

# Central Coast Council

## Planning Agreement Policy

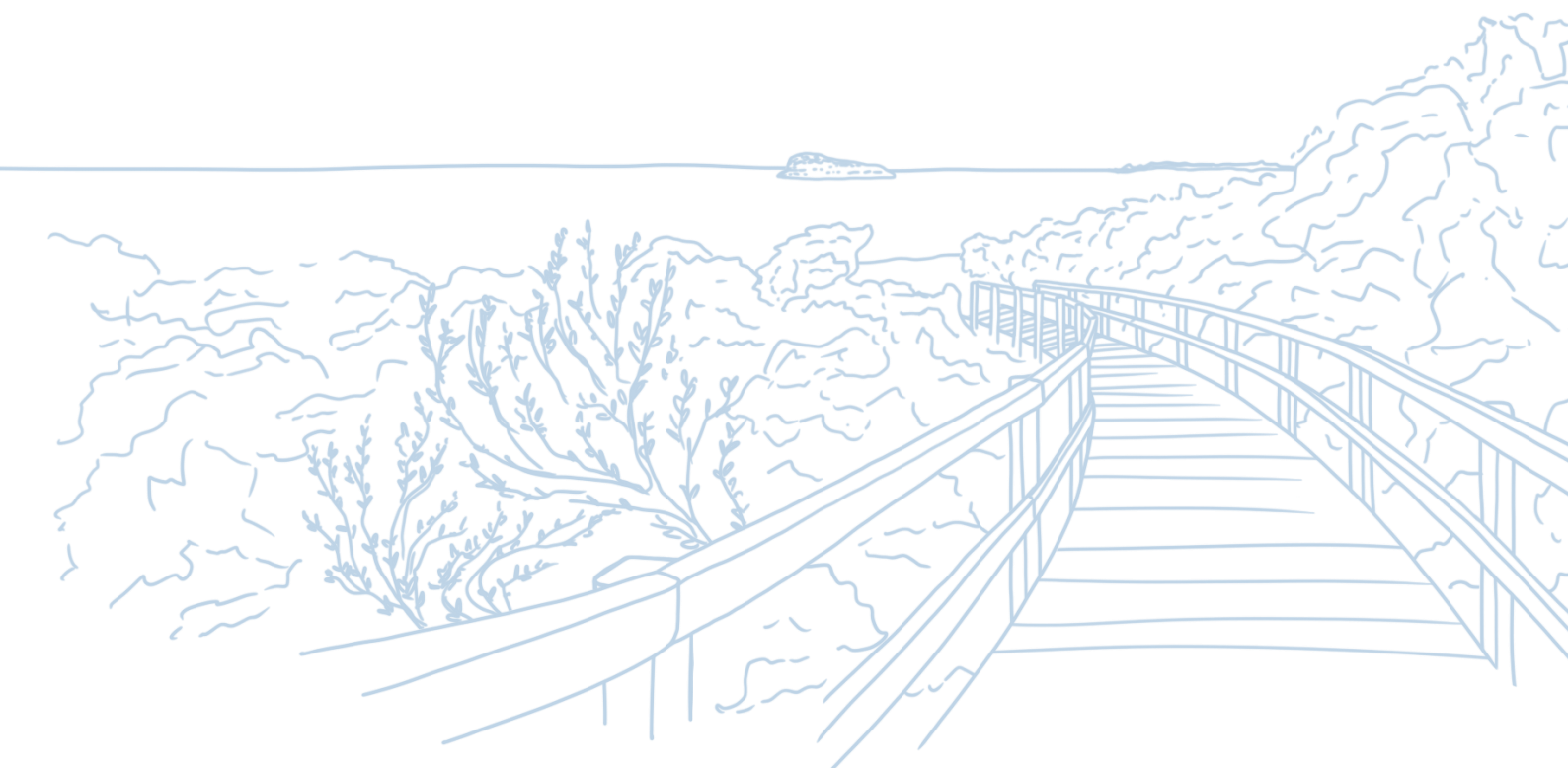


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## 1. Policy Objectives

- 1.1.** The purpose of this Policy is to establish a framework to guide the preparation of Planning Agreements under Section 7.4 of the *Environmental Planning and Assessment Act 1979* (the **EP&A Act**) and the *Environmental Planning and Assessment Regulation 2021* (the **Regulation**).
- 1.2.** The objectives of this Policy are to:
- a) Establish an efficient, fair, transparent and accountable framework that governs the use of Planning Agreements by Council;
  - b) Enhance flexibility of planning decisions through the use of Planning Agreements;
  - c) Enhance the range and extent of development contributions made by development towards public facilities in Council's area;
  - d) Set out Council's specific policies on the use of Planning Agreements; and
  - e) Set out procedures relating to the use of Planning Agreements in Council's area.
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## 2. Policy Scope

- 2.1.** This Policy applies to all Planning Agreements that Council might enter into with a landowner or developer who has sought to change an environmental planning instrument (i.e. planning proposal), made or proposes to make a development application or application for complying development certificate for land within the Central Coast local government area (LGA).
- 2.2.** This Policy covers personnel employed by Council; any person or organisation contracted to or acting on behalf of Council; and any person or organisation employed to work on Council premises or facilities and all activities of the Council.
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## 3. Policy Statement

- 3.1.** Council's Planning Agreements framework consists of the following:
- a) The provisions of Part 7, Division 7.1, Subdivision 2 of the EP&A Act;
  - b) The provisions of Part 9, Division 1 of the Regulation; and
  - c) Planning Agreements Practice Note - February 2021 (Department of Planning and Environment).

