

# Planning Agreement Policy & Procedures Manual

CITY OF CANADA BAY

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# Planning Agreements – Policy

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# 1. Introduction

## 1.1 OVERVIEW

Planning Agreements are voluntary agreements that allow development contributions such as the dedication of land to Council, monetary contributions, public infrastructure, community facilities, affordable housing, any other material public benefit or any combination of these to be delivered in connection with planning proposals and development applications.

Planning Agreements are separate from, though complement Council's section 7.11 and 7.12 contribution plans levied in accordance with the *Environmental Planning & Assessment Act 1979* (the Act).

Planning Agreements provide greater flexibility to target the range of public facilities and services that can be provided for the public's benefit in order to manage the impacts of development. Planning Agreements also provide an efficient means of incrementally developing community infrastructure in conjunction with redevelopment in urban renewal areas.

## 1.2 NAME OF THIS POLICY

This Policy is known as the Canada Bay Planning Agreements Policy & Procedures Manual (the Policy). It sets out Canada Bay Council's policy and procedures relating to the preparation of Planning Agreements under the Act.

Council will apply this Policy to ensure Planning Agreements comply with Part 7 of the Act and provide infrastructure and other public benefits that support Council's strategic direction and provide good value to the community.

## 1.3 COMMENCEMENT AND APPLICATION OF THE POLICY

The Policy was adopted by resolution of Council on 17 November 2020. This Policy is effective from 17 November 2020.

The Policy applies to development applications lodged pursuant to the *Environmental Planning and Assessment Act 1979* and planning proposals seeking to change the Canada Bay Local Environmental Plan for land and development within the Canada Bay Local Government Area.

## 1.4 OBJECTIVES

The objectives of this Policy are to:

- a. establish a fair, transparent and accountable policy governing the use of Planning Agreements by Council;
- b. to enable innovative approaches to the delivery of infrastructure and services that are consistent with the Council's corporate strategic planning documents and land use planning outcomes;
- c. 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;
- d. ensure participants in the negotiation of Planning Agreements understand their roles and responsibilities to maintain the highest standards of probity,
- e. set out Council's specific policy position and procedures relating to the use of Planning Agreements,
- f. promote public participation through the public exhibition and seeking submissions on draft Planning Agreements, and
- g. where applicable, achieve benefits for the community in line with adopted strategies and plans (particularly relating to land use improvement and foreshore access).

## 1.5 WHAT INFORMATION DOES THIS POLICY PROVIDE?

The Policy sets out the Council's approach to the preparation of Planning Agreements. In particular, this Policy sets out:

- a. the circumstances in which Council may consider entering into a Planning Agreement;
- b. the matters ordinarily covered by a Planning Agreement,
- c. the form of development contributions which may be sought under a Planning Agreement;
- d. examples of the kinds of public benefits which may be sought;
- e. the method for determining the value of public benefits;
- f. timing considerations in respect to Planning Agreements and procedures for negotiating and entering into Planning Agreements;

- g. whether the money paid under different Planning Agreements is to be pooled and applied towards public benefits from various Planning Agreements;
- h. how the benefits provided under Planning Agreements are valued;
- i. probity measures, and
- j. the Council's policy on other matters relating to Planning Agreements, such as their review and modification, the discharging of developer obligations, dispute resolution, enforcement mechanisms and the payment of costs relating to the preparation, negotiation, execution, monitoring and other administration of agreements.

## 1.6 INTERPRETATION

Defined terms used in this Policy:

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

**affordable housing condition** means a condition that may be imposed on development consent, under section 7.32 of the Act, requiring the dedication of land or a monetary contribution for the purpose of providing affordable housing.

**affordable housing contribution scheme** means a scheme referred to in section 7.32(3)(b) of the Act set out in or adopted in a local environmental plan.

**consent authority** has the same meaning as in the Act.

**Contributions plan** means a contributions plan within the meaning of the Act.

**contributions plan credit** means the \$ amount by which value of public benefits provided for in a Planning Agreement exceed the value of contributions that could be required in respect of development under the applicable contributions plan

**Council** means the City of Canada Bay Council.

**developer**, in relation to a Planning Agreement, 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.

**modification application** means an application to modify a development consent made under s4.55 of the Act.

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

**Parramatta Road Corridor Precinct** means an individual Precinct within the Parramatta Road Corridor Urban Transformation Strategy that has been earmarked for renewal because of the access to jobs, transport, infrastructure and services, and their ability to accommodate new development.

**Planned Precinct** means an area identified by the NSW Government identified for potential increased density due to the proximity to jobs, public transport, shops and services.

**Planning Agreement** means a voluntary Planning Agreement referred to in s7.4 of the Act.

**planning authority**, in relation to a Planning Agreement, means the Council

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

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

**Section 7.11 contribution** means a contribution under s7.11 (1) of the Act.

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

**Secretary** means the Secretary of the Department of Planning, Industry and Environment.

**value capture** refers to a sharing/ capture of Value Uplift as a development contribution to be appropriated to public benefit.

**value uplift** refers to the increased value of an asset following amendment/s to the planning framework.

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# 2. Regulatory & Policy framework

## 2.1 LEGISLATIVE FRAMEWORK

**2.1.1** Division 7.1 of the Act and Part 4 of the Regulation establish a statutory scheme for contributions by developers to local councils in connection with development. The scheme has compulsory and voluntary elements.

**2.1.2** The scheme provides for the Council to grant consent to development subject to a condition requiring development contributions to be made to the Council under:

- a. section 7.11 of the Act by means of the payment of money or the dedication of land free of cost, or
- b. section 7.12 of the Act by means of the payment of a levy to the Council of a fixed percentage of the proposed cost of carrying out the development,
- c. section 7.32 of the Act by means of the payment of money or the dedication of land free of cost for the purpose of providing affordable housing.

**2.1.3** The scheme also provides for Planning Agreements. A Planning Agreement is defined in s7.4 of the act to be a voluntary agreement or other arrangement between a 'planning authority' and a 'developer' (being a person who has sought a change to an environmental planning instrument, or who has made or proposes to make a development application or an application for a complying development certificate, or an associated person) under which the developer is required to make a monetary contribution, dedicate land free of cost, or provide any other material public benefit, or any combination of them, towards a public purpose.

**2.1.4** For the purpose of this policy, a public purpose includes (without limitation) is:

- a. 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,

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

**2.1.5** A Planning Agreement can apply to:

- a. a planning proposal, and
- b. a development application or an application for a complying development certificate, and
- c. a modification to a development consent.

**2.1.6** A Planning Agreement must describe the land, the planning proposal (if applicable), and the development to which it applies.

**2.1.7** A Planning Agreement must also provide for the following:

- a. details of the nature, extent, manner and timing of the provision to be made by the developer under the agreement,
- b. whether the agreement excludes (wholly or in part) or does not exclude the application of section 7.11, 7.12, or 7.24 of the Act to the development,
- c. if the application of section 7.11 is not excluded, whether benefits under the agreement are or are not to be taken into consideration in determining a development contribution under section 7.11,
- d. a dispute resolution mechanism,
- e. a suitable means of enforcing the agreement in the event of a breach of the agreement by the developer

**2.1.8** A Planning Agreement does not require a nexus. There is no need for any connection between developments to which a Planning Agreement applies and the object of expenditure of any money paid under the agreement. However see section 3.2 below.

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- 2.1.9** Council has prepared a template agreement that will form the basis for a Planning Agreement to be entered into with the Council. This template is to be used by developers as the basis for any Planning Agreement.
- 2.1.10** Public Notice - A proposed Planning Agreement must be the subject of public notice and public inspection (public exhibition). Where practicable, this should occur as part of and contemporaneously with and in the same manner as the public exhibition of the related planning proposal, development application, or application to modify a development consent.
- 2.1.11** A number of important provisions in the Act protect the probity of the negotiation process relating to Planning Agreements and the planning process in which Planning Agreements operate, including the following:
- development consent cannot be refused because a Planning Agreement has not been entered into or the developer has not offered to enter into a Planning Agreement,
  - development consent conditions can only require a Planning Agreement to be entered into in accordance with an offer made by the developers,
  - a Planning Agreement cannot require planning controls to be changed or a development consent to be granted,
  - a Planning Agreement is void to the extent that it allows or requires a breach of the Act, planning controls, or a development consent.

## 2.2 DEPARTMENTAL GUIDELINES

### *2021 Practice Note*

- 2.2.1** Clause 25B of the Regulation provides that the Secretary may from time to time issue practice notes to assist parties in the preparation of Planning Agreements, and requires a council that is negotiating, or entering into, a planning agreement to consider any relevant practice note.
- 2.2.2** The Secretary published a Planning Agreements Practice Note in February 2021 (2021 Practice Note). The 2021 Practice Note replaces the previous Practice Note on Planning Agreements issued by the Director General of the then Department

of Infrastructure, Planning and Natural Resources in July 2005.

