

Wingecarribee Shire Council

Planning Agreements Policy 2005



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1 Introduction

- 1.1 This Policy sets out Wingecarribee Shire Council's policy and procedures relating to planning agreements under Subdivision 2 of Division 6 of the *Environmental Planning and Assessment Act 1979 (EPA Act)*.

Planning Agreements form only one part of Council's Developer Contribution system. This Developer Contribution system aims to implement contribution schemes as described under sections 93C and 94 of the EPA Act that best manage the need for funding infrastructure as a result of new development without placing unnecessary financial burdens on the existing community.

The following summary best describe Council's approach to developer contributions and where Planning Agreements 'fit'.

- *Planning Agreements* are Council's preferred mechanism for collecting developer contributions and dealing with other development related matters for urban release areas. Planning Agreements may also be utilised for large scale developments (where development impacts will be significant) as an alternative to Development Contributions issued under the consent conditions.
- *Fixed Percentage Levies* will only be used by Council in:
 - areas where little or no growth is anticipated; and/or,
 - areas such as town centres where certainty of developer contributions is a factor to development, and/or,
 - areas where Council believes the flexibility of expenditure outweighs the likely opportunity cost of less developer contributions under traditional contributions.
- *Traditional S.94 Plans* will be used in all other instances where Fixed Percentage Levies and/or Planning Agreements are not used.

- 1.2 This Policy was adopted by resolution of the Council on 28 June 2006.

1.3 In this Policy, the following terminology is used:

Act means the *Environmental Planning and Assessment Act 1979*,

development application has the same meaning as in the Act,

development contribution means the kind of 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,

instrument change means a change to an environmental planning instrument to enable a development application to be made to carry out development the subject of a planning agreement,

planning benefit means a development contribution that confers a net public benefit, that is, a benefit that exceeds the benefit derived from measures that would address the impacts of particular development on surrounding land or the wider community,

public facilities means public infrastructure, facilities, amenities and services,

planning obligation means an obligation imposed by a planning agreement on a developer requiring the developer to make a development contribution,

Practice Note means the *Practice Note on Planning Agreements* published by the Department of Infrastructure Planning and Natural Resources (July 2005)

public includes a section of the public,

public benefit is the benefit enjoyed by the public as a consequence of a development contribution,

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

surplus value means the value of the developer's provision under a planning agreement less the sum of the value of public works required to be carried out by the developer under a condition imposed under s80A(1) of the Act and the value of development contributions that are or could have been required to be made under s94 or s94A of the Act in respect of the development the subject of the agreement.

- 1.4 The purposes of this Policy are:
- (a) to establish a framework governing the use of planning agreements by the Council
 - (b) to ensure that the framework so established is efficient, fair, transparent and accountable,
 - (c) to enhance planning flexibility in the Council's area through the use of planning agreements,
 - (d) to enhance the range and extent of development contributions made by development towards public facilities in the Council's area,
 - (e) to set out the Council's specific policies on the use of planning agreements,
 - (f) to set out procedures relating to the use of planning agreements within the Council's area.
- 1.5 The Council's planning agreements framework consists of the following:
- (a) the provisions of Subdivision 2 of Division 6 of Part 4 of the Act,
 - (b) the provisions of Division 1A of Part 4 of the Regulation,
 - (c) the Practice Note, reproduced in the Appendix,
 - (d) this Policy.
- 1.6 This Policy is not legally binding. However, it is intended that the Council and all persons dealing with the Council in relation to planning agreements will follow this Policy to the fullest extent possible.
- 1.7 It is intended that this Policy will be periodically updated. The up-dates may cover additional matters to those covered in this Policy or provide more detailed information or guidance on specific matters covered in this Policy.

2 Policy on the Use of Planning Agreements

Council's strategic objectives for the use of planning agreements

2.1 The Council's strategic objectives with respect to the use of planning agreements include:

- (a) To advance Council's adopted Vision for the shire: *"(to) Make the shire a better place in which to live, and in doing so, ensure that the unique character of the shire is retained."*
- (b) to provide an enhanced and more flexible development contributions system for the Council,
- (c) more particularly, to supplement or replace, as appropriate, the application of s94 and s94A of the Act to development,
- (d) to give all stakeholders in development greater involvement in determining the type, standard and location of public facilities and other public benefits,
- (e) to allow the community, through the public participation process under the Act, to agree to the redistribution of the costs and benefits of development in order to realise community preferences for the provision of public benefits.
- (f) To adopt innovative approaches to the provision of infrastructure (Management Plan),
- (g) To fund new, upgrade existing infrastructure to appropriate levels that reflect and balance environmental standards, community expectations and funding priorities' and
- (h) Provide certainty for the community, developers and Council in respect to infrastructure and development outcomes.

Fundamental principles governing the use of planning agreements

- 2.2 The Council's use of planning agreements will be governed by the following principles:
- (a) planning decisions may not be bought or sold through planning agreements,
 - (b) development that is unacceptable on planning grounds will not be permitted because of planning benefits offered by developers that do not make the development acceptable in planning terms,
 - (c) the Council will not allow planning agreements to improperly fetter the exercise of its functions under the Act, Regulation or any other Act or law,
 - (d) the Council will not use planning agreements for any purpose other than a proper planning purpose,
 - (e) the Council will not seek benefits under a planning agreement that are unrelated to particular development,
 - (f) the Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed planning agreement,
 - (g) the Council will not improperly rely on its statutory position in order to extract unreasonable public benefits from developers under planning agreements,
 - (h) if the Council has a commercial stake in development the subject of a agreements, it will take appropriate steps to ensure that it avoids a conflict of interest between its role as a planning authority and its interest in the development.

Circumstances in which Council will consider negotiating a planning agreement

- 2.3 The Council, in its complete discretion, may negotiate a planning agreement with a developer in connection with any application by the developer for an instrument change or for development consent relating to any land in the Council's area. It was resolved (24.8.05) *"THAT Council endorses the use of Planning Agreements as the preferred method of raising developer contributions from potential urban release sites"*.

Specific purposes of planning agreements

- 2.4 The Council may consider negotiating a planning agreement with a developer to:
- (a) compensate for the loss of, or damage to, a public amenity, service, resource or asset caused by the development through its replacement, substitution, repair or regeneration,
 - (b) meet the demands created by the development for new public infrastructure, amenities and services,
 - (c) address a deficiency in the existing provision of public facilities in the Council's area where the deficiency may prevent development occurring or from being properly serviced,
 - (d) achieve recurrent funding in respect of public facilities,
 - (e) prescribe inclusions in the development that meet specific planning objectives of the Council relating to the development,
 - (f) monitor the planning impacts of development,
 - (g) provide affordable housing.

