



# Planning agreements

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Practice note – February 2021



Published by NSW Department of Planning, Industry and Environment

[dpie.nsw.gov.au](http://dpie.nsw.gov.au)

Title: Planning agreements

Subtitle: Practice note – February 2021

First published: February 2021

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# Contents

<b>Preface</b> .....	<b>1</b>
Planning agreements.....	1
Legislative and regulatory framework.....	1
About this practice note.....	1
How to use this practice note.....	1
Terminology.....	2
Updates to this practice note.....	2
Transitional arrangements.....	2
<b>Part 1 Introduction</b> .....	<b>3</b>
1.1 Purpose of planning agreements.....	3
1.2 Rationale for planning agreements.....	3
<b>Part 2 Principles and policy for planning agreements</b> .....	<b>4</b>
2.1 Fundamental principles.....	4
2.2 Public interest and probity considerations.....	4
2.3 Value capture.....	5
2.4 Relationship with development applications and planning proposals.....	6
2.5 Acceptability test.....	6
2.6 Policies and procedures for planning agreements.....	7
<b>Part 3 Strategic considerations when using planning agreements</b> .....	<b>9</b>
3.1 When to use planning agreements.....	9
3.2 Land use and strategic infrastructure planning.....	10
<b>Part 4 Procedures and decision making</b> .....	<b>11</b>
4.1 Basic procedures for entering into a planning agreement.....	11
4.2 Offer and negotiation.....	12
4.3 Costs and charges.....	13
4.4 Registration and administration.....	13
4.5 Public participation and notification.....	15
4.6 Explanatory notes.....	15
<b>Part 5 Examples of the use of planning agreements</b> .....	<b>17</b>
Compensation for loss or damage caused by development.....	17
Meeting demand created by development.....	17
Prescribing inclusions in development.....	17
Providing benefits to the wider community.....	17
Recurrent funding.....	18
Biodiversity offsetting.....	18

# Preface

## Planning agreements

A planning agreement is a voluntary agreement or other arrangement between a planning authority and a developer, who has:

- sought a change to an environmental planning instrument; or
- made or proposes to make a development application or application for a complying development certificate,

under which the developer is required to:

- dedicate land free of cost;
- pay a monetary contribution;
- provide any other material benefit; or
- provide any combination of the above,

to be used for or applied towards a public purpose.

This practice note provides guidance on matters relating to planning agreements, often referred to as voluntary planning agreements or VPAs. It sets out the statutory framework for planning agreements and other matters such as the fundamental principles governing their use.

## Legislative and regulatory framework

Part 7 Division 7.1 Subdivision 2 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) provides the legislative framework for planning agreements.

Part 4 Division 1A of the *Environmental Planning and Assessment Regulation 2000* (the EP&A Regulation) has further requirements relating to the form and subject matter of planning agreements, making, amending and revocation of planning agreements, giving public notice and other procedural arrangements relating to planning agreements.

## About this practice note

This practice note is made for the purposes of clause 25B of the EP&A Regulation to assist parties in the preparation of planning agreements.

Planning authorities are not required to apply this practice note, when finalising proposed planning agreements which have been publicly notified pursuant to section 7.5 (1) of the EP&A Act, but not finalised before the issue of this practice note. However, planning authorities may choose to consider parts of the practice note when finalising these planning agreements.

This practice note replaces the previous 'Practice Note – Planning Agreements' issued by the Director General of the then Department of Infrastructure, Planning, and Natural Resources in July 2005.

## How to use this practice note

The practice note is structured as follows:

**Part 1** provides the rationale for planning agreements.

**Part 2** identifies and provides fundamental principles and policy considerations.

**Part 3** sets out strategic considerations for when and how planning agreements can be used.

**Part 4** provides guidance on the procedures and decision-making for application, negotiation and administration of planning agreements.

**Part 5** provides examples of the use of planning agreements.

## Affordable Housing Contributions

*State Environmental Planning Policy No. 70 - Affordable Housing (Revised Schemes)* (SEPP 70) is the enabling mechanism for securing affordable housing contributions through imposing a condition of consent. To secure contributions through this pathway, councils must establish an affordable housing contribution scheme and arrange for the relevant local environmental plan to be amended to authorise the imposition of the condition. *Environmental Planning Assessment (Planning Agreements) Direction 2019* sets out the matters to be considered by council if negotiating a planning agreement which provides for affordable housing.

