NSW GOVERNMENT Planning & Environment

Draft Practice Note

Planning Agreements

November 2016

Draft Practice Note on Planning Agreements
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Introduction

Planning agreements

This practice note provides advice on matters surrounding planning agreements. It provides an overview of current trends and practices, sets out the statutory framework for planning agreements and deals with issues such as the fundamental principles governing the use of planning agreements. It also outlines public interest and probity considerations and the NSW Government's policy position on the use of planning agreements.

Legislative basis

Subdivision 2 of Division 4 of Part 6 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) provides the statutory framework for planning agreements.

The *Environmental Planning and Assessment Regulation 2000* (the EP&A Regulation) provides a framework for planning agreements under Division 1A, Planning Agreements. The EP&A Regulation outlines the procedural requirements for the use of planning agreements as well as the making, amending and revocation of planning agreements and the public notice of planning agreements.

About this practice note

This draft practice note is made for the purposes of clause 25B(2) of the EP&A Regulation to assist parties in the preparation of planning agreements.

This draft practice note is prepared to revoke and replace the previous 'Practice Note – Planning Agreements' practice note which was issued by the former 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 provides best practice guidelines for planning agreements by identifying and explaining fundamental principles and key public interest and probity considerations. It also sets out policy considerations in how planning agreements can be used to support broader strategic land use and infrastructure planning objectives.

Part 3 provides a basic outline of the statutory procedure for negotiating, entering into and administering planning agreements.

Part 4 provides examples of the use of 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 the provision made by a developer under a planning agreement, being a monetary contribution, the dedication of land free of cost or the provision of a material public benefit to be used for or applied towards a public purpose
- **planning benefit** means a development contribution that confers a public benefit, that is, a benefit that exceeds the benefit derived from measures that would fairly and reasonably address the impacts of particular development on surrounding land or the wider community
- **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.

Part 1 – Introduction to planning agreements

Negotiation and agreement between planning authorities and developers to exact public benefits from the planning process have long been a part of the NSW planning system. However, prior to the commencement of *Environmental Planning and Assessment Amendment (Development Contributions) Act 2005*, the practices were largely unregulated. The negotiation process often occurred without the involvement of all interested stakeholders, and agreements were entered into without any opportunity for public participation.

Since 2005, the use of planning agreements has steadily grown across NSW. There are a range of reasons why the use of planning agreements has become widespread, including:

- development consent conditions, including infrastructure contributions under section 94 and section 94A, are primarily designed to ensure development makes a fair and reasonable contribution to respond to the additional demands on infrastructure that it creates;
- the nature of development in NSW is changing, as new housing and employment opportunities are delivered in infill or urban renewal locations, which makes the use existing infrastructure to accommodate development in these areas complex;
- developers are appreciating how their own developments benefit from the provision of public facilities and are seeking greater involvement in determining the type, standard and location of these facilities;
- negotiation tends to promote co-operation and compromise over conflict and can provide a more effective means for public participation in planning decisions;
- agreements provide a flexible means of achieving tailored development outcomes and focused public benefits, including agreement by communities to the redistribution of the costs and benefits of development;
- agreements can provide enhanced and more flexible infrastructure funding opportunities and better planning implementation; and
- 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 also provide a flexible framework under which the State and local councils can share responsibility for the provision of infrastructure in new release areas or in major urban redevelopment projects. They permit tailored governance arrangements to suit particular cases and the provision of infrastructure by the different levels of government in an efficient, co-operative and co-ordinated way.

Part 2 – Principles and policy for planning agreements

2.1. Fundamental principles

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

Planning agreements authorise development contributions for a variety of public purposes, some of which extend beyond the scope of section 94 or section 94A of the EP&A Act. These additional purposes include the recurrent funding of public facilities provided by councils, the capital and recurrent funding of transport and other State infrastructure and affordable housing, the protection and enhancement of the natural environment, and the monitoring of the planning impacts of development.

Planning agreements facilitate the provision of planning benefits by developers by contributing part of the development profit for a public purpose.

