



# Planning Agreement Policy



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### Document Control

<b>Policy</b>	Planning Agreement Policy	<b>Policy Number</b>	TBA
<b>Author/Reviewer</b>	Director Sustainable Growth	<b>Review Period and Date</b>	Reviewed within 12 months of election/4 yearly - September

This policy shall be reviewed: -

- This policy shall be reviewed within 12 months of an election, and thereafter at four yearly intervals at least, to ensure it meets all statutory requirements and the needs of council. It may also be reviewed at other times as determined by council.

### Document History

<b>Date</b>	<b>Status</b>	<b>Version</b>	<b>Resolution</b>	<b>Description</b>
26 July 2017	Draft	0.1		Presented to Council for endorsement, public exhibition 28 days
26 July 2017	Draft	0.2	17/201	Placed on public exhibition 28 days
25 October 2017	Draft	0.3		Presented to Council for adoption
25 October 2017	Final	1.0	17/283	Adopted



## 1. Introduction

Planning Agreements facilitate provision of complex infrastructure in connection with Planning Proposals (rezoning applications) or Development Applications under the *Environmental Planning and Assessment Act, 1979 (the Act)*. Agreements allow a level of flexibility in Council's development contribution system and may authorise contributions for a variety of public purposes some of which extend beyond the scope of Council's Section 94 or 94A Contribution Plans.

This Policy establishes a framework to guide consideration and administration of Planning Agreements lodged with Council pursuant to Section 93F of the Act.

## 2. Aims and Objectives

The Policy aims are to:

- Establish a fair, transparent and accountable framework governing the use of Planning Agreements by Council;
- Provide guidance to developers and the broader community on the use of Planning Agreements;
- Enhance the range of development contributions made by development towards public facilities in the Hilltops Local Government Area;
- Provide a generally applicable test for determining the acceptability of a planning agreement, which embraces among other things the concept of reasonableness;
- Give all stakeholders in development greater involvement in determining the type, standard and location of public facilities and other public benefits; and
- Provide for a more flexible development contributions system.

## 3. Legislation

- *Environmental Planning and Assessment Act, 1979.*
- *Environmental Planning and Assessment Regulation 2000.*

## 4. Planning Agreement Framework

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 *Environmental Planning and Assessment Regulation 2000*; and
- c) This Policy.

### 4.1 Principles

Planning Agreements will be governed by the following principles:

- a) The negotiation of a Planning Agreement is at the discretion of the Council.
- b) Planning decisions may not be bought or sold through Planning Agreements.
- c) Council will not allow Planning Agreements to improperly fetter the exercise of its functions under the Act and its Regulations or other legislation.
- d) Council will not use Planning Agreements for any purpose other than a proper planning purpose.
- e) Development that is unacceptable on planning grounds will not be permitted because of public benefits offered by developers that do not make the development acceptable on planning grounds having regard to the heads of consideration set out in Section 79C of the Act.
- f) Council will not take into consideration Planning Agreements that are wholly unrelated to an application, nor will Council give undue weight to a Planning Agreement.
- g) Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed Planning Agreement.



- h) Council will not improperly rely on its position in order to extract unreasonable public benefits from developers under Planning Agreements.
- i) Council will avoid, wherever possible, being party to Planning Agreements where they also have a stake in the development the subject of the Agreements.
- j) Council will not improperly rely on its peculiar statutory position in order to extract unreasonable public benefits from developers under Planning Agreements.

#### 4.2 Negotiation Procedures

Council, in its discretion, may negotiate a Planning Agreement with a developer to address the following matters in connection with any proposed application by the developer for a Planning Proposal (rezoning application) or development consent relating to any land in the Hilltops Local Government Area.

- a) Mitigate or 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 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, including those set out in Council's Section 94 and 94A Contribution Plans.
- f) Monitor the planning impacts of development; and
- g) Secure planning benefits for the wider community.