- 2.2.3** The practice note:
- provides a rationale for Planning Agreements,
  - identifies and provides fundamental principles and policy considerations,
  - sets out strategic considerations for when and how Planning Agreements can be used,
  - provides guidance on the procedures and decision-making for the application, negotiation and administration of Planning Agreements, and
  - provides examples of the use of Planning Agreements.
- 2.2.4** The 2021 Practice Note recognises the role of Planning Agreements as a tool for delivering innovative or complex infrastructure and public benefit outcomes in connection with planning proposals and development applications.
- 2.2.5** The 2021 Practice Note states that Planning Agreements must be governed by a set of policy principles that ensure transparency, fairness and flexibility of planning decisions.
- 2.2.6** The 2021 Practice Note identifies that it is critical to consider whether a Planning Agreement is in the public interest. Generally speaking, the public interest is directed towards ensuring the fair imposition of planning controls for the benefit of the community.
- 2.2.7** In some cases the public interest served by Planning Agreements may be development impact mitigation, and in others it may be securing benefits for the wider community.
- 2.2.8** It advocates the need for principles, policies, and procedures relating to Planning Agreements to safeguard the public interest and the bargaining process.
- 2.2.9** The 2021 Practice Note discusses the need for an awareness of the ways in which Planning Agreements can be misused by planning authorities or produce undesirable outcomes.
- 2.2.10** It recommends that planning authorities apply an 'acceptability test' when assessing proposals for Planning Agreements.



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(Acceptability Test provided under Section 3.2 of this policy)

Planning Agreement are made after public notification.

**2.2.11** The 2021 Practice Note makes specific reference to and provides guidance on the use of Planning Agreements for value capture in connection with the making of planning decisions.

**2.2.11** This Council policy on Planning Agreements seeks to comply with the 2021 Practice Note.

**2.2.12** Other key elements of the 2021 Practice Note include:

- a. identifying the objectives of the use of Planning Agreements,
- b. guidance on the relationship between Planning Agreements and development applications and planning proposals and variations sought to development standards,
- c. strongly encouraging councils to publish Planning Agreement policies and procedures,
- d. identifying strategic considerations when using Planning Agreements including the relationship between Planning Agreements and other contributions mechanisms, introducing a greater nexus between Planning Agreements and strategic infrastructure planning, and the use of Planning Agreements in overcoming past deficiencies in infrastructure provision,
- e. provides guidance on the content of offers to enter into Planning Agreements,
- f. provides guidance on the negotiation process including involving independent third parties in Planning Agreement negotiations in appropriate cases and encouraging efficient negotiation systems,
- g. provides guidance on the costs and charges, including the use of Planning Agreements for the funding of maintenance and other recurrent costs,
- h. provides guidance on the registration and administration of Planning Agreements,
- i. provides guidance on security for the enforcement of developers' obligations under Planning Agreements,
- j. provides guidance on the public participation and notification of Planning Agreements, in particular setting out a threshold test for when re-notification of a proposed Planning Agreement should occur if amendments to the proposed

## 2.3 EXPLANATORY NOTE

**2.3.1** Clause 25E(1) of the Regulation requires that an explanatory note must accompany a planning agreement, or an agreement that revokes or amends a planning agreement that:

- a. Summarises the objectives, nature and effect of the proposed agreement, amendment or revocation, and
- b. Contains an assessment of the merits of the proposed agreement, amendment or revocation, including the impact (positive or negative) on the public or any relevant section of the public.

**2.3.2** Clause 25E(2) of the Regulation requires that, when preparing the explanatory note, the planning authority must consider any relevant practice note.

**2.3.3** The 2021 Practice Note provides that the explanatory note:

- a. can be prepared by one of the parties but should be reviewed and agreed to by any other party to the Planning Agreement,
- b. must help the broader community to simply and clearly understand what a Planning Agreement is proposing, how it delivers public benefit, and why it is acceptable and in the public interest,
- c. should be easy to understand and written in plain English,
- d. must identify specific matters as listed in the practice note,
- e. should indicate timing of delivery and should include maps, diagrams and other material to help explain what public benefits are proposed and the nature of the development.

**2.3.4** Council's explanatory note template is included under Part 9, Planning Agreement Templates and must be used by developers as the basis for the preparation of explanatory notes.

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## 2.4 CORPORATE STRATEGIC PLANNING CONTEXT

- 2.4.1** An important strategic role for Planning Agreements is achieving specific land use planning outcomes with strategic and/or site specific merit.
- 2.4.2** A Planning Agreement should facilitate the provision of public facilities and amenity outcomes that advance the delivery of Council's corporate and strategic planning objectives and deliver valuable community benefits where appropriate.
- 2.4.3** The Council's long-term strategies including Canada Bay's Local Strategic Planning Statement and Community Strategic Plan - Your Future 2030 and delivery program are based on the outcomes of engagement with the community. The implementation of key aspects of some of these goals, the broader strategic directions and the delivery of key infrastructure areas can be directly or indirectly achieved through Planning Agreements.
- 2.4.4** The vision and goals established within Council's long-term strategic plans such as the Community Strategic Plan - Your Future 2030 and Local Strategic Planning Statement flow through to supporting plans that guide Council's medium and short-term priorities:
- Resourcing Strategy:
  - Long Term Financial Plan (10 years)
  - Asset Management Strategy (10 Years)
  - Workforce Strategy (3 years)
  - Delivery Program (4 years)
  - Operational Plan (Annual)
- 2.4.5** Council's Local Strategic Planning Statement considers planning for growth in Canada Bay, including relevant supporting strategies which seek to identify the communities needs for infrastructure such as community facilities, transport, open space, public domain and recreation infrastructure, capital works and infrastructure captured through plans of management.

## 2.5 RELATIONSHIP TO PAYMENT OF SECTION 7.11 & SECTION 7.12 CONTRIBUTIONS

- 2.5.1** The Council has two broad-based contributions plans:
- a. section 7.11 Development Contributions Plan, and
  - b. section 7.12 Fixed Levy Contributions Plan.
- 2.5.2** Council uses its contributions plans as the primary mechanisms to deliver public infrastructure within its area.
- 2.5.3** Planning Agreements are one means of implementing the development contributions strategies and targets and are part of the Council's overall development contributions planning system.
- 2.5.4** Planning Agreements are intended to complement the Council's contributions plans. In appropriate cases, Planning Agreements can be used to deliver specific infrastructure outcomes provided for in the contributions plans or to provide additional or different public benefits or benefits not able to be provided through the contributions plans, such as affordable housing.
- 2.5.5** Acceptance of any contributions not identified in Council's existing development contributions plan and / or other corporate planning documents will be at the sole discretion of Council.
- 2.5.6** Entering into a Planning Agreement does not ordinarily exclude the application of sections 7.11, 7.12 or 7.24 of the Act to the development. Noting a Planning Agreement cannot exclude s7.24 of the Act unless the approval of the Minister, or a development corporation designated by the Minister to give such approval, is obtained.

# 3. Probity & Public Accountability

## 3.1 FUNDAMENTAL PRINCIPLES

The 2021 Practice Note identifies fundamental principles governing the use of Planning Agreements. These are:

- a. planning authorities should always consider a proposal on its merits, not on the basis of a Planning Agreement,
- b. Planning Agreements must be underpinned by proper strategic land use and infrastructure planning carried out on a regular basis and must address expected growth and the associated infrastructure demand,
- c. strategic planning should ensure that development is supported by the infrastructure needed to meet the needs of the growing population,
- d. a consent authority cannot refuse to grant development consent on the grounds that a Planning Agreement has not been entered into in relation to the proposed development or that the developer has not offered to enter into such an agreement,
- e. Planning Agreements should not be used as a means of general revenue raising or to overcome revenue shortfalls,
- f. Planning Agreements must not include public benefits wholly unrelated to the particular development,
- g. value capture should not be the primary purpose of a Planning Agreement.

The Council will use all reasonable endeavours to ensure that this policy is applied and decisions are made about Planning Agreements in individual cases openly, honestly, freely, and fairly and that the policy is applied and those decisions are made consistently across the board.

## 3.2 ACCEPTABILITY TEST TO BE APPLIED TO ALL PLANNING AGREEMENTS

The 2021 Practice Note sets out best practice guidelines and safeguards in the use of Planning Agreements. These include determining the Planning

Agreement's acceptability and reasonableness.

Planning Agreements and letters of offer will be tested for acceptability against the following tests (which incorporates the acceptability tests in the 2021 Practice Note) and answer "Yes" to each question.

### Consistency with legislation and departmental guidelines

- a. Is the proposed Planning Agreement consistent with the Fundamental Principles governing the use of Planning Agreements?

### Strategic Merit

- a. Is the proposed development deemed to have site and strategic planning merit in accordance with relevant statutory and non-statutory planning policies?
- b. Is the proposed Planning Agreement directed towards a legitimate planning purposes, that can be identified in the statutory planning controls and other adopted planning strategies and policies applying to the development?

### General

- a. Is the proposed Planning Agreement consistent with the Fundamental Principles governing the use of Planning Agreements?
- b. Does the proposed Planning Agreement provide for the delivery of infrastructure or public benefits not wholly unrelated to the development?
- c. Does the proposed Planning Agreement address an unmet community need and is there a material public benefit to the wider community that results from the items?
- d. Do the items provide a public benefit (as opposed to principally contributing to the marketability of the development)?
- e. Does the proposed Planning Agreement produce outcomes that meet the general values and expectations of the public and protect the overall public interest?
- f. Does the proposed Planning Agreement provide for a reasonable means of achieving the desired outcomes and securing the benefits?
- g. Does the proposed Planning Agreement protect the community against adverse planning decisions?

