



THE HILLS PLANNING AGREEMENT POLICY

Policy 27/2021-2024

DATE

Ordinary Meeting of Council 26 September 2023

POLICY NO:	27/2021-2024
LEGISLATIVE REQUIREMENTS	<i>Environmental Planning and Assessment Act 1979 (NSW) and Environmental Planning and Assessment Regulation 2021 (NSW).</i>
RESPONSIBILITY:	Forward Planning
OBJECTIVE:	To provide guidance and establish criteria by which Developers may make an application to enter into a Planning Agreement with Council to commit to providing funding or other means towards the provision of new infrastructure, or improvements to existing infrastructure to benefit the Community.
REVIEW:	Within the first 12 months of each term of Council or as required.

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1. LEGISLATIVE FRAMEWORK

1.1. Name of This Policy

This Policy is known as The Hills Shire Council Planning Agreements Policy (“Policy”).

1.2. Application of this Policy and Commencement

This Policy applies to planning agreements, including the making and assessment of an offer to enter into a planning agreement. This Policy was endorsed by resolution of the Council on 26 September 2023.

1.3. What is a Planning Agreement

A planning agreement is a voluntary and legally binding agreement, entered into between a planning authority e.g. Council (or two (2) or more planning authorities) and a Developer, under which the Developer is required to dedicate land free of cost, pay a monetary contribution, or provide any other material public benefit, or any combination of them, to be used for or applied towards one (1) or more public purposes. Planning agreements may also be referred to as ‘voluntary planning agreements’ or ‘VPAs’.

1.4. Objectives of Planning Agreements

The objectives of planning agreements will be dictated by the circumstances of each case as well as relevant Council policies. However, as a general indication, planning agreements may be directed towards achieving the following broad objectives:

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

1.5. Legislative Context

The current legal and procedural framework for planning agreements is governed by:

- (a) Subdivision 2 of Division 7 of Part 7 of the EP&A Act;
- (b) Division 1 of Part 9 of the EP&A Regulation;
- (c) The *Local Government Act 1993* (NSW).
- (d) Any applicable Local Environmental Plan or State Environmental Planning Policy;
- (e) Any applicable Contributions Plan or draft Contributions Plan; and
- (f) this policy,

(each as amended from time to time).

In addition to the above, the Department of Planning and Environment (DPE) has issued a Planning Agreements Practice Note – February 2021 (the Practice Note) prepared pursuant to Section 203(6) of the EP&A Regulation. Under Section 203(7) of the EP&A Regulation, Council is required to consider any relevant practice notes as part of negotiating and entering into planning agreements. Accordingly, Council has relied upon the contents of the February 2021 Practice Note to inform this Policy and this policy has been prepared in accordance with, and is not inconsistent with, the Practice Note. If there is any inconsistency between that Practice Note and this policy, then this policy applies to the extent of that inconsistency.

Council will also be guided by all planning circulars issued by DPE from time to time, including DPE Planning Circular PS 21-002 'Reporting and accounting requirements for infrastructure contributions' issued on 12 February 2021.

Many new developments create the need for additional public amenities and public services. Division 7.1 of Part 7 of the EP&A Act empowers Council to require the proponent of new development to contribute towards the provision of these public services and amenities and planning agreements are one mechanism to achieve this outcome.

Entry into a planning agreement will not exclude the application of Section 7.11, 7.12 or 7.24 of the EP&A Act in respect of development unless so excluded in accordance with the EP&A Act and stipulated in the planning agreement.

Council will not agree to a planning agreement excluding the operation of s7.24 of the EP&A Act unless the Minister or the appropriate development corporation approves that exclusion.

1.6. Who Can Enter into a Planning Agreement

Section 7.4 of the EP&A Act sets out the circumstances under which a planning agreement may be entered into by Council. It provides that a planning agreement may be made between a planning authority (or two (2) or more planning authorities) and a person (Developer):

- a) who has sought a change to an environmental planning instrument, or
- b) who has made, or proposes to make, a development application or application for a complying development certificate, or
- c) who has entered into an agreement with, or is otherwise associated with, a person to whom paragraph (a) or (b) applies, under which the Developer is required to dedicate land free of cost, pay a monetary contribution, or provide any other material public benefit, or any combination of them, to be used for or applied towards a public purpose.

1.7. Local Strategic Planning Statement

In considering whether to accept an offer to enter into a planning agreement, Council will have regard to its then current Local Strategic Planning Statement (LSPS), and in particular whether the proposed planning agreement is consistent with objectives of the LSPS.

2. PURPOSE OF THIS POLICY

2.1. Objectives of this Policy

The purpose of this policy is to provide a fair, transparent and standard procedure and framework for the making and assessment of an offer to enter into a planning agreement.

This document provides an overview of the legal requirements of planning agreements under the applicable legislation and guidelines for negotiating planning agreements as well as the approval process for planning agreements internally within Council.

In particular:

- (a) the circumstances in which the Council would consider entering into a planning agreement;
- (b) the matters ordinarily covered by a planning agreement;
- (c) the form of development contributions ordinarily sought under a planning agreement;

- (d) the kinds of public benefits ordinarily acceptable to Council and whether they involve a planning benefit; and
- (e) the procedures for negotiating and entering into planning agreements.

2.2. Specific Purposes of this Policy

The specific purposes of this Policy are to:

- a) Establish a fair, transparent, and accountable framework governing the preparation and use of planning agreements by Council.
- b) Expand the range and extent of development contributions that may be made by development towards public facilities and other public benefits in Council's local government area.
- c) Set out Council's specific policies and procedures relating to the use of planning agreements within Council's local government area.
- d) To provide a framework that gives stakeholders in development and members of the community greater involvement in determining the type, standard and location of public facilities and other public benefits.
- e) Outline procedures for public notification to allow the community to gain an understanding of the benefits of proposed planning agreements.
- f) Specify the information to be submitted to Council for the purpose of considering an offer to enter into a planning agreement.
- g) Adopt innovative and flexible approaches to the provision of infrastructure and other public benefits through the use of planning agreements in a manner that is consistent with Council's Community Strategic Plan and LSPS.
- h) Allow Council to consider planning agreements which achieve planning benefits to the wider community.

2.3. Policy not Binding

This policy is not legally binding and Council is not bound to strictly apply this policy for every planning agreement entered into by Council. However, Council will generally seek to apply this policy, as far as reasonably practicable, in relation to planning agreements (including their negotiation).