## Mining Projects

This practice note does not apply to planning agreements for mining projects. However, councils can refer to Parts 1, 4 and 5, for appropriate guidance on use, process and governance of those planning agreements.

## Terminology

The following terminology is used to convey key concepts in relation to planning agreements:

- **development application** has the same meaning as in the EP&A Act
- **development consent** has the same meaning as in the EP&A Act
- **development contribution** means a contribution made by a developer under a planning agreement, being a monetary contribution, the dedication of land free of cost or the provision of a material public benefit, to be used for or applied towards a public purpose
- **planning authority** has the same meaning as in Division 7.1 of Part 7 of the EP&A Act
- **planning obligation** means an obligation imposed by a planning agreement on a developer requiring the developer to make a development contribution
- **planning proposal** has the same meaning as in the EP&A Act
- **public benefit** is the benefit enjoyed by the public as a consequence of a development contribution
- **public facilities** means public infrastructure, amenities and services

## Updates to this practice note

This practice note will be periodically updated. More detailed information or guidance on specific matters in this practice note may also be the subject of future separate practice notes.

## Transitional arrangements

This practice note does not apply to a new or amended planning agreement if it:

- has been substantially negotiated when this practice note is published, and
- public notice of the agreement or amendment is given before 1 July 2021.

# Part 1 Introduction

## 1.1 Purpose of planning agreements

Planning agreements are used widely in the planning system as a tool for delivering innovative or complex infrastructure and public benefit outcomes in connection with planning proposals and development applications.

They provide a way for planning authorities and developers to negotiate flexible outcomes in respect of development contributions and enable the NSW planning system to deliver sustainable development while achieving key economic, social and environmental objectives.

Planning agreements enable the provision of development contributions for a variety of public purposes, some of which extend beyond the scope of section 7.11 and 7.12 (local infrastructure contributions), of the EP&A Act. For example, these additional purposes could include the recurrent funding of public facilities provided by councils, the capital and recurrent funding of transport, the protection and enhancement of the natural environment, and the monitoring of the planning impacts of development.

Planning agreements are negotiated between planning authorities and developers in the context of applications for changes to environmental planning instruments (planning proposals) or for consent to carry out development (development applications).

## 1.2 Rationale for planning agreements

Since the commencement of the *Environmental Planning and Assessment Amendment (Development Contributions) Act 2005*, the use of planning agreements has steadily grown across NSW. There is a range of reasons why the use of planning agreements has become widespread.

- Planning agreements provide a flexible means of achieving tailored development outcomes and focused public benefits, including agreement by communities to the redistribution of the costs and benefits of development.
- Planning agreements can provide enhanced and more flexible infrastructure funding opportunities and better planning implementation.
- Planning agreements allow for the flexible delivery of infrastructure for a development proposal which may have good planning merit but be out of sequence with broader strategic planning processes.

Planning agreements provide a flexible framework under which the planning authorities can share responsibility for the provision of infrastructure in new release areas or in major urban renewal projects. They permit tailored governance arrangements and the provision of infrastructure in an efficient, co-operative and coordinated way.

## Part 2 Principles and policy for planning agreements

### 2.1 Fundamental principles

Planning agreements must be governed by a set of policy principles that ensure transparency, fairness and flexibility of planning decisions. A planning agreement cannot and should not purport to fetter any authority's exercise of statutory functions, in particular the function of a relevant planning proposal authority in relation to a planning proposal, a local plan-making authority in relation to the local environmental plan that gives effect to a planning proposal or the consent authority for a development application.

A planning agreement related to a development application is one of several matters for consideration identified by the EP&A Act when a consent authority is determining a development application. Public benefits offered by developers do not make unacceptable development acceptable.

Planning authorities and developers that are parties to planning agreements should adhere to the following fundamental principles.

- Planning authorities should always consider a development proposal on its merits, not on the basis of a planning agreement.
- 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.
- Strategic planning should ensure that development is supported by the infrastructure needed to meet the needs of the growing population.
- 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.
- Planning agreements should not be used as a means of general revenue raising or to overcome revenue shortfalls.
- Planning agreements must not include public benefits wholly unrelated to the particular development.
- Value capture should not be the primary purpose of a planning agreement.