### Land Dedication

In addition to the above, the Council will consider the following matters when deciding whether to

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enter into a Planning Agreement with respect to land dedication to ensure the land is suitable to the needs of Council and the purpose sought:

- a. Has an independent valuation of the monetary value of the land been undertaken? If not, will suitable arrangements be in place to ensure a valuation will be undertaken prior to the finalisation of the Planning Agreement.
- b. Are the dimensions, location and topography of the land suitable for the needs of Council and the purpose to which the land is sought?
- c. Are the current use and improvements on the land suitable for Council's purpose and has consideration been given as to how this affects the value of the land?
- d. Would the land be more appropriately classified as "value to the community" rather than "value to the development"?
- e. Does the site's soil condition, accessibility, solar access and the relationship with existing public facilities support the dedication of the land for a public purpose?

#### **Material Public Works**

In addition to above, the Council will consider the following matters when deciding whether to enter into Planning Agreement with respect to material public works:

- a. Does the agreement ensure that there are no significant financial implications for Council, particularly with respect to ongoing maintenance.
- b. Will the works be delivered within a reasonable timeframe?

#### **Affordable housing, where identified as a public benefit to be delivered through the Planning Agreement.**

In addition to above, the Council will consider the following matters when deciding whether to enter into a Planning Agreement with respect to affordable housing:

- a. Council's compliance with the *Environmental Planning and Assessment (Planning Agreements) Direction 2019*,
- b. Does the proposal meet the requirements of Council's Local Strategic Planning Statement and the Eastern City District Plan with respect to the requirement for 5% to 10% of all new residential floor space to be delivered as affordable housing (subject to feasibility)?
- c. Are there no other mechanisms available to deliver affordable housing? (for example, does the development application itself provide for affordable housing, or can council impose a condition of consent requiring an affordable housing contribution).

- d. Is the proposed Planning Agreement consistent with council's adopted policies and strategies with respect to affordable housing?
- e. Will the proposed affordable housing be dedicated to Council in perpetuity, provide a mix dwelling sizes, deliver equivalent quality of amenity to the balance of the development and consider universal accessibility?

#### **Value of Planning Agreement**

- a. Where a Planning Agreement is entered into in connection with planning proposal, or development proposal which exceeds the existing development standards or planning controls, and such planning proposal or development proposal has planning merit and will result in value uplift, does the proposed Planning Agreement reflect Council's methodology for calculating value uplift under Section 4.4 of the Policy?

### **3.3 NEGOTIATION OF PLANNING AGREEMENTS**

**3.3.1** There will be a separation of roles and responsibilities during the process of negotiating Planning Agreements. Section 7 Planning Agreements Responsibilities Matrix provides the allocation of responsibilities between roles within Council.

**3.3.2** A division of Council will be responsible for negotiating Planning Agreements and representing Council's commercial interests while a separate division will be responsible for assessing Planning Proposals and Development Applications.

**3.3.3** 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 who assesses the application to which a Planning Agreement relates is not the same person or a subordinate of the person who negotiated the terms of the Planning Agreement on behalf of the Council in its capacity as landowner, developer or financier.

**3.3.4** The Acceptability Test will be undertaken on all applications prior to the commencement of negotiations for any Planning Agreement.

**3.3.5** Council may appoint a probity advisor in respect of the negotiation, preparation and entering into of a Planning Agreement in circumstances that Council considers appropriate.

**3.3.6** Councillors will not be involved in the preparation or negotiation of a Planning Agreement.

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### 3.4 PUBLIC NOTIFICATION AND EXHIBITION OF A PLANNING AGREEMENT AND EXPLANATORY NOTE

**3.4.1** The Council is required to give public notice before a Planning Agreement is entered into, amended or revoked and make a copy of the proposed agreement, amendment or revocation available for inspection by the public for a period of not less than 28 days.

**3.4.2** As far as practicable, public notice of a proposed Planning Agreement or a proposed amendment or revocation of a Planning Agreement in connection with a planning proposal or development application or modification application will be given contemporaneously with and in the same manner as the proposal or application.

**3.4.3** Clause 25E(1) of the Regulation requires that an explanatory note must accompany a Planning Agreement, or an agreement that revokes or amends a Planning Agreement. See sections 2.3.1 to 2.3.3 above in relation to the explanatory note.

**3.4.4** The Council will endeavour to prepare explanatory notes in plain English and with a view to providing sufficient information about the proposed Planning Agreement or amendment or revocation to facilitate effective public involvement as required by the 2021 Practice Note.

**3.4.5** An explanatory note will be publicly exhibited with every Planning Agreement. The explanatory note is intended to help the community to simply and clearly understand what the Planning Agreement is proposing, how it delivers public benefits, and why it is considered by the Council to be acceptable and in the public interest.

**3.4.6** The Council will consider any public submission duly made in response to the public exhibition of a proposed Planning Agreement or a proposed amendment or revocation.

**3.4.7** Any material changes that are proposed to be made to a Planning Agreement after public notice has been given should be subject to re-notification if the changes would materially affect:

- a. how any of the matters specified in section 7.4 of the EP&A Act are dealt with by the Planning Agreement,
- b. other key terms and conditions of the Planning Agreement,
- c. the planning authority's interests or

the public interest under the Planning Agreement,

- d. whether a non-involved member of the community would have made a submission objecting to the change if it had been publicly notified.

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# 4. Preparing Planning Agreements

## 4.1 WHEN MAY COUNCIL ENTER INTO A PLANNING AGREEMENT

**4.1.1** The Act allows Planning Agreements to be entered into in connection with:

- a. planning proposals,
- b. development applications and applications for complying development certificates,
- c. modification applications.

**4.1.2** This Policy does not limit the broad circumstances in which the Council may enter into Planning Agreements.

**4.1.3** Where a development application involves an objection to a development standard under clause 4.6 of the LEP, Council will generally not support entering into a Planning Agreement. Where a Planning Agreement contribution addresses a planning impact of the additional density and is proportionate to the impact, Council will consider the circumstance on a merits basis. Variations to development standards under clause 4.6 of the LEP must be justified on planning grounds.

**4.1.4** Planning agreements should not be utilised where infrastructure delivery can be achieved via a condition of development consent in accordance with Section 4.17 of the Act. No value will be attributed under a planning agreement to works or land dedication that would otherwise be required by a condition of development consent.

## 4.2 TYPE OF CONTRIBUTIONS

**4.2.1** The Act allows development contributions made under Planning Agreements 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), the provision of Affordable Housing or any combination.

**4.2.2** This Policy generally does not limit the form of contributions under Planning Agreements entered into by Council.

## 4.3 TYPES OF BENEFITS

**4.3.1** Public benefits received through Planning Agreements contribute to Council's ability to deliver:

- a. infrastructure identified within existing development contributions plans (s7.11 or s7.12 contributions plans),
- b. infrastructure identified within Council's Strategic plans,
- c. infrastructure required directly as a result of density increases experienced or expected from the redevelopment of a site. e.g. due to changes in development controls arising from a Planning Proposal, and
- d. Land identified in a planning instrument, development control plan or contributions plan for a public purpose, dedication or acquisition.

Infrastructure items and land identified within the plans specified above are appropriate for delivery through a negotiated Planning Agreement.

## 4.4 VALUE OF A PLANNING AGREEMENT IF DEVELOPMENT PROPOSAL RESULTS IN VALUE UPLIFT

**4.4.1** The Council recognises it has a key role in providing services, amenities, infrastructure and other benefits to the public in its local government area, and that the demand for those public benefits will change over time.

**4.4.2** This is particularly the case where development proposed is above and beyond the existing planning controls and may generate unanticipated demands for public benefits.

**4.4.3** The Council considers that Planning Agreements can be used to complement the Council's other infrastructure funding methods to enable the Council to provide identified and anticipated services, amenities, infrastructure and other benefits to the public which benefit the local government area as a whole, and/or areas in which particular development may be proposed.

**4.4.4** To assist the Council in delivering benefits to the public through Planning Agreements in a way that is transparent and fair, Council considers it appropriate to use a value uplift

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methodology to guide the negotiations in relation to the development contributions to be provided under a Planning Agreement where the proposed development will result in value uplift to the land through a change to planning controls, or through a development consent to a development which exceeds development standards.

- 4.4.5** In such cases, Council considers that development contributions to the extent of 50% of the value uplift will generally be appropriate.
- 4.4.6** The development contributions would still be subject to the Acceptability Test.
- 4.4.7** The relevant application would need to be assessed and determined on its planning merits.
- 4.4.8** The percentage of value uplift may be negotiated between the Council and the developer. However, the developer would need to provide supporting documentation to the satisfaction of the Council if it sought to provide development contributions to a value other than 50% of the value uplift.
- 4.4.9** The extent of development contributions to be provided under a Planning Agreement using the value uplift methodology will be calculated by the following formula:

$$C = [RLV - MV] \times 50\%$$

Where:

**C** = dollar value of contributions to be made under a Planning Agreement which represents the total value of contributions

**RLV** = Assessed residual land value of the subject site following either an instrument change, plus associated or consequential changes to Development Control Plan(s) applying to the site, or the consent to development on the site allowing intensified development, change in use and/or permissibility of additional uses. RLV is to be expressed as \$/m<sup>2</sup> of gross floor area (GFA) for transparency and public record.

**MV** = Market Value (MV) of subject site having regard to the highest and best use of site under the existing planning framework. The assessed market value should exclude any price premium that may have been paid for a speculated land rezoning.