3. TERMS AND DEFINITIONS

Community infrastructure	means public amenities and public services.
Contributions Plan	means a public document prepared by a Council under to Section 7.11 and/or Section 7.12 of the EP&A Act.
Council	means The Hills Shire Council.
Developer	a person/entity who has made a planning application to Council and is seeking to enter into a planning agreement for the purpose of this Policy.
Development Application	has the same meaning as the EP&A Act.
Development Consent	has the same meaning as the EP&A Act.
Development contribution	means the payment of a monetary contribution, the dedication of land, the provision of a material public benefit (aka the carrying out of Works-in-Kind) or any combination of these.

DPE	Department of Planning and Environment.
EP&A Act	means the <i>Environmental Planning and Assessment Act 1979</i> (NSW).
EP&A Regulation	means the <i>Environmental Planning and Assessment Regulation 2021</i> (NSW).
Explanatory note	means a written statement associated with a draft planning agreement in accordance with Section 205 of the EP&A Regulation.
Instrument change	means a change to an environmental planning instrument.
LEP	Local Environmental Plan.
Material Public Benefit	has the same meaning as Works-in-Kind.
Planning Benefit	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.
Practice Note	means the Practice Note on Planning Agreements published by the Department of Planning and Environment in February 2021.
Provision of public infrastructure	includes: <ul style="list-style-type: none"> • the provision, extension and augmentation of (or the recoupment of the cost of providing, extending or augmenting) public infrastructure, and • the funding of recurrent expenditure relating to the provision, extension and augmentation of public infrastructure, and • the conservation or enhancement of the natural environment, and • any action of a planning authority in connection with the exercise of any statutory function under this Act, including the carrying out of any research or investigation and the preparation of any report, study or instrument.
Public benefit	is the benefit enjoyed by the public as a consequence of a development contribution.
Public purpose	means any one (1) or more of the following (without limitation): <ul style="list-style-type: none"> • the provision of (or the recoupment of the cost of providing) public amenities, public services, affordable housing, and transport or other infrastructure relating to land. • the funding of recurrent expenditure relating to the provision of public amenities or public services, affordable housing or transport or other infrastructure. • the monitoring of the planning impacts of development; • the conservation or enhancement of the natural environment. • any other public purposes set out in section 7.4(2) of the EP&A Act, as amended from time to time.
Regional infrastructure contributions (Special Infrastructure Contributions and/or Housing and Productivity Contributions)	means any contribution so directed by the Minister under Section 7.24 of the EP&A Act.

SEPP

State Environmental Planning Policy.

Works-in-Kind

means the whole or part undertaking of a work or provision of a facility, public amenity or service and/or embellishment of land that is specifically included within a works schedule in a contributions plan, in lieu of the part or full payment of either a monetary contribution or the dedication of land that is required as a condition of development consent.

Note: Unless otherwise specified, this Policy adopts the terms and definitions as used in the EP&A Act and EP&A Regulation and the Planning Agreements Practice Note, February 2021.

4. OVERVIEW OF PLANNING AGREEMENTS

4.1. Circumstances for Preparing a Planning Agreement

Planning Agreements may be entered into with respect to rezoning of land, development applications, other developments with respect to which Council is not the approval authority within The Hills Local Government area, or in any other circumstances permitted under the EP&A Act.

The acceptance of an offer to enter into a planning agreement is at the absolute discretion of Council. Council is under no obligation to enter into negotiations with any person with respect to a planning agreement or enter into a planning agreement offered by a proponent or applicant. Planning agreements are voluntary, but once entered, they become legally binding contracts that apply to the development and the land to which they relate.

A planning agreement is normally, but not exclusively, entered into in one (1) of the following circumstances:

- 1) In relation to a change to a planning instrument (a SEPP or LEP).
- 2) In relation to a development application, where the Developer agrees to provide development contributions in lieu of, or in addition to, contributions under Section 7.11, 7.12 and 7.24 of the EP&A Act.
- 3) In relation to a development where there is a shortfall in the provision of a particular item, such as car parking, or open space.

4.2. Timing of Development Contributions

A planning agreement must contain a time, or times, by which each development contribution required to be provided under the planning agreement. The timing of the provision of each development contribution must be acceptable to Council, which must require that each development contribution is provided by a time which ensures that the public need for the relevant item is met.

4.3. Pooling of Funds

Where a 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. Pooling may be appropriate to allow public benefits, particularly essential infrastructure, to be provided in a fair and equitable way.

4.4. Relationship of a Planning Agreement to Contribution Plans

A planning agreement differs from development contributions under Section 7.11 or Section 7.12 of the EP&A Act in that a planning agreement may require the Developer to construct items itself, at its cost, rather than pay a monetary sum to Council, with Council undertaking the construction of the relevant item. Under a Section 7.11 contributions plan Council can only require a Developer to pay a monetary contribution, or dedicate land free of charge, or both.

A planning agreement may be entered into where there is already a contributions plan in place, or it may be entered into where there is no current contributions plan.

A planning agreement may or may not exclude, in whole or in part, the application of either or both of Section 7.11 and Section 7.12 of the EP&A Act with respect to the development to which the planning agreement relates, depending on the nature and extent of the development contributions being provided under the planning agreement. This is a matter to be negotiated between Council and a Developer having regard to the circumstances of the case.

In considering whether or not a planning agreement will exclude the application of Section 7.11 or Section 7.12, Council will have regard to the anticipated development and income under the applicable contributions plan and the potential for any exclusion to result in a funding shortfall under that plan. Where a planning agreement is associated with a planning proposal or development application that seeks to enable development uplift beyond that envisaged under the current controls, and the contributions through the planning agreement relate only to that uplift, development contributions under the applicable Section 7.11 or Section 7.12 contributions plan will generally still be required with respect to any yield already anticipated under the current controls.

Where the application of Section 7.11 and Section 7.12 of the EP&A Act are not excluded by a planning agreement, the Council will generally not agree to a provision allowing benefits under the planning agreement to be taken into consideration in determining a development contribution under Section 7.11 or Section 7.12. In this case, any Section 7.11 or Section 7.12 contribution will be levied from future development in full compliance with the Council's relevant Section 7.11 or Section 7.12 plan and the EP&A Act.