The attached flowcharts provide guidance for the process and timing for preparing and negotiating Planning Agreements for rezonings and development applications.

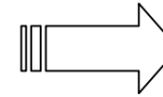
Planning Agreements (Rezoning)

Process (Summary)

Stage/Timing

PREPARATION OF AGREEMENT

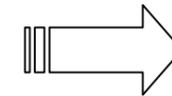
1. Both parties agree to enter into an agreement. (Provide developer with a copy of the Policy)



Prior to resolution of Council to rezone the land

2.1 Commence Infrastructure investigations and/or DCP preparation

2.2 Initial negotiation to set out the items/matters to be addressed in the Planning Agreement



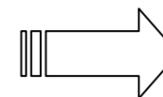
Prior to exhibition of LEP (rezoning)

3.1 Negotiations commence regarding

- On site and Off site infrastructure

3.2 Discuss what should be in the Implementation Agreement (refer 2.18 of Policy)

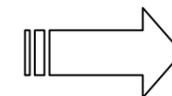
3.3 Timing of payments, infrastructure provision, dedications and works in kind.



- On completion of Infrastructure Investigations and/or DCP preparation.
- LEP (rezoning) exhibition should also occur during this phase.

4. Report to Council:

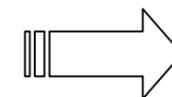
- Section 68 following exhibition of LEP (rezoning)
- Draft Planning Agreement and acceptability test (2.5 of Policy)



Report to Council following exhibition of LEP (rezoning), requesting the Department of Planning recommend the Minister make the plan (law).

EXECUTION OF AGREEMENT

5. Exhibition of Planning Agreement and applicant to lodge Development Application



Following gazettal of LEP (Rezoning)

6.1 As part of condition of consent – that the Planning Agreement be executed (signed) by the parties.

6.2 Registration of Agreement



Planning Agreement to be considered as part of the merits/considerations of the lodged DA

Planning Agreements (Development Applications)

Process (Summary)

Stage/Timing

PRE-DEVELOPMENT APPLICATION

1. Pre-development meeting and identification of infrastructure issues and implications.
(Provide developer with a copy of the Policy)

Pre-development meeting

2.1 Parties to discuss Planning Agreement as an option to provide certainty, clarity and practical options for the development.

Pre-development meeting

2.2 Both parties agree to enter into an agreement

Pre-development meeting

3.1 Internal Council assessment team set up to review and investigate infrastructure.

3.2 Initial negotiation to set out the items/matters to be addressed in the Planning Agreement

3.3 Negotiations commence regarding on site and off site infrastructure

3.4 Discuss what should be in the Implementation Agreement (refer 2.18 of Policy)

3.5 Timing of payments, infrastructure provision, dedications and works in kind

- Developer to submit pre DA plans submitted
- Developer to submit detailed infrastructure studies
- Council consider infrastructure requirements

4.1 Draft Agreement prepared in accordance with Policy

4.2 Draft Agreement and acceptability test (2.5 of Policy) reported to Council

- Using Council's existing Planning Agreement template
- Report to Council prior to lodgement of DA.

LODGEMENT OF DEVELOPMENT APPLICATION

5. Agreement between parties reached

Development Application (DA) lodged with Council. (Required to be exhibited for 28 days)

6.1 As part of condition of consent – that the Planning Agreement be executed (signed) by the parties.

6.2 Registration of Agreement

Planning Agreement to be considered as part of the merits/considerations of the lodged DA.

Acceptability test to be applied to all planning agreements

2.5 The Council will apply the following test in order to assess the desirability of a proposed planning agreement:

- (a) is the proposed planning agreement directed towards a proper or legitimate planning purpose having regard to its statutory planning controls and other adopted planning policies and the circumstances of the case?
- (b) does the proposed planning agreement provide for a reasonable means of achieving the relevant purpose?
- (c) can the proposed planning agreement be taken into consideration in the assessment of the relevant rezoning application or development application?
- (d) will the planning agreement produce outcomes that meet the general values and expectations of the community and protect the overall public interest?
- (e) does the proposed planning agreement promote the Council's strategic objectives in relation to the use of planning agreements?
- (f) does the proposed planning agreement conform to the fundamental principles governing the council's use of planning agreements?
- (g) are there any relevant circumstances that may operate to preclude the Council from entering into the proposed planning agreement?

Consideration of planning agreements in relation to instrument changes and development applications

2.6 When exercising its functions under the Act in relation to an application by a developer for an instrument change or a development consent to which a proposed planning agreement relates, the Council will consider to the fullest extent permitted by law:

- (a) whether the proposed planning agreement is relevant to the application and hence may be considered in connection with the application, and
- (b) if so, the proper planning weight to be given to the proposed planning agreement.

Application of s94 and s94A to development to which a planning agreement relates

- 2.7 The Council has no general policy on whether a planning agreement should exclude the application of s94 or s94A of the Act to development to which the agreement relates. This is a matter for negotiation between the Council and a developer having regard to the particular circumstances of the case.

Application of SEPP 1 to development to which a planning agreement relates

- 2.8 The Council will not agree to a provision in a planning agreement requiring the benefit provided by the developer under the agreement to be used to justify a dispensation with applicable development standards under *State Environmental Planning Policy No.1 – Development Standards* in relation to development unless the Council is of the opinion that the subject matter of the proposed planning agreement addresses the matters required to be addressed under that Policy in relation to the dispensation sought.

Form of development contributions under a planning agreement

- 2.9 The form of a development contribution to be made under a proposed planning agreement will be determined by the particulars of the instrument change or development application to which the proposed planning agreement relates.
- For example, whether the contribution shall be cash, provided as material public benefit (constructed in lieu of cash) or land dedication.

Standard charges

- 2.10 Wherever possible, the Council will seek to standardise development contributions sought under planning agreements in order to streamline negotiations and provide fairness, predictability and certainty for developers. This, however, does not prevent public benefits being negotiated on a case by case basis, particularly where planning benefits are also involved.

Recurrent charges

- 2.11 The Council may request developers, through a planning agreement, to make development contributions towards recurrent costs of public facilities. Generally, the planning agreement will 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, or for a time agreed between the parties.

In unusual cases, recurrent costs may be payable in perpetuity.

Pooling of development contributions

- 2.12 Where a proposed planning agreement provides for a monetary contribution by the developer, the Council may seek to include a provision permitting money paid under the agreement to be pooled with money paid under other planning agreements and applied progressively for the different purposes under those agreements, subject to the specific requirements of the relevant agreements. Pooling may be appropriate to allow public benefits, particularly essential infrastructure, to be provided in a fair, more efficient and equitable way.