- 4.4.10** The developer will be required to provide Council with sufficient details for an open book feasibility approach to assess market value under the existing statutory planning controls and the RLV from a change in development standards/planning controls. The uplift in land value shall be expressed as \$/sqm of GFA of additional floor space achieved.
- 4.4.11** Such documentation provided to the Council is to be verified by a certified practising valuer and/or qualified and experienced land economist. The Council staff responsible for the planning agreement may engage an independent land economist/valuer and other specialists such as quantity surveyor, to review information provided by the developer. Costs incurred by the Council will be met by the developer/proponent.
- 4.4.12** This paragraph 4.4 does not restrict the Council and the developer from negotiating a Planning Agreement even if the development proposal does not result in an increase in the land value. In those circumstances the formula above in relation to the total value of the contributions will not apply and the extent of contribution items to be provided in the planning agreement will be negotiated between Council and the developer.

## 4.5 CONTRIBUTIONS PLAN CREDITS

- 4.5.1** Council will not normally recognise contributions plan credits for Planning Agreements.
- 4.5.2** If Council, in its absolute discretion, agrees to recognise a contributions plan credit for a work or land under a Planning Agreement, the value of the work or land pursuant to which the contributions plan credit is calculated ordinarily cannot exceed the value of the work or land specified in the contributions plan.
- 4.5.3** No contributions plan credit is available for works or land provided for in a Planning Agreement which are additional to the works or land provided for in the contributions plan.
- 4.5.4** The Council will not agree to the refund of a contributions plan credit.
- 4.5.5** Council will consider and negotiate on a case by case basis the timing of the application of any contributions plan credit.

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## 4.6 VALUING WORKS AND MATERIAL PUBLIC BENEFITS

### Works

Where the benefit under a Planning Agreement is the carrying out of works for a public purpose, the value of the benefit (including the estimated detailed design and construction costs), will be:

- 4.6.1** if the work is listed in a contributions plan, the value attributed to it in the contributions plan, and
- 4.6.2** in any other case, determined by an independent valuer/registered quantity surveyor who is experienced in valuing works in New South Wales (and who is acceptable to Council), on the basis of a scope of work which is prepared by Council. All costs of the independent valuer/registered quantity surveyor including carrying out such a valuation will be borne by the developer/proponent.
- 4.6.3** When considering the value of contributions in the form of works, offered under a planning agreement in lieu of payment of Section 7.11 and Section 7.12 contributions, Council will take into account all circumstances of the particular case including the impact on the Council's contributions plan.
- 4.6.4** Provision of works are only ascribed value where they provide a 'material public benefit' to the wider community, i.e. the item delivers a response to a broader community need and is not principally for the benefit of the development. In respect of a Planning Agreement where the extent of development contributions to be provided is calculated using the value uplift methodology, The ascribed value will be considered against the dollar value of the contributions to be made under the Planning Agreement.
- 4.6.5** Items that would ordinarily be required by conditions of development consent will not normally be included in a Planning Agreement, however, if they are, will be ascribed a nominal value for the purposes of a Planning Agreement.

### Other material public benefits

- 4.6.6** Where the benefit under a Planning Agreement is the provision of any other material public benefit, Council and the developer/proponent will negotiate the manner which the benefit is to be valued for the purposes of the agreement.

## 4.7 LAND DEDICATION AND AFFORDABLE HOUSING

### Land Dedication

Where land is identified to be required for community infrastructure/ public purpose that land could be secured via compulsory acquisition or through land dedication. If land is to be secured through compulsory acquisition, Council will be identified as the acquiring authority in the local planning instrument and the provisions of the Land Acquisition (Just Terms Compensation) Act 1991 will apply to the determination of compensation.

If land dedication is identified as the preferred mechanism to secure the required land, a Planning Agreement is the expected instrument by which land is dedicated to Council. Where land is proposed to be dedicated, Council adopts the following policy approach:

- 4.7.1** Floorspace potential is to be calculated by applying a floorspace ratio to include land that is identified to be required for dedication for a public purpose (including roads, drainage and open space) as if it had not been dedicated. This is also referred to as the 'overall development capacity' of a site.
- 4.7.2** Where the overall development capacity of a site is not reduced, i.e. the floorspace potential associated with the land dedicated can be transferred and developed on the remaining site, a nominal value is ascribed to the land dedicated. This scenario only occurs where the remaining site has the environmental capacity to accommodate the transfer and development of floorspace potential associated with the land dedicated.
- 4.7.3** Provided the public purpose for which the land is required for dedication does not result in a negative impact to the value of the remaining site and there is no resultant loss of floorspace potential, the land dedicated will be attributed a nominal value of \$1.
- 4.7.4** Where the floorspace potential from the land dedicated is not able to be transferred and developed on the remaining site, Council may consider if built form controls can be reviewed to accommodate the transferred floorspace. If the floorspace potential from the land dedicated is still not able to be transferred and developed on the remaining site, the value of the foregone floorspace potential should be assessed by a qualified valuer.



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- 4.7.5** In respect of a Planning Agreement where the extent of development contributions to be provided is calculated using the value uplift methodology the value of the land dedicated will be considered against the dollar value of contributions to be made under the Planning Agreement.
- 4.7.6** Where land is required to be dedicated to address development need, for example, if proposed residential uses are to front a rear laneway and a footpath is required to be created for access, the land required for dedication is not considered to be for a public purpose. Accordingly, the requirement for land is expected to be part of the conditions of development consent.
- 4.7.7** Unless procurement of the land is specifically identified or funded in a s7.11 or s7.12 development contributions plan, land that is dedicated will not be eligible for any offset or reduction in s7.11 or s7.12 that is payable.
- 4.7.8** Ordinarily, any land which is required to be dedicated or transferred to the Council under a Planning Agreement must be dedicated or transferred free of encumbrances and remediated (if relevant).
- 4.7.9** Land on which work is required to be carried out under a Planning Agreement must be dedicated to the Council upon completion of the work to the Council's satisfaction unless otherwise specified in the Planning Agreement.
- 4.7.10** 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 Planning Agreement, the developer will be responsible for preparing all documents and meeting all costs relating to the following:
- a. removing an encumbrance on the title,
  - b. creating an interest in land in the Council's favour,
  - c. subdividing land,
  - d. preparing and lodging documents for registration,
  - e. obtaining the consent of any third party to registration,
  - f. dealing with any requisition from Land Registry Services relating to any dealing lodged for registration.

## Affordable Housing

Council will seek to negotiate a Planning Agreement for the provision of affordable housing for any development seeking new residential floor space arising from a planning proposal or development application. Council will have regard to development feasibility when determining whether affordable housing should be delivered through a Planning Agreement. In such circumstances, Council will seek dedication of a minimum of 5% -10% of the new residential Gross Floor Area of new floorspace as affordable housing.

In respect of a Planning Agreement where the extent of development contributions to be provided is calculated using the value uplift methodology the value of affordable housing contributions to be provided will be considered against, and not be more than the Dollar Value of the contributions to be made under the Planning Agreement.

The above paragraphs are the Council's policy on the circumstances in which the Council may seek to negotiate a Planning Agreement for the purposes of clause 5(3) of the *Environmental Planning and Assessment (Planning Agreements) Direction 2019*.

Where affordable housing is proposed to be dedicated, Council adopts the following policy approach:

- 4.7.11** Market value of the affordable housing contribution (minimum 5% -10% of new residential Gross Floor Area) will be assessed by an independent certified practising valuer who is experienced in valuing land in New South Wales (and who is acceptable to Council). All costs of the independent valuer in carrying out such a valuation will be borne by the developer/proponent.
- 4.7.12** If provided in-kind, the affordable housing should be at 'no cost' to Council and be provided in perpetuity.
- 4.7.13** The total value of the affordable housing will be deducted from the dollar value of the contributions to be made in a Planning Agreement.
- 4.7.14** Council will accept monetary contributions towards affordable housing as part of a Planning Agreement where the dollar value of the contributions in the Planning Agreement is either less than the value of a single unit or less than the affordable

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housing contributions sought.

**4.7.15** Affordable housing stock must be universally accessible.

**4.7.16** The make-up of dwelling sizes dedicated to Council as affordable housing must reflect the mix of dwelling sizes present in the overall development, though ensuring a diversity of household sizes and types are provided.

**Note:** Where an alternative policy is in place for the delivery of affordable housing, that policy would apply.

## **4.8 RECURRENT CHARGES & MAINTENANCE COSTS**

**4.8.1** Where a Planning Agreement proposes works or dedication of land and/or building assets, Council may require the developer to provide supporting documentation outlining the lifecycle costs to Council, including operation or ongoing service delivery, as well as likely maintenance and replacement costs. This information will assist Council in determining whether to accept a Planning Agreement offer.

**4.8.2** All Planning Agreements that involve the provision of public infrastructure through works to be carried out by the Developer should include a reasonable contribution toward ongoing maintenance and replacement costs of the infrastructure.

**4.8.3** The developer may make monetary contributions towards ongoing maintenance and replacement costs or may offer to maintain infrastructure delivered for a certain period of time after handover.

**4.8.4** Where the public infrastructure primarily serves the development to which the planning agreement relates or neighbouring development, the arrangement for recurrent funding may be in perpetuity.

**4.8.5** Where the public infrastructure or public benefit is intended to serve the wider community, the planning agreement may, where appropriate, only require the developer to make contributions towards the recurrent costs of the facility for a set period which will be negotiated according to the impact of the development, or until a public revenue stream is established to support the on-going costs of the facility.