### 2.2 Public interest and probity considerations

It is critical to consider whether a planning agreement is in the public interest. Generally speaking, the public interest is directed towards ensuring planning controls are imposed fairly for the benefit of the community. In some cases, the public interest may be directed towards the need to mitigate adverse impacts of development on the public domain or towards providing a benefit to the wider community.

Planning agreements are matters of public interest and this is a relevant consideration in negotiating outcomes. The negotiation of planning agreements involves the use of discretion on both sides, allowing planning authorities and developers to consider different values and varying concepts of the public and private interests.

The ability for a planning agreement to wholly or partly exclude the application of other infrastructure contributions gives a planning authority scope to prioritise the items of infrastructure

that is most needed under an agreement. This means that the financial, social and environmental costs and benefits of development can be redistributed through a planning agreement.

However, there is no guarantee that these costs and benefits will be equitably distributed within the community and what may be a specific benefit to one group in the community may be a loss to another group or the remainder of the community. As such, best practice principles, policies and procedures should be implemented as safeguards to protect the public interest and the integrity of the planning process. These are discussed in *Section 2.6 Policies and procedures for planning agreements*.

If probity and public interest are not considered, planning agreements may produce undesirable outcomes, including where:

- A planning authority seeks inappropriate benefits through a planning agreement because of opportunism or to overcome revenue-raising or spending limitations that exist elsewhere.
- A planning authority has not undertaken appropriate infrastructure planning as part of strategic land use planning, resulting in growth being poorly aligned with infrastructure planning and funding, infrastructure demand and costs relating to infrastructure operation.
- There is insufficient analysis of the likely planning impacts of a proposed development because a planning authority is determined to enter into, or to give effect, to a planning agreement.
- A planning authority allows the interests of individuals or small groups to demand benefits, which otherwise outweigh the public interest.
- A planning authority takes advantage of an imbalance of bargaining power between the planning authority and developer, for example by improperly relying on its statutory position in order to extract unreasonable public benefits under a planning agreement.
- A planning authority's ability to make independent decisions is compromised, or its decisions appear to be fettered by a planning agreement.

The potential for misuse also exists where a planning authority, acting as consent authority or in another regulatory capacity for development, is both party to a planning agreement and a development joint venture partner under the agreement, for example as a landowner. Special safeguards, such as the use of an independent third party in the development assessment process, would be appropriate in such circumstances.

### **Considerations for public participation**

Public participation in the planning agreement process is important to ensure the community has an opportunity to provide input in decisions being made relating to public benefit and development. Planning agreements redistribute the costs and benefits of a development, and it is

critical the public can comment on whether they think the balance between development and public benefit is achieved successfully. Public participation processes are discussed in *Section 4.5 Public participation and notification*.

## **2.3 Value capture**

The term value capture is widely used and covers several different practices. This practice note does not attempt to define or discuss them all. In general, the use of planning agreements for the primary purpose of value capture is not supported as it leads to the perception that planning decisions can be bought and sold and that planning authorities may leverage their bargaining position based on their statutory powers.

Planning agreements should not be used explicitly for value capture in connection with the making of



planning decisions. For example, they should not be used to capture land value uplift resulting from rezoning or variations to planning controls. Such agreements often express value capture as a monetary contribution per square metre of increased floor area or as a percentage of the increased value of the land. Usually the planning agreement would only commence operation as a result of the rezoning proposal or increased development potential being applied.

## 2.4 Relationship with development applications and planning proposals

### Development applications

When determining a development application, the consent authority is required by the EP&A Act to take into consideration any relevant planning agreement or draft agreement that the developer has offered to enter into. The consent authority is also required to take into consideration any public submissions made in respect of the development application, which may include submissions relating to a planning agreement.

### Planning proposals

The EP&A Act requires a planning proposal authority to state the objectives and outcomes of a planning proposal, and to describe and justify the process by which they will be achieved. The role of a planning agreement in facilitating these objectives or outcomes should be clearly set out in the planning proposal documentation.

### Nexus

Development contributions provided for in a planning agreement are not required to bear the same nexus with development as required for section 7.11 local contributions. However, planning agreements should provide for public benefits that are not wholly unrelated to development.

### Varying development standards

Benefits provided under a planning agreement must not be exchanged for a variation from a development standard under any circumstances. Variations to development standards under Clause 4.6 of the Standard Instrument LEP must be justified on planning grounds, and the benefit under the agreement should contribute to achieving the planning objective of the development standard.