- 3.2.** This Policy is not legally binding. However, it is intended that Council and all persons dealing with Council in relation to Planning Agreements will follow this Policy to the fullest extent possible.
- 3.3.** This Policy will be periodically reviewed and, depending on the outcome of any review, may be updated from time to time. The updates may cover additional matters to those covered in this Policy or provide more detailed information or guidance on specific matters covered in this Policy.
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## **4. Planning Agreement Policy**

### **4.1. Background**

- 4.1.1. A Planning Agreement is a voluntary agreement between a planning authority and a developer, who has sought a change to an environmental planning instrument (i.e planning proposal), or who has made, or proposes to make, a development application or application for a complying development certificate. Under a Planning Agreement, a developer agrees to make a contribution towards a public purpose. The contribution may be the dedication of land, payment of a monetary contribution, provision of a material public benefit, or any combination of these.
- 4.1.2. Planning Agreements are widely used by Council as a tool for delivering infrastructure and public benefit outcomes in association with planning proposals and development applications. It is important Council has a policy and procedure in place to guide the negotiation, administration and making of Planning Agreements. This ensures transparency, fairness and flexibility of planning decisions.

### **4.2. Objectives**

- 4.2.1. Council's objectives with respect to the use of Planning Agreements include:
- a) To provide an enhanced and more flexible development contributions system which achieves net Planning benefits from development;
  - b) To supplement or replace, as appropriate, the application of Section 7.11 and Section 7.12 of the EP&A 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 EP&A Act, to gain an understanding as 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 and flexible approaches to the provision of public facilities in a manner that is consistent with relevant controls, policies and circumstances legally recognised as relevant under Section 4.15 of the EP&A Act;

- f) To provide or upgrade public facilities to appropriate levels that reflect and balance environmental standards (including, without limitation, the principles of ecologically sustainable development), community expectations and funding priorities;
- g) To ensure that developers make appropriate contributions towards the cost of the provision and management of public facilities within the Central Coast LGA;
- h) To provide certainty for the community, developers and Council in respect to public facilities and development outcomes; and
- i) Where applicable, to achieve outcomes from development which ensure that the public has full access to natural public assets and waterways within the Central Coast LGA.

#### **4.3. Circumstances in which Council will consider Negotiating a Planning Agreement**

- 4.3.1. Council, in its complete discretion, may negotiate a Planning Agreement with a developer in connection with any application by the developer for an environmental instrument change, development application or application for a complying development certificate relating to development of land in the Central Coast LGA.

#### **4.4. Specific Purposes of Planning Agreements**

- 4.4.1. Council may consider negotiating a Planning Agreement with a developer to:
  - a) Compensate for the loss of, or damage to, a public amenity, service, resource or asset caused by the development through its replacement, substitution, repair or regeneration;
  - b) Meet the demands created by the development for new public facilities;
  - c) Achieve the provision of affordable housing;
  - d) Address a deficiency in the existing provision of public facilities in the Central Coast LGA;
  - e) Achieve recurrent funding in respect of public facilities;
  - f) Prescribe inclusions in the development that meet specific planning objectives of Council;
  - g) Monitor the implementation of development;
  - h) Ensure that public access to the Central Coast's natural public assets and waterways within the Central Coast LGA, are preserved or enhanced;
  - i) Secure planning benefits for the public;
  - j) Allow the payment of monetary contributions at various stages of development which may differ to that specified in an adopted

Contributions Plan, pending careful consideration of Public facility delivery and associated financial implications; and/or

- k) Negotiate flexible outcomes in respect of development contributions and enable the NSW planning system to deliver sustainable development while achieving key economic, social and environmental objectives.

#### **4.5. Principles for Planning Agreements**

4.5.1. 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. Planning authorities should always consider a development proposal on its merits, not on the basis of a Planning Agreement;
- b) Development that is unacceptable on planning grounds (including, without limitation, environmental, sustainability or financial grounds) will not be permitted because of Planning benefits offered by developers that do not make the development acceptable in planning terms;
- c) Planning Agreements must be underpinned by proper strategic land use and infrastructure planning carried out on a regular basis and must address expected growth and the associated infrastructure demand;
- d) Council will not allow Planning Agreements to improperly fetter the exercise of its functions under the EP&A Act, Regulation or any other Act or Law;
- e) Council will not use Planning Agreements for any purpose other than a proper planning purpose;
- f) Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed Planning Agreement;
- g) Council cannot refuse to grant development consent on the grounds that a Planning Agreement has not been entered into in relation to the proposed development or that the developer has not offered to enter into such an agreement;
- h) Planning Agreements should not be used as a means of general revenue raising or to overcome revenue shortfalls;
- i) Value capture should not be the primary purpose of a Planning Agreement;
- j) Council will not improperly rely on its statutory position, or otherwise act improperly, in order to extract unreasonable public benefits from developers under Planning Agreements, and will ensure that all parties involved in the Planning Agreement process are dealt with fairly;
- k) If 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;