Methodology for valuing public benefits under a planning agreement

- 2.13 Unless otherwise agreed in a case, where the benefit under a planning agreement is the provision of land for a public purpose, the Council will generally seek to value the benefit on the basis of the estimated amount of compensation to which the Developer would be entitled under the *Land Acquisition (Just Terms Compensation) Act 1991* upon the compulsory acquisition of the land.
- 2.14 Where the benefit under a planning agreement is the carrying out of works for a public purpose, the Council will generally seek to value the benefit on the basis of the estimated value of the completed works determined using the method that would be ordinarily adopted by a quantity surveyor.

Credits and refunds

- 2.15 The Council generally will not agree to a planning agreement providing for the surplus value under a planning agreement being refunded to the developer or offset against development contributions required to be made by the developer in respect of other development in the Council's area.

Time when developer's obligations arise under a planning agreement

- 2.16 The Council will generally require a planning agreement to provide that the developer's obligations under the agreement take effect in accordance with the schedule mutually agreed between the parties. This will generally require the satisfaction of the relevant obligations prior to the granting of a subdivision certificate or occupancy certificate for a particular stage of the development that is the subject of the agreement.

Where feasible the Council will seek to have the developer's obligations met as early as practical within the delivery of the development.

Implementation agreements

- 2.17 In appropriate cases, the council may require a planning agreement to provide that before the development the subject of the agreement is commenced, the Parties are to enter into an *implementation agreement* that provides for matters such as:

- (a) the design, technical specification and standard of any work required by the planning agreement to be undertaken by the developer,
- (b) the manner in which a work is to be handed over to the Council,
- (c) the manner in which a material public benefit is to be made available for its public purpose in accordance with the planning agreement.

Monitoring and review of a planning agreement

- 2.18 The Council will continuously monitor the performance of the developer's obligations under a planning agreement.
- 2.19 The Council will require the planning agreement to contain a provision establishing a mechanism under which the planning agreement is periodically reviewed with the involvement of all parties. This will include a review of the developer's performance of the agreement.
- 2.20 The Council will require the planning agreement to contain a provision requiring the parties to use their best endeavours to agree on a modification to the agreement having regard to the outcomes of the review.

Modification or discharge of the developer's obligations under a planning agreement

- 2.21 The Council will generally only agree to a provision in a planning agreement permitting the Developer's obligations under the agreement to be modified or discharged where the modification or discharge is linked to the following circumstances:
- (a) the developer's obligations have been fully carried in accordance with the agreement,
 - (b) the developer has assigned the developer's interest under the agreement in accordance with its terms and the assignee has become bound to the Council to perform the developer's obligations under the agreement,
 - (c) the development consent to which the agreement relates has lapsed,
 - (d) the performance of the planning agreement has been frustrated by an event beyond the control of the parties,
 - (e) the Council and the developer otherwise agree to the modification or discharge of the agreement.

Should the parties agree to a modification, the executed agreement shall be publicly exhibited in accordance with Council's current notification policy.

- 2.22 Such a provision will require the modification or revocation of the planning agreement in accordance with the Act and Regulation.

Assignment and dealings by the developer

2.23 The Council will require every planning agreement to provide that the Developer may not assign its rights or obligations under the agreement nor have any dealing in relation to the land the subject of the agreement unless, in addition to any other requirements of the agreement:

- (a) the developer has, at no cost to the Council, first procured the execution by the person with whom it is dealing of all necessary documents in favour of the Council by which that person agrees to be bound by the agreement as if they were a party to the original agreement including the provision of any security, bank guarantee or bond required by clauses 2.25 and 2.26 of this policy;
- (b) the Developer is not in breach of this Agreement; and
- (c) the developer has established to Councils satisfaction that it can perform the agreement satisfactorily.

Provision of security under a planning agreement

2.24 The Council generally will require a planning agreement to make provision for security by the developer of the developer's obligations under the agreement.

2.25 The Council will generally require the security in the form of a bank guarantee from an Australian Bank in favour of the Council on terms mutually agreed between the parties. Council reserves the right to require other forms of security.

The value of the security will generally be a percentage of the proportion of the value of the developer's non cash and/or land obligation likely to be due to be satisfied on or before the issue of the subdivision certificate for the relevant stage of the development.

The value of the bond to be so provided will generally be determined with the relevant development application and required as a condition of development consent.

Council will generally consider the provision of a series of Bonds that can be incrementally released as the development proceeds and the relevant obligations are met.

Council may agree to the provision of a letter of undertaking in lieu of a bank guarantee from a State Government Agency.

Preparation of the planning agreement

- 2.26 The Council and the developer will, in each case, decide who will prepare the planning agreement relating to a particular application for an instrument change or development application.

Council's costs of negotiating, entering into, monitoring and enforcing a planning agreement

- 2.27 Unless otherwise agreed each party to the planning agreement shall be responsible for its own costs associated with the negotiation, preparation and entering into the agreement
- 2.28 The amount to be paid by the developer will be determined by negotiation in each case,
- 2.29 In particular cases, the Council may require the planning agreement to make provision for a development contribution by the developer towards the on-going administration of the agreement and/or administration of existing section 94 plans.

Notations on Certificates under s149(2) of the Act

- 2.30 The Council may require a planning agreement to contain an acknowledgement by the developer that the Council may, in its absolute discretion, make a notation under s149(2) of the Act about a planning Agreement on any certificate issued under s149 of the Act relating to the land the subject of the agreement or any other land.

Registration of planning agreements

- 2.31 The Council may require a planning agreement to contain a provision requiring the developer to agree to registration of the agreement pursuant to s93H of the Act if the requirements of that section are satisfied.

- 2.32 In the event of the sale or transfer of the land to which a planning agreement applies, the consent of the Council will be required to any assignment or the planning agreement notwithstanding its registration under Section 93H of the Act, having regard to the ability of the transferee to perform the terms and conditions of the planning agreement including the provision of any security, bank guarantee or bond which may be required by clauses 2.25 and 2.26 of this policy.
- 2.33 The Council will consent to the removal from the title to the land of the fact of registration of a planning agreement upon being satisfied that all conditions of development, including the release of subdivision and/or construction certificates for the development, have been complied with and shall make available the appropriate Request to enable such a notation to be removed from the title of the land.

Dispute resolution

- 2.34 The Council will generally require a planning agreement to provide for mediation of disputes between the parties to the agreement before the parties may exercise any other legal rights in relation to the dispute.