5. PRINCIPLES GOVERNING THE USE OF PLANNING AGREEMENTS

Council's use of planning agreements will be governed by the following principles, which have been determined having regard to the Practice Note:

- 1) All planning decisions will be made based on planning grounds alone, irrespective of any material public benefits offered through planning agreements. Development that is unacceptable on planning grounds (including, without limitation, environmental grounds) will not be permitted because of planning benefits offered by developers through planning agreements.
- 2) When considering a development application or instrument change, Council will not give undue weight to a planning agreement.
- 3) A planning agreement cannot impose an obligation to grant development consent or to exercise any function under the EP&A Act in relation to a change to an environmental planning instrument.
- 4) Any exceptions to relevant development standards cannot be addressed by a planning agreement and instead must only be assessed in accordance with the relevant Environmental Planning Instruments.

- 5) Council will not enter a planning agreement unless it is satisfied that the proposed development is acceptable on planning grounds having regard to the objects set out in s1.3 of the EP&A Act and the general heads of consideration set out in s4.15 of the EP&A Act.
- 6) Planning agreements must be underpinned by proper strategic land use and infrastructure planning carried out on a regular basis and must address expected growth and the associated infrastructure demand.
- 7) A consent authority cannot refuse to grant development consent on the grounds that a planning agreement has not been entered into in relation to the proposed development or that the developer has not offered to enter into such an agreement.
- 8) Planning agreements must only be used for a planning purpose and are not a means of revenue raising or overcoming spending limitations wholly unrelated to particular development.
- 9) Value capture should not be the primary purpose of a planning agreement.
- 10) Planning decisions will not be bought or sold through planning agreements.
- 11) Council will not allow planning agreements to improperly fetter the exercise of its functions under the EP&A Act, the EP&A Regulation or any other Act or Regulation.
- 12) Planning agreements must not include public benefits wholly unrelated to the particular development.
- 13) Council will take into consideration whether the public purposes provided by the planning agreement are related to, and not inconsistent with, the Council's public works program as developed from time to time.
- 14) Council will consider whether a planning agreement provides benefits to the wider community and will consider the planning agreement against the public interest.
- 15) Council will not allow the interests of individuals, lobbyists, or interest groups to outweigh the public interest when considering a proposed planning agreement.
- 16) Council will not improperly rely on its position in order to extract unreasonable public benefits from Developers under planning agreements.
- 17) A planning agreement may propose measures that can address planning issues that have been identified with respect to the relevant development application.

6. PROCESS FOR ENTERING INTO A PLANNING AGREEMENT

6.1. Acceptability Test

Council will only agree to accept an offer to enter into a planning agreement after considering whether the planning agreement meets the acceptability test referred to below. The acceptability criteria below are reflective of the Practice Note.

For a planning agreement to be acceptable to Council it must:

- 1) Be submitted in writing with a formal letter of offer to enter into a planning agreement which is signed by all landowners and/or proposed parties to the agreement and identifies the development application or planning instrument change to which the offer relates.
- 2) Be directed towards legitimate planning purposes, which can be identified in the statutory planning controls and other adopted planning strategies and policies applying to development.

- 3) Provide for public benefits that bear a relationship to the development, that are not wholly unrelated to the development and are located in the locality in which the development is situated.
- 4) Produce outcomes that meet the general values and expectations of the public and protect the overall public interest.
- 5) Provide for a reasonable means of achieving the desired outcomes and securing the benefits.
- 6) Protect the public against unreasonable, adverse environmental or amenity impacts.
- 7) Provide clear details of the nature and extent of the development contributions offered by the developer under the agreement and clearly specify when and how the contributions will be made in the formal offer.
- 8) Be suitable in the context of Council's broader strategic infrastructure planning framework, including all draft or in force Section 7.11 or Section 7.12 Contributions Plans, precinct planning works, other planning agreements and this Policy.
- 9) Not result in a shortfall or deficit under the contributions plan applicable to the development by way of granting exemption from the applicable Section 7.11 or Section 7.12 contributions.

6.2. Matters that Council will Consider

The criteria that Council may take into account when considering whether or not to negotiate a planning agreement with a Developer includes but is not limited to the following:

- 1) Whether planning benefits for the wider community accrue from the planning agreement.
- 2) Whether the public benefits proposed to be provided under the planning agreement meet:
 - a. the demands created by the development for new public infrastructure, amenities, services; and
 - b. the planning objectives of Council.
- 3) Whether the development meets the objectives of Council's LSPS.
- 4) Whether an existing deficiency in the provision of public facilities in the Council's Local Government Area (LGA) is rectified through the planning agreement.
- 5) Whether compensation is required 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.
- 6) The financial impost on Council arising as a result of the provision of the public benefits under the planning agreement, including but not limited to:
 - a. the financial burden on Council with respect to the management and maintenance of any land and facilities provided (including whether any initial or ongoing costs are designated as Council's responsibility); and
 - b. whether recurrent funding of those facilities is required or provided.
- 7) The extent to which Council needs to monitor the planning impacts of development.
- 8) Whether there are any other relevant circumstances that may operate to preclude Council from entering into the proposed planning agreement.

6.3. When Will Planning Agreements be Considered by Council

The Council will consider entering into a planning agreement with a Developer when:

- 1) A Developer voluntarily desires to be a party to such an agreement.
- 2) Alternative means of securing public benefits from the development process (such as Section 7.11 or Section 7.12 contributions) are unwieldy, inappropriate or inferior.
- 3) There is a clear public interest in pursuing a planning agreement.
- 4) The planning agreement would meet the acceptability test as outlined in this Policy.

