in addition to a bond or bank guarantee.

### **Step-in rights**

The Developer will be required to allow the Council to step-in and remedy any breach of the Developer in carrying out works under a PA. Specifically, the Developer will be required to agree to the following:

- allow the Council to enter, occupy and use any land owned or controlled by the Developer and any equipment on such land to remedy a breach,
- allow the Council to recover its costs of remedying the breach by either or a combination of calling-up and applying the security provided by the Developer to the Council or as a debt due in a court of competent jurisdiction.

### **Registration**

Section 7.6 of the Act provides for the registration of a PA on the title to land. Registration requires the agreement of all persons having a registered interest in the land, including mortgagees, charges, lessees and the like.

The Council will require a PA to be registered on the title unless the Council is satisfied there is a good reason not to do so and the Council's interests under the PA will not be prejudiced. For this reason, the landowner, if different to the Developer, will generally be required to be an additional party to a PA.

The Council will generally agree that registration can be removed on any part of the subject land in conjunction with the issuing of a subdivision certificate to create lots that are to be sold to end-purchasers or otherwise created for separate occupation, use and disposition.

Registration will ordinarily be required to be undertaken by the Developer immediately upon commencement of the PA.

Council will require the relevant registered landowner to consent to and procure the consent of any other prior registered interests to the registration of the planning agreement.

### **Restriction on dealings**

Unless and until all PA obligations are completed by the developer to the satisfaction of the Council, restrictions will apply to transactions with third parties involving:

- the sale or transfer the land to which the PA applies,
- the assignment of the Developer's rights or obligations under the PA, or
- novation of the PA.

Such a sale, transfer, assignment or novation may not occur unless and until:

- the Developer has, at no cost to the Council, first procured the execution by purchaser, transferee, assignee or novatee of a deed in favour of the Council on terms reasonably satisfactory to the Council,
- the Council notifies the Developer that it considers that the purchaser, transferee, assignee or novatee, is reasonably capable of performing its obligations under the PA, and
- the Developer is not in breach of the PA, and

- the Council has given its consent to the sale, transfer, assignment or novation.

### **Insurance**

The Developer will be required to take out and keep current to the satisfaction of the Council the following insurances in relation to work to be carried out under a PA:

- **contract works insurance**, noting the Council as an interested party, for the full replacement value of the works (including the cost of demolition and removal of debris, consultants' fees and authorities' fees),
- **public liability insurance** for at least \$20,000,000 for a single occurrence, which covers the Council, the Developer and any subcontractor of the Developer, for liability to any third party,
- **workers compensation insurance** as required by law, and
- any other insurance required by law.

### **Indemnity**

The Developer will be required to indemnify the Council from and against all claims that may be sustained, suffered, recovered or made against the Council arising in connection with the carrying out of works under the PA except if, and to the extent that, the claim arises because of the Council's negligence or default.

### **Dispute resolution**

PAs will be required to make provision for mediation or expert determination depending on the nature of the dispute. Expert determination would 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 an independent expert.

### **Notations on section 10.7 Planning Certificate**

The Council will generally require a PA to contain an acknowledgement that the Council may, at its absolute discretion, make a notation under s10.7(5) of the Act to the effect that the land is subject to the PA on any certificate issued under s10.7 of the Act relating to the land the subject of the agreement.

### **Monitoring and review**

The Council will continuously monitor the performance of the Developer's obligations under a PA. The Council will require a PA to contain provisions requiring the Developer at its cost to report periodically to the Council on its compliance with obligations under the PA. The Council may require a PA to contain provisions establishing a mechanism under which the PA is periodically reviewed by the parties. For the purposes of addressing any matter arising from a review of a PA the parties may agree on and implement appropriate amendments to the PA.

### **Amendment**

PAs can be amended by agreement between the parties. Either party can initiate an amendment.

The parties will be required to act co-operatively, reasonably and in good faith in considering any request to amend a PA.

Amendment will generally occur by means of a deed of variation to the PA in a form acceptable to Council. The party proposing the amendment must bear the other party's costs of the modification.

### **Discharge of PA**

The Developer must ensure that the public benefits are provided by the date or milestone identified in the planning agreement. For works in kind, the Council will inspect and provide confirmation in writing that the works have reached completion.

A Developer may be discharged from its obligations under a PA in certain circumstances. These include:

- the Developer's obligations have been fully carried out in accordance with the PA,
- the Development Consent to which the PA relates has lapsed, or it has been modified to such an extent that the Developer's obligations may no longer apply,
- the performance of the PA by the Developer has been frustrated by an event or events beyond the reasonable control of the parties, such as a change in planning controls,
- the Developer has transferred the land to which the PA relates or assigned its interest under the PA or novated the PA on terms agreed to by the Council,
- other material changes affecting the operation of the PA have occurred, and
- the parties have entered into a new PA or other suitable arrangement,
- the Council and the Developer otherwise agree to the discharge of the PA.