3 Procedures Relating to the Use of Planning Agreements

Council's negotiation system

- 3.1 The Council's negotiation system for planning agreements aims to be efficient, predictable, transparent and accountable.
- 3.2 The system seeks to ensure that the negotiation of planning agreements runs in parallel with applications for instrument changes or development applications.
- 3.3 The system is based on principles of fairness, co-operation, full disclosure, early warning, and agreed working practices and timetables.

When should a planning agreement be negotiated?

- 3.4 The Council is required to ensure that a planning agreement is publicly notified as part of and in the same manner as and contemporaneously with the application for the instrument change or the development application to which it relates.
- 3.5 The planning agreement must therefore be negotiated and documented before it is publicly notified as required by the Act and Regulation.
- 3.6 The Council prefers that a planning agreement is negotiated before lodgement of the relevant application and that it accompanies the application on lodgement.

Who will negotiate a planning agreement on behalf of the Council?

- 3.7 A council officer or officers with appropriate delegated authority will negotiate a planning agreement on behalf of the Council. No planning agreement shall become binding until it is approved and accepted by a resolution of Council.
- 3.8 The councillors will not be involved in the face to face negotiation of the agreement.

Separation of the Council's planning assessment and negotiation roles

- 3.9 The Council will, in all cases, ensure that the person who undertakes the assessment of the application to which a planning agreement relates for the purpose of determining the application or reporting on it to the Council is not the same person or a subordinate of the person who negotiated the planning agreement on behalf of the Council.

Involvement of independent third parties in the negotiation process

- 3.10 In cases where it is clear that the knowledge of an expert third party is essential, the Council will encourage the appointment of such an independent person to facilitate or otherwise participate in the negotiations or aspects of it, particularly where:
- (a) an independent assessment of a proposed instrument change or development application is necessary or desirable,
 - (b) factual information requires validation in the course of negotiations,
 - (c) sensitive financial or other confidential information must be verified or established in the course of negotiations,
 - (d) facilitation of complex negotiations are required in relation to large projects or where numerous parties or stakeholders are involved,
 - (e) dispute resolution is required under a planning agreement.

Key steps in the negotiation process

- 3.11 The negotiation of a planning agreement will generally involve the following key steps:
- (a) before lodgement of the relevant application by the developer, the parties will decide whether to negotiate a planning agreement
 - (b) the parties will then appoint persons to represent them in the negotiations, trying to limit the maximum number of persons per party to three(3) each.
 - (c) the parties will also appoint an additional person to attend and take minutes of all negotiations.

- (d) the parties will also decide whether to appoint an independent person to facilitate or otherwise participate in the negotiations or aspects of it
- (e) the parties will also agree on a timetable for negotiations and the protocols and work practices governing their negotiations
- (f) the parties will then identify the key issues for negotiation and undertake the negotiations
- (g) if agreement is reached, the parties will determine who is to prepare the proposed planning agreement and to provide a copy of it to the other party
- (h) the parties will undertake further negotiation on the specific terms of the proposed planning agreement
- (i) once agreement is reached on the terms of the proposed planning agreement, the developer shall submit to the Council a letter of intent to the Council for exhibition accompanied by the signed planning agreement
- (j) the developer may then make the relevant application to the Council accompanied by a copy of the proposed agreement
- (k) the parties may be required to undertake further negotiations and, hence, a number of the above steps as a result of the public notification and inspection of the planning agreement or its formal consideration by the Council in connection with the relevant application.
- (l) the Council shall include at its discretion a condition of consent requiring the execution of the planning agreement by the developer. The form of the condition shall be generally as per the template condition contained in Attachment C of the DoP Practice Note 2005.

Public notification of planning agreements

- 3.12 A planning agreement must be publicly notified and be available for public inspection for a minimum period of 28 days as prescribed by the Act and Regulations. In addition to the legislative requirements, Council will notify the general public of the planning agreement in accordance with the requirements of Council's Notification Policy in force at the time.

- 3.13 As mentioned, the Council is required to ensure that a planning agreement is publicly notified as part of and in the same manner as and contemporaneously with the application for the instrument change or the development application to which it relates.
- 3.14 Where the application to which a planning agreement relates is required by or under the Act or Regulation to be publicly notified and available for public inspection for a period exceeding 28 days, the Council will publicly notify the planning agreement and make it available for public inspection for that longer period.
- 3.15 Where the application to which a planning agreement relates is permitted by or under the Act or Regulation to be publicly notified and available for public inspection for a period of less than 28 days, the Council will publicly notify the application and make it available for public inspection for a minimum period of 28 days.
- 3.16 The Council will publicly re-notify and make available for public inspection a proposed planning agreement and the application to which it relates if, in the Council's opinion, a material change is made to the terms of the agreement or the application after it has been previously publicly notified and inspected. Such a change may arise as a consequence of public submissions made in respect of the previous public notification and inspection of the agreement or the application, or their formal consideration by the Council, or for any other reason.

When is a planning agreement required to be entered into?

- 3.17 A planning agreement is entered into when it is signed by all of the parties.
- 3.18 A planning agreement can be entered into at any time after the agreement is publicly notified in accordance with the Act and Regulation.
- 3.19 The Council will usually require a planning agreement to be entered into as a condition of consent prior to the issue of a Subdivision Certificate or Construction Certificate.

Appendix

Practice Note on Planning Agreements

Department of Infrastructure Planning and Natural Resources, July 2005

Planning agreements

The purpose of this practice note is to provide advice on the matters surrounding voluntary 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, as well as public interest and probity considerations. Some examples of the use of planning agreements are also provided, along with a template planning agreement and explanatory note.

Part 1 - Introduction

About planning agreements

The *Environmental Planning and Assessment Amendment (Development Contributions) Act 2005* introduced Subdivision 2 of Division 4 of Part 6 providing for a statutory system of planning agreements.

It was not intended that the new system preclude other kinds of agreements in the planning process. For this reason, no transitional arrangements have been included in the new legislation. However, other kinds of agreements, whether made before or after the new system comes into force, must comply with the general law.

It was largely because of uncertainty surrounding the application of the general law to agreements in the planning process that the new system of planning agreements was enacted.

Furthermore there is uncertainty about the application of the Goods and Services Tax (GST) to other kinds of agreements. The intention of the planning agreements legislation was to overcome that uncertainty and remove the application of the GST to planning agreements as far as possible. However, independent advice should be sought on the GST implications of entering into any sort of agreement in the planning process and on a case specific basis.

About this practice note

This practice note is made for the purposes of clause 25B(2) of the *Environmental Planning and Assessment Regulation 2000*.

The purpose of this practice note is to assist planning authorities, developers, and others in the preparation of planning agreements under s93F of the *Environmental Planning and Assessment Act 1979*, and to understand the role of planning agreements in the planning process.