6.4. Instances where the use of a Planning Agreement may be Relevant to the Development of Land within The Hills Shire LGA

A planning agreement may be relevant to the development of land within The Hills LGA under the following circumstances:

- 1) Where a proposed development is unanticipated by Council or in advance of the completion of detailed planning investigations and as a result, works and facilities to cater for the development have not been identified. Planning agreements can be utilised as a means of providing community infrastructure required to meet the demands generated by new development. In particular, this could occur in association with a planning proposal to amend Council's planning controls to provide development uplift or in association with a development application which seeks to exceed or vary the applicable planning controls, resulting in additional yields.
- 2) Where it is in both Council's and the developer's interest to 'package' a range of development contributions related to a proposed development. This may include contributions otherwise required by a condition of consent under Section 4.17(1)(f) or (h) of the EP&A Act, or other contributions or arrangements described below.
- 3) Where a single landowner or consortium of landowners seeks to undertake holistic and major development of a site or precinct including the provision of all community infrastructure required to support the development.
- 4) Where the owner or owners have an incentive to be directly involved in the delivery of community infrastructure (such as where quicker timeframes for delivery of infrastructure are required for the developer to bring product to the market).
- 5) Where a developer proposes to provide planning benefits to the community. Planning benefits may take the form of community infrastructure additional to, or at a higher standard than, what has been specified under the applicable development control plan, contributions plan and / or engineering specifications. Planning benefits may also take the form of land and works that provide a public benefit enjoyed by the wider community and not just the users or occupants of the development.
- 6) Where Council and a developer can, by negotiation, achieve different and better or more innovative outcomes than can be achieved through imposing direct or indirect contributions.
- 7) Where the existing contributions framework is insufficient to allow for the managing of credits, offsets, works-in-kind, material public benefits, valuation of non-monetary benefits etc. as part of a staged development or in relation to the provision of critical community infrastructure that can be funded by one major developer but will benefit a number of other developers.

- 8) As a means of securing recurrent funding for community infrastructure, whether the infrastructure is located within or outside the site the subject of the instrument change or development application. Where the infrastructure primarily serves the development to which the planning agreement relates the arrangement for recurrent funding may be in perpetuity.
- 9) Where public benefits can be secured through negotiation of a planning agreement in association with another Council or authority.

7. NEGOTIATING A PLANNING AGREEMENT

7.1. Offer to Enter into a Planning Agreement

Council's negotiation system for planning agreements aims to be efficient, predictable, transparent and accountable. In this regard, the process set out in this Policy is based on principles of fairness, co-operation, full disclosure, early warning and agreed working practices and timetables.

Generally, a planning agreement should be offered, negotiated and documented before lodgement of a Development Application or Planning Proposal.

An offer to enter into a planning agreement should:

- 1) Be in writing.
- 2) Be addressed to the General Manager.
- 3) Be signed by or on behalf of all proposed parties to the proposed planning agreement (other than Council).
- 4) Outline in sufficient detail the matters required to be included in a planning agreement as specified in s7.4 (3) of the EP&A Act to allow proper consideration of the offer by the planning authority. Such matters include, but are not necessarily limited to:
 - a. description of the land and the development to which the proposed planning agreement relates;
 - b. description of the development application or change to the environmental planning instrument to which the proposed planning agreement relates;
 - c. description of the nature, extent and timing of contributions proposed to be made by the Developer under the planning agreement;
 - d. assessment of the value of the contributions proposed under the planning agreement;
 - e. whether the planning agreement proposes to exclude (wholly or in part) or does not exclude the application of Section 7.11 or Section 7.12 contributions;
 - f. if the planning agreement does not exclude the application of section 7.11 to the development, whether benefits under the planning agreement are or are not to be taken into consideration in determining a development contribution under section 7.11.
 - g. details of intended dispute resolution procedures; and
 - h. details of the enforcement measures to enable Council to enforce the planning agreement by suitable means, in the event of a breach and how these are intended to operate e.g. securities or bank guarantees.

- 5) Outline in sufficient detail all other key terms and conditions proposed to be contained in the planning agreement.
- 6) Identify if the planning agreement will require an amendment to an existing adopted contributions plan.

7.2. Timing of Offers in Association with Planning Proposals

Under the Local Environmental Plan (LEP) Making Guideline (2022) and Council's Planning Proposal Policy, Council is subject to benchmark timeframes for the assessment of planning proposals, which means there are limited opportunities to negotiate on planning agreements following formal lodgement of the associated planning proposal. The scoping phase for a planning proposal (i.e. 'Pre-lodgement') provides an opportunity for Proponents to present a planning agreement offer to Council officers and receive feedback prior to formal lodgement. It is expected that all discussions, negotiations and offers with respect to planning agreements, as well as the preparation of a proposed planning agreement, would occur as part of the scoping phase. If a Proponent seeks to enter into a planning agreement with Council as part of a planning proposal, it is expected that the proposed planning agreement, prepared in accordance with this Policy and Council's Planning Agreement Template, will be lodged when the planning proposal is formally lodged.

7.3. Steps In the Negotiation Process

The negotiation of a Planning Agreement will generally involve the following key steps:

- 1) Council and the Developer (and any other relevant party) will decide whether to negotiate a planning agreement. In some cases, there may be a land use strategy for a locality, which will inform the preparation of the planning agreement. In making this decision consideration should be given to the Practice Note, relevant Legislation and any relevant policies. The parties should consider whether other planning authorities and / or other persons associated with the development should be additional parties to the planning agreement, such as the Landowner if the Landowner is a different person to the Developer.
- 2) Initial discussions between Council and the Developer would culminate in the submission of a formal offer to enter into a planning agreement by the developer (see Section 7.1).
- 3) Council may seek legal advice on any planning agreement at the commencement of negotiations, even if Council undertakes initial negotiations itself, without its solicitor present.
- 4) Planning agreement offers in association with planning proposals will be considered concurrently with the pre-lodgement assessment (scoping phase) of the planning proposal. Planning agreement offers in association with development applications will be considered concurrently with the assessment of the development application.
- 5) Council officers do not need to report the matter to the elected Council prior to commencing negotiation of a planning agreement.
- 6) Both parties should ensure they appoint a person to represent them in the negotiation of the planning agreement. Council will appoint a Council officer or officers with appropriate delegated authority to negotiate a planning agreement on behalf of the Council. Council may involve an independent person(s) or expert to facilitate or otherwise participate in the negotiations or aspects of it, particularly where this will lead to a better planning outcome. Councillors will not be involved in the face to face

negotiation of a planning agreement but will ultimately be responsible for the approval or rejection of the agreement as part of their duties as Councillors.

