



Policy No. 3.9

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Related Legislation:	Environmental Planning and Assessment Act 1979 Environmental Planning and Assessment Regulation 2000
Associated Policies Documents:	Section 94A Contributions Plan 2015 Works-In-Kind / Material Public Benefit Policy
Responsible Director:	Manager Planning and Environment

1. INTRODUCTION

1.1 POLICY STATEMENT

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

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

1.2 PURPOSES

The purposes of this Policy are:

- a) To establish a framework governing the use of planning agreements by the Council;
- b) To ensure that the framework so established is efficient, fair, transparent and accountable;
- c) To enhance flexibility in the Council's area through the use of planning agreements;
- d) To enhance the range and extent of development contributions made by development towards public facilities in the Council's area;
- e) To set out the Council's specific policies on the use of planning agreements;
- f) To set out procedures relating to the use of planning agreements within the Gloucester Shire Council local government area.

1.3 DEFINITIONS

Act means the Environmental Planning and Assessment Act 1979;

agreement has the same meaning as planning agreement;

affordable housing has the same meaning as in the Act;

contributions plan means a contributions plan approved under section 94EA of the Act for the purpose of requiring contributions under section 94 or 94A of the Act;

Council means Port Stephens Council

developer, developers has the same meaning given in section 93F(1) of the Act;

development has the same meaning given in section 94 of the Act;

development application has the same meaning given in section 4 of the Act;

development consent has the same meaning given in section 4 of the Act;

development contribution means the kind of provision made by a developer under a planning agreement, being a monetary contribution, the dedication of land free of cost or the provision of material public benefits;

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

LGA means the Port Stephens local government area;

net public benefit 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;

parties means Council and a developer or developers;

planning agreement has the meaning given in section 93F(1) of the Act and includes an agreement to amend or revoke a planning agreement;

planning benefit means a development contribution that confers a net public benefit;

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

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

public includes a section of the public;

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

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

public purpose has the meaning given in section 93F(2) of the Act;

Regulation means the Environmental Planning And Assessment Regulation 2000, and

surplus value means the value of development contributions to be provided under a planning agreement, less the value of the contributions the developer would have been required to make under any contributions plan in respect of the development to which the planning agreement relates, had the planning agreement not been entered into.

2.0 ROLE OF THIS DOCUMENT

The Planning Agreement Procedure set out in Section 5 of this Policy provides a detailed of processes and other matters to be followed when Council and a developer is considering entering into negotiations, the subject of a proposed planning agreement.

2.1 COUNCIL'S STRATEGIC OBJECTIVES FOR THE USE OF PLANNING AGREEMENTS

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

- a) To provide an enhanced and more flexible development contributions system for the Council;
- b) More particularly, to supplement or replace, as appropriate, the application of s94 and s94A of the Act to development
- c) To give all stakeholders in development greater involvement in determining the type, standard and location of public facilities and other public benefits;
- d) To allow the community, through the public participation process under the Act, to agree to the redistribution of the costs and benefits of development in order to realise community preferences for the provision of public benefits;
- e) To adopt innovative approaches to the provision of infrastructure;
- f) To fund new and upgrade existing infrastructure to appropriate levels that reflect and balance environmental standards, community expectations and funding priorities; and
- g) To provide certainty for the community, developers and Council in respect to infrastructure and development outcomes.

2.2 FUNDAMENTAL PRINCIPLES GOVERNING THE USE OF PLANNING AGREEMENTS

The Council's use of planning agreements will be governed by the following principles:

- a) planning decisions may not be bought or sold through planning agreements;
- b) development that is unacceptable on planning grounds will not be permitted because of planning benefits offered by developers that do not make the development acceptable in planning terms;
- c) the Council will not allow planning agreements to improperly fetter the exercise of its functions under the Act, Regulation or any other Act or law;
- d) the Council will not seek benefits under a planning agreement that are unrelated to the particular development;

- e) the Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed planning agreement;
- f) the Council will not improperly rely on its statutory position in order to extract unreasonable public benefits from developers under planning agreements;
- g) if the Council has a commercial stake in development the subject of a planning agreement, it will take appropriate steps to ensure that it avoids a conflict of interest between its role as a planning authority and its interest in the development.