### Conditions of development consent

Planning authorities and developers must make a judgement in each case about whether negotiation of a planning agreement is beneficial and otherwise appropriate. However, planning agreements should not be used to require compliance with or restate obligations imposed by conditions of development consent.

## 2.5 Acceptability test

Planning agreements should be assessed against the acceptability test below which is a generally applicable test for determining the acceptability of a planning agreement.

The acceptability test requires that planning agreements:

- Are directed towards legitimate planning purposes, which can be identified in the statutory planning controls and other adopted planning strategies and policies applying to development.
- Provide for the delivery of infrastructure or public benefits not wholly unrelated to the development.

- Produce outcomes that meet the general values and expectations of the public and protect the overall public interest.
- Provide for a reasonable means of achieving the desired outcomes and securing the benefits.
- Protect the community against adverse planning decisions.

## 2.6 Policies and procedures for planning agreements

Councils are strongly encouraged to publish policies and procedures concerning their use of planning agreements. Best practice principles, policies and procedures should be implemented as safeguards to protect the public interest and the integrity of the planning process.

These safeguards are to protect against the misuse of planning discretions and processes, which may seriously undermine good planning outcomes and public confidence in the planning system. They should ensure that planning decisions are made openly, honestly and freely in any given case and fairly and consistently across the board.

Policies applying to the use of planning agreements should:

- Provide a generally applicable test for determining the acceptability of a planning agreement (see *Section 2.5 Acceptability Test*).
- Contain specific measures to protect the public interest and prevent misuse of planning agreements.
- Have published and accessible rules and procedures.
- Provide for effective formalised public participation.
- Extend fairness to all parties affected by a planning agreement.
- Guarantee regulatory independence of the planning authority.

Policies and procedures prepared by planning authorities should incorporate the contents of this practice note and the following considerations:

- How the use of planning agreements aligns with any relevant district and regional strategic plans and policies.
- How the use of planning agreements fits within the context of the planning authority's broader organisational strategic planning and land use planning policies, goals, and strategies.
- The circumstances in which the planning authority would consider entering into a planning agreement.
- The land use planning and development objectives that are sought to be promoted or addressed by the use of planning agreements.
- The role served by planning agreements in the development contributions and infrastructure funding systems of the planning authority.
- The types of development to which planning agreements will ordinarily apply, and how their use may be differentiated between different types of development.
- Whether any thresholds apply to the use of planning agreements in relation to particular types of development or in particular circumstances.
- The matters ordinarily covered by a planning agreement.
- The form of development contributions ordinarily sought under a planning agreement.
- The kinds of public benefits sought.
- The method for determining the value of public benefits.
- When, how and where public benefits will be provided.

- The procedures for negotiating and entering into planning agreements.
- The planning authority's policies on other matters relating to planning agreements, such as review and modification, discharging of the developer's obligations under agreements, dispute resolution and enforcement mechanisms, and payment of costs relating to the preparation, negotiation, execution, monitoring and other administration of agreements.

## Part 3 Strategic considerations when using planning agreements

### 3.1 When to use planning agreements

This section provides guidance and strategic considerations on when to use planning agreements. Planning agreements should meet the considerations set out in Section 2.1 Fundamental principles and Section 2.5 Acceptability test and should fully comply with the specific requirements in these sections. Whether a planning agreement is acceptable and reasonable can only be judged in the circumstances of the case and considering State, regional or local planning policies.

Planning agreements have the potential to be used in a wide variety of circumstances. For example, they may be an appropriate contribution mechanism:

- In major development sites or precincts that are owned by a single landowner or a consortium of landowners.
- Where the developer has a direct incentive, such as bringing forward potential development, to be involved in the delivery of community infrastructure.
- Where the developer wants to provide community infrastructure in addition to, or at a higher standard than, what has been specified under the contributions plan.
- Where a council and the developer negotiate a different and better or more innovative outcome than can be achieved through imposing direct or indirect contributions.
- Where a proposed development has not been anticipated by local council and thus works and facilities to cater for this development have not been identified. A planning agreement can be prepared to specifically target the needs of the development.