- 7) The offer will be assessed by Council officers against the relevant provisions of this Policy, including but not limited to the acceptability test in Section 6.1.
- 8) There will be internal consultation between all of the relevant officers within Council who may have an interest in the planning agreement or anything arising from it. At this stage, Council officers will identify any key, outstanding or unresolved issues for negotiation with the developer. In particular, Council should seek to reach agreement with the Developer as to:
 - (a) the nature and extent of the development contributions to be provided by the Developer under the planning agreement;
 - (b) the estimated value of those development contributions;
 - (c) the time by which each of the development contributions should be provided;
 - (d) whether the planning agreement will exclude, in whole or in part, the application of s7.11 and/or s7.12 of the EPA Act to the Development; and
 - (e) the nature and extent of the development to which the planning agreement will apply.
- 9) The Developer will be advised in writing of any key issues for negotiation and provided with the opportunity to address any outstanding or unresolved issues, by way of submission of an amended formal offer. Council officers will be responsible for negotiating (or coordinating the negotiation of) a planning agreement on a 'without prejudice' basis but do not have delegation to agree to, endorse or enter into a Planning Agreement.
- 10) The parties should undertake further negotiation on the specific terms of the proposed planning agreement as necessary.
- 11) Following negotiations, the Developer should submit to Council a formal, irrevocable and unconditional offer to enter into the planning agreement signed by all external parties. The Developer should also prepare and submit a proposed planning agreement in accordance with this Policy and the Planning Agreement Template (including the Explanatory Note), as adopted by Council from time to time. As noted previously, in the case of planning proposals, the proposed planning agreement must be lodged with the planning proposal application in order to be considered with the planning proposal.
- 12) Council will seek legal advice (or advice from another relevant third party) on a planning agreement at any time during the negotiation process and prior to public exhibition, where considered necessary. Such circumstances may include complex negotiations or large projects, where factual information requires validation or where there is considered to be a higher risk to Council than with other planning agreements. In such circumstances, Council may request confirmation from an Applicant or Proponent that it will cover Council's reasonable costs for obtaining this preliminary advice.
- 13) Council will require a planning agreement to make provision for payment by the Developer of the Council's reasonable costs of and incidental to assessing, negotiating, preparing and entering into the agreement. A planning agreement may also need to make provision for payment by the Developer of Council's reasonable costs for the monitoring and enforcing of the planning agreement. This may include an obligation on the Developer to provide security to Council for those costs.
- 14) Subject to any direction of the Minister and decision of any Local Planning Panel constituted under the EP&A Act, Council may then proceed to adopt any of the processes available to it with respect to deciding to proceed, or not to proceed, with

the proposed planning agreement. Ideally, that process will include the submission of a report to the elected Council with a recommendation to either:

- a. proceed with the exhibition of the proposed planning agreement subject to a legal review (and incorporating any changes recommended by the legal review); or
 - b. to proceed no further with the proposed planning agreement.
- 15) Councillors will not participate in negotiations with a Developer or their representatives and the Councillors' role through the Council Meeting process will be limited to voting on the following:
- a. Accepting, in principle, a planning agreement offer;
 - b. Endorsing a draft planning agreement for legal review and public exhibition;
 - c. Determining whether or not to enter into a draft planning agreement; and
 - d. Approving the execution of a planning agreement.
- 16) Should Council accept, in principle, the planning agreement offer, the planning agreement would then be subject to a detailed legal review on behalf of Council (at the cost of the developer), prior to being placed on public exhibition. The completion of legal review prior to public exhibition will ensure that the version of a planning agreement which is placed on public exhibition is both legally enforceable and 'executable', providing greater transparency for the community and avoiding the need to re-exhibit a planning agreement as a result of any legal/drafting amendments which may arise from the legal review. Where the legal review results in drafting amendments to the planning agreement which are not 'material' (do not change the terms or value of the offer or the planning/public benefits associated with the offer), these will be incorporated into the draft planning agreement prior to public exhibition.
- 17) Once legal advice has been obtained, the proposed planning agreement will be publicly exhibited (assuming a resolution of Council to this effect) in accordance with legislative requirements and this Policy.
- 18) Council may negotiate further changes to the planning agreement having regard to any matters raised following public notification and exhibition. If any substantial or material changes are made to the proposed planning agreement after it has been publicly exhibited, then the process in Section 7.3 would need to be followed again with respect to that amended planning agreement.
- 19) Once the exhibition of the proposed planning agreement has been undertaken the proposed planning agreement would be reported to the elected Council in order to:
- a. consider any public submissions made with respect to the proposed planning agreement;
 - b. resolve whether or not to accept the offer made by the Developer and enter into the planning agreement.
- 20) The planning agreement is entered into when it is signed by all the parties. The planning agreement comes into effect at the time stated in the agreement.
- 21) Where the application to which a planning agreement relates is a development application, and if Council approves the application, Council will impose a condition of consent requiring the planning agreement to be entered into between the parties or, if an agreement has been executed, set out in the consent the terms of the agreement.

- 22) Where the application to which a planning agreement relates is a planning proposal seeking to amend a planning instrument, the instrument of change will not be finalised until the planning agreement has been entered into by both parties and registered on the title of the land.
- 23) Any modifications to a planning agreement, whether sought by the Council or other parties to the agreement, will need to be considered by way of the process outlined in this Section 7.3.

7.4. Form of Contributions

The standardisation of development contributions sought under planning agreements (similar to the operation of a typical contributions plan) will not always be possible and as such, the negotiation of each planning agreement will have regard to the type and scale of the proposed development, the scale of demand for new infrastructure arising from the proposal, the location of the proposed development, the capacity of existing infrastructure within the locality surrounding each development and the impact of the contributions on development feasibility.

Notwithstanding this, to assist Developers and the community in understanding Council's general priorities for planning obligation negotiations, a list of potential benefits that Council will consider is provided as Schedule 1 of this Policy. This list has been prepared having regard to the relevant State and regional planning policies as well as Council's strategic land use planning policies and objectives, strategic infrastructure planning and development contributions framework.

It is acknowledged that planning benefits proposed under a planning agreement may differ from the examples in Schedule 1 and other benefits which are not specifically identified may also be relevant when negotiated on a case-by-case basis, especially where planning benefits are also offered.

Council will consider the provision of contributions in the form of the dedication of land (free of cost), the provision of material public benefit or the payment of monetary contributions. However, where a particular development is unable to deliver an item of infrastructure in its entirety, the payment of monetary contributions is preferable as it allows for greater flexibility in timing and allocation of the expenditure, as well as the pooling of monetary contributions collected from a range of planning agreements.

A planning agreement may include a provision relating to the payment of a monetary contribution towards recurrent costs associated with a public purpose.

Where particular development outcomes (including but not limited to through-site links, local roads (construction, utility relocation, and dedication at no cost), public domain improvements or local infrastructure) would normally be required by way of a condition of development consent in accordance with any applicable DCP or Contributions Plan, these will not be considered to be 'public benefits' (or valued as such) under a planning agreement. Such works will not be accepted as ground for reducing a contribution under a planning agreement or reducing the contributions otherwise payable under the applicable Section 7.11 or Section 7.12 contributions plan.