3.0 CIRCUMSTANCES IN WHICH COUNCIL WILL CONSIDER NEGOTIATING A PLANNING AGREEMENT

Planning agreements are voluntary, and accordingly at the commencement of the process, a developer should make a formal approach to Council indicating a voluntary intention to enter into a planning agreement with Council.

Council, as its discretion, may agree to negotiate a planning agreement with a developer in connection with any application by the developer for an instrument change or for development consent relating to any land in Council's LGA.

The type of development contributions which Council will be prepared to accept under a planning agreement is at the discretion of Council

4.0 CONTENT OF A PLANNING AGREEMENT

Section 93F of the Act and Clause 25E(1) of the Regulation specify information to be included in a planning agreement and the associated explanatory note.

5.0 PROCESS

5.1 WHEN SHOULD A PLANNING AGREEMENT BE NEGOTIATED?

The negotiation of planning agreements should run in parallel with applications for instrument changes or development applications.

At the commencement of the process, a developer should make a formal approach to Council indicating a voluntary intention to enter into a planning agreement with Council.

Council prefers that a planning agreement is negotiated before lodgement of the relevant application and that it accompanies the application on lodgement.

5.2 WHO WILL NEGOTIATE A PLANNING AGREEMENT ON BEHALF OF THE COUNCIL?

An authorised Council officer will negotiate a draft Planning Agreement for Council's endorsement.

5.3 KEY STEPS IN THE NEGOTIATION PROCESS

The negotiation of a planning agreement will generally involve the following key steps:

5.3.1 Prelodgement/Negotiations

- a) Before lodgement of the relevant application by the developer, the parties will decide whether to negotiate a planning agreement.
- b) The parties will then appoint a person to represent them in the negotiations.
- c) The parties may also appoint a third person to attend and take minutes of all negotiations.
- d) The parties will also decide whether to appoint an independent person to facilitate or otherwise participate in all or part of the negotiations.
- e) The parties will also agree on a timetable for negotiations and the protocols and work practices governing their negotiations.
- f) The parties will then identify the key issues for negotiation and undertake the negotiations.
- g) If agreement is reached, the proposed planning agreement will be prepared by one of the parties by (agreement) and a copy provided to the other party(s).
- h) The parties will undertake further negotiation on the specific terms of the proposed planning agreement.
- i) The developer may then make the relevant application to the Council accompanied by a copy of the proposed agreement.
- j) The proposed agreement is reported to Council, and Council resolves whether or not to adopt a recommendation to endorse the proposed planning agreement (Council may choose to reject the planning agreement at this stage).
- k) If no changes are proposed, once the relevant application (DA or rezoning) is determined, two copies of the final planning agreement are prepared for execution.

5.3.2 Notification, assessment and consideration/determination.

- a) The proposed planning agreement and explanatory note are placed on public exhibition for a minimum of 28 days, together with the application for development consent or instrument change.
- b) Assessment is undertaken by Council officers and reported to Council.
- c) The parties may undertake further negotiations as a result of the public notification and inspection of the planning agreement or its formal consideration by the Council in connection with the relevant application.
- d) Council resolves to adopt the proposed planning agreement.
- e) If adopted, two (or more if there are more than 2 parties) copies of the planning agreement is prepared for execution by the parties. Once executed a copy is to be retained by each party.

5.3.3 Implementation of planning obligations – post approval.

- a) Tracking of developer contributions or public works begins on approval.

- b) Relevant Council responsibility areas are notified once the planning agreement is active (note: the planning agreement may state that it is not active until the change to the instrument or issue of a development consent).
- c) Handover of works to Council.
- d) Administrative tasks associated with implementation and tracking of the planning agreement.

5.3.4 Administration – tracking payment and completion of works.

The Planning Agreement Register will be updated and maintained by the Council and monetary contributions and/or public domain works will be tracked by the relevant Council responsibility areas

6.0 PROBITY

- 6.1** Public probity is important and Council will ensure that the negotiation of any planning agreements is fair, transparent and is directed at achieving public benefits in an appropriate manner free of corruption.