Section 93F and other provisions in Subdivision 2 of Division 6 of Part 4 of the *EP&A Act* relating to planning agreements were inserted by the *Environmental Planning and Assessment Amendment (Development Contributions) Act 2005*. Related provisions were inserted into the *Regulation* by the *Environmental Planning and Assessment Amendment (Development Contributions) Regulation 2005*. The amendments to the *EP&A Act* and *Regulation* took effect on 8 July 2005. Those amendments, together with this practice note, form the broad planning agreements framework for NSW.

This practice note is not legally binding. In some cases it may advocate greater restrictions on the content and use of planning agreements than is provided for in the *EP&A Act* and *Regulation*. However, the *EP&A Act* and *Regulation* provide only a broad legislative framework for planning agreements, whereas this practice note seeks to provide best practice guidance in relation to their use. It also sets out various templates designed to standardise planning agreements documentation in order to foster efficient systems. It is intended, therefore, that planning authorities, developers, and others will follow this practice note to the fullest extent possible.

The remainder of this practice note is structured as follows:

- **Part 2** provides a brief overview of current practices relating to the use of agreements in the planning process in NSW and the recommendations of the Ministerial Taskforce that lead to amendments to the *EP&A Act* and *Regulation* to provide for a statutory system of planning agreements for the State,
- **Part 3** summarises the legislative framework for planning agreements established by the *EP&A Act* and *Regulation*,
- **Part 4** provides best practice guidelines in relation to planning agreements by identifying and explaining key public interest and probity considerations and fundamental principles relating to the use of planning agreements, and setting out a broad policy framework and basic statutory procedures for negotiating, entering into and administering planning agreements.
- **Part 5** provides examples of the possible use of planning agreements.
- **Attachments A to C** set out several template documents, including a template planning agreement for use in agreements between councils and developers.

Terminology

The introduction of new statutory processes, such as the new statutory system of planning agreements under Division 6 of Part 4 of the *EP&A Act*, invariably lead to the introduction of new terminology that can assist clear and efficient communication.

In this practice note, the following terminology is used to convey several key concepts in relation to planning agreements:

- **development contribution** means the kind of 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
- **planning benefit** means a development contribution that confers a net public benefit, that is, a benefit that exceeds the benefit derived from measures that would address the impacts of particular development on surrounding land or the wider community
- **public facilities** means public infrastructure, facilities, amenities and services
- **planning obligation** means an obligation imposed by a planning agreement on a developer requiring the developer to make a development contribution

- **public** includes a section of the public
- **public benefit** is the benefit enjoyed by the public as a consequence of a development contribution.

Up-dates to this practice note

It is intended that 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 2 - Overview of current trends and practices¹

Negotiation and agreement between planning authorities and developers to exact public benefits from the planning process are now widespread. However, practices are largely unregulated. The negotiation process often occurs without the involvement of all interested stakeholders, and agreements are entered into without effective public participation.

The levying of s94 contributions and the imposition of conditions of development consent requiring works-in-kind also frequently involve significant negotiation between consent authorities and developers, despite the public impression that such contributions are obtained through strict adherence to the formal processes under the *EP&A Act* and *Regulation*.

There are a number of apparent reasons why the use of agreements in the planning process to exact public benefits has become widespread. These include:

- planning authorities are under increasing pressure from local communities to ensure that development produces targeted public benefits over and above measures to address the impact of development on the public domain,
- development consent conditions, including s94, are ill-equipped to produce such benefits as they are primarily designed to mitigate the external impacts of development on surrounding land and communities,
- as developers increasingly appreciate how their own developments benefit from the provision of targeted public facilities, they are seeking greater involvement in determining the type, standard and location of such 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 targeted public benefits, including a means by which communities can agree to the redistribution of the costs and benefits of development in order to realise their specific preferences for the provision of public benefits,
- agreements can provide enhanced and more flexible infrastructure funding opportunities for planning authorities, subject always to good planning implementation.

Further, planning agreements provide a flexible framework under which the State and local government can share responsibility for the provision of infrastructure in new release areas or in major urban redevelopment projects. Planning agreements permit particular governance arrangements that suit particular cases and foster the provision of infrastructure by the different levels of government in an efficient, co-operative and co-ordinated way.

Part 3 - Outline of statutory framework

¹ This Part is taken from Taylor, L., *Bargaining for Developer Contributions in NSW*, A Research Thesis for the Degree of Doctor of Philosophy, Macquarie University 2000.

Nature of planning agreements

Subdivision 2 of Division 6 of Part 4 of the *EP&A Act* sets out a statutory system of planning agreements in NSW.

Section 93F(1) provides that a planning agreement is a voluntary agreement or other arrangement between one or more planning authorities and a developer under which the developer agrees to make development contributions towards a *public purpose*.

Who is a planning authority?

Section 93C defines a *planning authority* to mean a council, the Minister, the Ministerial corporation constituted under s8(1) of the *EP&A Act*, a development corporation within the meaning of the *Growth Centres (Development Corporations) Act 1974* or a public authority declared by the regulations to be a planning authority.

Clause 25A of the *EP&A Regulation* declares all public authorities to be planning authorities for this purpose.

Who is a developer?

A *developer* is a person who has sought a change to an environmental planning instrument (which includes the making, amendment or repeal of an instrument (s93F(11)), or who has made or proposes to make a development application, or who has entered into an agreement with or is otherwise associated with such a person.

Additional parties to a planning agreement

Section 93F(7) provides that any Minister or public authority or other person approved by the Minister for Infrastructure and Planning is entitled to be an additional party to a planning agreement and to receive a benefit on behalf of the State.

Joint planning agreements

Planning authorities may enter into joint planning agreements.

Section 93F(8) provides that a council is not precluded from entering into joint planning agreements with another council or other planning authority merely because it applies to land not within, or any purposes not related to, the area of the council.

Types of development contributions authorised by planning agreements

Development contributions under a planning agreement can be monetary contributions, the dedication of land free of cost, any other material public benefit, or any combination of them, to be used for or applied towards a public purpose.

Section 93F(4) provides that a provision of a planning agreement is not invalid by reason only that there is no connection between the development and the object of expenditure of any money required to be paid under the provision.

Definition of *public purpose*

Public purpose is defined in s93F(2) to include the provision of, or the recoupment of the cost of providing public amenities and public services (as defined in s93C), affordable housing, transport or other infrastructure. It also includes the funding of recurrent expenditure relating to such things as the monitoring of the planning impacts of development and the conservation or enhancement of the natural environment.