7.5. Key Considerations for Development Contributions

Council is required to have regard to the following key considerations before deciding whether to accept a Developer's offer of a Planning Agreement:

- 1) Can the public infrastructure that is proposed to be funded by a development contribution be provided within a reasonable time?
- 2) What will be the impact of the proposed development contribution on the affordability of the proposed development?
- 3) Is the proposed development contribution based on a reasonable apportionment between existing demand and new demand for public infrastructure to be created by the proposed development to which the contribution relates?
- 4) Is the proposed development contribution based on a reasonable estimate of the cost of proposed public infrastructure?
- 5) Are the estimates of demand for each item of public infrastructure to which the proposed development contribution relates reasonable?
- 6) Guidance provided within Schedule 2 of this Policy.

8. PROCEDURE

8.1. Probity

Public probity is important to Council, and it will ensure that the negotiation and the outcome of any planning agreement is fair, transparent and is directed at achieving public benefits in an appropriate manner free of actual or perceived corrupt conduct or maladministration.

In this regard, Council will:

- 1) Inform any applicant about Council's values and business ethics, specifically, about ethical behaviour appropriate to business dealings in accordance with Council's Code of Conduct.
- 2) Ensure that the local community is informed about the system and the Council's role, specifically, how the planning agreement system operates and how Council will deal with developments objectively.
- 3) Publicly exhibit planning agreements to ensure they are open and transparent, specifically achieving maximum public awareness of the matters contained in a planning agreement and the potential public benefit of an agreement.
- 4) Ensure appropriate delegations and separation of responsibilities in considering planning proposals and development applications that involve a planning agreement, specifically the need to ensure processes adequately address the level of risk of corruption of a process while at the same time being appropriate to the likely level of risk.
- 5) Ensure that modifications to approved development should be subject to the same scrutiny as the original development application.
- 6) Ensure that Councillors and members of Council staff understand their varied roles, to avoid any perceived or actual conflict of interest.
- 7) Take every step to ensure that conflicts of interest are ameliorated to the greatest extent possible, specifically, independent assessment by third parties where Council has an interest and not entering into any contractual arrangement which purports to guarantee outcomes that are contrary to separate regulatory processes and the public interest.

Council will ensure that negotiation and formation of any planning agreement will be undertaken in accordance with any then current probity policy that may apply.

In certain circumstances, Council may decide to implement a probity policy specific to the negotiation of a particular planning agreement.

8.2. Public Notification

A planning agreement cannot be entered into, amended or revoked unless there has been public notification (exhibition) of the proposed planning agreement for a period of at least twenty-eight (28) days, or as otherwise required under the EP&A Act or the EP&A Regulation.

The public notification of a planning agreement will be carried out as follows:

- 1) Where Council supports exhibition of the draft planning agreement, it will publicly exhibit the development application and/or proposed instrument and the planning agreement in accordance with the EP&A Act and its notification requirements and invite public submissions.
- 2) The terms of the planning agreement and its proposed public benefits are to be clearly shown as part of consultation material. Planning agreements must be accompanied by an explanatory note to assist the public in understanding the agreement. This will help the community make a fully informed decision on the overall proposal.
- 3) Council encourages the public to make submissions on planning agreement. This will allow for the Council to better understand local needs and permit fine tuning of the planning obligations set out in any planning agreement.
- 4) Public submissions to planning agreement notifications will be assessed by the Council in accordance with its notification policy.
- 5) Council will publicly re-notify and make available for public inspection a proposed planning agreement and the application to which it relates if, in 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 planning agreement or the application, or their formal consideration by Council, or for any other reason.
- 6) Any material changes that are proposed to be made to a planning agreement after a public notice has been given should be subject to renotification if the changes would materially affect:
 - How any of the matters specified in Section 7.4 of the EP&A Act are dealt with by the planning agreement.
 - Other key terms and conditions of the Planning Agreement.
 - The planning authority's interests or the public interest under the planning agreement.
 - Whether a non-involved member of the community would have made a submission objecting to the change if it had been publicly notified.

8.3. Explanatory Note

An Explanatory Note will be notified in conjunction with the exhibition of a draft Planning Agreement. An Explanatory Note must contain the following:

- 1) A summary of the objectives, nature and effect of the proposed Planning Agreement, amendment or revocation.

- 2) Identify the merits of the proposed planning agreement including how the planning agreement, amendment or revocation promotes the public interest, impact on the public and one or more of the objects of the EP&A Act.
- 3) Identify how the planning agreement, amendment or revocation promotes one or more of the Guiding Principles for Councils under Section 8 of the Local Government Act 1993 (NSW).
- 4) Identify a planning purpose or purposes served by the Planning Agreement, amendment or revocation, and contain an assessment of whether it provides for a reasonable means of achieving that purpose.
- 5) Identify whether the planning agreement, amendment or revocation conforms to Council's capital works program.
- 6) State whether the Planning Agreement, amendment or revocation specifies that certain requirements of the agreement must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued.
- 7) Should indicate timing of delivery.
- 8) Should include maps, diagrams, and other material to help explain what is proposed.
- 9) Be easy to understand and written in plain English.

The Developer must prepare the explanatory note. However, it will be reviewed and agreed on by Council and any other parties to the agreement. The final form of the Explanatory Note is a matter for the Council.

8.4. Preparation of the Planning Agreement

Unless otherwise specified in this Policy, the Planning Agreement Template is to be used as a basis for any planning agreement to be entered into between Council and a Developer where possible, but it is not compulsory for all the provisions in that template to be used and it will be adapted to each development as appropriate. In that regard, however, Council wishes to ensure consistency of administration of its planning agreements and as such may not agree to amend clauses within its template planning agreement with respect to matters which require ongoing Council administration. Any changes to the standard wording within Council's template will need to be accompanied by detailed justification.

Council will generally not agree to amend clauses of the following nature in the template planning agreement when negotiating Planning Agreements with a Developer (as applicable to each development):

- (a) Defects Liability.
- (b) Developer's Warranties and Indemnities.
- (c) Registration.
- (d) Assignment.
- (e) Dispute Resolution.
- (f) Breach.
- (g) Termination.

- (h) Legal costs.