- l) Council will not seek benefits under a Planning Agreement that are wholly unrelated to a particular development;
- m) When considering a development application or environmental planning instrument change, the Council will not take into consideration any public facility or public benefits proposed in the Planning Agreement that are wholly unrelated to the application; and
- n) When considering a development application or environmental planning instrument change, Council will not give undue weight to a Planning Agreement.

#### **4.6. Procedures and Decision Making**

##### 4.6.1. Basic procedures for entering into a Planning Agreement

- a) Council's negotiation system for Planning Agreements aims to be efficient, predictable, transparent and accountable. The system seeks to ensure that the negotiation of Planning Agreements runs in parallel with applications for Instrument changes or applications for development.
- b) The procedures for negotiating a Planning Agreement between Council and developers are provided at **Appendix 1**. The procedures are based on principles of fairness, co-operation, full disclosure, early warning and agreed working practices and timetables.

#### **4.7. Acceptability Test to be Applied to all Planning Agreements**

##### 4.7.1. Council will apply the following test in order to assess the acceptability of a proposed Planning Agreement:

- a) Does the proposed Planning Agreement meet the requirements of the EP&A Act and Regulation?
- b) Is the proposed Planning Agreement directed towards a proper or legitimate planning purpose having regard to its statutory planning controls, other adopted planning policies and strategies and the circumstances of the case?
- c) Does the proposed Planning Agreement provide for a reasonable means of achieving the relevant purpose and outcomes and securing the benefits?
- d) Does the Planning Agreement provide for the delivery of infrastructure or public benefits not wholly unrelated to the development?
- e) Can the proposed Planning Agreement be taken into consideration in the assessment of the relevant Instrument change or application for development?

- f) Will the proposed Planning Agreement produce outcomes that meet the general values and expectations of the public and protect the overall public interest against adverse planning decisions?
- g) Does the proposed Planning Agreement promote Council's objectives in relation to the use of Planning Agreements as set out in this Policy?
- h) Does the proposed Planning Agreement conform to the principles governing Council's use of Planning Agreements as set out in this Policy?
- i) Are there any relevant circumstances that may operate to preclude Council from entering into the proposed Planning Agreement?

#### **4.8. Application of Section 7.11 and Section 7.12 to Development to which a Planning Agreement Relates**

- 4.8.1. A Planning Agreement may wholly or partly exclude the application of Section 7.11 or Section 7.12 of the EP&A 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.
- 4.8.2. Where the application of Section 7.11 or Section 7.12 of the EP&A Act to development is not excluded by a Planning Agreement and where there are no works-in-kind involved, Council will generally not agree to a provision allowing benefits under the agreement to be taken into consideration in determining Development Contributions under Section 7.11 or Section 7.12 of the EP&A Act.

#### **4.9. Consideration of Planning Agreements in relation to Instrument Changes and Applications for Development**

- 4.9.1. When exercising its functions under the EP&A Act in relation to an application by a developer for an Instrument change or a development consent to which a proposed Planning Agreement relates, 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.

#### **4.10. Relationship between Planning Agreements and applications to vary development standards under Clause 4.6 of CCLEP 2022**

- 4.10.1. Benefits provided under a Planning Agreement must not be exchanged for a variation from a development standard under any circumstances. Variations to development standards under Clause 4.6 of the Central Coast Local Environmental Plan 2022 (CCLEP 2022) must be justified on planning

grounds, and the benefit under the agreement should contribute to achieving the planning objective of the development standard.

#### **4.11. Contents of Planning Agreement**

4.11.1. The Form of Development Contributions under a Planning Agreement to be made under a proposed Planning Agreement will be determined by the particulars of the Instrument change or application for development to which the proposed Planning Agreement relates. Development contributions by a developer under a proposed Planning Agreement may include:

- a) The dedication of land to Council or another relevant public authority;
- b) The provision of particular public facilities and/or infrastructure;
- c) The making of a monetary contribution towards the cost of the provision of public facilities and/or infrastructure; and/or
- d) The provision of, or payment towards, recurrent services in respect of public facilities and/or infrastructure.

#### **4.12. Recurrent Charges**

4.12.1. Council may request developers, through a Planning Agreement, to make Development Contributions towards the recurrent costs of public 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.

4.12.2. However, where the public facility or public benefit is intended to serve the wider community, the Planning Agreement will only require the developer to make contributions towards the recurrent costs of the public facility until a public revenue stream is established to support the ongoing costs of the facility.

#### **4.13. Pooling of Monetary Contributions**

4.13.1. 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 or Contributions Plans and applied progressively for the different purposes under those agreements or plans, subject to the specific requirements of the relevant agreements or plans. Pooling may be appropriate to allow public facilities that provide public benefit, to be provided in a fair and equitable way.