#### Objectives of planning agreements

The objectives of planning agreements will be dictated by the circumstances of each case and the policies of planning authorities in relation to their use. However, as a general indication, planning agreements may be directed towards achieving the following broad objectives:

- Meeting the demands created by the development for new or augmented public infrastructure, amenities and services.
- Securing off-site benefits for the community so that development delivers a net community benefit.
- Compensating for the loss of or damage to a public amenity, service, resource or asset by development through replacement, substitution, repair or regeneration.

#### Relationship to other contributions mechanisms

Planning agreements should complement other contribution mechanisms. They can be used to deliver infrastructure outcomes for which these contributions are required, or additional public benefit. Planning agreements should not be used as de facto substitutes for contributions plans.

There is a clear legislative, regulatory and policy framework supporting contributions plans which does not apply to planning agreements. Where there is need for public infrastructure across a development area with a range of landowners, a contributions plan is likely to be more appropriate because it simplifies transactions and is underpinned by clear strategic planning.

Planning agreements may be used to overcome past deficiencies in infrastructure provision that would otherwise prevent development from occurring. This may involve the conferring of a public benefit under the agreement.

## 3.2 Land use and strategic infrastructure planning

This section provides advice on how planning agreements can support broader strategic infrastructure planning, particularly in areas where there is significant growth, and where a planning agreement may be associated with a planning proposal.

Land use planning should occur concurrently with strategic infrastructure planning to ensure that built form provisions and infrastructure contributions deliver both appropriate urban forms and contributions related to the development.

Strategic infrastructure planning should be undertaken regularly and address expected growth, infrastructure demand resulting from this growth, and the apportioned cost of these infrastructure provisions. Planning agreements should be used towards public benefits that are in accordance with the council's infrastructure planning and funding policies and strategies. Planning agreements should not be used as a substitute to proper strategic infrastructure planning.

### Local Strategic Planning Statements

Local strategic planning statements set out the 20-year vision for land use in the local area, including how change will be managed into the future. These statements need to align with the regional and district plans, and council's own priorities in the community strategic plan it prepares under the *Local Government Act 1993*. The statements identify the planning priorities for an area and explain how these are to be delivered.

In this regard, local strategic planning statements will identify upfront the strategic planning priorities and infrastructure needs for an area, which should be reflected in planning agreements that demonstrate a comprehensive approach to infrastructure planning and funding.

### Impact of planning proposals

There may be circumstances where a developer lodges a planning proposal that was not anticipated at the time the local strategic planning statement was prepared. It is common site-specific planning proposals in locations where development had not been anticipated to be accompanied by offers to enter into planning agreements. While it is appropriate that applications for more intensive development also consider opportunities for public benefit associated with development, this must be in a way that is mutually agreeable between the planning authority and the developer.

Planning authorities must ensure that adequate infrastructure is available to support the development, that the community can be confident in the integrity of the planning decision and that the planning authority is not improperly relying on its statutory role to extract unreasonable contributions.

Site specific planning proposals must not be prioritised on the basis they provide an opportunity for public benefits. Public benefits to be delivered by development should not be wholly unrelated to the development and the costs should be clearly set out and justified in the planning agreement. It is important that planning agreements in relation to planning proposals complement a comprehensive approach to infrastructure planning and funding.

## Part 4 Procedures and decision making

### 4.1 Basic procedures for entering into a planning agreement

Planning agreements may be negotiated between planning authorities and developers in relation to development applications or changes sought by developers to local environmental plans. Where possible, planning agreements should be negotiated between planning authorities and developers before the related development application is determined or the local environmental plan giving effect to the planning proposal is made so that the development application or planning proposal may be exhibited or notified alongside the draft planning agreement. The steps below are provided for general guidance and are indicative only. The actual steps taken in negotiating each specific planning agreement may differ.

#### Indicative steps for planning agreements

**Step 1 Commencement** Before making a development application or submitting a planning proposal, the planning authority and developer decide whether to negotiate a planning agreement. In making this decision consideration should be given to this practice note, relevant legislation and any relevant policies. The parties consider whether other planning authorities and other persons associated with the development should be additional parties to the planning agreement, such as the landowner if the landowner is a different person to the developer.