Planning agreements are negotiated between planning authorities and developers in the context of applications by developers for changes to environmental planning instruments or for consent to carry out development. In many cases, the planning authority will be a person charged with the exercise of statutory functions in respect of the subject-matter of the agreement, such as the Minister or a council having functions relating to the making, amendment or repeal of an instrument or the determination of a development application.

Accordingly, planning agreements must be governed by the fundamental principle that planning decisions may not be bought or sold. A planning agreement should not fetter a planning authority's exercise of other statutory functions, in particular the function of a relevant planning authority in relation to a planning proposal or as the consent authority for a development application. Unacceptable development should not be permitted because of planning benefits offered by developers that do not make the development acceptable in planning terms.

That is not to say that development contributions provided for in a planning agreement must bear the same nexus with development as required by s94. The nexus principle applies to s94 because development contributions can be compulsorily charged under that section. Because planning agreements, by contrast, are voluntary and facilitate planning benefits, they can allow for a redistribution of the costs and benefits of development subject to the above fundamental principles.

Planning authorities that are participating in planning agreements should follow the following fundamental principles:

- Planning agreements must be governed by the fundamental principle that planning decisions may not be bought or sold
- Planning authorities should not allow planning agreements to improperly fetter the exercise of statutory functions with which they are charged
- Planning authorities should not use planning agreements as a means of revenue raising, to overcome spending limitations, or for other improper purposes

- Planning authorities should not be party to planning agreements in order to seek public benefits that are unrelated to particular development
- Planning authorities should not, when considering applications to change environmental planning instruments or development applications, take into consideration planning agreements that are wholly unrelated to the subject-matter of the application, or attribute disproportionate weight to a planning agreement
- Planning authorities should not allow the interests of individuals or interest groups to outweigh the public interest when considering planning agreements
- Planning authorities should not improperly rely on their statutory position in order to extract unreasonable public benefits from developers under planning agreements
- Planning authorities should ensure that their bargaining power is not compromised or their decision-making freedom is not fettered through a planning agreement
- Planning authorities should avoid, wherever possible, being party to planning agreements where they also have a stake in the development covered by the agreements.

2.2. Public interest and probity considerations

This section discusses the public interest and probity issues that arise in connection with the use of planning agreements. It aims to lift the general level of awareness of these issues, and outlines best practice principles, policies and procedures.

A critical consideration in whether to enter into a planning agreement is whether the agreement is in the public interest. Generally speaking, the public interest is directed towards securing the fair imposition of planning controls for the benefit of the community. Planning agreements are matters of public interest and this is a relevant consideration in negotiating outcomes.

In some cases, the public interest public may be measured in terms of the need to mitigate any adverse impacts of development on the public domain or the desirability of providing a planning benefit to the wider community.

The statutory bargaining framework for planning agreements raises the fundamental issue of what is an appropriate planning agreement. The bargaining process involves the exercise of discretion on both sides, giving planning authorities and developers room to accommodate subjective values and varying concepts of the public interest, private interests and other standards.

The ability for a planning agreement to wholly or partly exclude the application of local infrastructure contributions (in the case of councils) or special infrastructure contributions (SICs) (in the case of the State Government) to development gives a planning authority scope for trade-offs under an agreement. This means that the financial, social and environmental costs and benefits of development can be redistributed through an 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 or the remainder of the community.

Safeguards in the form of best practice principles, policies and procedures protect the public interest and the integrity of the process. They also guard against misuse of planning discretions and processes, which would seriously undermine good planning outcomes and public confidence in the planning system.

This also ensures that planning decisions are exercised openly, honestly, freely and fairly in any given case and fairly and consistently across the board. This also protects planning agreements from the natural suspicion that changes to environmental planning instruments and development consents can be bought by the highest bidder.

Misuse of planning agreements can occur for a variety of reasons and produce a variety of unwelcome results including:

- where a planning authority seeks inappropriate public benefits because of opportunism or to overcome revenue-raising or spending limitations that exist elsewhere;
- where there is insufficient analysis of the likely planning impacts of proposed development because a planning authority is determined to enter into, or to give effect, to a planning agreement;
- where a planning authority allows the interests of individuals or small groups to demand particular public benefits, which otherwise outweigh the public interest; and
- where a planning authority takes advantage of an imbalance of bargaining power between the planning authority and developer. For example, abuse would occur if a planning authority sought to improperly rely on its peculiar statutory position in order to extract unreasonable public benefits under a planning agreement.