#### **4.14. Method for Valuing Public Benefits under a Planning Agreement**

*Provision of land for a public purpose*

4.14.1. 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 valuer with at least



10 years' experience in valuing land in New South Wales (and who is acceptable to Council and the developer), on the basis of a scope of work which is prepared by Council, in consultation with the developer. All costs of the independent valuer in carrying out such a valuation will be borne by the developer.

#### *Carrying out of works for a public purpose*

4.14.2. 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 with at least 10 years' experience (and who is acceptable to Council and the developer), on the basis of the estimated value of the completed works determined using the method that would be ordinarily adopted by a quantity surveyor. Council will prepare the scope of work for this independent quantity surveyor in consultation with the developer. All costs of the independent quantity surveyor in carrying out this work will be borne by the developer.

#### *Provision of a Material Public Benefit*

4.14.3. 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.

#### *Credits*

4.14.4. 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 other development outside of the area of the applicable Contributions Plan.

4.14.5. Unless otherwise agreed by the Parties in a particular case, the Surplus value will not be refunded to a developer until the following criteria are met:

- a) All of the developer's land within the area serviced by a contributions plan covering that area has been developed and all relevant contributions have been offset against the Surplus value;
- b) 75% of the areas benefiting from the Surplus value have contributed to the scheme; and
- c) Sufficient funds exist in the fund ensuring the refund will not impact on Council's ability to carry out works contained on its rolling works programme.

### **4.15. Time when Developer's Obligations arise under a Planning Agreement**

4.15.1. 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 development that is the

subject of the agreement, and will operate progressively, in accordance with its terms, as the development proceeds from the issue of the first Construction Certificate in respect of that development until the grant of the final Occupation Certificate.

4.15.2. 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 matters such 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 Planning Agreement; and/or
- e) The management or maintenance of land or works following hand over to Council.

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## 5. Implementation

### 5.1. Preparation and Form of the Planning Agreement

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

5.1.2. Council will generally require the Planning Agreement to be in or to the effect of the standard form Planning Agreement.

### 5.2. Council's Costs of Negotiating, Entering into, Monitoring and Enforcing a Planning Agreement

5.2.1. Council will generally require a Planning Agreement to make provision for payment by the developer of Council's costs of and incidental to:

- a) Negotiating, preparing, advertising and entering into the agreement;
- b) Registration of the agreement on the title of any relevant land; and
- c) Enforcing and monitoring the agreement.

5.2.2. The amount to be paid by the developer will be determined by negotiation in each case. However, as a general rule, Council considers that when the Planning Agreement relates to an application by the developer for an Instrument change, or relates to an application for development, in each case it is fair and reasonable that the developer will pay the whole of Council's costs.

- 5.2.3. In particular cases, Council may require the Planning Agreement to make provision for a contribution by the developer towards the ongoing administration of the agreement.

### **5.3. Registration of Planning Agreements**

- 5.3.1. The Planning Agreement is to contain a provision requiring the developer to agree to registration of the agreement pursuant to Section 7.6 of the EP&A Act if the requirements of that section are satisfied. All costs associated with the registration or otherwise will be borne by the developer.
- 5.3.2. To ensure that the intention of the parties to register the Planning Agreement is not defeated, the developer should get written agreement to the registration from each person with an estate or interest in the land to which the planning agreement applies. This should be provided to the planning authority as a precondition to the execution of the Planning Agreement.

### **5.4. Notations on Certificates under Section 10.7(5) of the EP&A Act**

- 5.4.1. Council will generally require a Planning Agreement to contain an acknowledgement by the developer that Council may, in its absolute discretion, make a notation under Section 10.7(5) of the EP&A Act about a Planning Agreement on any certificate issued under Section 10.7(2) of the EP&A Act relating to the land the subject of the agreement or any other land.

### **5.5. Monitoring and Review of a Planning Agreement**

- 5.5.1. Council will continuously monitor the performance of the developer's obligations under a Planning Agreement. This may include Council requiring the developer (at its cost) to report periodically to Council on its compliance with obligations under the Planning Agreement.
- 5.5.2. 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.
- 5.5.3. 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.

### **5.6. Assignment and Dealings by the Developer**

- 5.6.1. 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 requirements of the agreement:
- a) Council has given its consent to the proposed assignment or dealing;

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

### **5.7. Provision of Security under a Planning Agreement**

- 5.7.1. Council generally will require a Planning Agreement to make provision for security by the developer of the developer's obligations under the Planning Agreement.
- 5.7.2. Unless otherwise agreed by the parties in a particular case, the form of security required by Council will be cash or an irrevocable Bankers Guarantee approved by Council's Chief Financial Officer in favour of Council to the full value of the developer's provision (together with projected CPI) under the Planning Agreement.

