

CITY PLANNING

Planning Agreements Policy

09 November 2023

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1. Preliminary

1.1 About this policy

This policy establishes a framework to guide the preparation of Planning Agreements in a manner that is efficient, fair, transparent and accountable. Planning Agreements are legally established under the *Environmental Planning and Assessment Act 1979 (EPA Act)* and *Environmental Planning and Assessment Regulation 2021 (the Regulation)*, to provide an alternative mechanism for development proponents to contribute towards public facilities and infrastructure arising from development.

Council has adopted this policy in order to provide development proponents and the community with an understanding of the objectives, principles and procedures which will be applied by Council in the negotiation, preparation and administration of Planning Agreements.

This Policy is not legally binding however, it is intended that Council and all persons dealing with the Council, in relation to Planning Agreements, will follow this Policy to the fullest extent possible.

Note: The Planning Agreements Practice Note (NSW Government, February 2021) should be read in conjunction with this Policy. If there is any inconsistency between the legislative provisions, the Practice Note issued by NSW Government and this Policy, the legislative provisions and NSW Government Practice Note prevails to the extent of that inconsistency.

1.2 Name of this Policy

This policy is called Randwick City Planning Agreements Policy 2023.

1.3 Objectives

The objectives of this Policy are as follows:

- a) To provide a clear, transparent and consistent framework governing the use and specific procedures relating to Planning Agreements.
- b) To establish a probity framework for the negotiation, preparation and implementation of Planning Agreements.
- c) 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 under the EP&A Act.
- d) To align with Council's corporate and strategic planning context, including Council's Local Strategic Planning Statement, Community Strategic Plan, Delivery Plan, Operational Plan, Development Contribution Plans or other Infrastructure Planning Documents.
- e) To give stakeholders greater involvement in determining the type, standard and location of public facilities and other public benefits.
- f) To provide certainty for the community, developers and Council with respect to infrastructure and development outcomes.
- g) To achieve the timely delivery of infrastructure required as a result of the conduct of development so that it is provided when and where it is needed.
- h) To ensure that all developers are treated consistently in the negotiation and execution of Planning Agreements.
- i) To work with developers who seek to provide infrastructure and public benefits for the community which go beyond meeting the impacts generated by their developments.
- j) To raise public confidence in the delivery of infrastructure provided by developers.

- k) To limit any potential financial risk to Council in entering into a Planning Agreement.
- l) To set out Council's specific policies on the use of Planning Agreements.

1.4 Land to which this Policy applies

This Policy applies to all land within the Randwick City Local Government Area. The policy also applies to those circumstances where there is a joint Planning Agreement between Council and another council or planning authority.

1.5 What is a Planning Agreement?

A Planning Agreement is a voluntary agreement between one or more planning authorities (i.e. **Council**) and one or more developer(s) (and/or land owners), who has sought a change to an environmental planning instrument (i.e. **a Planning Proposal**), or who has made, or proposes to make, a Development Application (**DA**) or application for a Complying Development Certificate (**CDC**).

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.

Planning Agreements may address purposes and contributions included in a contributions plan but may also address other purposes and contributions that have a wider public benefit. For this reason, Planning Agreements are a more flexible type of development contribution mechanism than the payment of s7.11/s7.12 contributions, as they allow for the provision of contributions and facilities in conjunction with the conduct of the relevant development.

Council has a duty to act with probity and transparency in Planning Agreement negotiations and in the interests of the wider community.

The EPA Act and the Regulations set out basic requirements for the preparation, execution and administration of Planning Agreements. This Policy provides detail on the Council's approach to Planning Agreements beyond those minimum legislative requirements.

1.6 Why use a Planning Agreement?

Planning Agreements may be used for a variety of reasons in order to achieve public benefits which are not ordinarily available through the planning and development system or are available in a restricted manner. In that regard, Planning Agreements:

- provide a way for Council on behalf of the local community to secure public benefits in addition to measures which are required to address the impact of development on private and public lands;
- allow for a flexible means for achieving good development outcomes and targeted public benefits;
- allow opportunities for more innovative and efficient provision of public benefits than might be realised under other means;
- provide opportunities for the local community to participate in the quality and delivery of public benefits; and
- Allow developers to have an input to the type, quality, timing and location of public benefits.