On the other hand, misuse can also occur if the planning authority's bargaining power is compromised or its decision-making freedom 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 also a development joint venture partner under the agreement, for example as a landowner. Special safeguards, such as the intervention of a disinterested third party in the development assessment process, would be needed in such circumstances.

For these reasons, the safeguards applying to the use of planning agreements should:

- provide a generally applicable test for determining the acceptability of a planning agreement, which embraces among other things the concept of of reasonableness;
- contain specific measures to protect the public interest and prevent misuse of planning agreements;
- have published rules and accessible procedures;
- provide for effective formalised public participation;
- extend fairness to all parties affected by a planning agreement; and
- guarantee regulatory independence of the planning authority.

The generally applicable acceptability test should require that planning agreements:

- are directed towards proper legitimate planning purposes, that can be identified in the statutory planning controls and other adopted planning policies applying to development;
- provide for public benefits that bear a relationship to development that is not *de minimis* (that is benefits that are not wholly unrelated to 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; and
- protect the community against planning harm.

Planning agreements and public participation

Public participation in the planning agreement process is critical to ensure the wider community has an opportunity to provide input into decisions being made relating to public benefit and development. Planning agreements distribute 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.

Planning agreements are legal documents and are therefore not easily understood by the public. An explanatory note is required to be prepared to accompany public notice of a planning agreement and they should be written in easy to understand.

Parties to a planning agreement should make sure explanatory notes are written in plain English. The explanatory note should help the 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 planning interest.

Parties should consider if other types of consultation material can help with this process.

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 the subject of re-notification. This would be the case where proposed changes would materially affect:

- how any of the matters specified in section 93F(3) 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; or
- whether a non-involved member of the community would have made a submission objecting to the change if it had been exhibited.

Planning agreements and development applications

Section 79C(1)(a)(iiia) of the EP&A Act requires a consent authority, when determining a development application, to take into consideration any relevant planning agreement or draft agreement that has been entered into under section 94F.

Section 79C(1)(d) requires the consent authority to take into consideration any public submissions made in respect of the development application which may include submissions relating to a planning agreement.

Section 93I(2) precludes a consent authority refusing to grant development consent on the ground 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.

Section 93I(3) authorises a consent authority to require a planning agreement (or any agreement containing provisions similar to those that are contained in an agreement referred to in section 93F) to be entered into as a condition of development consent, but only if it requires an agreement that is in the terms of an offer made by the developer in connection with the development application or a change to an environmental planning instrument.

Relationship between planning agreements and varying development standards (Clause 4.6 or SEPP 1)

In recent years, the Land and Environment Court has handed down decisions limiting the ability of consent authorities and developers to rely on planning agreements to justify dispensations from development standards contained in local environmental plans proposed by development applications: see *Jubilee Properties v Warringah Council* [2015] NSWLEC 1042; *Mecone Pty Limited v Waverley Council* [2015] NSWLEC 1312.

The Land and Environment Court decisions reinforce the principle that the benefits provided under a planning agreement should not be used to justify a variation from a development standard unless the benefit is directed towards achieving the planning objective of the relevant development standard.

Under no circumstances should the benefits provided under a planning agreement be exchanged for a variation from a development standard under clause 4.6 where the variation is not justified on planning grounds and the benefit is not directed towards achieving the planning objective of the development standard.

Planning agreement or conditions of development consent?

Planning authorities and developers must make a judgement in each particular case about whether the use of a planning agreement is beneficial and otherwise appropriate. However, planning agreements should never be used to require compliance with or re-state obligations imposed by conditions of development consent as it may create unnecessary duplication.

2.3. Using planning agreements

This section sets out a best practice policy and practice framework on the use of planning agreements. Planning agreements should comply with the specific requirements in this section to the fullest extent possible.