Any offer by a developer to enter into a Planning Agreement with Council is to be in writing. The written offer is to contain sufficient information for Council to properly consider whether or not to accept the offer and shall include but not be limited to:

- a) The land to which the Planning Agreement relates, including its legal description;
- b) The Development Application or Planning Proposal (rezoning application) that relates to the Planning Agreement;
- c) If the developer is not the owner of the relevant land, then the land owner's details and whether the land owner intends to enter into the Planning Agreement as well (if so, a written offer will be required from the relevant land owners);
- d) The nature of the security to be provided for the public benefits;
- e) The public benefits being offered under the terms of the Planning Agreement; and
- f) The developer's details.

The negotiation of a Planning Agreement will involve the following procedure:

- a) Prior to the lodgement of the relevant application by the developer, the Council and developer should decide whether to negotiate a Planning Agreement.
- b) A timetable and process for negotiations should be agreed by the parties. The parties may decide to appoint an independent person to facilitate or otherwise participate in the negotiations.
- c) The key issues for negotiation should be agreed by the parties.
- d) Once agreement on the content of the Planning Proposal is reached a draft proposed Planning Agreement including the explanatory note should be prepared by one of the parties, and provide a copy of it to the other parties. Planning Agreements and explanatory notes are to be in or to the effect of the standard templates provided in Appendices 1 and 2.
- e) The relevant application is lodged with Council accompanied by the proposed Planning Agreement.
- f) The proposed agreement will be reported to Council, and Council will resolve whether or not to adopt a recommendation to exhibit the proposed Planning Agreement (Council may resolve to reject the agreement).



- g) Council will publicly exhibit the relevant application and proposed Planning Agreement, in accordance with the Act. Following exhibition, an assessment is undertaken by Council officers and reported to Council.
- h) The parties may undertake further negotiations 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.
- i) Council resolves to adopt the proposed Planning Agreement.
- j) If the application is a Development Application and is granted consent, a condition is to be imposed requiring the Agreement to be entered into in terms of the developer's offer. Council would resolve to execute the Planning Agreement when approving the application. If the application is approved on terms different to the developer's offer, the Agreement could not be required to be entered into.
- k) The Planning Agreement Register will be updated and maintained by the Council and monetary contributions and/or works will be tracked by the Council.

### 4.3 Agreement Acceptability Test

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

- a) Is the Planning Agreement directed towards a proper and legitimate planning purpose having regard to the statutory planning controls and other adopted planning policies, infrastructure strategies 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 Development Application or Planning Proposal (rezoning 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?
- g) Does the Planning Agreement conform to the principles governing the Councils use of Planning Agreements?
- h) Are there any relevant circumstances that may operate to preclude the Council from entering into the Planning Agreement?
- i) Will the Planning Agreement result in a positive net community benefit calculated as follows?

**Net community benefit = Proposed Planning Agreement contributions – (Development works + Contributions)**

Where:

- Development works: Works required to serve the development itself and/or conditioned as part of the development consent under Section 80A of the Act.
- Contributions: Payments required to be paid under a Section 94 or 94A contributions plan under the Act.
- Proposed Planning Agreement contributions: The contributions proposed via agreement, either monetary, dedication of land, the provision of material public benefits, or any combination of these for a public purpose.
- Net community benefit: The community benefit must be greater than the value of the development works and contributions. Positive values mean potential net community benefit. Negative values indicate that Council would potentially be worse off by entering into the proposed Planning Agreement.



#### **4.4 Public Notification Procedures**

In accordance with the Act, a proposed Planning Agreement must be publicly notified and available for public inspection for a minimum period of 28 days. During this time Council will make the relevant application, including the proposed Planning Agreement, explanatory note and any other relevant documents available for public comment, consistent with statutory requirements and its notification procedures.