1.7 Specific Purposes of Planning Agreements

Council may consider negotiating a Planning Agreement for reasons including the following:

- a) Compensate for the loss of, or damage to, a public amenity, service, resource or asset caused by the development through replacement, substitution, repair or regeneration.
- b) Meet the demands created by the development for new public infrastructure, amenities and services.
- c) Address a deficiency in the existing provision of public facilities in the Council area;
- d) Achieve recurrent funding in respect of public facilities.
- e) Prescribe inclusions in the development that meet specific planning objectives of the Council.
- f) Monitor the implementation of the relevant development.
- g) Provide affordable housing.
- h) Secure planning benefits for the public.
- i) 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.
- j) Negotiate flexible outcomes in respect of development contributions and enable the delivery of sustainable development while achieving key economic, social and environmental objectives.

1.8 Types of development contributions authorised by a Planning Agreement

Development contributions under a Planning Agreement may be the provision of:

- a) monetary contributions;
- b) dedication of land and/or asset free of cost;
- c) any other material public benefit such as the conduct of works; and
- d) any combination of (a), (b) and (c).

2. Legislative and Policy Context

2.1 Legislative Context

This Policy and the preparation, content and implementation of Planning Agreements must have regard to, and be governed by:

- a) provisions of Subdivision 2 (Planning Agreements) of Division 7.1 (Development Contributions) of Part 7 (Infrastructure Contributions and Finance) of the EP&A Act;
- b) provisions of Division 1 (Planning Agreements) of Part 9 (Infrastructure Contributions and finance) of the Regulation; and
- c) the Planning Agreements Practice Note (NSW Government, February 2021).

2.2 Strategic Land Use and Infrastructure Planning

2.2.1 District Planning

Planning Agreements can assist in the delivery of directions and planning priorities outlined in the Eastern City Plan which are set out under the following four (4) themes drawn from the Greater Sydney Region Plan - A Metropolis of Three Cities:

- Infrastructure and Collaboration.
- Liveability.
- Productivity.
- Sustainability.

Planning Agreements must align with the directions of the Eastern City Plan through the delivery of local infrastructure that would contribute to increased levels of liveability, productivity and sustainability within the Randwick LGA. This may include, but is not limited to, affordable housing, community infrastructure, local transport infrastructure, new public space and improvements to existing public space, streetscape and public realm upgrades, and environmental sustainability measures.

In negotiating Planning Agreements and establishing the type of public facilities to be included in an agreement, all parties must take into consideration the relevant directions and planning priorities contained in the Eastern City Plan.

2.2.2 Local Strategic Planning

Planning Agreements may be utilised to deliver infrastructure and public benefits identified in Council's key strategic planning and land use planning documents including the following:

- The **Randwick Local Strategic Planning Statement (LSPS)**, which sets out the 20 year vision for land use in Randwick City and how change would be managed into the future. The LSPS identifies upfront strategic planning priorities and infrastructure needs for an area, which should be reflected in Planning Agreements that demonstrate a comprehensive approach to infrastructure planning and funding.
- The **Randwick Local Environmental Plan 2012** which is the main local statutory planning instrument applying to land within Randwick City.
- The **Randwick Development Control Plan 2013** which provides more detailed development/design guidelines to guide development and infrastructure delivery.
- Local infrastructure funding schemes including but are not limited to:
 - the **K2K s7.12 Plan** which levies developer contributions based on the cost of works to fund infrastructure within the Kingsford and Kensington town centres required as a consequence of development;

- the **K2K Community Infrastructure Contribution Plan** which outlines works to be funded from CIC contributions received for new development within Kensington and Kingsford town centres;
- the **Randwick City wide s7.12 Plan 2015** which levies developer contributions based on the cost of works to fund infrastructure across Randwick City (excluding K2K); and
- other infrastructure contributions plans that may be adopted from time to time.