Fundamental principles and acceptability

It is critical that all planning agreements meet the fundamental principles in Part 2.1 and considerations of acceptability set out in Part 2.2. Whether a particular planning agreement is acceptable and reasonable can only be judged on the circumstances of the case and considering State, regional or local planning policies.

Objectives of planning agreements

The objectives of planning agreements will be dictated by the circumstances of individual cases 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 development for new public infrastructure, amenities and services;
- prescribing the nature of development to achieve specific planning objectives;
- securing off-site planning benefits for the wider 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.

Competing proposals to provide planning benefits

Situations may arise where planning authorities are faced with competing applications each accompanied by offers to enter into planning agreements providing planning benefits. In such cases, provided the planning benefits offered are not wholly unrelated to development, they may be considered in connection with the applications and it may be perfectly rational for the planning authority to approve the proposal which offers the greatest planning benefit in related external public benefits where the planning benefits of the development itself are equal.

Planning agreements or other contributions mechanisms

Planning agreements should complement other contribution mechanisms, including section 94 contributions and section 94A levies for local infrastructure, or SICs. They can be used to deliver infrastructure outcomes specified in these mechanisms, or additional public benefit.

However, 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 land owners, a contributions plan maybe more appropriate because it simplifies transactions and has clearer underpinning strategic planning.

The table on page 13 identifies some factors in development outcomes and infrastructure needs that may be considered when identifying an appropriate contribution mechanism.

Method	Application/issues
Section 94 development contributions	• In urban release areas and major urban renewal precincts • In areas where growth is faster and higher levels of contributions are able to offset the considerable administration costs, financial risks and inefficiencies of managing money amongst and within the funds • In areas with multiple owners who are unable to coordinate offering dedications or provision of a material public benefit • Where the council can access supplementary funds to meet the non-development demand for the infrastructure included in the contributions plan • Areas where the overall rate of growth is uncertain but different landholders are likely to proceed with development at rates different to other landholders
Section 94A levy	• In established urban areas where supplementary funding of infrastructure to meet non-development demands is uncertain • In high growth urban centres where infrastructure needs are mixed and where a high number of development can contribute to shared costs • In areas where both the rate, and the infrastructure impacts, of future development is relatively low, difficult to predict, or spread over time • Where the provision of the infrastructure benefits a dispersed set of contributors and nexus is difficult to identify • Where resources to manage the development contributions are limited • In areas with multiple ownership with little scope for land dedications or provision of a material public benefit as alternatives to paying a monetary contribution • Where the costs of needed infrastructure are relatively low and spread over time
Planning agreements	• In relation to a major development site or precinct that is owned by a single land owner or a consortium of land owners • Where the owner or owners have an incentive to be directly involved in the delivery of community infrastructure, such as quicker timeframes for delivery of infrastructure are important for the developer to bring the product to market • Where a proposed development is unanticipated by 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 and community • Where the owners agree to be involved in the provision of public infrastructure, rather than just community infrastructure • Where the owners want to provide community infrastructure additional to, or at a higher standard than, what has been specified under the contributions plan • Where a council and the developer(s) can, by negotiation, achieve different and better or more innovative outcomes than can be achieved through imposing direct or indirect contributions

Planning benefits

The provision of planning benefits for the wider community through planning agreements involves capturing part of development's profit. The value of planning benefits should always be restricted to a reasonable share of development profit.

Planning benefits should never be obtained through planning agreements that are or could be considered to be a form of taxation on development for revenue raising.

Accordingly, planning benefits, though primarily directed to the wider community, must never be wholly unrelated to development contributing the benefit. How and when public benefit will be spent should be made transparent by the planning authority to the developer.

Planning agreements and strategic infrastructure planning

Planning agreements should not be used to explicitly capture windfall gain in connection with the making of planning decisions under the EP&A Act, in particular in relation to changes to planning instruments.

Planning authorities should always have regard to a developer's entitlement to a share of development profit, while continuing to ensure new development is appropriately serviced by infrastructure. Should a planning agreement result in a developer's share of the profit dropping below a point where the development is no longer feasible, the development may not proceed and benefits would not be realised.