In the case of Development Applications, a proposed Planning Agreement may be advertised separate to the application once acceptable negotiations have taken place. In the case of Planning Proposals (rezoning applications), the agreement will be advertised at the same time as the Planning Proposal during the exhibition period.

Council may renotify a proposed Planning Agreement and the relevant application if, a change is made to the terms of the agreement or the application after it has been notified.

#### **4.5 Specific Planning Agreement Provisions**

##### **Standard Planning Agreements**

Unless otherwise agreed by the parties in a particular case, a Planning Agreement will be prepared by Council at the developer's cost. Planning Agreements and explanatory notes are to be in or to the effect of the standard templates provided in Appendices 1 and 2.

##### **Relationship with Section 94 or 94A contribution plans**

Public benefits in Planning Agreements are additional to required contributions. By exception, a Planning Agreement may partly or fully exclude the application of Section 94 or Section 94A of the Act to development to which the Agreement relates.

If the Agreement does not exclude the application of Section 94 to the development, it must state whether benefits under the Agreement are or are not to be taken into consideration in determining development contribution under the Act.

##### **Entering into a Planning Agreement**

A Planning Agreement is entered into when it is signed by all of the parties. A Planning Agreement can be entered into at any time after the Agreement is publicly notified in accordance with the Act and its Regulations.

Council will require a Planning Agreement to be entered into as a condition of granting development consent to the development to which the Agreement relates or as part of the Gateway process for a Planning Proposal (rezoning application).

##### **Planning Agreement obligation**

Council will require a Planning Agreement to provide that the developer's obligations must be met:

- a) prior to the issuing of any construction certificate related to the development consent;
- b) on notification of an environmental planning instrument; or
- c) on another event agreed by the parties.

##### **Modification and discharge of developer's obligations**

Planning Agreements should set out the circumstances in which the parties agree to modify or discharge the developer's obligations under the Agreement. The modification or discharge should be effected by an amendment to the Agreement.



### **Pooling of development contributions**

Planning Agreements should specifically provide that monetary contributions paid under different Planning Agreements are to be pooled and progressively applied towards the provision of public benefits that relate to the various Agreements. Pooling may be appropriate to allow public benefits, particularly essential infrastructure, to be provided in a fair and equitable way.

### **Implementation Agreements**

Council may require an implementation Agreement that provides for matters such as:

- a) The timetable for provision of planning obligations 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**

Council will continuously monitor the performance of the developer's obligations under a Planning Agreement and report them in accordance with the Act.

### **Assignment and dealings by the developer**

Council will not permit the assignment of any or all of the developer's rights or obligations under the Agreement, or permit any dealing in relation to any part or the whole of the land the subject of the Agreement unless:

- a) Council has given its consent to the proposed assignment or dealing
- b) The developer has, at no cost to the Council, 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) If the proposed dealing involves a mortgage, charge or other encumbrance in relation to the party's right, title and interest in the land, such documents provide for an Agreement by the person to the effect that they, and any receiver appointed by them, will not enjoy rights greater than those of that party, and
- d) The party is not in breach of this Agreement.

### **Provision of security under a Planning Agreement**

Council will require a Planning Agreement to make provision for security to cover the developer's obligations under the Agreement. The form of security will be an unconditional bank guarantee from an Australian Bank in favour of the Council to the full value of the developer's obligations under the agreement. In respect of contributions in the form of land, Council will require a Planning Agreement to include provisions allowing Council to acquire any land to be dedicated for \$1 if the developer defaults.

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

Council will 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 (including but not limited to staffing costs, consultants fees, legal fees);
- b) registration of the Agreement on the title of any relevant land, and
- c) enforcing the Agreement.



Council may require the Planning Agreement to make provision for a development contribution by the developer towards the ongoing administration of the Agreement, should this be relevant

### **Notations on Planning Certificates**

Council will require a Planning Agreement to contain an acknowledgement by the developer that Council will make a notation about a Planning Agreement on any certificate issued under Section 149(5) of the Act relating to the land the subject of the agreement.