2.2.3 Integrated Planning

Planning Agreements can play an important role in implementing projects, actions and services identified in Council's integrated planning and reporting framework. In negotiating Planning Agreements and establishing the type of public facilities to be included in a Planning Agreement, all parties will take into consideration Council's integrated planning framework and proposed infrastructure which may be identified in the plans and strategies outlined as follows:

- Randwick City Community Strategic Plan.
- Randwick City Delivery Program and Operational Plan.
- Randwick City Resourcing Strategy, incorporating the Long Term Financial Plan, Asset Management Strategy and Workforce Management Plan.
- The Annual Report.
- Informing Strategies including:
 - Arts and Culture Strategy.
 - Economic Development Strategy.
 - Environment Strategy.
 - Housing Strategy.
 - Inclusive Randwick Strategy.
 - Integrated Transport Strategy.
 - Open Space and Recreation Strategy.

3. Principles and Policy for Planning Agreements

3.1 Fundamental Principles

Council and developers that are parties to Planning Agreements are required to adhere to the following fundamental principles:

- Council should always consider a development proposal on its merits, and not on the basis of a Planning Agreement.
- Planning Agreements must be underpinned by strategic land use and infrastructure planning, and address expected growth and associated infrastructure demand.
- Strategic planning should ensure that development is supported by the infrastructure needed to meet the needs of the growing population.
- Council cannot refuse to grant development consent on the basis that a Planning Agreement has not been entered in relation to a proposed development or that the developer has not offered to enter into a Planning Agreement.
- Planning Agreements should not be used as a means of general revenue raising or to overcome revenue shortfalls.
- Planning decisions will not be bought or sold through Planning Agreements.
- Development that is not acceptable on planning grounds will not be permitted because of benefits offered by Planning Agreements that do not make the development acceptable in planning terms.
- Council will not allow Planning Agreements to improperly fetter the exercise of its functions under the EPA Act, the Regulation or any other Act or law.
- Council will not use Planning Agreements for any purpose other than a public purpose (as defined in s 7.4 of the EPA Act).
- Council will not actively seek benefits under a Planning Agreement that are wholly unrelated to the development subject to that Planning Agreement, but may consider offers which include such benefits made by a developer.
- Council will not allow the interests of individuals or interest groups to outweigh the public interest benefits when considering a proposed Planning Agreement.
- If Council has a commercial interest in the development the subject of a proposed, 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.

3.2 Acceptability test

Planning Agreements are to be assessed against the following acceptability test for determining the acceptability of a Planning Agreement. The acceptability test requires that Planning Agreements:

- are directed towards legitimate planning purposes, which can be identified in the statutory planning controls and other adopted planning strategies and policies applying to development;
- provide for the delivery of infrastructure or public benefits not wholly unrelated to the development;
- produce outcomes that meet the general values and expectations of the public and protect the overall public interest;
- provide for a reasonable means of achieving the desired outcomes and securing the benefits; and
- protect the community against adverse planning decisions.

The following assessments should also be taken into account when determining if a Planning Agreement is acceptable for Council to enter into:

- Is the Planning Agreement directed towards a legitimate purpose?
- Do the proposed public benefits have a relationship to the development that are not wholly unrelated to the development?
- Does the Planning Agreement meet values and expectations of the public and protect public interest?
- Does the Planning Agreement demonstrate the achievement of a public benefit?
- Does the Planning Agreement adequately secure public benefits as required?
- Has the Planning Agreement been negotiated and prepared to protect the community against adverse planning decisions?
- Do the public benefits proposed under the Planning Agreement adequately meet the demands created by the new development?
- Are there any identified risks for Council in entering into the Planning Agreement and if so, can they be suitably managed?
- Are the benefits proposed by the Planning Agreement such that it is appropriate to forego monetary contributions that would be otherwise paid under the applicable development contributions plan?

3.3 Consideration of Planning Agreements in relation to Instrument changes and applications

When exercising its functions under the EPA 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.