**Step 2 Negotiation** If an agreement or arrangement is negotiated, it is documented as a draft planning agreement with an accompanying explanatory note. The draft planning agreement should be assessed against the acceptability test outlined in this practice note. The parties should consider how the draft planning agreement will be enforced and when the draft planning agreement will be executed, as this will inform the security provisions and conditions of the agreement. Legal advice should be sought in each case to ensure that the appropriate provisions are included in the planning agreement.

**Step 3 Application** When the developer makes the application or submits a planning proposal to the relevant authority, it should be accompanied by the draft planning agreement that has been signed by the developer and the explanatory note.

**Step 4 Notification** Relevant public authorities are consulted and the application or planning proposal, draft planning agreement and explanatory note are publicly notified in accordance with the EP&A Act and EP&A Regulation. Any amendments required to the application or planning proposal and draft agreement as a result of submissions received are made. If necessary, the amended application, draft planning agreement and explanatory note are re-notified.

**Step 5 Assessment** The draft planning agreement and public submissions are considered in the determination of the related application. The weight given to the draft planning agreement and public submissions is a matter for the relevant authority acting reasonably.

**Step 6 Execution** The draft planning agreement is either executed before the relevant application is determined or not long after the application is determined.

## 4.2 Offer and negotiation

### Offer to enter into a planning agreement

The EP&A Act does not define what constitutes an 'offer' for the purpose of section 7.7(3) of the EP&A Act. However, an offer should:

- Be in writing.
- Be addressed to the planning authority to whom it is made.
- Be signed by or on behalf of all parties to the proposed planning agreement other than the planning authority to whom the offer is made.
- 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 planning authority.
- Address in sufficient detail any relevant matters required to be included in an offer as specified in any applicable planning agreements policy published by the planning authority to whom the offer is made to allow proper consideration by the planning authority.
- Outline in sufficient detail all other key terms and conditions proposed to be contained in the planning agreement to allow proper consideration by the planning authority.

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.

However, if a developer has offered to enter into a planning agreement in connection with the development application or a change to an environmental planning instrument, then a consent authority is authorised to require a planning agreement to be entered into in the terms of the offer as a condition of development consent.

### Efficient negotiation systems

Planning authorities, particularly councils, should implement fast, predictable, transparent and accountable negotiation systems for planning agreements. Negotiation of planning agreements should not unnecessarily delay ordinary planning processes and should run in parallel with applications to change environmental planning instruments or development applications. This includes through pre-application negotiation in appropriate cases. Negotiation should be based on principles of co-operation, full disclosure, early warning, and agreed working practices and timetables.

### Involvement of independent third parties

Independent third parties can be used in a variety of situations involving planning agreements. Planning authorities and developers are encouraged to make appropriate use of them during negotiation, including where:

- An independent assessment of a proposed change to an environmental planning instrument or development application is necessary or desirable.
- Factual information requires validation.
- Sensitive financial or other confidential information must be verified or established in the course of negotiations.
- Facilitation of complex negotiations is required for large projects or where numerous parties or stakeholders are involved.
- Dispute resolution is required.

## Dispute resolution

Different kinds of dispute resolution mechanisms may suit different disputes, and this should be reflected in a planning agreement. For example, mediation may be suitable to deal with disputes arising from grievances, while expert determination may be suitable to resolve disputes of a technical nature and arbitration may be suitable for resolving commercial disputes.

## 4.3 Costs and charges

### Costs

There is no comprehensive policy on the extent to which a planning authority may recover costs for negotiating, preparing, executing, registering, monitoring, enforcing and otherwise administering planning agreements. Wherever possible, planning authorities and developers should negotiate and agree costs at the earliest opportunity.

### GST considerations

Both parties to a planning agreement have a potential GST liability and they should obtain advice in every case on whether a potential GST liability attaches to the agreement.

### Recurrent costs and maintenance payments

Planning agreements may require developers to make contributions towards the recurrent costs of facilities that primarily serve the development to which the planning agreement applies or neighbouring development in perpetuity. However, where the facilities are intended to serve the wider community, planning agreements should only require the developer to make contributions towards the recurrent costs of the facility until a public revenue stream is established to support the on-going costs of the facility.

## 4.4 Registration and administration

### Standard form planning agreements

Planning authorities are encouraged to publish and use standard form planning agreements or standard clauses for inclusion in planning agreements in the interests of process efficiency.

### Documentation of planning agreements

The parties to a planning agreement should agree on which party is to draft the agreement to avoid duplication of resources and costs.