### **Registration of Planning Agreements**

Pursuant to Section 93H of the Act, Council may require a Planning Agreement to contain a provision requiring the developer to agree to registration of the Agreement on the title to the land to which the agreement applies.

### **Dispute resolution**

Council will 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.

## **4.6 Planning Agreement Register**

Council is required keep a register of planning agreements that apply in the Hilltops LGA, whether or not Council is a party to a planning agreement.

The Register should state the date an agreement was entered into and a short description of the agreement (including any amendment).

Council will make the following available for public inspection copies of Planning Agreements (including amendments), and copies of the related explanatory notes.

The Planning Agreement Register will be updated and maintained by the Council and monetary contributions and/or public domain works will be tracked by the relevant Council responsibility areas.



## Appendix 1 – Planning Agreement Template

### PLANNING AGREEMENT

#### Parties

## of ##, New South Wales (Council)

and

## of ##, New South Wales (Developer).

#### Background

*(For Development Applications)*

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

*(For Changes to Environmental Planning Instruments)*

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

#### Operative Provisions

##### 1. Planning Agreement under the Act

The Parties agree that this Agreement is a planning agreement governed by Subdivision 2 of Division 6 of Part 4 of the Act.

##### 2. Application of this Agreement

[Drafting Note 2: Specify the land to which the Agreement applies and the development to which it applies]

##### 3. Operation of this Agreement

[Drafting Note 3: Specify when the Agreement takes effect and when the Parties must execute the Agreement]

##### 4. Definitions and interpretation

###### 4.1 In this Agreement the following definitions apply:

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

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

**Development** means ##



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

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

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

**GST** has the same meaning as in the GST Law.

**GST Law** has the meaning given to that term in A New Tax System (Goods and Services Tax) Act 1999 (Cth) and any other Act or regulation relating to the imposition or administration of the GST.

**Instrument Change** means ## Local Environmental Plan ##.

**Land** means Lot ## DP ##, known as ##.

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

**Public Facilities** means ##.

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

4.2 In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:

- a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
- b) A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- c) If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.
- d) A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
- e) A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- f) A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- g) A reference to a Clause, part, schedule or attachment is a reference to a Clause, part, schedule or attachment of or to this Agreement.
- h) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- i) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- j) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
- k) References to the word 'include' or 'including' are to be construed without limitation.
- l) A reference to this Agreement includes the agreement recorded in this Agreement.
- m) A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.
- n) Any schedules and attachments form part of this Agreement.



**5. Development Contributions to be made under this Agreement**

[Drafting Note 5: Specify the development contributions to be made under the agreement; when they are to be made; and the manner in which they are to be made]

**6. Application of the Development Contributions**

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

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

[Drafting Note 7: Specify whether and to what extent s94 and s94A apply to development the subject of this Agreement]

**8. Registration of this Agreement**

[Drafting Note 8: Specify whether the Agreement is to be registered as provided for in s93H of the Act]

**9. Review of this Agreement**

[Drafting Note 9: Specify whether, and in what circumstances, the Agreement can or will be reviewed and how the process and implementation of the review is to occur].

**10. Dispute Resolution**

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

**11. Enforcement**

[Drafting Note 11: Specify the means of enforcing the Agreement]

**12. Notices**

12.1 Any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:

- a) Delivered or posted to that Party at its address set out below.
- b) Faxed to that Party at its fax number set out below.
- c) Emailed to that Party at its email address set out below.

Council

Attention: ##

Address: ##

Fax Number: ##

Email: ##

Developer

Attention: ##

Address: ##

Fax Number: ##

Email: ##

12.2 If a Party gives the other Party 3 business days notice of a change of its address or fax number, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.