**4.8.6** The amount of any monetary contribution acceptable to Council will depend on the type

and value of the works being handed over to Council, whether repair and maintenance works are likely to be needed and the anticipated costs of maintenance and repair works.

**4.8.7** If the developer proposes to maintain the works after completion, a bond or bank guarantee will be required by Council to cover the likely maintenance works in the event the developer defaults.

**4.8.8** Planning Agreements may also require a developer to make contributions towards other recurrent costs of public facilities such as operational or service provision costs.

## **4.9 FEASIBILITY**

**4.9.1** The Council is committed to ensuring that obligations under Planning Agreements 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.

**4.9.2** Where a Developer claims that such Planning Agreement 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 retain a suitably qualified independent person appointed by the Council to review the Developer's feasibility.

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

**4.9.4** The Council may in its discretion agree to modify, reduce or postpone monetary contributions or security obligations under a Planning Agreement based on a submitted feasibility analysis.

**4.9.5** 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.

**4.9.6** If a revised or new feasibility analysis established that development feasibility has improved, the Council may

'clawback' development contributions or security obligations.

required under a Planning Agreement will be subject to annual indexation requirements.

## 4.10 POOLING OF MONETARY CONTRIBUTIONS

**4.10.1** Where the proposed Planning Agreement provides for a monetary contribution by the developer/proponent, the Council may seek to include a provision permitting money paid under the agreement to be pooled to allow public benefits, particularly essential infrastructure, to be provided in a fair and equitable way.

## 4.11 REFUND OF MONETARY CONTRIBUTIONS

**4.11.1** The Council is under no legal obligation to refund monetary contributions to a developer that were paid to the Council under a Planning Agreement which exceed the funds necessary for the public purpose for which they were paid. In such circumstances, the funds will be applied at Councils discretion towards another public purpose having regard to the public interest prevailing at the time.

## 4.12 INDEXATION OF CONTRIBUTION VALUES AND SECURITY

**4.12.1** Monetary contributions, and the value of works (design and construction) and land, required to be provided under a Planning Agreement are subject to indexation to reflect increases in the consumer price index between the execution of the agreement and timing of payment/s or provision of the development contribution. Indexation shall be undertaken in accordance with the formula:

$$\text{\$insert contribution value} \times \frac{\text{The CPI at the time of provision of the development contribution}}{\text{The CPI at the date of the Planning Agreement}}$$

CPI is the All Groups Consumer Price Index applicable to Sydney published by the Australian Bureau of Statistics.

Securities (such as bank guarantees)

## 4.13 DEVELOPMENT CONTRIBUTIONS COMPRISING CARRYING OUT OF WORKS

### Third party works contract

**4.13.1** If the developer enters into a contract with a third party for the carrying out of building or construction works under a Planning Agreement, the developer will be required to submit the draft contract to the Council for approval before it is entered into.

### Principal contractor warranties

**4.13.2** Upon completion and delivery to the Council of works under a Planning Agreement, the developer will be required to assign to the Council the principal contractor's warranties under the relevant building or construction contract.

### Design & specification of works

**4.13.3** The developer will be required to obtain the Council's prior approval to the design and specification of works under a Planning Agreement in accordance with a process approved by the Council and specified in the Planning Agreement.

### Access to land

**4.13.4** If works under a Planning Agreement 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.

**4.13.5** If works under a Planning Agreement 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

**4.13.6** 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 Planning Agreement unless and until the works are completed and delivered to the Council

### Commencement of works

**4.13.7** The developer will be required to give the Council not less than 10 business days'

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written notice of its intention to commence works under a Planning Agreement.

### Inspection of works

- 4.13.8** The developer will be required to allow the Council reasonable access to the site on which works are being carried out under a Planning Agreement upon reasonable notice being given by the Council to enable the Council to inspect the works.

### Completion & delivery of works

- 4.13.9** The developer will be required to give the Council not less than 5 business days written notice of the date on which it will complete works under a Planning Agreement.
- 4.13.10** The Council will inspect the works within 10 business days of receiving the developer's written notice.
- 4.13.11** The works under a Planning Agreement will be completed when the Council gives a written notice to the developer to that effect.
- 4.13.12** 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.
- 4.13.13** The Council will assume responsibility for the works completed under a Planning Agreement on the later to occur of:
- 10 business days after the Council gives the developer a written 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

- 4.13.14** 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 Planning Agreement. Ordinarily, the defects liability period will be 24 months. A security amount to the value of 5% of the value of the planning agreement will be held by Council over the 24 month period.

### Works-as-executed plan

- 4.13.15** Not later than 5 business days after works are completed and delivered to the Council under a Planning Agreement, the developer will be required to submit to the Council a full works-as-executed-plan in respect of the works.
- 4.13.16** 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.

## 4.14 PROVISION OF SECURITY UNDER A PLANNING AGREEMENT

The Council will require a Planning Agreement to make provision for security to cover the developer's obligations under the agreement and may be provided as follows:

- 4.14.1** 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 and on terms otherwise acceptable to the Council. Where a bank guarantee to the full value of the developer's obligations is not suitable/feasible, Council will require alternative mechanisms agreed to and acceptable to Council, to assure the guarantee of delivery of the developer's obligations under the planning agreement. Any consequential costs to such arrangements will be at the cost of the developer.
- 4.14.2** To complement the provision of financial security, the Council will generally require a developer's obligations under a Planning Agreement to be completed before the issue of subdivision works certificates, subdivision certificates, construction certificates and occupation certificates and restrict the issuing of such certificates unless and until the obligations have been performed.
- 4.14.3** In respect of planning agreement contributions in the form of land, the Council considers that, in addition to the provision of financial security, a suitable means of enforcement would be to include provisions in the Planning Agreement allowing Council to compulsorily acquire any land to be dedicated for one Australian dollar if the developer defaults.
- 4.14.4** In appropriate cases, Council may also

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require the creation of a charge over land, and may require the landowner to agree not to object to Council lodging caveats on the title of all or any of the land the subject of the planning agreement. In particular, Council will generally require a planning agreement to include provisions acknowledging Council has a caveatable interest over the whole of the land; and any land to be dedicated to Council, once the relevant portion of land has been created.

- 4.14.5** Any amount to be secured by a Bank Guarantee or bond will be adjusted on each anniversary date in accordance with increases in the consumer price. The formula for adjustment of security amounts will be consistent with the indexation of planning agreement contributions specified in the planning agreement.

#### **Step-in rights**

- 4.14.6** 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 Planning Agreement. Specifically, the developer will be required to agree to the following:
- a. 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,
  - b. allow the Council to recover its costs of remedying the breach by either 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.

### **4.15 DEFERRAL OF OBLIGATIONS**

- 4.15.1** The Council will ordinarily require the developer to provide a financial security or an additional financial security, such as a bond or bank guarantee to 100% of the value of the obligation, where the developer seeks to postpone obligations under a Planning Agreement to a time later than the time originally specified for performance in the Planning Agreement. An amendment to the Planning Agreement would ordinarily be required in such circumstances unless the Planning Agreement already makes provision for such an arrangement.

### **4.16 REGISTRATION**

- 4.16.1** Section 7.6 of the Act allows for the registration of a Planning Agreement on the title to land, although this is not a mandatory requirement.
- 4.16.2** The Council will require Planning Agreements to be registered on the title. For this reason, the landowner, if different to the developer, will be required to be an additional party to a Planning Agreement.
- 4.16.3** Registration requires the agreement of all persons having a registered interest in the land. Such persons include mortgagees, charges, lessees and the like.
- 4.16.4** Registration will ordinarily be required to be undertaken by the developer immediately upon commencement of the Planning Agreement. This means that the Council will generally not execute a Planning Agreement unless and until the landowner has produced evidence to the Council's satisfaction of the agreement of all third parties to its registration and evidence of production of any relevant certificate of titles for the purposes of registering the Planning Agreement.
- 4.16.5** The landowner (or proponent), at its cost, will be required to submit to the Council in registrable form all documents necessary to enable the Council effect registration of the Planning Agreement, and to assist the Council to address any requisition from Land Registry Services relating to any dealing lodged for registration.
- 4.16.6** Provision should ordinarily be made in a registered Planning Agreement about when the notation of the Planning Agreement on the title to land can be removed. Where, for example, the development involves subdivision, the Council will ordinarily 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 provided that all Planning Agreement obligations required to be performed by the developer prior to the issuing of the subdivision certificate have been performed to the Council's satisfaction.

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## 4.17 RESTRICTION ON DEALINGS

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

- a. the sale or transfer the land to which the Planning Agreement applies,
- b. the assignment of the developer's rights or obligations under the Planning Agreement, and
- c. novation of the Planning Agreement.

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

- a. 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,
- b. the Council notifies the developer that it considers that the purchaser, transferee, assignee or novatee, is reasonably capable of performing its obligations under the Planning Agreement, and
- c. the developer is not in breach of the Planning Agreement.

**4.17.3** The Council has a standard form of Deed of Assignment / Novation, which will be required to be used for any assignment or novation of a Planning Agreement.

## 4.18 INSURANCE

**4.18.1** 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 Planning Agreement:

- a. 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),
- b. public liability insurance for at least \$20,000,000.00 for a single occurrence, which covers the Council, the developer

and any subcontractor of the developer, for liability to any third party,

- c. workers compensation insurance as required by law, and
- d. any other insurance required by law.