3.4 Application of s7.11 and s7.12 to development to which a Planning Agreement Relates

A Planning Agreement may wholly or partly exclude the application of s7.11 or s7.12 of the EPA Act to development to which the Planning Agreement relates.

Council has no general policy on whether a Planning Agreement should exclude the application of s7.11 or s7.12 of the Act to development to which the Planning Agreement relates or not. This is a matter for negotiation between Council and the relevant developer having regard to the particular circumstances of the case.

3.5 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 application to which the proposed Planning Agreement relates. Development contributions by a developer under a Planning Agreement may include:

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

- a combination of any one or more of the above.

3.6 Standard public benefits

Wherever possible, Council will seek to standardise development contributions sought under Planning Agreements in order to streamline negotiations and provide fairness, predictability and certainty for developers. However, Council is not bound to accept an offer to enter into a Planning Agreement on the basis of consistency with any other Planning Agreement and does not prevent public benefits being negotiated on a case by case basis.

3.7 Recurrent Charges

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 any neighbouring development, the arrangement for recurrent funding may be sought in perpetuity. 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 facility until a public revenue stream is established to support the on-going costs of the facility.

3.8 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 Planning Agreement to be pooled with money paid under other Planning Agreements and applied progressively for the different purposes under those agreements, subject to the specific requirements of the relevant agreements. Pooling may be appropriate to allow public benefits, particularly essential infrastructure, to be provided in a fair, more efficient and equitable way.

3.9 Methodology for valuing public benefits under a Planning Agreement

- a) 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 of 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 or approved by the Council. All costs of the independent valuer in carrying out such a valuation will be borne by the developer.
- b) 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 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 or approved by Council. All costs of the independent quantity surveyor in carrying out this work will be borne by the developer.
- c) Where the benefit under a Planning Agreement is the provision of a 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 relevant Planning Agreement.

3.10 Credits and refunds

Council generally will not agree to a Planning Agreement providing for the surplus value under a Planning Agreement to be refunded to the developer or offset against development contributions required to be made by the developer in respect of other development in the LGA.

3.11 Time when 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 development that is the subject of the agreement.

Contributions will usually be required to be made prior to the issuing of a construction certificate, subdivision works certificate, occupation certificate or subdivision certificate in respect of the development.

3.12 Monitoring and review of a planning agreement

- a) Council will continuously monitor the performance of the developer's obligations under a Planning Agreement. This may include the Council requiring the developer (at its costs) to report periodically to Council on its compliance with obligations under the Planning Agreement.
- b) Council may require a Planning Agreement to contain a provision establishing a mechanism under which the Planning Agreement is periodically reviewed with the involvement of all parties.
- c) Council will require a Planning Agreement to contain a provision requiring the parties to use their best endeavours to agree on any modification to the agreement having regard to the outcomes of the review.

3.13 Modification or discharge of the developer's obligations under a Planning Agreement

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 Planning Agreement.
- b) The developer has assigned the developer's interest under the Planning 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 Planning Agreement relates has lapsed.
- d) The performance of the Planning Agreement has been frustrated by an event beyond the control of the parties.
- e) Council and the developer otherwise agree to the modification or discharge of the Planning Agreement. Such a provision will require the modification or revocation of the Planning Agreement in accordance with the EPA Act and the Regulation.

3.14 Assignment and dealings by the developer

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

- a) Council has given its consent to the assignment or dealing;
- b) the developer, at no cost to the Council, has 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 Planning Agreement as if they were a party to the original agreement;
- c) Council is satisfied that the person to whom the land or rights are transferred is able to perform the obligations under the Planning Agreement, based on evidence to be provided to Council when Council's consent to transfer is sought; and
- d) the developer is not in breach of the Planning Agreement.