Councils are required to keep and make available a register of planning agreements. The register should be made available online or incorporated into the online planning register of the planning authority's website.

### Monitoring and review of planning agreements

Planning authorities should use standardised systems to monitor the implementation of planning agreements in a systematic and transparent way. This may involve co-operation by different parts of planning authorities.

Monitoring systems should enable information about the implementation of planning agreements to be made readily available to public agencies, developers and the community. Planning agreements should contain a mechanism for their periodic review that should involve the participation of all parties.



## Security for enforcement of developer's obligations

Parties should consider the means by which a planning agreement may be enforced. The most suitable means of enforcement may depend on:

- The circumstances of the planning agreement.
- The nature and extent of the developer's obligations under the planning agreement.
- The planning authority's reasonable assessment of the risk and consequences of non-performance.

Tying the performance of the developer's obligations to the issuing of construction, subdivision or occupation certificates may provide a suitable means of enforcing planning agreement obligations in some cases. The EP&A Act and the EP&A Regulation restrict the issuing of a construction certificate, subdivision certificate or occupation certificate by a certifier until any preconditions to the issuing of the certificate specified in a planning agreement have been complied with. Where adopting this approach, consideration should be given to including provisions to allow a developer to provide a financial security, such as a bond or bank guarantee, if they subsequently seek release of a certificate before completing the required obligations. This will avoid the need to amend the planning agreement.

Financial security, such as a bond or bank guarantee, can be a suitable means of enforcement where a planning agreement requires the carrying out of works or the dedication of land by the developer. Financial security can be called on by the planning authority in the event of default, coupled with step-in rights by the planning authority. The value of the financial security should relate to the potential costs that may be incurred by the planning authority in carrying out the relevant works obligations of the developer in the event of default by the developer.

Financial security or additional financial security may also be appropriate where the developer seeks to postpone obligations under a planning agreement to a time later than the time originally specified for performance. An amendment to the planning agreement would ordinarily be required in such circumstances unless the planning agreement already makes provision for such an arrangement.

## Registration on title

Registration is important to inform people of the existence of a planning agreement affecting the land and for the enforcement of a planning agreement. Registration on title may bind future owners of the land to the agreement.

To ensure that the intention of the parties to register the planning agreement is not defeated, the developer should get written agreement to the registration from each person with an estate or interest in the land to which the planning agreement applies. This should be provided to the planning authority as a precondition to the execution of the planning agreement.

Provision should be made in a registered planning agreement about when the notation of the planning agreement on the title to land can be removed. For example, when:

- The developer has complied with the obligations under the planning agreement in respect of a part of the land and the notation of the planning agreement will be removed from that part of the land.
- Land the subject of the planning agreement is subdivided and titles for new lots are created and the developer has complied with all relevant planning agreement obligations relating to the subdivision.
- Additional valuable security for performance of the planning agreement acceptable to the planning authority is provided by the developer in exchange for removal of the registration of the planning agreement from the title to land.

## Discharge of developer's obligations

Planning agreements should not impose obligations on developers indefinitely. Planning agreements should set out the circumstances in which the parties agree to discharge the developer's obligations under the agreement.

## 4.5 Public participation and notification

Planning agreements must be publicly notified and made available for public inspection before they can be entered into.

The EP&A Regulation requires that the notification of a proposed planning agreement occurs at the same time as the planning proposal or development application, or if this is not practicable, as soon as possible after.

The terms of the planning agreement and its proposed public benefits should be clearly shown as part of consultation material. This will help the community make a fully informed decision on the overall proposal.

Planning agreements must be accompanied by an explanatory note to assist the public in understanding the agreement. Other types of consultation material are encouraged in addition to the explanatory note. This might include additional written material, diagrams or plans.

### Amendment to proposed planning agreement after public notification

Any material changes that are proposed to be made to a planning agreement after a public notice has been given should be subject to renotification 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 planning authority'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.

## 4.6 Explanatory notes

Planning agreements are legal documents and may not be easily understood by the public. An explanatory note can help the public understand a planning agreement and facilitate informed discussion. The EP&A Regulation requires that an explanatory note is provided with the public notice of a planning agreement.

In practice, the explanatory note can be prepared by one of the parties but should be reviewed and agreed on by any other party to the agreement.

The explanatory note 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. It should be easy to understand, written in plain English and address all considerations outlined in this practice note.