### **5.8. Deferred or Periodic Payments and Bank Guarantees**

- 5.8.1. Deferred or periodic payments may be permitted in the following circumstances:
  - a) Where the applicant has reached agreement with the Council to provide works in kind, land dedication and/or material public benefits documented in a formal Planning Agreement, which makes detailed and specific provision for the dedication of, and/or, the carrying out of works-in-kind and/or the provision of a material public benefit in partial or full satisfaction of a condition imposed on the development consent, and, as an integral part of the delivery of that package of works process, sets out an alternative timing for the payment of monetary contributions, with security if required; or
  - b) In other circumstances, such as financial hardship. This must be substantiated in writing by the applicant with appropriate documentation, which demonstrates the financial hardship to be both severe and sufficiently unique as to distinguish the applicant from any other applicant.
- 5.8.2. Council, on the specific merits of the case, must also determine that the deferred or periodic payment of the contributions will not cause prejudice to the community deriving benefit from the works or the timing or the manner of the provision of the public facilities.
- 5.8.3. Should Council agree to accept deferred or periodic payments having regard to the above circumstances, and unless otherwise expressed within a formal Planning Agreement, Council will require the applicant to provide a non-expiring bank guarantee by an Australian bank for the full amount of the contribution, or the outstanding balance.

5.8.4. Deferred or periodic payments may be permitted, in accordance with the above requirements, only with approval of the Council officer(s) whose position(s) holds the required Council delegations.

## **5.9. Modification or Discharge of the Developer's Obligations under a Planning Agreement**

5.9.1. 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 out 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 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 applies;
- 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.

5.9.2. Such a provision will require the modification or revocation of the Planning Agreement in accordance with the EP&A Act and Regulation.

## **5.10. Dispute Resolution**

5.10.1. Council will generally require a Planning Agreement to provide for mediation of disputes between the parties, at their own cost, before the parties may exercise any other legal rights in relation to the dispute. Different kinds of dispute resolution mechanisms may suit different disputes, and this should be reflected in a planning agreement. 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.

### **5.11. Hand Over of Works**

- 5.11.1. Council will generally not accept the handover of a public facility carried out under a Planning Agreement unless the developer furnishes to Council a certificate to the effect that the work has been carried out and completed in accordance with the agreement and any applicable development consent (which 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 or Engineer.
- 5.11.2. 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.

### **5.12. Management of Land or Works after Hand Over**

- 5.12.1. If a Planning Agreement provides for the developer, at the developer's cost, to manage or maintain land that has been dedicated to Council or public facilities that have been handed over to Council, Council will generally require the parties to enter into a separate implementation agreement in that regard (see Clause 4.15.2 of this Policy).
- 5.12.2. The failure of the parties to reach agreement in relation to management and maintenance of the land or facilities may be dealt with under the dispute resolution provisions of the Planning Agreement.

### **5.13. Public Use of Privately Owned Facilities**

- 5.13.1. 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 Clause 4.15.2 of this Policy).
- 5.13.2. Such an agreement may, subject to 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.

### **5.14. Planning Agreements Entered into by Other Planning Authorities**

- 5.14.1. The EP&A Act authorises other planning authorities to enter into Planning Agreements with developers. These authorities include the Minister for Planning, growth centre development corporations and other public authorities designated in the Regulation.
- 5.14.2. Such Planning Agreements may relate to proposed developments or Instrument changes applying to or affecting the Central Coast LGA 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.

5.14.3. 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 the the Central Coast LGA; or
- b) Relates to a development or Instrument change that is likely to have a cost or impact on the Central Coast LGA; or
- c) Proposes to provide, or in the opinion of Council should provide, public facilities within the Central Coast LGA.

5.14.4. Council will, pursuant to Section 7.4(7) of the EP&A Act, seek to become an additional party to the agreement and receive a benefit under the agreement on behalf of the State.

#### **5.15. Developer not the owner**

5.15.1. Where the developer is not the owner, the owners shall be party to the Planning Agreement together with any mortgagees. A mortgagee is bound if a mortgagor takes possession of, or exercises power of sale over the property.

#### **5.16. Separation of Council's Commercial and Planning Assessment Roles**

5.16.1. If Council has a commercial interest in the subject matter of a Planning Agreement as a landowner, developer or financier, Council will ensure that the person who assesses the application to which a Planning Agreement relates is not the same person or a sub-ordinate of the person who negotiated the terms of the Planning Agreement on behalf of Council in its capacity as land owner, developer or financier.

#### **5.17. Role of the Governing Body of Council in relation to Applications for Development to which Planning Agreements Relate**

5.17.1. Except as otherwise agreed to by the Chief Executive Officer, the governing body of Council will determine applications for development to which a Planning Agreements relates.

#### **5.18. Involvement of Independent Third Parties in the Negotiation Process**

5.18.1. Council may appoint an independent person to facilitate or otherwise participate in the negotiation of a Planning Agreement, or aspects of it, such as where:

- a) An independent assessment of a proposed Instrument change or application for Development 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 under a Planning Agreement.