Mandatory contents of planning agreements

Section 93F requires planning agreements to include provisions specifying:

- (a) a description of the land to which the agreement applies,
- (b) a description of the change to the environmental planning instrument, or the development, to which the agreement applies,
- (c) the nature and extent of the development contributions to be made by the developer under the agreement, and when and how the contributions are to be made,
- (d) whether the agreement excludes (wholly or in part) the application of s94 or s94A to particular development,
- (e) if the agreement does not exclude the application of s94 to a development, whether benefits under the agreement may or may not be considered by the consent authority in determining a contribution in relation to that development under s94,
- (f) a dispute resolution mechanism, and
- (g) the enforcement of the agreement by a suitable means, such as the provision of a bond or bank guarantee, in the event of a breach by the developer. (Consideration should be given to the type of security which is appropriate to the circumstances of the particular development).

The *EP&A Act* does not preclude a planning agreement containing other provisions that may be necessary or desirable in particular cases, except those provisions mentioned immediately below.

Limitations on the contents of planning agreements

Section 93F(9) precludes a planning agreement from imposing an obligation on a planning authority to grant development consent or to exercise a function under the *EP&A Act* in relation to a change to an environmental planning instrument.

Section 93F(10) provides that a planning agreement is void to the extent, if any, to which it authorises anything to be done in breach of the *EP&A Act*, or an environmental planning instrument or a development consent applying to the land to which the agreement applies.

Provisions of planning agreements relating to s94 or s94A

A planning agreement may wholly or partly exclude the application of s94 or s94A to development that is the subject of the agreement.

Section 93F(5) provides that, in such a case, a consent authority is precluded from imposing a condition of development consent in respect of that development under s94 or s94A except to the extent that any part of those sections are not excluded by the agreement.

A planning agreement may exclude the benefits under the agreement from being considered under s94 in its application to development.

Section 93F(6) provides that in such a case, s94(6) does not apply to any such benefit. Section 94(6) provides that if a consent authority proposes to impose a condition under s94 in respect of development, it must take into consideration any land, money or other material public benefit that the applicant for development consent has elsewhere dedicated free of cost to the consent authority or previously paid to the consent authority, other than a benefit provided as a condition of development consent granted under the *EP&A Act*, or a benefit excluded from consideration under s93F(6).

Application of development contributions obtained under a planning agreement

Sections 93E(1) and (4) require that a planning authority is to hold any monetary contribution paid in accordance with a planning agreement, together with any additional amount earned from its investment, for the purpose for which the payment was required and apply it towards that purpose within a reasonable time.

Section 93E(3) contains a similar requirement in respect of land dedicated in accordance with a planning agreement.

Limitation on provisions of environmental planning instruments

Section 93I(1) invalidates any provision of an environmental planning instrument made after the commencement of that section that *expressly* requires a planning agreement to be entered into before a development application can be made, considered or determined, or that expressly prevents a development consent from being granted or having effect unless or until a planning agreement is entered into.

However, s93D provides that Division 6 of Part 4 of the *EP&A Act* (other than s93I) does not derogate from or otherwise affect any provision of an environmental planning instrument, whether made before or after the commencement of the section, that requires satisfactory arrangements to be made for the provision of particular kinds of public infrastructure, facilities or services before development is carried out.

Determination of development applications

Section 79C(1)(a)(iia) of the *EP&A Act* requires a consent authority, when determining a development application, to take into consideration, so far as is relevant to the proposed development, any planning agreement that has been entered into under s94F or any such draft agreement offered by a developer. Section 79C(1)(d) requires the consent authority to take into consideration any public submissions made in respect of the planning agreement or draft planning agreement.

Section 93I(2) precludes a consent authority from 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 to be entered into as a condition of a 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 sought by the developer for the purposes of making the development application.

Public notice of planning agreements

Section 93G(1) precludes a planning agreement from being entered into, amended or revoked unless public notice is given of the proposed agreement, amendment or revocation.

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Clause 25D of the *EP&A Regulation* makes provision for public notice to be given of an agreement to enter, amend or revoke a planning agreement together with any public notice required under the *EP&A Act* for the relevant proposed change to a local or regional environmental plan or development application.

Clause 25E(1) of the *EP&A Regulation* requires the preparation of an explanatory note by a planning authority which proposes to enter into a planning agreement or an agreement to amend or revoke a planning agreement.

Clause 25E(3) provides that the explanatory note must be prepared jointly with the other parties proposing to enter into the planning agreement.

Clause 25E(4) makes provision for separate explanatory notes in certain circumstances if there are two or more planning authorities involved in the agreement.

Clause 25E(7) provides that a planning agreement may provide that the explanatory note may not be used to assist in construing the agreement.

Provision of information about planning agreements

Sections 93G(3) and (4) apply where the Minister and a council, respectively, are not party to a planning agreement and require the relevant planning authority that is party to the agreement to give certain information to the Minister or the council as relevant within 14 days after the agreement is entered into, amended or revoked.

Clause 25D(6) of the *EP&A Regulation* provides that if a council is not a party to a planning agreement that applies to its area, a copy of the explanatory note must be provided to the Council at the same time as the material under s93G(4) is provided.

Section 93G(5) requires a planning authority that has entered into a planning agreement, while the agreement is in force, to include in its annual report certain particulars relating to the planning agreement during the year to which the report relates.

Clauses 25F and 25G of the *EP&A Regulation* make provision for the keeping and public inspection of planning agreement registers. A council must keep a planning agreement register of any planning agreements that apply to the area of the council. The Director-General must keep a planning agreement register of any planning agreements entered into by the Minister.

Clause 25H of the *EP&A Regulation* makes provision for planning authorities other than the Minister or a council to make planning agreements to which those authorities are party available for public inspection.

Registration of planning agreements

Sections 93H(1) and (4) permit a planning agreement or any amendment or revocation of a planning agreement to be registered if each person with an estate or interest in the land agrees to its registration.

Section 93H(2) requires the Registrar-General to register a planning agreement on its lodgement by a planning authority in a form approved by the Registrar-General.

Section 93H(3) provides that a planning agreement that has been registered under s93H is binding on and enforceable against the owner of the land from time to time as if each owner for the time being had entered into the agreement.

No appeals to the Land and Environment Court

Section 93J(1) expressly excludes a person from appealing to the Land and Environment Court against the failure of a planning authority to enter into a planning agreement or against the terms of a planning agreement.