3.15 Provision of security under a Planning Agreement

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

Unless otherwise agreed by the parties in a particular case, the form of security will usually, but not necessarily, be an unconditional bank guarantee from an Australian Bank in favour of the Council to the full value of the developer's provision under the Planning Agreement and on terms otherwise acceptable to Council. Other forms of security that Council may require include the following:

- Where the Planning Agreement provides for benefits to be paid in the form of a monetary contribution, that the contribution be made prior to the issue of a construction certificate, subdivision works certificate, occupation certificate or a subdivision certificate.
- Where the Planning Agreement provides for works to be carried out, a bond or bank guarantee from an Australian bank in favour of Council should be provided for at least 120% of the agreed estimated value of the works, and on terms otherwise acceptable to Council.
- Where the Planning Agreement provides for the dedication of land to Council, a Planning Agreement must include a provision that enables the Council to compulsorily acquire the land for A\$1.00 in the event of a breach of the agreement by the developer.
- Council will require the Planning Agreement to be registered on the title of the land to which it applies.
- Council will also require any financial security that is provided to be indexed according to the same index as the contributions to which it relates.

3.16 Preparation of the Planning Agreement

Council and the developer will, in each case, decide who will prepare the Planning Agreement relating to a particular application for an instrument change or application.

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

3.17 Council's costs of negotiating, entering into, monitoring and enforcing a Planning Agreement

Council may require a Planning Agreement to make provision for payment by the developer of part or all of the Councils' costs of and incidental to:

- a) negotiating, preparing and entering into the Planning Agreement;
- b) registering and removing the Planning Agreement on and from the title of any relevant land; and
- c) enforcing the Planning Agreement.

The amount to be paid by the developer will be determined by negotiation in each case.

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

3.18 Notations on Certificates under Section 10.7(5) of the EPA Act

Council will generally require a Planning Agreement to contain an acknowledgement by the developer that Council will make a notation under section 10.7(5) of the EPA Act about the Planning Agreement on any certificate issued under section 10.7(2) of the EPA Act relating to the land the subject of the Planning Agreement or any other land.

3.19 Registration of Planning Agreements

Council will require a Planning Agreement to contain a provision requiring the developer to agree to registration of the agreement pursuant to s7.6 of the EPA Act if the requirements of that section are satisfied.

Council will require a Planning Agreement to be registered prior to the issue of any construction certificate or subdivision works certificate with respect to the relevant development.

3.20 Dispute resolution

Council will require a Planning Agreement to provide for mediation of disputes between the parties to the agreement, at their own costs, 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.

3.21 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 furnishes to the Council a certificate to the effect that the work has been carried out and completed in accordance with the agreement and any applicable development consents (which certificate may, at the Council's discretion, be a final occupation certificate, compliance certificate or a subdivision certificate) and, following the issue of such a certificate to the Council, the work is also certified as complete by a Council building surveyor or engineer.

Council will also require the Planning Agreement to provide for a defects liability period during which any defects must be rectified at the developer's expense and for security to be held by Council on account of defects.

3.22 Developer not the owner

Where the developer is not the owner of the land to which a Planning Agreement applies, Council will usually require the owners of that land be party to the Planning Agreement.

4. Procedures Relating to the Use of Planning Agreements

4.1 Summary Steps for Planning Agreements

Step 1: Offer to Enter into a Planning Agreement

The offer to enter into a Planning Agreement is initiated by the developer and can occur prior to the lodgement of the Application (DA, CDC or Planning Proposal) or during the assessment phase of the Application.

In the case of a DA, this can also be undertaken at or after determination under the following scenarios:

- Where a Deferred Commencement Consent is issued with a condition for an Offer to Enter into a Planning Agreement resulting in an executed Planning Agreement being in place ahead of commencement of the operational consent.
- Where an adopted s7.12 Development Contribution Plan is in place and the development consent condition stipulates an option to enter into a Planning Agreement to deliver an identified infrastructure to reduce the cash contribution amount payable to Council.

Council's preference is for a letter of offer to be submitted outlining in broad terms the draft Planning Agreement that is being sought. The draft Planning Agreement or letter of offer is preferred to be negotiated prior to the lodgement of the DA, CDC or PP and with preliminary concept plans of the proposed development or change to a planning instrument.