## 4.19 INDEMNITY

**4.19.1** 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 Planning Agreement except if, and to the extent that, the claim arises because of the Council's negligence or default.

## 4.20 DISPUTE RESOLUTION

**4.20.1** Planning Agreements will be required to make provision for mediation or expert determination depending on the nature of the dispute.

**4.20.2** 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.

**4.20.3** Either party may notify the other of a dispute. Once this occurs, neither party may exercise their legal rights under the Planning Agreement until the mediation or expert determination process runs its course.

**4.20.4** The parties will be initially required to resolve the dispute by discussion or negotiation before a mediator or expert can be appointed to deal with the dispute.

**4.20.5** Mediation will be required to be undertaken in accordance with the Mediation Rules of the Law Society of New South Wales

**4.20.6** The parties will be required to request the President of the Law Society to select a mediator or expert to deal with a dispute.

**4.20.7** The parties will be required to bear their costs of the dispute and jointly bear the costs of the President and the mediator or expert.

**4.20.8** If mediation fails to resolve a dispute, the parties will be able to exercise their legal rights under the Planning Agreement.

**4.20.9** The decision of an expert will be final and binding on the parties.

## **4.21 MONITORING AND REVIEW**

**4.21.1** Council will continuously monitor the performance of the Developer's obligation under a Planning Agreement. The Council will require a Planning Agreement to contain provisions requiring the Developer at its own cost to report periodically to the Council on its compliance with obligations under the Planning Agreement. The provisions will set out the process and procedures for the review.

## **4.22 AMENDMENT**

**4.22.1** Planning Agreements can be amended by agreement between the parties. Either party can initiate amendment.

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

**4.22.3** Amendment will generally occur by means of a deed of variation to the Planning Agreement in a form acceptable to Council and will need to be publicly notified in accordance with the Act and Regulation.

**4.22.4** The party proposing the amendment must bear the other party's costs of the amendment.

## **4.23 DISCHARGE OF PLANNING AGREEMENT**

**4.23.1** A developer may be discharged from its obligations under a Planning Agreement in certain circumstances. These include:

- a. the developer's obligations have been fully carried out in accordance with the Planning Agreement,
- b. the development consent to which the agreement relates has lapsed, or it has been modified to such an extent that the developer's obligations may no longer apply,

c. the performance of the Planning Agreement 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,

d. the developer has transferred the land to which the Planning Agreement relates or assigned its interest under the agreement or novated the Planning Agreement on terms agreed to by the Council,

e. other material changes affecting the operation of the Planning Agreement have occurred, and

f. the parties have entered into a new Planning Agreement or other suitable arrangement,

g. Council and the developer otherwise agree to the discharge of the Planning Agreement.

## **4.24 DEED POLL & UNILATERAL UNDERTAKINGS**

**4.24.1** Section 7.4 of the Act defines a Planning Agreement to involve an agreement or 'other arrangement' between a planning authority and a developer and associated person.

**4.24.2** Such an arrangement could be a unilateral undertaking by a developer in favour of the Council to provide public benefits to the Council by 'Deed Poll'.

**4.24.3** The Council will give consideration to a request by a developer to enter into a Deed Poll in favour of the Council to provide public benefits to the Council for the purposes of s7.4.

**4.24.4** The Council will be under no obligation to agree to the arrangement and will consider it on merit having regard to the justification proposed by the developer, the circumstances of the Council and the public interest.

## **4.25 TEMPLATES RELATING TO PLANNING AGREEMENTS**

**4.25.1** The Council requires developers to use a Council approved template Planning Agreement provided separately to this Policy.

**4.25.2** Should any variations be required to the template, these are required to be identified in the Letter of Offer provided to Council.

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# Planning Agreements – Procedures



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# 5. Council Procedures

## 5.1 INTRODUCTION

- 5.1.1** Council's negotiation process for planning agreements aims to be efficient, predictable, transparent and accountable.
- 5.1.2** Council will seek to ensure that the final negotiation of planning agreements runs concurrently with applications for Planning Proposals or development applications so as not to unduly delay the approval.

## 5.2 WHEN IS THE PLANNING AGREEMENT REQUIRED TO BE ENTERED INTO?

- 5.2.1** It is also preferable that a Planning Agreement is negotiated before lodgement of the relevant application and that the draft Planning Agreement accompanies the application on lodgement. In any event, a Planning Agreement should be negotiated and executed before the relevant application is determined or the local environmental plan giving effect to a planning proposal is made.

## 5.3 FORM OF A PLANNING AGREEMENT OFFER

- 5.3.1** Any formal planning agreement offer must be made in writing by the developer and landowners (if the developer does not own the land) in the form of a Planning Agreement template (see Part 9 Planning Agreement Template) including in-principle agreement to the terms set out in the Planning Agreement template.
- 5.3.2** An offer can be in the form of :a proposed Planning Agreement prepared on the Council's Planning Agreement template (see Part 9 Planning Agreement Template) including the explanatory note and which is signed by all the parties to the Planning Agreement (other than the Council) accompanied by a letter covering the matters set out in Section 5.3.3 , or a detailed letter of offer covering the matters set out in Section 5.3.3.

### 5.3.3 All offers must:

- be in writing,
- be addressed to the Council,
- be signed by or on behalf of all parties to the proposed Planning Agreement (other than the Council) including all landowners,
- outline in sufficient detail the matters required to be included in a Planning Agreement as specified in s7.4(3) of the EP&A Act to allow proper consideration of the offer by the Council,
- address in sufficient detail the following matters to allow proper consideration by the Council:
  - a. agreement to the terms of the Council's Planning Agreement template,
  - b. potential variations to the template Planning Agreement accompanied by reasons for the proposed variation,
  - c. how the proposed Planning Agreement address the Acceptability Test in Section 3.2 of this policy,
- outline in sufficient detail all other key terms and conditions proposed to be contained in the Planning Agreement to allow proper consideration by the Council,

## 5.4 ACCEPTABILITY TEST – PRELIMINARY ASSESSMENT OF PLANNING AGREEMENT

- 5.4.1** Upon receipt of the offer to enter into a Planning Agreement, Council staff will consider the merit of the offer against the matters identified under Section 3.2 Acceptability Test as well as any applicable Ministerial Direction and [the 2021 Practice Note](#) and the guiding principles of this Policy.

## 5.5 CONSIDERATION OF PLANNING AGREEMENT PROPOSALS

### Planning proposals

- 5.5.1** Any agreement by the Council to a planning proposal will generally be conditional on the execution of the Planning Agreement by the developer on terms satisfactory to the Council and delivery of the executed Planning Agreement to the Council before any amendment to the planning controls, the subject of the planning proposal takes effect.

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**5.5.2** The Council will refer any such planning proposal to the Department of Planning, Industry and Environment with a request that:

- a. any gateway approval require the draft Planning Agreement be publicly notified and entered into before any amendment to the planning controls the subject of the planning proposal, and
- b. the Minister not agree to any amendment to the planning controls the subject of the planning proposal until the Planning Agreement is executed by the developer and delivered to the Council.

### **Development applications & modification applications**

**5.5.3** Where a Planning Agreement proposal is made in connection with a development application or modification, the Planning Agreement proposal should be the subject of pre-lodgement discussions with Council officers where a formal planning agreement offer is to be made in accordance with Section 5.3.2. The Council and the developer are to then negotiate the terms of the Planning Agreement.

**5.5.4** Lodgement of the development application or modification should generally be accompanied by a draft of the Planning Agreement acceptable to the Council including the explanatory note and which is signed by the parties to the Planning Agreement (other than the Council)..A detailed written irrevocable offer acceptable to the Council for the purposes of s7.7 of the Act as described in Section 5.3.2 may be provided instead if the Council consider is appropriate in the circumstances of the case.

**5.5.5** 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 Planning Agreement to be entered into in accordance with the offer before the consent operates.

## **5.6 OFFER TO ENTER INTO PLANNING AGREEMENT**

**5.6.1** At the conclusion of negotiations for a proposed Planning Agreement, and before proceeding to publicly notify the Planning

Agreement, the Council will require the developer to make a formal and irrevocable offer to the Council to enter into the proposed Planning Agreement.

**5.6.2** An offer will be acceptable to the Council if made in one of the following ways:

- a. if the developer and all other parties to the proposed Planning Agreement (other than the Council) executes the proposed Planning Agreement and delivers it to the Council,
- b. if the developer and all other parties to the proposed Planning Agreement (other than the Council) executes a deed poll in favour of the Council irrevocably promising to enter into the proposed Planning Agreement on terms satisfactory to the Council and delivers it to the Council,
- c. if the developer and all other parties to the proposed Planning Agreement (other than the Council) executes a binding heads of agreement in the form of a deed irrevocably promising to enter into the proposed Planning Agreement on terms satisfactory to the Council and delivers it to the Council,
- d. if the developer delivers a letter of offer executed by the developer and all other parties to the proposed Planning Agreement (other than the Council) to the Council irrevocably promising to enter into the proposed Planning Agreement on terms satisfactory to the Council.

## **5.7 PREPARATION OF PLANNING AGREEMENT**

**5.7.1** The draft Planning Agreement and explanatory note, and any heads of agreement constituting or containing an offer to enter into a Planning Agreement, will be prepared by the Council's lawyer, to an agreed outcome by both parties, at the developer's cost.