Planning authorities should ensure that:

- planning agreements are not used as a mechanism to capture windfall gain;
- planning agreements are evidence based and preferably independently peer reviewed and should be used as a mechanism to introduce agreed public benefit developed through appropriate processes of strategic planning and community consultation;
- a proposed development gives opportunity for public benefit and infrastructure, including affordable housing, to be delivered by development with regard to the fair apportionment of costs;
- the method of apportioning infrastructure costs is clearly set out, justified and ensures the developer an entitlement to profit that enables the development to proceed; and
- proper investigation and consideration of development feasibility and capacity to pay is carried out, preferably on an 'open-book' basis, if raised as an issue by the developer.

When seeking to implement strategic infrastructure planning through a planning agreement and when determining charges, planning authorities should allow for flexibility.

When considering opportunities to deliver agreed infrastructure objectives through planning agreements, consideration should be given to apportionment for different development types or in development circumstances, and include thresholds and exemptions.

If planning authorities seek to link planning agreements to planning incentives, density bonuses, planning trade-offs or the like, details of the relevant scheme and its implementation should preferably be contained in an environmental planning instrument or development control plan. This is to avoid parallel, non-statutory and largely unregulated planning processes, which can undermine the proper functioning of the planning system established by the EP&A Act.

When considering a 'bonus scheme' planning authorities should carry out public consultation, consider the apportionment of funding, look at the feasibility impact and determine the need for the infrastructure. Such a

scheme should also satisfy the fundamental principles and considerations for acceptability set out in Part 2 of this practice note.

Planning authorities should not use any bargaining power accruing to them by reason of their regulatory functions under the EP&A Act to force or attempt to force developers to enter into planning agreements providing for any windfall gain on the terms sought by the planning authority.

Planning authorities should consider all applications for planning proposals, development consents or modifications on their merits. The unwillingness of a developer to offer to enter into a planning agreement related to land value increase should not be a reason why a proposal is refused. Equally, a planning proposal that may have negative planning outcomes cannot be justified solely on the basis of an opportunity to enter into a planning agreement related to windfall gain.

It is not appropriate for a planning authority to prioritise site specific planning proposals on the basis they provide for opportunity to capture windfall gain, over undertaking precinct-, centre-, or LGA-wide strategic planning initiatives. Infrastructure and public benefit, including affordable housing, is likely to be planned and delivered in a more comprehensive way if linked to broad strategic planning exercises, rather than determining planning impacts and potential public benefits on a site-by-site basis. Other contributions mechanisms can also provide for a more efficient and reasonable distribution of the costs of infrastructure associated with growth, rather than focusing on individual large developments. These considerations are not inconsistent with the role of a council to assess site specific planning proposals on their planning merits.

2.4. Planning agreements policies and procedures

Planning authorities, particularly councils, should publish policies and procedures concerning their use of planning agreements that reflect the following fundamental principles. These should set out:

- the use of planning agreements by the planning authority within the context of its broader corporate strategic planning and land use planning policies, goals, and strategies;
- the circumstances in which the planning authority would ordinarily 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, how their use may be differentiated between different types of development;
- whether any thresholds or exemptions 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 and, in relation to each kind of benefit, whether it involves a planning benefit;

- the method for determining the value of public benefits and whether that method involves standard charging;
- whether money paid under different planning agreements is to be pooled and progressively applied towards the provision of public benefits to which the different agreements relate;
- when, how and where public benefits will be provided. A register of planning agreements could be made available online or incorporated into the online planning register of the planning authorities website;
- the procedures for negotiating and entering into planning agreements; and
- the planning authority's policies on other matters relating to planning agreements, such asreview and modification, discharging of the developer's obligations under agreements, the circumstances, if any, in which refunds may be given, dispute resolution and enforcement mechanisms, and payment of costs relating to the preparation, negotiation, execution, monitoring and other administration of agreements.

Planning agreement policies should be sufficiently detailed to address the particular circumstances and intentions of the planning authority relating to its use of planning agreements. They should not be formulaic nor merely represent an attempt at formal compliance with the requirement of this practice note for a policy to exist.