The explanatory note must:

- Identify how the agreement promotes the public interest.
- Identify whether the agreement conforms with the planning authority's capital works program, if any.
- State whether the agreement specifies that certain requirements of the agreement must be

complied with before a construction certificate, occupation certificate or subdivision certificate is issued.

It should be possible for a person to be able to readily understand the nature of the development proposed and the public benefits to be provided. The explanatory note should indicate timing of delivery and should include maps, diagrams and other material to help explain what is proposed.

An explanatory note must summarise the objectives, nature and effect of the proposed agreement and contain an assessment of the merits of the proposed agreement, including the impact on the public or relevant section of the public.

## Part 5 Examples of the use of planning agreements

Planning agreements have the potential to be used in a wide variety of planning circumstances and to achieve many different planning outcomes. Their use will be dictated by the circumstances of individual cases and the policies of planning authorities. Accordingly, it is not possible to set out all the circumstances in which a planning agreement may be appropriately entered into.

Below are some examples of the potential scope and application of planning agreements.

### Compensation for loss or damage caused by development

Planning agreements can provide for development contributions that compensate for increased demand on the use of a public amenity, service, resource or asset that will or is likely to result from the carrying out the development.

For example, development may result in the loss of or increased impact on the provision of public open space, public car parking, public access, water and air quality, bushland, wildlife habitat or other natural areas.

The planning agreement could impose planning obligations directed towards replacing, substituting, or restoring the public amenity, service, resource or asset to an equivalent standard to that existing before the development is carried out.

In this way, planning agreements can offset development impacts that may otherwise be unacceptable.

### Meeting demand created by development

Planning agreements can also provide for development contributions that meet the demand for new public infrastructure, amenities and services created by development. For example, development may create a demand for public transport, drainage services, public roads, public open space, streetscape and other public domain improvements, community and recreational facilities.

The public benefit provided under the agreement could be the provision, extension or improvement of public infrastructure, amenities and services to meet the additional demand created by the development. An agreement may be used to meet the requirements set out in a contributions plan in relation to certain land, or, potentially in the case of a large development area being delivered by one or a small number of developers, provide public amenities and services in lieu of preparing a contributions plan.

### Prescribing inclusions in development

Planning agreements can be used to secure the implementation of particular planning policies by requiring development to incorporate particular elements that confer a public benefit.

Examples include agreements that require the provision of public facilities, open space or the retention of urban bushland. Agreements may also require development, in the public interest, to meet aesthetic standards, such as design excellence.

### Providing benefits to the wider community

Planning agreements can also be used to secure the provision of broader benefits for the wider community. Broader benefits provided through planning agreements involve an agreement between a developer and a planning authority to allow the wider community to share in benefits

resulting from the development. The benefit may be provided in conjunction with planning obligations or other measures that address the impacts of the development on surrounding land or the wider community.

Alternatively, the benefit could wholly or partly replace such measures if the developer and the planning authority agree to a redistribution of the costs and benefits of development in order to allow the wider community, the planning authority and the developer to realise their specific preferences for the provision of public benefits.

Broader benefits may take the form of additional or better-quality public facilities than is required for a particular development. Alternatively, benefits may involve the provision of public facilities that, although not strictly required to make the development acceptable in planning terms, are not wholly unrelated to the development.

## Recurrent funding

Planning agreements may provide for public benefits that take the form of development contributions towards the recurrent costs of infrastructure, facilities and services. Such benefits may relate to the recurrent costs of items that primarily serve the development to which the planning agreement applies or neighbouring development. In such cases, the planning agreement may establish an endowment fund managed by a trust, to pay for the recurrent costs of the relevant item.

For example, a planning agreement may fund the recurrent costs of water quality management in respect of development that will have a demonstrated impact on a natural watercourse that flows through or nearby to the development.

Broader benefits may also take the form of interim funding of the recurrent costs of infrastructure, facilities and services that will ultimately serve the wider community. The planning agreement would only require the developer to make such contributions until a public revenue stream is established to support the on-going costs of the facility.

## Biodiversity offsetting

A planning agreement may make provision with respect to the offset of the impact on biodiversity values of proposed development, including by the retirement of biodiversity credits in accordance with the *Biodiversity Conservation Act 2016* (see section 7.18 of that Act).