### **Implementation agreements**

Under the Act, the PA must set out the nature and extent of the development contributions to be made by the Developer, the time or times by which the development contributions are to be made and the manner by which the development contributions are to be made.

The Parties may enter into agreements relating to the subject-matter of a PA that are not inconsistent with the PA for the purpose of implementing the PA.

## **PROCEDURES FOR NEGOTIATING A PA**

### **Procedures for consideration of PA Proposals**

A Developer will be required to pay the PA Proposal Fee to the Council before the Council considers a PA Proposal.

The Council's negotiation procedure for PAs aims to be efficient, predictable, transparent and accountable.

Council will seek to ensure that negotiations of PAs run in parallel with Development Applications and Planning Proposals.

#### *Planning Proposals*

Where a PA Proposal is made in connection with a Planning Proposal under the Act, the Council requires the Planning Proposal to explain the purpose and nature of the PA and set out in detail its proposed terms.

Any agreement by the Council to the Planning Proposal will generally be conditional on the execution of the PA by the Developer on terms satisfactory to the Council. The PA will generally be required to be registered on the title, and proof of registration submitted to the Council before finalisation of the Planning Proposal.

### *Development Applications*

Where a PA Proposal is made in connection with a Development Application, the PA Proposal should be the subject of pre-lodgement discussions with Council officers. Lodgement of the Development Application should be accompanied by a draft of the PA acceptable to the Council, or a detailed written irrevocable offer acceptable to the Council for the purposes of s7.7(3) of the Act.

The Council will require the Developer to execute the agreed draft PA or to have provided a detailed written irrevocable offer acceptable to the Council before the Development Application is determined (whether by the governing body or a delegate).

If the Developer has submitted a detailed written irrevocable offer acceptable to the Council, any Development Consent granted by the Council to the Development Application will ordinarily be subject to a deferred commencement condition requiring the PA to be entered into in accordance with the offer before the consent operates.

### **Preparation and form of PA**

The Council will oversee preparation of a PA. Typically, PA's will be prepared by a legal firm engaged by Council at the proponent's cost. However, Council may accept a draft PA prepared by a proponent at its discretion.

Council may prepare templates for PAs and associated explanatory notes to assist proponents.

Depending on the nature of the public benefit proposed, some clauses in template PA's may not apply. For example, if the public benefit is solely a monetary contribution, clauses regarding developer works may not be necessary.

Some provisions are standard for every PA to comply with the Act and Regulations.

### **Involvement of independent third parties in negotiation process**

The Council may require the appointment of an independent person to facilitate or otherwise participate in the negotiation of a PA or aspects of it, particularly where:

- 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 are required in relation to large projects or where numerous parties or stakeholders are involved.

### **Council's costs of negotiating, entering into, monitoring and enforcing a PA**

Prior to considering a PA Proposal, the Council may, in its sole discretion, require the Developer to pay the Council an amount towards Council's anticipated costs in negotiating, preparing and entering into the PA.



These may include legal costs and costs related to independent consultants/facilitators, land valuers, quantity surveyors and the like. In some cases, the Council may seek a contribution in the PA towards the ongoing administration of the PA.

### **Public notification of PAs**

In accordance with the Act, all draft PAs will be publicly notified for a minimum period of 28 days.

If the PA is in connection with a Planning Proposal, the PA will be publicly notified, if practicable, with the public notification and community consultation period of the relevant Planning Proposal. This ensures that the community can consider all elements of the change to the Local Environmental Plan as a whole at the same time.

If the PA is in connection with a DA, the public notice will be given contemporaneously with the DA wherever possible.

The Council will publicly re-notify and make available for public inspection a PA and the application or Planning Proposal to which it relates if, in the Council's opinion, a material change is made to the terms of the PA or the application or Planning Proposal after it has been previously publicly notified and inspected.

Such a change may arise as a consequence of public submissions or for any other reason.

### **PA register**

The Council maintains a register of all PAs.

The following is available for public inspection (free of charge) during ordinary Council office hours:

- the PA register kept by the Council;
- copies of all PAs (including amendments) that apply to the area of the Council; and
- copies of the explanatory notes relating to those PAs or amendments.

The Council includes information about executed PAs in its Annual Report.

## **PROBITY MATTERS**

### **Separation of staff responsibilities within the Council**

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

### **Involvement of Councillors in PA negotiation process**

Councillors will not be involved in the face to face negotiations of any PA.

## **REVIEW**

The Planning Agreements Policy is to be reviewed every four years.