Council will:

- a) Inform any applicant about Council values and business ethics – specifically, about ethical behaviour appropriate to business dealings.
- b) Ensure that its communities understand the system and the Council's role – specifically, how the planning agreements system operates and how Council will deal with developments objectively.
- c) Notify planning agreements to ensure they are open and transparent – specifically, achieving maximum public awareness of the matters contained in a planning agreement(s) and the potential benefits of an agreement.
- d) Ensure appropriate delegations and separation of responsibilities in considering development applications that involve planning agreements – 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.
- e) Ensure that modifications to approved development should be subject to the same scrutiny as the original development application.
- f) Ensure that Councillors and Council staff understand their varied roles, some of which have potential to conflict.
- g) Take every step to ensure that conflicts of interest are ameliorated to the greater extent possible – specifically, independent assessment by third parties where Council has an interest and not entering into any contractual arrangement which purport to guarantee outcomes that are subject to separate regulatory processes.

- 6.2** The procedures that will be implemented to address these matters may include, but not be limited by, the following procedures:

- a) The Councillors will not be involved in the face to face negotiation of the agreement but will ultimately approve the planning agreement as part of their duties as Councillors.
- b) A Council officer with appropriate delegated authority will negotiate a planning agreement on behalf of the Council in accordance with this Policy.
- c) The Council will, in all cases, ensure that Council staff with key responsibility for providing advice on approvals, approving applications or ensuring compliance, do not have a role in the assessment of the commercial aspects of the agreement nor on the conditions of the planning agreement except where advice is required on matters relating to the conditions of consent for a particular proposal.
- d) The Council may involve an independent person(s) to facilitate or otherwise participate in the negotiations or aspects of it, particularly where this will lead to a better planning outcome.
- e) The Council will ensure that all negotiations with a developer and their consultants are sufficiently separated and documented.
- f) Where the Council has a commercial stake in development the subject of an agreement, it will take appropriate steps to ensure that it avoids a conflict of interest between its role as a planning authority and its commercial interest in the development.

If the Council has a commercial interest in the subject matter of a planning agreement as a landowner, developer or financier, the Council will ensure that the person who assesses the application to which a planning agreement relates is not the same person or a subordinate of the person who negotiated the terms of the planning agreement on behalf of the Council in its capacity as landowner, developer or financier. Council will ensure that its commercial role does not fetter its planning assessment role.

7.0 INVOLVEMENT OF INDEPENDENT THIRD PARTIES IN THE NEGOTIATION PROCESS

An independent person may be appointed to facilitate or otherwise participate in the negotiations, or processes related to it, such as where:

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

The costs of the independent person will be borne by the developer.

8.0 PUBLIC NOTIFICATION OF PLANNING AGREEMENTS

A planning agreement must be publicly notified and available for public inspection for a minimum period of 28 days, and in accordance with any minimum requirements of the Act or its Regulation.

The Council is required to ensure that a planning agreement is publicly notified as part of, and in the same manner, and at the same time as, the application for the instrument change or the development application to which it relates.

Where the application to which a planning agreement relates is required by or under the Act or Regulation to be publicly notified and available for public inspection for a period exceeding 28 days, the Council will publicly notify the planning agreement and make it available for public inspection for that longer period.

Where the application to which a planning agreement relates is permitted by or under the Act or Regulation to be publicly notified and available for public inspection for a period of less than 28 days, the Council will publicly notify the application and make it available for public inspection for a minimum period of 28 days.

The Council will publicly re-notify and make available for public inspection a proposed planning agreement and the application to which it relates if, in the Council's opinion, a material change is made to the terms of the agreement or the application after it has been previously publicly notified and inspected. Such a change may arise as a consequence of public submissions made in respect of the previous public notification and inspection of the agreement or the application, or their formal consideration by the Council, or for any other reason.

9.0 WHEN IS A PLANNING AGREEMENT ENTERED INTO?

A planning agreement is entered into when it is signed by all of the parties.