Part 3 – Planning agreement procedures and decision making

3.1. 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 93I(3) of the EP&A Act. 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 planning agreement other than the planning authority to whom the offer is made;
- outline in sufficient detail to allow proper consideration by the planning authority the matters required to be included in a planning agreement as specified in section 93F(3) of the EP&A Act;
- address in sufficient detail to allow proper consideration by the planning authority 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; and
- outline in sufficient detail to allow proper consideration by the planning authority all other key terms and conditions proposed to be contained in the planning agreement.

Efficient negotiation systems

Planning authorities, particularly councils, should implement measures to create fast, predictable, transparent and accountable negotiation systems for planning agreements. The systems should ensure that the negotiation of planning agreements do not unnecessarily delay ordinary planning processes. The systems should contain measures to ensure that the negotiation of planning agreements run in parallel with applications to change environmental planning instruments or development applications, including through pre-application negotiation in appropriate cases. Negotiation systems 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 could be used in a variety of situations involving planning agreements. Planning authorities and developers are encouraged to make appropriate use of them during negotiation. The situations include:

- where an independent assessment of a proposed change to an environmental planning instrument or development application is necessary or desirable;
- where factual information requires validation;
- where sensitive financial or other confidential information must be verified or established in the course of negotiations;

- where facilitation of complex negotiations are required for large projects or where numerous parties or stakeholders are involved; and
- where dispute resolution is required under a planning agreement.

Dispute Resolution

Different kinds of dispute resolution mechanisms may suit different kinds of 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 most suitable to resolve disputes of a technical nature. Similarly, arbitration may be suitable for resolving commercial disputes.

Standard-form planning agreements

Planning authorities are also encouraged to publish and use standard forms of planning agreements or standard clauses for inclusion in planning agreements to improve process efficiency.

Past deficiencies in infrastructure provision

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

3.2. 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

The parties to planning agreements should obtain advice in every case on whether a potential GST liability attaches to the agreement. An agreement potentially involves two taxable supplies: the supply of development rights from the planning authority to the developer and the supply of public benefits by the developer to the planning authority. In other words, both parties have a potential GST liability.

Standard charges

Planning authorities are encouraged to standardise development contributions sought under planning agreements in order to streamline negotiations and provide predictability and certainty for developers. However, this does not prevent public benefits being negotiated on a case by case basis, particularly where planning benefits are also involved.

Standard form planning agreements

Planning authorities are also encouraged to publish and use standard forms of planning agreements or standard clauses for inclusion in planning agreements in the interests of process efficiency. Where possible, councils are encouraged to use the template planning agreement at Attachment A.

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.

Pooling of monetary contributions

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

Refunds

Planning agreements may provide that refunds of monetary development contributions made under the agreement are available if public benefits are not provided in accordance with the agreement.

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.

3.3. Registration and administration of planning agreements

Registration of planning agreement

Registration is important to inform people dealing with land of the existence of a planning agreement affecting the land and for the enforcement of a planning agreement.

There is no requirement that a planning agreement must be registered over the whole of the land covered by the agreement.

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

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. This may, for example, occur when:

- the developer has complied with all obligations under the planning agreement relating to the land and is discharged from the planning agreement;
- the developer has complied with all relevant obligations under the planning agreement relating to a stage of development and the notation about that stage in the planning agreement on the title to the land is removed;
- 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; or

- 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 notation of the planning agreement from the title to land.

Security for enforcement of developer's obligations

The EP&A Act does not prescribe any particular means by which the developer's performance of a planning agreement may be enforced. What is a suitable means of enforcement of the planning agreement depends on the circumstances and in particular the nature and extent of the developer's obligations under the planning agreement and 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 certificates under Part 4A of the EP&A Act may provide a suitable means of enforcement of planning agreement obligations in some cases. The EP&A Act and the regulations made under that Act restrict the issuing of a construction certificate, occupation certificate or subdivision certificate by a certifier until any preconditions to the issuing of the certificate specified in a planning agreement have been complied with.

Where a developer requests that a Part 4A certificate be issued even though all preconditions to the issuing of the certificate specified in a planning agreement have not been fulfilled, the planning agreement would ordinarily require the developer to provide financial security, such as a bond or bank guarantee, to secure the performance of the unfulfilled obligations as a condition of agreeing to the developer's request. An amendment to the planning agreement would ordinarily be required in such circumstances unless the planning agreement already makes provision for such an arrangement.

