Development Contributions – Practice Note

# 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 practices[1]

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.

[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.

## Part 3 - Outline of statutory framework

### 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**

Section79C(1)(a)(iiia) 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.

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 considerations[2]**

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

[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.

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 should not 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 agreement[3],
- 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.

[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.

## 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 benefits[4].

**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.

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

**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 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

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

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.