Jurisdiction of the Land and Environment Court to enforce planning agreements

Section 93J(2) provides that the removal by s93J(1) of an appeal to the Land and Environment Court does not affect the jurisdiction of the Court under section 123 of the *EP&A Act*. Section 123(1) provides that any person may bring proceedings in the Court for an order to remedy or restrain a breach of '*this Act*', whether or not any right of that person has been or may be infringed by or as a consequence of that breach. Section 122(b)(v) provides that in s123 a reference to *this Act* includes a reference to a planning agreement referred to in s93F.

Determinations or directions by the Minister

Section 93K authorises the Minister for Infrastructure and Planning, generally or in any particular case or class of cases, to determine or direct any other planning authority as to the procedures to be followed in negotiating a planning agreement, the publication of those procedures, or any standard requirements with respect to planning agreements.

Commencement and amendment

A planning agreement will take effect in accordance with its terms. Ordinarily, the obligation to perform an agreement will arise, in accordance with the terms of the agreement, when the development to which it relates is commenced.

Clause 25C(2) of the *EP&A Regulation* authorises a planning agreement to specify that a planning agreement does not take effect until the happening of certain particular events.

Clause 25C(3) of the *EP&A Regulation* provides that a planning agreement can be amended or revoked by further agreement in writing signed by the parties (including by a subsequent planning agreement).

Form of planning agreements

A planning agreement must be in writing and signed by all of the parties to the agreement. A planning agreement is not entered into until it is so signed.

Part 4 - Best practice guidelines

Public interest and probity considerations²

² This section is taken from Taylor, L., *Bargaining for Developer Contributions in NSW*, A Research Thesis for the Degree of Doctor of Philosophy, Macquarie University 2000.

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 to inform the principles, policies and procedures contained in the best practice guidelines relating to planning agreements discussed later in this Part.

Problems inherent in the use of development agreements concern whether an agreement is in the public interest. Generally speaking, the public interest is directed towards securing the fair imposition of planning control for the benefit of the community and as between one developer and another. For this reason, the parties to a planning agreement do not enjoy the same bargaining freedom as do the parties to a commercial contract.

In particular cases, the public interest implicated by a planning agreement 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. Benefit to the developer is not a primary consideration.

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 s94 or s94A to development gives a planning authority scope for limited 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 the costs and benefits of development will be equitably distributed within the community. Planning agreements may facilitate the provision of public benefits that do not relate to development. Further, 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.

Safeguards in the form of a system of principles, policies and procedures relating to planning agreements are needed to protect the public interest and the integrity of the process, and to guard against misuse of planning discretions and processes. Such misuse has the potential to seriously undermine good comprehensive planning, and public confidence in the planning system.

A system that ensures that planning discretions are exercised openly, honestly, freely and fairly in any given case and fairly and consistently across the board will serve to protect planning agreements from the natural suspicion that changes to environmental planning instruments and development consents can be bought by the highest bidder through planning agreements.

Misuse of planning agreements can occur for a variety of reasons and produce a variety of unwelcome results. Some examples are:

- where a planning authority seeks inappropriate public benefits because of opportunism or to overcome revenue-raising or spending limitations that exist elsewhere.
- where insufficient analysis of the likely planning impacts of proposed development by a planning authority 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 outweigh the public interest.
- because 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 is somehow fettered through a planning agreement.

The potential for misuse also exists where a planning authority, acting as consent authority or in another regulatory capacity in respect of development, is both party to a planning agreement and also a development joint venture partner under the agreement. 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 for a generally applicable test for determining the acceptability of a planning agreement, which embraces amongst other things concepts of reasonableness,
- contain specific measures to protect the public interest and prevent misuse of planning agreements and,
- be open with published rules and accessible procedures,
- provide for effective formalised public participation,
- extend fairness to all parties affected by a planning agreement,
- guarantee regulatory independence of the planning authority.

The generally applicable *acceptability test* referred to above should require that planning agreements:

- are directed towards proper or legitimate planning purposes, ordinarily ascertainable from 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 relevant purposes and outcomes and securing the benefits, and
- protect the community against planning harm.

Formal public participation in a planning agreements system as referred to above is fundamental as it is the tool which legitimates the redistribution of the costs and benefits of development through planning agreements. That is, it is the means by which the community can express its preference to bear some of the costs of particular development on the public domain in order to share in wider community benefits provided under an agreement.

Fundamental principles

Planning agreements provide a facility for planning authorities and developers to negotiate flexible outcomes in respect of development contributions. They are a means to enable the NSW planning system to deliver sustainable development, through which key economic, social and environmental objectives of the State and local government can be achieved.

Planning agreements authorise development contributions for a variety of public purposes, some of which extend beyond the scope of s94 or s94A 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.

As such, the objective of planning agreements is not limited to internalising the potential costs of development on the public domain. Rather, they facilitate the provision of planning benefits by developers. A planning agreement that provides for a planning benefit involves an agreement by the developer to contribute 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. This means that contributions made by developers towards public purposes that are wholly unrelated to their development should be discouraged, and that 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 exacted 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.

Agreements between planning authorities and developers can be put in place outside the planning system to secure development contributions that are wholly unrelated to development or that do not make development acceptable.

Fundamental principles governing the participation by planning authorities in planning agreements include:

- planning agreements must be governed by the fundamental principle that planning decisions may not be bought or sold,
- planning authorities should never 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 to overcome revenue-raising or spending limitations to which they are subject 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, nor should they attribute disproportionate weight to a planning agreement³,

³ See *Tesco Stores v Secretary of State for the Environment & Ors.* [1995] 1 WLR 759, where the House of Lords held in relation to planning agreements under s106 of the *Town and Country Planning Act 1991* (UK) that if a planning obligation is completely unrelated to the development, it could not be a material consideration in the determination of an application and could be regarded only as an attempt to buy development consent. But if it has some connection with the proposed development which is not *de minimis*, then regard must be had to it. But the extent, if any, to which it should affect the decision is a matter entirely within the discretion of the decision-maker, who, in exercising that discretion, was entitled to have regard to established planning policy.

- planning authorities should not allow the interests of individuals or interest group to outweigh the public interest when considering planning agreements,
- planning authorities should not improperly rely on their peculiar 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, and
- planning authorities should avoid, wherever possible, being party to planning agreements where they also have a stake in the development the subject of the agreements.

Policy and practice framework

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.

Acceptability test. It is of paramount importance that all planning agreements should meet the acceptability test set out in the previous Part. Whether a particular planning agreement is acceptable and reasonable is a matter of planning judgement to be exercised in the circumstances of the case in the light of particular State, regional or local planning considerations, as appropriate.

Efficient negotiation systems. Planning authorities, particularly councils, should implement measures that aim to create fast, predictable, transparent and accountable negotiation systems of planning agreements. Such 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.