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

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## 6. Responsibilities

### 6.1. Determination of Development Applications that include a Planning Agreement

6.1.1. Council staff are precluded from exercising consent authority functions for applications that are accompanied by a planning agreement, and such development applications are referred to the appropriately delegated consent authority, which includes:

- The Local Planning Panel (as per Schedule 2, Part 4(f) of the Local Planning Panels Direction for Development Applications); or
- the Regional Planning Panel (for 'regionally significant development' applications set out in relevant Environmental Planning Instruments).

6.1.2. When such an application is referred to the relevant Panel for consideration/determination, it must be accompanied by the final draft planning agreement and submissions received in relation to the agreement during the required notification period. The weight given to the draft planning agreement and public submissions is a matter for the relevant authority.

6.1.2. Where Council is not the consent authority, Council will advise the consent authority about whether it is satisfied with any associated planning agreement for consideration in the consent authority's determination of the relevant development application.

### 6.2. Determination of Planning Proposals that include a Planning Agreement

6.2.1. In accordance with the Local Planning Panels Direction for Planning Proposals, the Local Planning Panel is required to provide advice on any Planning Proposal before Council considers whether or not to forward it to the Minister under Section 3.34 of the *Environmental Planning and Assessment Act 1979*. At the time the Local Planning Panel considers any Planning Proposal, any relevant draft Planning Agreement must be provided for consideration alongside the Planning Proposal.

6.2.2. Following public exhibition, the Planning Proposal and final draft Planning Agreement is to be reported to Council for determination.

### 6.3. Compliance, monitoring and review

6.3.1. It is intended that this Policy will be periodically reviewed and, depending on the outcome of any review, may be updated from time to time. The



updates may cover additional matters to those covered in this Policy or provide more detailed information or guidance on specific matters covered in this Policy.

- 6.3.2. Suspected breaches or misuse of this policy are to be reported to the Chief Executive Officer. Alleged breaches of this policy shall be dealt with by the processes outlined for breaches of the Code of Conduct, as detailed in the Code of Conduct and in the Procedures for the Administration of the Code of Conduct.

#### **6.4. Reporting**

- 6.4.1. After adoption by Council, any future reporting will be in accordance with the terms of the Planning Agreement, the EP&A Act and Regulation and any direction made by the Department of Planning and Environment.

#### **6.5. Records management**

- 6.5.1. Staff must maintain all records relevant to administering this policy in accordance with Council's [Information Records Management Policy](#).
- 6.5.2. Council is required to keep a register of Planning Agreements applying to land within the Central Coast LGA, 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).
- 6.5.3. Council will make the following available for public inspection (free of charge) during ordinary office hours:
- a) The Planning Agreement register kept by Council
  - b) Copies of all Planning Agreements (including amendments) that apply to the Central Coast LGA; and
  - c) Copies of the explanatory notes relating to those agreements or amendments.
- 6.5.4. Council will also make its Planning Agreement register available to the public on its website.

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## **7. Policy Definitions**

<b>Act</b>	means the <i>Environmental Planning and Assessment Act 1979</i> .
<b>Contributions Plan</b>	means a contributions plan approved under Section 7.18 of the EP&A Act for the purpose of requiring contributions under Section 7.11 or 7.12 of the EP&A Act.
<b>Council</b>	means Central Coast Council
<b>Developer, Developers</b>	has the same meaning given in Section 7.4(1) of the EP&A Act
<b>Development application</b>	has the same meaning as in the EP&A Act

<b>Development consent</b>	has the same meaning as in the EP&A Act
<b>Development</b>	has the same meaning given in Section 1.5 of Part 1 of the EP&A Act
<b>Development Contribution</b>	means a contribution made by a developer under a planning agreement, being a monetary contribution, the dedication of land free of cost or the provision of a material public benefit, to be used for or applied towards a public purpose
<b>Instrument change</b>	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
<b>Net public benefit</b>	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
<b>Parties</b>	means Council and a Developer or Developers
<b>Planning Agreement</b>	means a voluntary agreement or other arrangement between Council and a Developer authorised by Subdivision 2 of Division 7.1 of Part 7 of the EP&A Act and includes an agreement to amend or revoke a Planning Agreement
<b>Planning authority</b>	has the same meaning as in Division 7.1 of Part 7 of the EP&A Act
<b>Planning benefit</b>	means a Development Contribution that confers a Net public benefit
<b>Planning proposal</b>	has the same meaning as in the EP&A Act
<b>Public</b>	includes a section of the public
<b>Public benefit</b>	is the benefit enjoyed by the public as a consequence of a development contribution
<b>Public facilities</b>	means public infrastructure, facilities, amenities and services
<b>Public purpose</b>	means any purpose that benefits the public, including but not limited to a purpose specified in Section 7.4(2) of the EP&A Act
<b>Regulation</b>	means the <i>Environmental Planning and Assessment Regulation 2000</i>
<b>Surplus value</b>	means the value of the Developer's provision under a Planning Agreement less the sum of the value of public works required to be carried out by the Developer under a condition imposed under Section 4.17(1) of the EP&A Act and the value of development contributions that are or could have been required to be made under Section 7.11 or Section 7.12 of the EP&A Act in respect of the development the subject of the agreement