8.5. Provision of Security Under a Planning Agreement

- 1) Council will require a planning agreement to make provision for adequate security to cover the Developer's obligations under the agreement. Security enables Council, for example, to draw on funding to complete works which are unable to be completed by a Developer.
- 2) In a general sense, adequate security, is security which is sufficient to allow Council to either:
 - a. Ensure the need for the relevant material public benefit is not generated until that material public benefit is provided (i.e. by withholding the issue of a subdivision certificate); or
 - b. Immediately take steps to ensure that the relevant material public benefit is available to meet the need generated by the Development (i.e. by way of a bank guarantee that can be immediately called upon by Council).
- 3) The form of security may include, but is not limited to one (1) or more of the following:
 - a. Provision of an unconditional bond or bank guarantee from an Australian bank in favour of Council to the full value of the contributions to be provided under the planning agreement (including in respect of any works and defects for works) on terms otherwise acceptable to Council.
 - b. The ability for Council to withhold issuing a Construction Certificate, Occupation Certificate and/or Subdivision Certificate until the Developer has fulfilled some or all of its obligations under the planning agreement.
 - c. The ability for Council to step-in and complete works where the Developer fails to complete them within a specified time.
 - d. Where the development contributions include the dedication of land to Council, a right for Council to:
 - compulsorily acquire the relevant land in the event the Developer fails to dedicate it to Council by the time required under the planning agreement; and/or
 - register a caveat on the title of the relevant land until such time as it is dedicated to Council.
- 4) Council will only accept a personal guarantee, or a parent company/corporate guarantee as security for the obligations of the Developer under a planning agreement in addition to other forms of security specified above.
- 5) Council will not accept Insurance Bonds in lieu of Bank Guarantees under a planning agreement.
- 6) Council will not accept registration of a planning agreement on the title of the land to which the planning agreement applies in lieu of other forms of security referred to above.
- 7) If a Bank Guarantee is required to be provided to secure the provision of works, Council may require that Bank Guarantee to be provided in an amount which exceeds the agreed value of the works as set out in the planning agreement. The basis for that is that the works may not be provided for some time after the planning agreement is entered into, and the actual cost of providing those works may greatly exceed the estimated value as set out in the planning agreement.

The nature and extent of the enforcement provisions in the planning agreement will be a matter for negotiation between Council and the Developer having regard to the particular circumstances of the planning agreement.

8.6. Registration of Planning Agreements

Council will require a planning agreement to contain a provision requiring the Developer to agree to registration of the planning agreement pursuant to Section 7.6 of the EP&A Act.

On execution of the planning agreement and until it is registered on title, the Developer may be required to consent to Council lodging a caveat on the title of the relevant land until the planning agreement is registered.

The Developer must provide Council with all the necessary documents required to facilitate the registration of the planning agreement on the title to the land, including the written consent of any parties with interests in the land.

8.7. Notations on Certificates

Council will require a planning agreement to contain an acknowledgement by the Developer that Council will make a notation under Section 10.7(5) of the EP&A Act about a Planning Agreement on any certificate issued under Section 10.7(2) of the EP&A Act relating to the land the subject of the agreement or any other land.

8.8. Works

Where works are to be provided under a planning agreement, the planning agreement will specify:

- 1) the design process required to be followed in respect of the works (if any), including a requirement for Council to review and approve any such design where appropriate;
- 2) the timing for completion of the works;
- 3) the standard of the works; and
- 4) rectification of defects in respect of the works,

as generally included in Council's Planning Agreement Template.

8.9. Dispute Resolution

A planning agreement must have a dispute resolution mechanism pursuant to s7.4(3)(f) of the EP&A Act.

The dispute resolution mechanism set out in Council's Planning Agreement Template is Council's preferred position with respect to dispute resolution under a planning agreement.

8.10. Value of Public Benefits Under a Planning Agreement

The value of a benefit proposed under a planning agreement will be determined prior to the planning agreement being publicly notified. There are numerous methods of determining such values and the methodologies for valuing the public benefits set out in this section are to be used as a general guide only. Accordingly, Council is not bound to follow such methodologies but may elect to do so on a case-by-case basis.

If a contribution under a planning agreement is the carrying out of works for a public purpose, Council may value the particular development contribution on the basis of a cost estimate for the completed works. This may be prepared by a suitably qualified quantity surveyor or a valuer (as the case may be) appointed by Council and paid for by the Developer.

If the offered works or land are contained in a contributions plan that has been adopted by Council and that plan is in force, the value of works or land will be the value identified in that plan or the actual value of the completed works, whichever is less.

Where the development contribution under a planning agreement includes the dedication of land and the value of that land is to be taken into account, Council may 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* (NSW) upon the compulsory acquisition of the land or by seeking the services of an appropriately qualified independent land valuer, as appointed by Council and at the cost of the Developer, in order to value the land being dedicated.

All costs associated with the valuation of public infrastructure to be included in a planning agreement by other professionals engaged by Council will be met by the Developer.

In the event that a planning agreement proposes works and services that would normally be provided as a condition of development consent, then those works, and services will be deemed to have no value under the particular planning agreement.

Council will generally seek to ensure that monetary contributions required to be paid under a planning agreement are increased by reference to an appropriate index (such as the consumer price index) from the time of the formation of the planning agreement until the relevant monetary contribution is paid.

8.11. Assignment and Dealings by the Developer

Council will not permit the assignment of any or all of the developer's rights or obligations under the agreement, nor will Council permit any dealing in relation to any part or the whole of the land the subject of the agreement unless:

- a) The Developer has, at no cost to Council, first procured the execution by the person with whom it is dealing of all necessary documents in favour of Council by which that person agrees to be bound by the agreement as if they were a party to the original agreement; and
- b) If the proposed dealing involves a mortgage, charge or other encumbrance in relation to the party's right, title and interest in the land, such documents provide for an agreement by the person to the effect that they, and any receiver appointed by them, will not enjoy rights greater than those of that party;
- c) The party is not in breach of this agreement; and
- d) Appropriately notified Council in writing of the above.

This does not affect the operation of any of the other requirements of the agreement.

8.12. Planning Agreements and Council's Compulsory Acquisition Power

A planning agreement may include an obligation on a Developer to make a monetary development contribution to Council to meet some, or all, of the costs incurred by Council in undertaking the acquisition of land.

A planning agreement cannot impose an obligation on Council to use the compulsory acquisition power conferred on it under the *Local Government Act 1993* (NSW), the *Roads Act 1993* (NSW) and the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).