In making the decision to proceed with a letter of offer or draft Planning Agreement, consideration should be given to the relevant practice notes, relevant legislation and this Policy. The parties consider whether other planning authorities and other persons associated with the development should be additional parties to the draft Planning Agreement, such as the landowner if the landowner is a different person to the developer.

Step 2: Negotiation

If a Planning Agreement is negotiated, it is documented as a 'draft Planning Agreement' with an accompanying Explanatory Note. The draft Planning Agreement should be assessed in accordance with this Policy. 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.

Step 3: Application

When the developer makes the application or submits a Planning Proposal to Council, it should be accompanied by the letter of offer or draft Planning Agreement that has been signed by the developer, as well as the Explanatory Note.

Step 4: Notification

Relevant public authorities are consulted and the Application (DA or CDC) or Planning Proposal, the letter of offer or draft Planning Agreement and Explanatory Note are publicly notified in accordance with the EPA Act and the Regulation. Any amendments required to the application or Planning Proposal and draft agreement as a result of submissions received are made. If necessary, the amended application, draft Planning Agreement and Explanatory Note are re-notified.

Step 5: Assessment

The draft Planning Agreement, letter of offer and public submissions are considered in the determination of the related application. Determinations involving a letter of offer or draft Planning Agreement shall be subject to a deferred commencement condition requiring the execution of a Planning Agreement prior to the consent becoming operative.

Step 6: Execution

The draft Planning Agreement is either executed before the relevant application is determined or not long after the application is determined.

4.2 Negotiation Process

Council's negotiation process for Planning Agreements aims to be efficient, predictable, transparent and accountable. The process is based on principles of fairness, co-operation, full disclosure, early warning, and agreed working practices and timetables.

4.2.1 When should a Planning Agreement be negotiated?

Council is required to ensure that a Planning Agreement/letter of offer is publicly notified as part of, and in the same manner as, the application for the instrument change or the DA or CDC to which it relates.

The Planning Agreement must be negotiated and documented before it is publicly notified as required by the Act and Regulation.

4.2.2 Who will negotiate a Planning Agreement on behalf of the Council?

Council staff with delegated authority will negotiate a Planning Agreement on behalf of Council. No Planning Agreement will become binding until it is approved and accepted by a resolution of Council and executed by the parties to it.

Councillors will not be involved in the negotiation of the agreement.

4.2.3 Separation of Council's commercial and planning assessment roles

If Council has a commercial interest in the subject matter of a Planning Agreement as a landowner or developer, Council will ensure that the person who assesses the application to which a Planning Agreement relates is an external planning consultant and has had no involvement in negotiating the terms of the Planning Agreement on behalf of the Council in its capacity as landowner or developer.

4.2.4 Role of the Randwick Local Planning Panel in relation to development applications to which Planning Agreements relate

The Department of Planning & Environment (State Significant Development), Sydney Eastern City Planning Panel (Regional Development) or the Randwick Local Planning Panel (Local Development) will, in all cases, determine development applications to which Planning Agreements relate.

4.2.5 Involvement of independent third parties in the negotiation process

Council may encourage the appointment of an independent person (the costs of the independent person will be borne by the developer) to facilitate or otherwise participate in the negotiations or aspects of it, particularly where:

- a) an independent assessment of a proposed instrument change or development application is necessary or desirable;
- b) factual information requires validation in the course of negotiations;

- c) sensitive financial or other confidential information must be verified or established in the course of negotiations;
- d) facilitation of complex negotiations are required in relation to large projects or where numerous parties or stakeholders are involved; and/or
- e) dispute resolution is required under a Planning Agreement.