A planning agreement can be entered into at any time after the agreement is publicly notified and Council has resolved to enter into it, in accordance with the Act and Regulation.

Council may require a planning agreement to be entered into as a condition of granting development consent to the development to which the agreement relates.

Generally, Council will sign the planning agreement on the same day, or as soon as possible after the day, that the development consent or instrument change to which the agreement relates, is granted or made.

10.0 PLANNING AGREEMENT REGISTER

Council is required keep a register of planning agreements applying to land within the Council's area, whether or not Council is a party to a planning agreement.

Council is required to record in the register the date an agreement was entered into and a short description of the agreement (including any amendment).

Council will make the following available for public inspection (free of charge) during ordinary office hours:

- the planning agreement register kept by the Council;

- copies of all planning agreements (including amendments) that apply to the area of the Council, and
- copies of the explanatory notes relating to those agreements or amendments.

Council will also make its planning agreement register available to the public on its website.

11.0 VALUING PUBLIC BENEFITS AND NET COMMUNITY BENEFIT

Unless otherwise agreed in a particular case, public benefits will be valued as follows:

11.1 PROVISION OF LAND FOR A PUBLIC PURPOSE

Where the benefit under a planning agreement is the provision of land for a public purpose, the value of the benefit will be determined by an independent valuer who is experienced in valuing land in New South Wales (and who is acceptable to Council), on the basis of a scope of work which is prepared by Council. All costs of the independent valuer in carrying out such a valuation will be borne by the developer.

11.2 CARRYING OUT OF WORKS FOR A PUBLIC PURPOSE

Where the benefit under a planning agreement is the carrying out of works for a public purpose, the value of the benefit will be determined by an independent quantity surveyor (who is acceptable to Council), on the basis of the estimated value of the completed works being determined using the method that would be ordinarily be adopted by a quantity surveyor. Council will prepare the scope of work for the independent quantity surveyor. All costs of the independent quantity surveyor in carrying out this work will be borne by the developer.

11.3 MATERIAL PUBLIC BENEFIT

Where the benefit under a planning agreement is the provision of a material public benefit, Council and the developer will negotiate the manner in which the benefit is to be valued for the purposes of the agreement. Unless otherwise agreed, when deciding whether to accept the provision of a material public benefit, Council will take into consideration the following factors:

- a) the extent to which the material public benefit satisfies a community need;
- b) the extent to which the material public benefit satisfies the purpose for which the contribution was sought;
- c) a consideration of location and other factors which may affect the benefit to council and the community, and
- d) an assessment of recurrent maintenance costs to Council.

11.4 NET COMMUNITY BENEFIT

Council at its own discretion, may negotiate a planning agreement. Council will typically only enter into such an agreement if it can be demonstrated that there is a net

community benefit. This means the value of the development contributions to be provided under a planning agreement, less the value of the contributions and or development works the developer would have been required to make in respect of the development, is greater than had the planning agreement not been entered into.

Council will apply the following test to assess the monetary value of a proposal put forward in terms of establishing the net community value.

Net community benefit = Proposed planning agreement contributions – (s80A Developer Works + s94 Contributions)

s80A Developer Works: Works required to serve the development itself and or conditioned as part of the development consent.

s94 Contributions: Payments required to be paid under a contributions plan approved under S.94 of the Act for the purposes of requiring contributions under section 94 or 94A of the Act.

Proposed planning agreement developer contributions: The contributions proposed via agreement, either monetary, dedication of land or the provision of material public benefits.

Net community benefit: The community benefit must be greater than the value of the development works and contributions. Positive values indicate a potential net community benefit. Negative values indicate that Council would potentially be worse off by entering into the proposed agreement.