## 8. Policy Administration

<b>Business Group</b>	Planning and Environment
<b>Responsible Officer</b>	Strategic Planning Unit Manager
<b>Associated Procedure (if any, reference document(s) number(s))</b>	D15590950) - Appendix 1: Planning Agreement Procedures for Development Applications that include a Planning Agreement  D15636534 - Appendix 2: Planning Agreement Procedures for Planning Proposals that include a Planning Agreement
<b>Policy Review Date</b>	Three years from date of adoption unless legislated otherwise
<b>File Number / Document Number</b>	D15590911
<b>Relevant Legislation (reference specific sections)</b>	Part 7, Division 7.1, Subdivision 2 of the <i>Environmental Planning and Assessment Act 1979</i>  Part 9, Division 1 of the <i>Environmental Planning and Assessment Regulation 2021</i>
<b>Relevant desired outcome or objectives as per Council's Delivery Program</b>	<b>Link to Community Strategic Plan</b>  Theme 2: Smart  <b>Goal G: Good governance and great partnerships</b>  R-G1: Build strong relationships and ensure our partners and community share the responsibilities and benefits of putting plans into practice.
<b>Related Policies / Protocols / Procedures / Documents (reference document numbers)</b>	<ul style="list-style-type: none"> <li>▪ Information Records Management Policy (D14025241)</li> </ul>

## 9. Policy Authorisations

No.	Authorised Function	Authorised Business Unit / Role(s)
1	Negotiation of Planning Agreements	Director, Environment and Planning Unit Manager, Strategic Planning Unit Manager, Development Assessment Section Manager, Local Planning and Policy Section Manager, Local Infrastructure and Planning Section Manager, Strategic Planning Projects Unit Manager, Governance, Risk and Legal Unit Manager, Environmental Management

## 10. Policy History

Revision	Date Approved / Authority	Description Of Changes
1	14 October 2009	Policy adopted
2	26 April 2023	Policy reviewed and new policy adopted

## 11. Appendices

Item	Document No	Name of document
1	D15590950	Appendix 1: Planning Agreement Procedures for Development Applications that include a Planning Agreement
2	D15636534	Appendix 2: Planning Agreement Procedures for Planning Proposals that include a Planning Agreement

# Appendix 1: Planning Agreement Procedures for Development Applications that include a Planning Agreement

Council's negotiation system for Planning Agreements aims to be efficient, predictable, transparent and accountable. The system seeks to ensure that the negotiation of Planning Agreements runs in parallel with applications for development. The following procedures are based on principles of fairness, co-operation, full disclosure, early warning and agreed working practices and timetables.

## **Steps for negotiating a Planning Agreement accompanying a Development Application (see Figure 1)**

### Step 1 – Commencement

Before submitting a development application, the consent authority and developer decide whether to negotiate a Planning Agreement. When deciding whether to enter into a Planning Agreement, consideration should be given to Council's Planning Agreement Policy, relevant legislation and DPE Practice Note on Planning Agreements.

### Step 2 – Negotiation

*When should a Planning Agreement be negotiated?*

Council prefers that a Planning Agreement is negotiated before lodgement of the relevant application. It should accompany the application on lodgement.

If an agreement or arrangement is negotiated, it is documented as a draft Planning Agreement with an accompanying explanatory note. The draft Planning Agreement should be assessed against the acceptability test outlined in this Policy and DPE's Planning Agreements Practice Note (February 2021).

The parties should consider how the draft Planning Agreement will be enforced and when the draft planning agreement will be executed, as this will inform the security provisions and conditions of the agreement. Legal advice should be sought in each case to ensure that the appropriate provisions are included in the Planning Agreement.

Council is required to ensure that a proposed Planning Agreement is publicly notified at the same time as the development application to which it relates.

*Who will negotiate a Planning Agreement on behalf of Council?*

Council's Chief Executive Officer or another Council officer with appropriate delegated authority will negotiate a Planning Agreement on behalf of Council. Councillors will not be involved in the face-to-face negotiation of an agreement.

### Step 3 – Submission and Council Consideration

When the developer submits a development application, it should be accompanied by the draft Planning Agreement and explanatory note. Council officers then assess the application and draft Planning Agreement.

#### Step 4 - Public Notification of Planning Agreements

Planning agreements must be publicly notified and made available for public inspection before they can be entered into. A Planning Agreement and Explanatory Note must be publicly notified and available for public inspection for a minimum period of 28 days.

The Regulation requires that the notification of a proposed Planning Agreement occurs at the same time as the development application. If this is not practicable, it should be exhibited as soon as possible after and before the relevant consent authority considers the development application.

Where the proposed application and Planning Agreement is required by or under the EP&A Act or Regulation to be publicly notified and available for public inspection for a period exceeding 28 days, Council will publicly notify the Planning Agreement and make it available for public inspection for that longer period.

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

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

#### Step 5 – Assessment and Determination

Council is not the consent authority for development applications that include a Planning Agreement, however the Planning Agreement must be finalised and endorsed by Council prior to reporting the application to the relevant panel for determination. The entering into and execution of the Planning Agreement between Council and the Developer is contingent on the Panel approving the Development Application.