4.3 Key Steps in the Negotiation Process

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

- a) Before lodgement of the relevant application by the developer, the parties will decide whether to negotiate a Planning Agreement.
- b) The parties will then appoint persons to represent them in the negotiations, generally involving a minimum of 2 and maximum of 3 persons per party.
- c) The parties may appoint an additional person to attend and take minutes of all negotiations;
- d) The parties will also decide whether to appoint an independent person to facilitate or otherwise participate in the negotiations or aspects of it. The parties will also agree on a timetable for negotiations and the protocols and work practices governing their negotiations.
- e) The parties will then identify the key issues for negotiation and undertake the negotiations;
- f) If an agreement is reached, the agreed party (Council or developer) will prepare the proposed Planning Agreement and provide a copy to the other party.
- g) The parties will undertake further negotiation on the specific terms of the proposed Planning Agreement.
- h) Once agreement is reached on the terms of the proposed Planning Agreement, the developer will be required to execute the agreement and make an irrevocable offer to Council to enter into the Planning Agreement.
- i) The developer may then make the relevant application to the Council accompanied by the offer to enter into the Planning Agreement.
- j) The parties may be required to undertake further negotiations and, hence, a number of the above steps as a result of the public notification and inspection of the Planning Agreement or its formal consideration by the Council in connection with the relevant application.

4.4 The Offer

The EPA Act does not define what constitutes an ‘offer’ for the purpose of section 7.7(3) of the EPA Act. However, an offer should:

- be in writing;
- be addressed to the planning authority to whom it is made;
- be signed by all parties to the proposed Planning Agreement other than the planning authority to whom the offer is made;
- outline in sufficient detail the matters required to be included in a Planning Agreement as specified in s7.4 (3) of the EPA Act to allow proper consideration of the offer by the planning authority;
- address in sufficient detail any relevant matters required to be included in an offer as specified in this Policy to allow proper consideration by Council; and
- outline in sufficient detail all other key terms and conditions proposed to be contained in the Planning Agreement to allow proper consideration by the planning authority.

Council cannot refuse to grant development consent on the grounds that a Planning Agreement has not been entered into in relation to a proposed development or that the developer has not offered to enter into such an agreement. However, if a developer has offered to enter into a

Planning Agreement in connection with the DA, CDC or a change to an environmental planning instrument, then Council is authorised to require a Planning Agreement to be entered into in the terms of the offer as a condition of development consent.

4.5 Consideration of the Offer

There must be a demonstrable public benefit arising from a Planning Agreement and this should be clearly demonstrated in the Offer.

Council has the discretion not to accept an offer to enter into a Planning Agreement for any reason, including if the contribution is not considered to deliver a sufficient demonstrable public benefit. In consideration of an Offer, the following will be taken into account:

- a) Whether it is acceptable and reasonable to use a Planning Agreement.
- b) Whether the offer proposed in a Planning Agreement can be achieved via an alternate mechanism such as a condition of development consent.
- c) Whether the Planning Agreement meets the requirements of the EPA Act and the Regulation.
- d) Whether the Planning Agreement meets the current and future demands created by the development for new public infrastructure, amenities and services.
- e) Whether the Planning Agreement aligns with Council's strategic documents.
- f) Whether compensation is required for the loss of, or damage to, a public amenity, service, resource, the natural environment or asset caused by the development through its replacement, substitution, repair or regeneration.
- g) Whether the Planning Agreement rectifies an existing deficiency in the provision of public facilities and services within the LGA.
- h) Whether future recurrent funding related to the proposed public benefit is sustainable.
- i) Whether the public benefit accrues over time.
- j) Whether the Planning Agreement is directed towards proper or legitimate planning purposes, ordinarily ascertainable from the statutory planning controls and other adopted planning policies applying to development.
- k) Producing outcomes that meet the general values and expectations of the public and protect the overall public interest.
- l) Providing for a reasonable means of achieving the relevant purposes and outcomes and securing the benefits.
- m) Protecting the environment and community against planning harm or adverse planning decisions.
- n) Whether there any relevant circumstances that may operate to preclude Council from entering into the proposed Planning Agreement.

4.6 Probity

Public probity is important to Council and consideration of an Offer/proposed Planning Agreement will be undertaken in a manner that is fair, transparent and directed at achieving public benefits in free of corruption or perception of bias.

To this end, the following practices will apply:

- a) Roles and responsibilities within the processes for a Planning Agreement, a planning proposal and a development application will be managed to ensure transparency, impartiality and accountability and to avoid conflicts of interest. This will generally include separation of roles and responsibilities.
- b) Commercial and financial information will be treated as confidential material.