Any such acquisition of land by Council may only be undertaken for a public purpose and is subject to the approval of the Minister and the Governor. Council will not agree to compulsorily acquire land in a planning agreement where such an acquisition is for the sole benefit of the Development and does not serve a broader public purpose.

If Council resolves to acquire land for which a monetary Development Contribution is required to be paid under a planning agreement, Council cannot be subject to an obligation to acquire that land by a certain time, or at all.

8.13. Amendments to Planning Agreements

Council may agree to a provision in a planning agreement permitting the developer's/proponent's obligations under the agreement to be modified / varied in certain circumstances.

In some circumstances and depending on the nature of the modifications made, a planning agreement may need to be subject to the process outlined in Section 7.3.

8.14. Credits and Refunds

Council will generally not agree to a planning agreement providing for the surplus value under a planning agreement being refunded or provided as credit to the Developer or offset against development contributions required to be made by the Developer in respect of other development in Council's LGA, including in circumstances where the value of the material public benefits provided under a planning agreement exceed the value of the contributions that would otherwise have been required to be paid under the relevant Contributions Plan.

8.15. Carrying out of Material Public Benefit Works

Upon entering into a planning agreement, the Developer will be legally obliged to undertake all necessary material public benefit works set out in the Schedule of Works annexed to the Planning Agreement. These works will be subject to a separate approval and/or a Construction Certificate issued by the Council or from an Accredited Certifier. The works will also be monitored by the Council subject to the quality assurance conditions imposed under the planning agreement and works which fail to meet such requirements will be subject to rectification.

8.16. Planning Agreement Register

A register of all executed planning agreements, containing all relevant information required by the EP&A Act and the EP&A Regulation, will be made available on Council's website.

SCHEDULE 1 - POTENTIAL BENEFITS AND INFRASTRUCTURE

Public Benefit	Indicative Rate of Provision	Examples and Opportunities
Active Open Space		
Playing Fields	1 per 4,000 people for high density areas 1 per 2,000 people for low density areas	Soccer and rugby fields, cricket ovals, athletics tracks/AFL ovals, additional fields on rural/urban fringe, additional fields within urban areas, co-location of fields on existing or new school sites and upgrade existing facilities to synthetic.
Passive Open Space		
Local Parks	1 per 2,000 people	New designated local parks/playgrounds within or surrounding development site, embellishment of existing open spaces to increase capacity (new play equipment or upgrade of facilities).
Riparian Embellishment		Planting, embellishment and revitalisation of riparian corridors, pocket parks within riparian corridors, enhanced public access opportunities, new or upgraded cycleways/pathways through riparian areas.
Town Squares/Urban Plazas		Town squares/urban plazas as part of new development within existing or future centres.
Community Facilities		
Community centres/Libraries	Subject to Council Library and Community Facilities Strategy	Additional floor space for library and community spaces to be integrated into development within centres and surrounding public transport nodes (such as new Sydney Metro North West stations) and planned town squares/urban plazas.
Traffic and Transport		
Roadworks	Rate of provision varied Dependant on scale and location	New road design and construction, road widening/extension, pavement reconstruction, intersection upgrades (provision of roundabouts or traffic signals), bus and traffic turning lanes, bridges (pedestrian/cyclist or vehicular), undergrounding of overhead powerlines.

Public Benefit	Indicative Rate of Provision	Examples and Opportunities
Public Domain Works		
Public Domain Improvement	Rate of provision varied Dependant on scale and location	Paving upgrades within existing centres or along major pedestrian routes, street tree planting, lighting and signage, public art and furniture, provision of new public domain works within new and emerging centres (including within and surrounding Sydney Metro North West rail precincts).

Note: The public benefits proposed as part of an individual planning agreement would be assessed having regard to the type and scale of the proposed development, the scale of demand for new infrastructure arising from the proposal, the location of the proposed development, the capacity of existing infrastructure within the locality surrounding each development and the impact of the contributions on development feasibility.

Notwithstanding this, to assist developers and the community in understanding Council's general priorities for planning obligation negotiations, the above list identifies the main type of benefits that Council will consider as well as any potential opportunities or projects which could benefit from contributions. It should be noted that the items listed would only be considered to be public benefits offered under a planning agreement where the works are not already required to be provided as part of the development under existing controls.

It is acknowledged that planning benefits actually proposed under a planning agreement may differ from these examples and other benefits which are not specifically identified may also be relevant when negotiated on a case-by-case basis, especially where planning benefits are also offered. Further, it is acknowledged that some planning agreements may seek to provide specific items of infrastructure, while others will provide a monetary contribution towards this infrastructure, which can be pooled and expended by Council as deemed appropriate.

SCHEDULE 2 - GUIDE FOR COUNCIL STAFF

1. Purpose of this Schedule

This procedure is intended to guide council staff in negotiating planning agreements.

1. Inter-relationship between a Development Application/Instrument Change and a Planning Agreement

1.1. Under the EP&A Act a planning agreement must be entered into in relation to either:

1. an application for development consent; or
2. an instrument change.

1.2. Ideally a planning agreement which relates to a Development Application:

1. will be proposed and negotiated prior to the determination of the Development Application;
2. publicly exhibited simultaneously with the public exhibition of the relevant Development Application; and
3. resolved to be entered into by Council at the same time (or as soon as reasonably practical after) a decision is made on whether or not to approve the relevant Development Application.

1.3. A condition of development consent may be imposed requiring the Developer to enter into the planning agreement in the form offered by the Developer prior to the determination of the development consent.

In that regard, s7.7 of the EP&A Act states as follows:

1. A provision of an environmental planning instrument (being a provision made after the commencement of this Section):
 - (a) that expressly requires a planning agreement to be entered into before a development application can be made, considered or determined, or
 - (b) that expressly prevents a development consent from being granted or having effect unless or until a planning agreement is entered into,has no effect.
2. A consent authority cannot refuse 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.
3. However, a consent authority can require a planning agreement to be entered into as a condition of a development consent, but only if it requires a planning agreement that is in the terms of an offer made by the Developer in connection with:
 - (a) the development application, or

- (b) a change to an environmental planning instrument sought by the Developer for the purposes of making the development application,
- (c) or that is in the terms of a commitment made by the proponent in a statement of commitments made under Part 3A.

1.4. Council is still able to negotiate and enter into a Planning Agreement after a Development Consent has been granted, provided that the relevant planning agreement relates to the development permitted under that application.