At the time that the DA is considered/determined by the relevant Panel, the development application and Planning Agreement must have been notified and the Panel must consider the outcomes of public notification. The Planning Agreement presented to the Panel should be the final draft version.

#### Step 6 - Execution and Registration on title

##### *Execution*

The draft Planning Agreement is either executed before the relevant application is determined or not long after the application is determined. Council will usually 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 to which the agreement relates, is granted or made. However, there may be circumstances where it is necessary to enter into a Planning Agreement before consent is granted.

### *Registration on title*

Registration is important to inform people of the existence of a Planning Agreement affecting the land and for the enforcement of a planning agreement. The Planning Agreement must be registered on Title before consent is granted for the relevant development application.

Provision should be made in a registered Planning Agreement about when the notation of the Planning Agreement on the Title to land can be removed.

**Figure 1 - Planning Agreement Process – Development Applications that include a Planning Agreement**





## Appendix 2: Planning Agreement Procedures for Planning Proposals that include a Planning Agreement

Council's negotiation system for Planning Agreements aims to be efficient, predictable, transparent and accountable. The system seeks to ensure that the negotiation of Planning Agreements runs in parallel with applications for development. The following procedures are based on principles of fairness, co-operation, full disclosure, early warning and agreed working practices and timetables.

### **Steps for negotiating a Planning Agreement accompanying a Planning Proposal (see Figure 2)**

#### Step 1 – Commencement

Before submitting a planning proposal, the consent authority and developer decide whether to negotiate a Planning Agreement. When deciding whether to enter into a Planning Agreement, consideration should be given to Council's Planning Agreement Policy, relevant legislation and DPE Practice Note on Planning Agreements.

#### Step 2 – Negotiation

*When should a Planning Agreement be negotiated?*

Council prefers that a Planning Agreement is negotiated before lodgement of the planning proposal and that it accompanies the application on lodgement.

If an agreement or arrangement is negotiated, it is documented as a draft Planning Agreement with an accompanying explanatory note. The draft Planning Agreement should be assessed against the acceptability test outlined in this Policy and DPE's Planning Agreements Practice Note (February 2021).

The parties should consider how the draft Planning Agreement will be enforced and when the draft planning agreement will be executed, as this will inform the security provisions and conditions of the agreement. Legal advice should be sought in each case to ensure that the appropriate provisions are included in the Planning Agreement. Council is required to ensure that a proposed Planning Agreement is publicly notified as part of, in the same manner as and, where practicable, at the same time as the planning proposal to which it relates.

*Who will negotiate a Planning Agreement on behalf of Council?*

Council's Chief Executive Officer or another Council officer with appropriate delegated authority will negotiate a Planning Agreement on behalf of Council. Councillors will not be involved in the face-to-face negotiation of the agreement.

#### Step 3 – Submission and Council Consideration

When the developer submits a planning proposal, it should be accompanied by the draft Planning Agreement and explanatory note. The Local Planning Panel is required, as per the Local Planning Panels Direction for Planning Proposals, to provide advice on any Planning Proposal before Council considers whether or not to forward it to the Minister under Section 34 of the *Environmental Planning & Assessment Act 1979*.

Once the planning proposal and Planning Agreement is reported to the LPP for comment, Council officers then prepare a report for Council recommending to forward the planning proposal and Planning Agreement to the Minister.

#### Step 4 - Public Notification of Planning Agreements

Planning agreements must be publicly notified and made available for public inspection before they can be entered into. A Planning Agreement and Explanatory Note must be publicly notified and available for public inspection for a minimum period of 28 days. The Regulation requires that the notification of a proposed planning agreement occurs at the same time as the planning proposal. If this is not practicable, it should be exhibited as soon as possible after.

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

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

Council will publicly re-notify and make available for public inspection a Planning Agreement and planning proposal to which it relates if, in Council's opinion, a material change is made to the terms of the agreement or planning proposal 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, the planning proposal, or their formal consideration by Council, or for any other reason.

#### Step 5 – Assessment and Council Consideration

Post-exhibition, Council officers are required to consider all public submissions. Council officers are required to prepare a report on the comments received during notification for consideration by Council. All planning proposals and Planning Agreement are reported to Council for determination.

#### Step 6 - Execution and Registration on title

##### *Execution*

The draft Planning Agreement is either executed before the relevant planning proposal is determined or not long after the proposal is determined. Council will usually require a Planning Agreement to be entered into prior to finalisation of the instrument change. In the case of a Planning Agreement relating to a planning proposal, all parties must sign the Planning Agreement before the environmental planning instrument is made. 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 in accordance with the EP&A Act and Regulation.

##### *Registration on title*

Registration is important to inform people of the existence of a Planning Agreement affecting the land and for the enforcement of a Planning Agreement. The Planning Agreement must be registered on Title before finalisation of the environmental planning instrument.

Provision should be made in a registered planning agreement about when the notation of the Planning Agreement on the Title to land can be removed.

**Figure 2 - Planning Agreement Process – Planning Proposals that include a Planning Agreement**