**5.7.2** Any deed poll or letter constituting or containing an offer to enter into a Planning Agreement will be reviewed by the Council's lawyer at the developer's cost to determine if it is satisfactory for legal purposes and properly protects the Council's interests. Any amendments required by the Council's lawyer will be made at the developer's cost.

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## 5.8 SECURITY FOR COUNCIL'S LEGAL COSTS

**5.8.1** Before the Council instructs its lawyer to prepare a draft Planning Agreement and explanatory note or a heads of agreement, or to review a deed poll or letter of offer, the developer will be required to pay a Planning Agreement proposal fee to the Council as security for the payment of the Council's legal costs of preparing or reviewing and negotiating and finalising any such document.

**5.8.2** The Planning Agreement proposal fee is the fee determined by the Council for each financial year in accordance with Part 10 of the Local Government Act 1993.

## 5.9 FLOWCHART OF THE PLANNING AGREEMENT PROCESS

**5.9.1** A Flowchart of Planning Agreement Process is provided as Attachment 8, showing key steps followed for the preparation of a Planning Agreement, whether through the Planning Proposal or Development Application.

## 5.10 PLANNING AGREEMENT PROCESS – STAFF ROLES AND RESPONSIBILITIES

**5.10.1** Council will publish on its website a flowchart showing staff roles and responsibilities for:

- Assessing Planning Agreements against matters outlined under Section 3.2 Acceptability Test;
- Negotiating Planning Agreements on behalf of the Council in accordance with Council's standard delegation procedures;
- Implementing and updating the Planning Agreement Policy;
- Reporting to the Council on the Planning Agreement proposals and draft Planning Agreements;
- Public exhibition of Planning Agreements, consideration of submissions arising from public exhibition and any re-exhibition requirements arising from amendments following public exhibition,
- Contract administration and ongoing

monitoring of the performance of Planning Agreement obligations; and

- Enforcing the Planning Agreements.

Councillors will not be involved in the face to face negotiation of the planning agreement, but will, in their role as Councillors, ultimately endorse and approve the planning agreement by resolution to exhibit and execute the agreement or alternatively, resolve to reject an offer to enter into a planning agreement.

## 5.11 OVERVIEW OF KEY STEPS IN THE PLANNING AGREEMENT PREPARATION PROCESS

**5.11.1** The negotiation of a planning agreement will generally involve the following key steps that are shown as a flowchart under Section 8 Flowchart of Planning Agreement Process, and outlined below:

### 1. Pre-lodgement

- Preliminary plans to be provided to Council, where Council will review the proposal against the Acceptability Test criteria and any applicable Ministerial Direction and Practice Note.
- Applicant meets with Council officers with preliminary plan and parties decide whether a planning agreement is appropriate in connection with any development application, modification application, complying development certificate application or planning proposal.
- Agreement is reached whether a Planning Agreement is an appropriate pathway.
- Where agreement is reached to enter into a Planning Agreement, negotiation process is commenced.

### 2. Negotiations between the Applicant and Council

- A formal planning agreement offer is required to be made in writing by the developer and landowners (if the developer does not own the land) as described in section 5.3.2.
- Council and the developer are to nominate the persons that will represent them in the negotiations. Council may at any time nominate a third party at its discretion.
- Parties decide whether to appoint an

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independent facilitator and agree on a timetable for negotiations

- Negotiations are guided by the requirements and template provisions of the Planning Agreement Policy. The nominated officer from Council will consult with relevant stakeholders or third party experts as required.
- Officer will seek in principle support from Council's executive team prior to the completion of the commercial terms.
- If agreement is reached, the developer (and any other relevant party) will prepare the proposed planning agreement including the explanatory statement, prior to making the relevant application to the Council accompanied by the proposed agreement documentation
- Negotiations are completed when both parties are in agreement with the contents of the Planning Agreement and explanatory note and a draft Planning Agreement is signed by the parties to the proposed Planning Agreement (other than the Council) or a detailed written irrevocable offer acceptable to the Council is made (where Council considers a detailed letter of offer is more appropriate in the circumstances of the case).

### **3. Application lodged with Council**

- Applicant will be advised to formally lodge an application and the application will generally be required to be accompanied by the draft Planning Agreement signed by the parties to the proposed Planning Agreement (other than the Council). A detailed written irrevocable offer acceptable to the Council for the purposes of s7.7 of the Act as described in Section 5.3.2 may accompany the application instead if the Council consider is appropriate in the circumstances of the case.

### **4. Report to Council (Endorsement for public exhibition)**

- The outcomes of the negotiation and assessment of the formal written Planning Agreement offer are to be reported to Council seeking a resolution that a draft planning agreement be prepared for public exhibition purposes (if one hasn't already been prepared and executed).
- A draft Planning Agreement will need to be endorsed by Council for public exhibition

purposes as follows:

In the case of a Planning Proposal application, the report to Council will ordinarily occur concurrently with a report seeking that the planning proposal be submitted to the Department of Planning, Industry and Environment for Gateway Determination, with the intention of exhibiting the draft agreement with the planning proposal;

In the case of a Development Application (or modification of a consent), or application for complying development certificate (CDC) before or concurrent with the Council's consideration of the development application, with the intention of exhibiting the draft agreement as soon as practicable after lodgement of the development application (mod or CDC).

- The advertising costs relating to public exhibition of the Planning Agreement will be borne by the developer, in accordance with Council's adopted Fees and Charges Schedule.

### **5. Notification (Public Exhibition)**

- Planning agreement is formally placed on public exhibition in accordance with the Act, for a period of not less than 28 days. The Planning Agreement will be exhibited concurrently with, or as close as practically possible, to the public exhibition timing of the application.

### **6. Report to Council (Endorsement, amendment etc. of Planning Agreement)**

- The draft Planning Agreement, any related development assessment report and any submissions received following notifications are considered by Council staff prior to being reported to a formal Council meeting for consideration.
- Prior to finalisation and execution of a Planning Agreement or amendment to an existing Planning Agreement, a further report to Council is required to detail the outcomes of the public exhibition, if any submissions have been made, details of any submissions and any discussions undertaken with the developer to address matters raised, and where necessary recommending further changes to the draft planning agreements as a result of the exhibition and above considerations.

The report will include recommendations about how to proceed with the Planning Agreement (i.e. seek execution of the agreement, amend the agreement or not proceed with the agreement).

- Any changes that are proposed to be made to a Planning Agreement after public notice has been given should be subject to re-notification if the changes would materially affect:
  - how any of the matters specified in section 7.4 of the EP&A Act are dealt with by the Planning Agreement,
  - other key terms and conditions of the Planning Agreement,
  - the Council's interests or the public interest under the Planning Agreement,
  - whether a non-involved member of the community would have made a submission objecting to the change if it had been publicly notified.

#### **7. Implementation (Execution of Planning Agreement)**

- Should Council endorse a Planning Agreement for execution, the planning agreement must be fully executed before Council will finalise any instrument change associated with an accompanying planning proposal application. If the Planning Agreement is not executed at this time, Council will ask the Minister not to proceed with the relevant instrument change under section 3.35(4) of the Act.
- Where the Planning Agreement is made in conjunction with a development application (or modification application), the development consent will be subject to conditions requiring the planning agreement to be complied with. If the agreement is not executed prior to the development consent being granted or modified, a condition will be imposed requiring execution of the planning agreement in accordance with the offer made and subsequent registration of the agreement. Conditions requiring the execution and registration of a planning agreement may be deferred commencement conditions that must be satisfied before the consent becomes operational.

## **5.12 PLANNING AGREEMENT PROCESS – TEMPLATES**

**5.12.1** Council will publish on its website the following templates which are to be utilised for the preparation of any Planning Agreement. Any letter of offer provided to Council must state where/if it intends to deviate from the following Council's template/s:

- Generic Planning Agreement including:
  - Provisions specific to Monetary Contributions
  - Provisions specific to Affordable Housing
  - Provisions specific to Works
  - Provisions specific to the Dedication of Land
- Draft Explanatory Note

## **5.13 PLANNING AGREEMENT REGISTER**

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

- a. The Planning Agreement register kept at Council;
- b. Copies of all Planning Agreements (including amendments) that apply to the area of the Council; and
- c. Copies of the explanatory notes relating to those agreements or amendments.

**5.13.2** The Planning Agreement register is available to the public on its website.

## **5.14 DISCHARGING OF DEVELOPER'S OBLIGATIONS**

**5.14.1** Upon completion of all the developer's obligations in the Planning Agreement to the Council's satisfaction, Council will upon request provide a letter of discharge to the developer.