12.0 ACCEPTABILITY TEST TO BE APPLIED TO ALL PLANNING AGREEMENTS

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

- a) Is the proposed planning agreement directed towards a proper or legitimate planning purpose having regard to its statutory planning controls and other adopted planning policies and the circumstances of the case?
- b) Does the proposed planning agreement provide for a reasonable means of achieving the relevant purpose and outcomes and securing the benefits?
- c) Can the proposed planning agreement be taken into consideration in the assessment of the relevant instrument change or development application?
- d) Will the proposed planning agreement produce outcomes that meet the general values and expectations of the public and protect the overall public interest?
- e) Does the proposed planning agreement promote council's strategic objectives in relation to the use of planning agreements?
- f) Does the proposed planning agreement meet the principles governing Council's use of planning agreements as set out in this policy?
- g) Are there any relevant circumstances that may operate to preclude the Council from entering into the proposed planning agreement?

- h) Will the proposed planning agreement provide public benefits that bear a relationship to the development?

13.0 CONSIDERATION OF PLANNING AGREEMENTS IN RELATION TO INSTRUMENT CHANGES AND DEVELOPMENT APPLICATIONS

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

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

13.2 A planning agreement cannot impose an obligation on Council to:

- a) to grant development consent, or
- b) to exercise any function under this Act in relation to a change to an environmental planning instrument.

14.0 APPLICATION OF S94 AND S94A TO DEVELOPMENT TO WHICH A PLANNING AGREEMENT RELATES

A planning agreement may wholly or partly exclude the application of section 94 or section 94A of the Act to development to which the agreement relates. This is a matter for negotiation between Council and a developer having regard to the particular circumstances of the case, including, but not limited to, negotiation and agreement relating to works in kind.

15.0 FORM OF DEVELOPMENT CONTRIBUTIONS UNDER A PLANNING AGREEMENT

The form of a development contribution to be made under a proposed planning agreement will be determined by the particulars of the instrument change or development application to which the proposed planning agreement relates. Without limitation, development contributions by a developer under a proposed planning agreement may include such items as:

- a) the provision of particular public facilities;
- b) the making of a monetary contribution towards the cost of the provision of infrastructure or other public facilities, and
- c) the dedication of land to Council.

16.0 STANDARD CHARGES

Wherever possible, the Council will seek to standardise development contributions sought under planning agreements in order to streamline negotiations and provide fairness, predictability and certainty for developers.

This, however, does not prevent public benefits being negotiated on a case by case basis, particularly where planning benefits are also involved.

17.0 RECURRENT CHARGES

Council may request developers, through a planning agreement, to make development contributions towards the recurrent cost of facilities.

Where the public facility primarily serves the development to which the planning agreement relates or neighbouring development, the arrangement for recurrent funding may be in perpetuity.

18.0 POOLING OF DEVELOPMENT CONTRIBUTIONS

Where a proposed planning agreement provides for a monetary contribution by the developer, Council may seek to include a provision permitting money paid under the agreement to be pooled with money paid under other planning agreements and applied progressively for the different purposes under those agreements, subject to the specific requirements of the relevant agreements.

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

19.0 METHODOLOGY FOR VALUING PUBLIC BENEFITS UNDER A PLANNING AGREEMENT

Unless otherwise agreed in a particular case, where the benefit under a planning agreement is the provision of land for a public purpose, the value of the benefit will be determined by an independent registered valuer with at least 10 years' experience in valuing land in New South Wales (and who is acceptable to the Council), on the basis of a scope of work which is prepared by the Council.

All costs of the independent valuer in carrying out such a valuation will be borne by the developer.

Unless otherwise agreed in a particular case, where the benefit under a planning agreement is the carrying out of works for a public purpose, the value of the benefit will be determined by an independent quantity surveyor of at least 10 years' experience (and who is acceptable to the Council), on the basis of the estimated value of the completed works determined using the method that would be ordinarily adopted by a quantity surveyor. The scope of work for this independent quantity surveyor will be prepared by the Council.

All costs of the independent quantity surveyor in carrying out this work will be borne by the developer.

Where the benefit under a planning agreement is the provision of some other material public benefit, the Council and the developer will negotiate the manner in which the benefit is to be valued for the purposes of the agreement.

20.0 CREDITS AND REFUNDS

Council will not allow the surplus value under a planning agreement to be offset against development contributions required to be made by the developer in respect of another development in the LGA.