Where a planning agreement requires land to be dedicated to the planning authority, a suitable means of enforcement of such obligation may well be for the planning agreement to contain a pre-acquisition agreement for the purposes of the *Land Acquisition (Just Terms Compensation) Act 1991* enabling the planning authority to compulsorily acquire the land to be dedicated for nominal or an agreed value in the event of default by the developer.

Where a planning agreement requires the carrying out of works by the developer, the suitable means of enforcement of such obligation will ordinarily be a financial security, such as a bond or bank guarantee, which 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 to the planning authority 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.

Provision by the developer of a financial security or additional financial security, such as a bond or bank guarantee, would ordinarily 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.

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.

Modification and 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 modify or discharge the developer's obligations under the agreement. The modification or discharge should be effected by an amendment to the agreement. The circumstances that may require planning agreements to be modified or discharged may include the following:

- material changes to the planning controls applying to the land;
- a material modification to the development consent;
- the lapsing of the development consent;
- the revocation or modification by the Minister of a development consent; and
- other material changes in the overall planning circumstances of an area affecting the operation of the planning agreement.

3.4. Basic statutory procedure for entering into a planning agreement

The nature of planning agreements and requirements for their public notification and consideration in determining applications dictate the basic procedures for entering into planning agreements.

Planning agreements may be entered into between planning authorities and developers (and associated persons) in relation to changes sought by developers to environmental planning instruments (including the making, amendment or repeal of instruments), or development applications or proposed development applications.

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

Planning agreements and public submissions relating to them should where possible be considered, when deciding to make changes to environmental planning instruments to which they relate or when determining planning applications to which planning agreements relate.

Where possible, planning agreements should be negotiated between planning authorities and developers before applications are made so that applications may be accompanied by copies of draft agreements. The basic procedures relating to planning agreements are therefore as follows:

Step 1. Before the making of an application, the planning authority and developer decide whether to negotiate a planning agreement. The parties consider whether other planning authorities and other persons associated with the developer should be additional parties to the agreement. If the developer is not the owner of the relevant land, the landowner should be an additional party to the agreement.

Step 2. If an agreement is negotiated, it is documented as a draft planning agreement and the parties agree on the terms of the accompanying explanatory note required by the EP&A Regulation. The parties also agree on the content of the application to which the draft agreement relates.

Step 3. The developer makes the application to the relevant authority, accompanied by the draft planning agreement and the explanatory note. The application must clearly record the developer's offer to enter into the planning agreement if the application is approved. Preferably, the draft agreement should be executed by the developer to indicate the developer's commitment to enter into the agreement if the application is approved. In the case of an application to change an environmental planning instrument, the application may record the

developer's offer as being to enter into the planning agreement if consent is subsequently granted to a development application relating to the change to the instrument.

Step 4. Relevant public authorities are consulted in relation to the application and draft planning agreement and any consequential amendments required to the application and draft agreement are made.

Step 5. The application, draft planning agreement and explanatory note are publicly notified and exhibited in accordance with the EP&A Act and EP&A Regulation. Any consequential amendments required to the application and draft agreement are made and, if necessary, the amended application, draft planning agreement and explanatory note are re-exhibited.

Step 6. The draft planning agreement and public submissions are considered in the determination of the application so far as relevant to the application. The weight given to the draft agreement and public submissions is a matter for the relevant authority acting reasonably.

Step 7. If the application, being a change to an environmental planning instrument, is approved, the agreement may be entered into immediately. Alternatively, it can be entered into if consent is subsequently granted to a development application relating to the change to the instrument. If the application, being a development application, is granted consent, a condition may be imposed requiring the planning agreement to be entered into but only in terms of the developer's offer made in connection with the application. The planning authority would resolve to execute the agreement when approving the application. If the application is approved on terms different to the developer's offer, the agreement could not be required to be entered.

Part 4 - 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 in relation to their use. Accordingly, it is not possible to prescribe their use, nor would this be appropriate.