- c) Not allowing the interests of individuals or interest groups to outweigh the wider public interest when decided whether to enter into Planning Agreements.
- d) Allowing the public to access and download this Policy and all executed Planning Agreements from Council's website.
- e) Where Council has a commercial interest in a development the subject of a Planning Agreement, that appropriate steps are taken to ensure conflicts or interests are avoided or managed.
- f) Working with proponents to establish clear timeframes to progress Planning Agreements efficiently and actively communicate the status of the Planning Agreement.
- g) Publicly notify proposed Planning Agreements in accordance with the EPA Act and the Regulation.
- h) Not approving development that is unacceptable on planning grounds because of public benefits offered by developers through the Planning Agreement process.
- i) Ensuring that the Council staff nominated to negotiate a Planning Agreement are not the same staff with the primary role of assessing or approving a planning proposal or development application except to provide advice on contributions or other relevant matters.

Depending on the type of Planning Agreement and the Council's involvement, the Council may engage a probity expert for advice and assistance with the agreement. Costs associated with this service will be shared between the Council and the other parties associated with the agreement

4.7 Public Notification

A Planning Agreement must be publicly notified and be available for public inspection for a minimum period of 28 days as prescribed by the EPA Act and the Regulation.

The Regulation requires that the notification of a proposed Planning Agreement occurs at the same time as the Planning Proposal or DA, or if this is not practicable, as soon as possible thereafter.

The terms of the Planning Agreement and its proposed public benefits should be clearly shown as part of consultation material. Planning Agreements must be accompanied by an Explanatory Note to assist the public in understanding the proposed agreement. Other types of consultation material are encouraged in addition to the explanatory note. This might include additional written material, diagrams or plans

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, or the formal consideration by the Council, or for any other reason.

Amendment to proposed Planning Agreement after public notification

- Any material changes that are proposed to be made to a Planning Agreement after a public notice has been given should be subject to renotification if the changes would materially affect any of the following:
 - How any of the matters specified in section 7.4 of the EPA Act are dealt with by the Planning Agreement.
 - Other key terms and conditions of the Planning Agreement.
 - The planning authority's interests or the public interest under the Planning Agreement.
 - Whether a non-involved member of the community would have made a submission objecting to the change if it had been publicly notified.

4.8 Explanatory Notes

The Regulation requires that an Explanatory Note is provided with the public notice of a Planning Agreement. The Explanatory Note can be prepared by one of the parties but should be reviewed and agreed on by any other party to the agreement. The Explanatory Note must help the broader community to simply and clearly understand what a Planning Agreement is proposing, how it delivers public benefit, and why it is acceptable and in the public interest. It should be easy to understand, written in plain English and address all considerations outlined the Practice Notes.

The Explanatory Note must:

- be written in plain English and address all considerations outlined in the Practice Notes and this Policy;
- summarise the objectives, nature and effect of the proposed Planning Agreement and contain an assessment of the merits of the proposed agreement, including the impact on the public or relevant section of the public;
- identify how the Planning Agreement promotes the public interest;
- identify whether the Planning Agreement conforms with Council's capital works program, if any;
- state whether the Planning Agreement specifies that certain requirements of the agreement must be complied with before a construction certificate, occupation certificate, subdivision works certificate or subdivision certificate is issued; and
- indicate timing of delivery and include maps, diagrams and other material to help explain what is proposed.

4.9 Planning Agreement Register

Council is required to keep a register of Planning Agreements applying to land within the Randwick LGA, whether or not the Council is a party to a Planning Agreement. The Register will include the date a Planning Agreement was entered into and a short description of the agreement (including any amendment).

The Planning Agreement Register will be made available to the public on Council's website. In addition, Council will make the following available (free of charge) during ordinary office hours:

- (a) copies of all Planning Agreements (including amendments) that apply to the LGA; and
- (b) copies of the Explanatory Notes relating to those agreements.
- (c) details of projects and works funded through the Planning Agreements.

End of Document