# 6. Acceptability Checklist

	<b>CONSISTENCY WITH LEGISLATION AND DEPARTMENTAL GUIDELINES</b>	<b>GUIDE REF CL</b>	<b>YES / NO</b>
<b>A</b>	<b>STRATEGIC MERIT</b>		
	a. Is the proposed development deemed to have site and strategic planning merit in accordance with relevant statutory and non-statutory planning policies?	<b>2.4</b>	
	b. Is the proposed Planning Agreement directed towards a legitimate planning purposes, that can be identified in the statutory planning controls and other adopted planning strategies and policies applying to the development?	<b>2.4</b>	
<b>B</b>	<b>GENERAL</b>		
	a. Is the proposed Planning Agreement consistent with the Fundamental Principles governing the use of Planning Agreements?	<b>3.1</b>	
	b. Does the proposed Planning Agreement provide for the delivery of infrastructure or public benefits not wholly unrelated to the development?	<b>2.4</b>	
	c. Does the proposed Planning Agreement address an unmet community need and is there a material public benefit to the wider community that results from the items?	<b>2.4</b>	
	d. Do the items provide a public benefit (as opposed to principally contributing to the marketability of the development)?	<b>4.6</b>	
	e. Does the proposed Planning Agreement produce outcomes that meet the general values and expectations of the public and protect the overall public interest?	<b>4.3</b>	
	f. Does the proposed Planning Agreement provide for a reasonable means of achieving the desired outcomes and securing the benefits?	<b>4.14</b>	
	g. Does the proposed Planning Agreement protect the community against adverse planning decisions?	<b>3.2</b>	
	<b>LAND DEDICATION</b>		
	a. Has an independent valuation of the monetary value of the land been undertaken? If not, will suitable arrangements be in place to ensure a valuation will be undertaken prior to the finalisation of the Planning Agreement.	<b>4.4</b>	
b. Are the dimensions, location and topography of the land suitable for the needs of Council and the purpose to which the land is sought?	<b>4.7</b>		

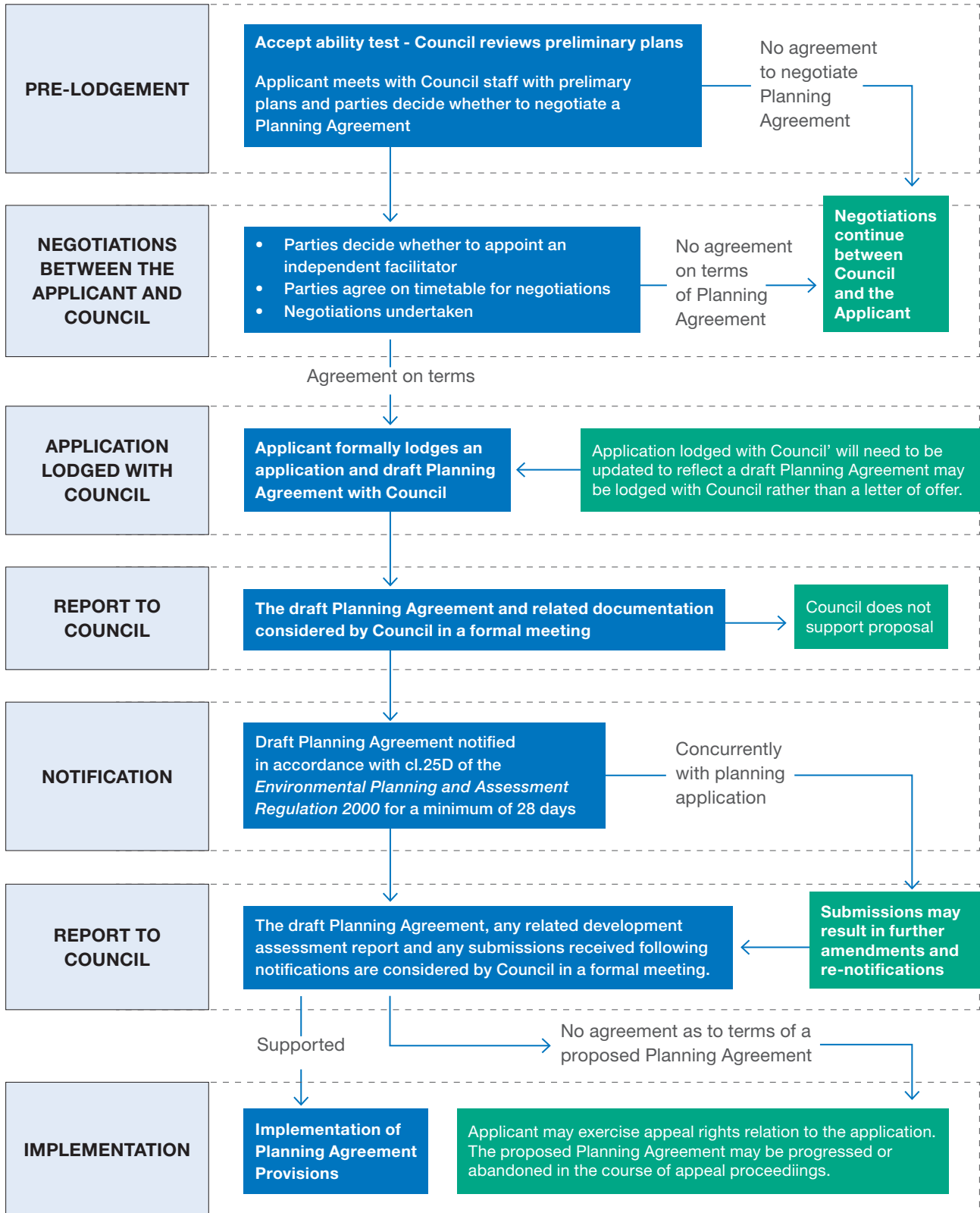
	<b>CONSISTENCY WITH LEGISLATION AND DEPARTMENTAL GUIDELINES</b>	<b>GUIDE REF CL</b>	<b>YES / NO</b>
<b>B</b>	<b>LAND DEDICATION</b>		
	c. Are the current use and improvements on the land suitable for Council’s purpose and has consideration been given as to how this affects the value of the land?	<b>4.7</b>	
	d. Would the land be more appropriately classified as “value to the community” rather than “value to the development”?	<b>4.7</b>	
	e. Does the site’s soil condition, accessibility, solar access and the relationship with existing public facilities support the dedication of the land for a public purpose?	<b>2.4</b>	
	<b>MATERIAL PUBLIC WORKS</b>		
	a. Does the agreement ensure that there are no significant financial implications for Council, particularly with respect to ongoing maintenance.	<b>4.8</b>	
	b. Will the works be delivered within a reasonable timeframe?	<b>3.2</b>	
	<b>AFFORDABLE HOUSING, WHERE IDENTIFIED AS A PUBLIC BENEFIT TO BE DELIVERED THROUGH THE PLANNING AGREEMENT.</b>		
	a. Does the proposal meet the requirements of Council’s Local Strategic Planning Statement and the Eastern City District Plan with respect to 5% to 10% of all new residential development to be delivered as affordable housing (subject to feasibility)?	<b>4.7</b>	
	b. Are there no other mechanisms available to deliver affordable housing? (i.e. an affordable housing contribution imposed on a development consent, pursuant to the Local Environmental Plan, in lieu of a planning agreement).	<b>3.2</b>	
	c. Is the proposal consistent with Council’s expectation that affordable housing is provided in addition to local infrastructure contributions that may be imposed under section 7.11 or section 7.12 of the Act?	<b>3.2</b>	
	d. Will the proposed affordable housing be dedicated to Council in perpetuity, provide a mix dwelling sizes, deliver equivalent quality of amenity to the balance of the development and consider universal accessibility?	<b>4.7</b>	
	<b>VALUE OF PLANNING AGREEMENT</b>		
	e. Where a planning proposal, or development proposal which exceeds the existing development standards or planning controls, has planning merit and will result in value uplift, does the proposal reflect Council’s methodology for calculating value uplift under Section 4.4 of the Policy?	<b>4.4</b>	

# 7. Planning Agreements Responsibilities Matrix

ROLE	General Manager	Manager of Property	Planning Agreements Administrator	Manager of Strategic Planning
Acceptability test (Consideration of the test, Parts A and B as shown)		B		A
Negotiation of Planning Agreement	✓	✓		
Assessment		✓		
Preparation of draft Planning Agreement and Explanatory note		✓		
Report to Council		✓		
Public Notification / Website preparation			✓	
Planning Agreement Executed	✓		✓	
Planning Agreement registered on title			✓	
Notification letter to the Department of Planning and Environment			✓	
Notification letter to the Proponent along with a copy of the Executed Planning Agreement			✓	
Upfront Obligations (security)			✓	
Ongoing obligations			✓	
Ongoing contract maintenance and reporting / update register			✓	



# 8. Flowchart of Planning Agreement Process

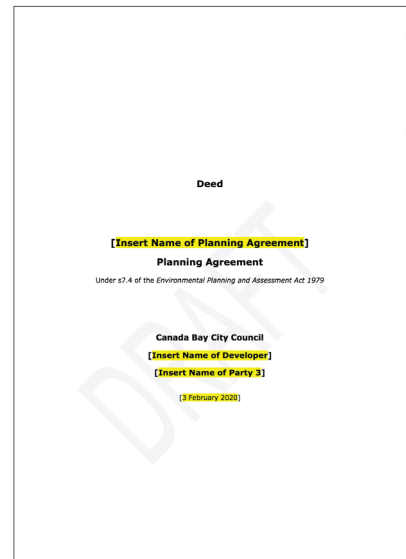


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# 9. Planning Agreement Templates

The following standard templates are provided on Council’s website:

1. Planning Agreement Templates
  - a. Generic Planning Agreement Provisions
  - b. Provisions specific to Monetary contributions
  - c. Provisions specific to Affordable Housing
  - d. Provisions specific to Works
  - e. Provisions specific to the Dedication of Land
2. Explanatory Note



# 10. Supporting Adopted Council Policy

The following documents are available on Council’s website from the Planning Agreements page:

1. City of Canada Bay - Statement of Business Ethics
2. Canada Bay Community Strategic Plan – Our Future 2030
3. Canada Bay Local Strategic Planning Statement