Planning agreements policies and procedures. Planning authorities, particularly councils, should publish policies and procedures concerning their use of planning agreements. These should set out:

- the circumstances in which the planning authority would ordinarily consider entering into a planning agreement,
- the matters ordinarily covered by a planning agreement,
- the form of development contributions ordinarily sought under a planning agreement,
- the kinds of public benefits ordinarily 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,
- the procedures for negotiating and entering into planning agreements,
- the planning authority's policies on other matters relating to planning agreements, such as their review and modification, the discharging of the developer's obligations under agreements, the circumstances, if any, in which refunds may be given, dispute resolution and enforcement mechanisms, and the payment of costs relating to the preparation, negotiation, execution, monitoring and other administration of agreements.

More detailed policies and procedures can be prepared by planning authorities to supplement the high level policies and procedures.

Planning agreements or conditions of development consent? There are no general policy restrictions on the circumstances in which planning agreements may be used, including whether they may be used instead of 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. This entails unnecessary duplication and could frustrate the developer's right of appeal to the Land and Environment Court against the conditions.

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 may have a GST liability. The imposition of a condition under s93I requiring a planning agreement to be entered into may overcome the potential GST liability attaching to a planning agreement, but legal advice should still be obtained in every case.

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.

Planning benefits. The provision of planning benefits for the wider community through planning agreements necessarily involves capturing part of development profit for that purpose. 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 as a form of taxation on development. Accordingly, planning benefits, though primarily directed to the wider community, must never be wholly un-related to development contributing the benefit.

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 terms of both the development itself and related external public benefits⁴.

⁴ See the decision of the House of Lords in *Tesco Stores v Secretary of State for the Environment & Ors.* [1995] 1 WLR 759.

Relationship between planning agreements and SEPP No.1. The benefits provided under planning agreements should never be used to justify a dispensation with applicable development standards under *State Environmental Planning Policy No. 1 – Development Standards* in relation to development.

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.

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. This, however, 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. Councils are encouraged to use the template planning agreement at Attachment A, wherever suitable.

Involvement of independent third parties. Independent third parties can be potentially used in a variety of situations involving planning agreements. Planning authorities and developers are encouraged to make appropriate use of them. 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 in the course of negotiations,
- where sensitive financial or other confidential information must be verified or established in the course of negotiations,
- where facilitation of complex negotiations are required in relation to large projects or where numerous parties or stakeholders are involved,
- where dispute resolution is required under a planning 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.

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 so as to avoid duplication of resources and costs.

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 to which the agreement applies,
- a material modification to the development consent to which an agreement relates,
- the lapsing of the development consent to which an agreement relates,
- the revocation or modification of a development consent to which an agreement relates by the Minister,
- other material changes in the overall planning circumstances of an area affecting the operation of the planning agreement.

Costs. There is no comprehensive policy on the extent to which planning authorities may recover their costs of preparing, negotiating, executing, monitoring and otherwise administering planning agreements. However, cost recovery should be based on reasonable charges and generally should be shared equally with the developer.

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 (includes 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 must be considered, so far as relevant, when deciding to make changes to environmental planning instruments to which they relate or when determining development applications to which planning agreements relate.

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 *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 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 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 the loss of or damage to a public amenity, service, resource or asset that will or is likely to result from the carrying out of development the subject of the agreement.

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

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 assist in ameliorating against 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 the subject of the agreement. 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 and the like.

The public benefit provided under the agreement could be the provision, extension or augmentation 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 be used to secure the provision of planning benefits from development. That is, through a planning agreement, development may provide an overall net benefit to the wider community rather than merely address the more direct impacts of the development on surrounding land or 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 the subject of a planning agreement in order to allow the wider community, the planning authority and the developer to realise their specific preferences for the provision of public benefits in connection with the development.

Planning benefits may take the form of additional or better quality public facilities than is required to meet 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 the latter 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 perpetuity. In addition, it may bind future owners in a development to make periodic payment to the fund or otherwise in respect of the recurrent costs of the item.

For example, a planning agreement may fund the recurrent costs of habitat protection in respect of development that will have a demonstrated impact on sensitive habitat which is nearby to the development. 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

(Between Council and Developer)

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

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

8 Registration of this Agreement

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

9 Review of this Agreement

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

10 Dispute Resolution

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

11 Enforcement

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

12 Notices

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

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

Council

Attention: ##

Address: ##

Fax Number: ##

Email: ##

Developer

Attention: ##

Address: ##

Fax Number: ##

Email: ##

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

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

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

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

(c) If it is sent by fax, as soon as the sender receives from the sender's 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

Wingecarribee Shire Council

Planning Agreements Policy 2005

Dated: ##

Executed as an Agreement: ##

Attachment B

Template explanatory note

Environmental Planning and Assessment Regulation 2000

(Clause 25E)

Explanatory Note

Draft Planning Agreement

Under s93F of the Environmental Planning and Assessment Act 1979

1. Parties

(Planning Authority)

(Developer)

2. Description of Subject Land

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

4. Summary of Objectives, Nature and Effect of the Draft Planning Agreement

5. Assessment of the Merits of the Draft Planning Agreement

The Planning Purposes Served by the Draft Planning Agreement

How the Draft Planning Agreement Promotes the Objects of the Environmental Planning and Assessment Act 1979

How the Draft Planning Agreement Promotes the Public Interest

For Planning Authorities:

- (a) Development Corporations - How the Draft Planning Agreement Promotes its Statutory Responsibilities
- (b) Other Public Authorities - How the Draft Planning Agreement Promotes the Objects (if any) of the Act under Which it is Constituted
- (c) Councils – How the Draft planning Agreement Promotes the Elements of the Council's Charter
- (d) All Planning Authorities – Whether the Draft Planning Agreement Conforms with the Authority's Capital Works Program

Wingecarribee Shire Council

Planning Agreements Policy 2005

The Impact of the Draft Planning Agreement on the Public or Any Section of the Public

Other Matters

Signed and Dated by All Parties

Attachment C

Template condition of development consent

(Where planning agreement accompanied a development application)

##. Pursuant to section 80A(1) of the *Environmental Planning and Assessment Act 1979*, the planning agreement that relates to the development application the subject of this consent must be entered into before *[Insert Requirement]*.

(Where planning agreement accompanied an application to change an environmental planning instrument)

##. Pursuant to section 80A(1) of the *Environmental Planning and Assessment Act 1979*, the planning agreement that accompanied the application made by *[Insert Name of Developer]* to *[Insert Name of Planning Authority]* dated *[Insert Date]* relating to *[Specify Name of Environmental Planning Instrument]* for the purpose of the making of the development application the subject of this consent.