21.0 TIME WHEN THE DEVELOPER'S OBLIGATIONS ARISE UNDER A PLANNING AGREEMENT

Council will generally require a planning agreement to provide that the developer's obligations under the agreement take effect when the first development consent operates in respect of the development that is the subject of the agreement, and will operate progressively, in accordance with its terms, as the relevant development proceeds from the issue of the first construction certificate in respect of that development until the final occupation certificate or subdivision certificate.

22.0 IMPLEMENTATION AGREEMENTS

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

- a) the times at which and, if relevant, the period during which, the developer is to make provision under the planning agreement;
- b) the design, technical specification and standard of any work required by the planning agreement to be undertaken by the developer;
- c) the manner in which a work is to be handed over to Council;
- d) the manner in which a material public benefit is to be made available for its public purpose in accordance with the
- e) planning agreement, and
- f) the management or maintenance of land or works following hand-over to Council.

23.0 MONITORING AND REVIEW OF A PLANNING AGREEMENT

Council will continuously monitor the performance of the developer's obligations under a planning agreement. This may include the Council requiring the developer (at the developer's cost) to report periodically to Council on its compliance with obligations under the planning agreement.

Council will require the planning agreement to contain a provision establishing a mechanism under which the planning agreement is periodically reviewed with the involvement of all parties. This will include a review of the developer's performance of the agreement.

Council will require the planning agreement to contain a provision requiring the parties to use their best endeavours to agree on a modification to the agreement having regard to the outcomes of the review.

24.0 MONITORING OR DISCHARGE OF THE DEVELOPER'S OBLIGATIONS UNDER A PLANNING AGREEMENT

The Council will generally only agree to a provision in a planning agreement permitting the developer's obligations under the agreement to be modified or discharged where the modification or discharge is linked to the following circumstances:

- a) The developer's obligations have been fully carried in accordance with the agreement;
- b) The developer has assigned the developer's interest under the agreement in accordance with its terms and the assignee has become bound to the council to perform the developer's obligations under the agreement;
- c) The development consent to which the agreement relates has lapsed;
- d) There has been a material modification to the development consent to which the agreement relates;
- e) Material changes have been made to the planning controls applying to the land to which the agreement relates;
- f) The revocation or modification by the minister for planning of a development consent to which an agreement relates;
- g) The performance of the planning agreement has been frustrated by an event beyond the control of the parties; and
- h) The parties otherwise agree to the modification or discharge of the agreement.

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

25.0 ASSIGNMENT AND DEALINGS BY THE DEVELOPER

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

- a) the Council has given its consent to the proposed assignment or dealing;
- b) the developer has, at no cost to the Council, first procured the execution by the person with whom it is dealing of all necessary documents in favour of the Council by which that person agrees to be bound by the agreement as if they were a party to the original agreement; and
- c) the developer is not in breach of this planning agreement.

26.0 PROVISION OF SECURITY UNDER A PLANNING AGREEMENT

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

Except for in exceptional circumstances, and as agreed by Council, the form of security required by the Council in respect of cash contributions or works, will be cash or irrevocable bank guarantee from an Australian Bank, approved by the General Manger, in favour of Council to the full value of the developer's provision (together with project Consumer Price Index) under the planning agreement.

In respect of contributions in the form of land, Council will require a planning agreement to include provisions allowing Council to acquire any land to be dedicated for \$1 if the developer defaults.

27.0 PREPARATION AND FORM OF THE PLANNING AGREEMENT

Unless otherwise agreed by the parties in a particular case, a planning agreement will be prepared by Council at the developer's cost.

The Council will generally require the planning agreement to be in or to the effect of the standard-form planning agreement.

28.0 COUNCIL'S COSTS OF NEGOTIATING, ENTERING INTO, MONITORING AND ENFORCING A PLANNING AGREEMENT

The Council will generally require a planning agreement to make provision for payment by the developer of the Council's costs of and incidental to:

- a) negotiating, preparing and entering into the agreement (including but not limited to staffing costs, consultants fees, legal fees);
- b) registration of the agreement on the title of any relevant land, and
- c) enforcing the agreement.