- 12.3 Any notice, consent, information, application or request is to be treated as given or made at the following time:
- a) If it is delivered, when it is left at the relevant address.
  - b) If it is sent by post, 2 business days after it is posted.
  - c) If it is sent by fax, as soon as the sender receives from the sender's
  - d) fax machine a report of an error free transmission to the correct
  - e) fax number.
- 12.4 If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

### **13. Approvals and consent**

Except as otherwise set out in this Agreement, and subject to any statutory obligations, a Party may give or withhold an approval or consent to be given under this Agreement in that Party's absolute discretion and subject to any conditions determined by the Party. A Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

### **14. Assignment and Dealings**

[Drafting Note 14: Specify any restrictions on the Developer's dealings in the land to which the Agreement applies and the period during which those restrictions apply]

### **15. Costs**

[Drafting Note 15: Specify how the costs of negotiating, preparing, executing, stamping and registering the Agreement are to be borne by the Parties]

### **16. Entire Agreement**

This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with. No Party can rely on an earlier document, or anything said or done by another Party, or by a director, officer, agent or employee of that Party, before this Agreement was executed, except as permitted by law.

### **17. Further acts**

Each Party must promptly execute all documents and do all things that another Party from time to time reasonably requests to affect, perfect or complete this Agreement and all transactions incidental to it.

### **18. Governing law and jurisdiction**

This Agreement is governed by the law of New South Wales. The Parties submit to the nonexclusive jurisdiction of its courts and courts of appeal from them. The Parties will not object to the exercise of jurisdiction by those courts on any basis.

### **19. Joint and individual liability and benefits**

Except as otherwise set out in this Agreement, any Agreement, covenant, representation or warranty under this Agreement by 2 or more persons binds them jointly and each of them individually, and any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.

### **20. No fetter**

Nothing in this Agreement shall be construed as requiring Council to do anything that would cause it to be in breach of any of its obligations at law, and without limitation, nothing shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.



## 21. Representations and warranties

The Parties represent and warrant that they have power to enter into this Agreement and comply with their obligations under the Agreement and that entry into this Agreement will not result in the breach of any law.

## 22. Severability

If a Clause or part of a Clause of this Agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any Clause or part of a Clause is illegal, unenforceable or invalid, that Clause or part is to be treated as removed from this Agreement, but the rest of this Agreement is not affected.

## 23. Modification

No modification of this Agreement will be of any force or effect unless it is in writing and signed by the Parties to this Agreement.

## 24. Waiver

The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another Party. A waiver by a Party is only effective if it is in writing. A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

## 25. GST

If any Party reasonably decides that it is liable to pay GST on a supply made to the other Party under this Agreement and the supply was not priced to include GST, then recipient of the supply must pay an additional amount equal to the GST on that supply.

## Execution

Dated: ##

Executed as an Agreement: ##



## Appendix 2 – Explanatory Note Template

### Explanatory Note

Draft Planning Agreement

Under s93F of the *Environmental Planning and Assessment Act, 1979*

#### 1. Parties

## (Planning Authority)

## (Developer)

#### 2. Description of Subject Land

#### 3. Description of Proposed Change to Environmental Planning Instrument/ Development Application

#### 4. Summary of Objectives, Nature and Effect of the draft Planning Agreement Assessment

#### 5. Assessment of the Merits of the draft Planning Agreement

The planning purposes served by the draft Planning Agreement.

How the draft Planning Agreement promotes the objects of the *Environmental Planning and Assessment Act, 1979*.

How the draft Planning Agreement promotes the public interest.

For Planning Authorities:

- a) Development corporations - How the draft Planning Agreement promotes its statutory responsibilities.
- b) Other Public Authorities - How the draft Planning Agreement promotes the objects (if any) of the Act under which it is constituted.
- c) Councils – How the draft Planning Agreement promotes the elements of the Council's charter.
- d) All Planning Authorities – Whether the draft Planning Agreement conforms with the Authority's capital works program.

The Impact of the draft Planning Agreement on the public.

Other relevant matters

Signed and dated by all Parties