The examples given in this section serve only to provide an indication of the potential breadth of their scope and application.

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.

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 open space, community or recreational facilities or the retention of urban bushland, or agreements that require development, in the public interest, to meet aesthetic standards, such as design excellence.

Providing planning benefits to the wider community

Planning agreements can also be used to secure the provision of broader planning benefits for the wider community.

The provision of planning benefits through planning agreements necessarily involves an agreement between a developer and a planning authority to allow the wider community to share in part of the development profit to achieve specified public benefits.

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

Alternatively, the planning 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.

Planning benefits may take the form of additional or better quality public facilities than is required for a particular development. Alternatively, planning 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. An example of this might be development contributions towards the provision or retention of off-site affordable housing.

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. In addition, it may bind future owners in a development to make periodic payment to the fund for the recurrent costs of the item.

For example, a planning agreement may fund the recurrent costs of habitat protection where development will have a demonstrated impact on nearby sensitive habitat. Further, 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.

Planning 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.

Attachment A – Template planning agreement

PLANNING AGREEMENT

Parties

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

and

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

Background

(For Development Applications)

A. On, ##, the Developer made a Development Application to the Council for Development Consent to carry out the Development on the Land.

B. That Development Application was accompanied by an offer by the Developer to enter into this Agreement to make Development Contributions towards the Public Facilities if that Development consent was granted.

(For Changes to Environmental Planning Instruments)

A. On, ##, the Developer made an application to the Council for the Instrument Change for the purpose of making a Development Application to the Council for Development Consent to carry out the Development on the Land.

B. The Instrument Change application was accompanied by an offer by the Developer to enter into this Agreement to make Development Contributions towards the Public Facilities that Development Consent was granted.

C. The Instrument Change was published in NSW Government Gazette No. ## on ## and took effect on ##.

D. On, ##, the Developer made a Development Application to the Council for Development Consent to carry out the Development on the Land.

Operative Provisions

1 Planning agreement under the Act

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

2 Application of this Agreement

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

3 Operation of this Agreement

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

4 Definitions and interpretation

4.1 *In this Agreement the following definitions apply:*

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

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

Development *means ##*

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

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

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

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

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

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

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

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

Public Facilities *means ##.*

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

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

(a) *Headings are inserted for convenience only and do not affect the interpretation of this Agreement.*

(b) *A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.*

(c) *If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.*

(d) *A reference in this Agreement to dollars or $ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.*

(e) *A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.*

(f) *A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.*

(g) *A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.*

(h) *An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.*

(i) *Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.*

(j) *A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.*

(k) *References to the word 'include' or 'including are to be construed without limitation.*

(l) *A reference to this Agreement includes the agreement recorded in this Agreement.*

(m) *A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.*

(n) *Any schedules and attachments form part of this Agreement.*

5 *Development Contributions to be made under this Agreement*

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

6 *Application of the Development Contributions*

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

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

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

8 *Registration of this Agreement*

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

9 *Review of this Agreement*

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

10 Dispute Resolution

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

11 Enforcement

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

12 Notices

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

(a) *Delivered or posted to that Party at its address set out below.*

(b) *Faxed to that Party at its fax number set out below.*

(c) *Emailed to that Party at its email address set out below.*

Council

Attention: *##*

Address: *##*

Fax Number: *##*

Email: *##*

Developer

Attention: *##*

Address: *##*

Fax Number: *##*

12.1.2 *Email:* *##*

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

12.3 *Any notice, consent, information, application or request is to be treated as given or made at the following time:*

(a) *If it is delivered, when it is left at the relevant address.*

(b) *If it is sent by post, 2 business days after it is posted.*

(c) *If it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.*

12.4 *If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.*

13 Approvals and consent

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

14 Assignment and Dealings

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

15 Costs

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

16 Entire agreement

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

17 Further acts

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

18 Governing law and jurisdiction

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

19 Joint and individual liability and benefits

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

20 No fetter

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

21 Representations and warranties

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

22 *Severability*

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

23 *Modification*

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

24 *Waiver*

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

25 *GST*

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

Execution

Dated: *##*

Executed as an Agreement: *##*