However as a general rule, Council considers that whether the planning agreement relates to an application by the developer for an instrument change, or relates to a development application, in each case it is fair and reasonable that the developer will pay the whole of the Council's costs.

In particular cases, the Council may require the planning agreement to make provision for a development contribution by the developer towards the ongoing administration of the agreement.

29.0 NOTATIONS ON CERTIFICATES UNDER S149 OF THE ACT

The Council will generally require a planning agreement to contain an acknowledgement by the developer that the Council may, in its absolute discretion, make a notation under section 149 of the Act about a planning agreement on any certificate issued under section 149 of the Act relating to the land the subject of the agreement or any other land.

30.0 REGISTRATION OF PLANNING AGREEMENTS

The planning agreement is to contain a provision requiring the developer to register the agreement pursuant to section 93H of the Act, within a certain timeframe and if the requirements of that section are satisfied.

31.0 DISPUTE RESOLUTION

Council will generally require a planning agreement to provide for mediation of disputes between the parties to the agreement, at their own cost, before the parties may exercise any other legal rights in relation to the dispute.

Unless the parties agree otherwise, the planning agreement will provide that such mediation will be conducted pursuant to the Mediation Rules published by the Law Society of New South Wales current at the time the agreement is entered into.

32.0 HAND-OVER OF WORKS

Council will generally not accept the hand-over of a public work carried out under a planning agreement unless the developer provides to Council a certificate under part 4 of the Act, to the effect that the work has been carried out and completed in accordance with the agreement and any applicable development consent (the certificate may, at Council's discretion, be a final occupation certificate, compliance certificate or a subdivision certificate) and, following the issue of such a certificate to Council, the work is also certified as complete by a Council building surveyor and/or engineer.

Council will also require the agreement to provide for a defects liability period during which any defects must be rectified at the developer's expense.

33.0 MANAGEMENT OF LAND OR WORKS AFTER HAND-OVER

If a planning agreement provides for the developer, at the developer's cost, to manage or maintain land that has been dedicated to the Council or works that have been handed-over to Council, Council will require the parties to enter into a separate implementation agreement in that regard (see principle 22.0 of this policy).

The failure of the parties to reach agreement in relation to management and maintenance of the land or works may be dealt with under the dispute resolution provisions of the planning agreement.

34.0 PUBLIC USE OF PRIVATELY OWNED FACILITIES

If a planning agreement provides for the developer to make a privately-owned facility available for public use, Council will generally require the parties to enter into a separate implementation agreement in that regard (see principle 22.0 of this policy).

Such an agreement may, subject to the Council's agreement, provide for payment to the developer of a reasonable fee by a member of the public who desires to use the relevant facility.

35.0 PLANNING AGREEMENTS ENTERED INTO BY OTHER PLANNING AUTHORITIES

The Act authorises other planning authorities to enter into planning agreements with developers. These authorities include the Minister for Planning and Infrastructure, growth centres development corporations and other public authorities designated in the Regulation. In particular, an agreement may relate to state significant development or state significant infrastructure which is approved by an entity other than Council, such as the Minister or a Joint Regional Planning Panel.

Such planning agreements may relate to proposed developments or instrument changes applying to or affecting Council's area and Council needs to ensure that:

- a) any costs or impacts of the proposed development or instrument change will be adequately addressed by the agreement;
- b) any opportunities or requirements to provide public facilities under the agreement are properly pursued, and
- c) any proposed benefits under the agreement are appropriately provided in the best interests of the local community.

To this end, where another planning authority proposes to enter into a planning agreement that:

- a) relates to a development or instrument change on land within Council's LGA, or
- b) relates to a development or instrument change that is likely to have a cost or impact on Council's LGA, or
- c) proposes to provide, or in the opinion of Council should provide, public facilities within Council's LGA.

Council will:

- a) encourage the relevant planning authority to have ongoing liaison with Council from an early stage in the planning agreement process;
- b) seek to provide comment on the planning agreement on the planning agreement at the notification stage, and
- c) be a party to the planning agreement should this be beneficial to Council's interests.