

18.4 PUBLIC EXHIBITION OF DRAFT PLANNING AGREEMENTS POLICY

ATTACHMENTS:	1. IMPLICATIONS 2. PLANNING AGREEMENTS POLICY (DRAFT) 3. PLANNING AGREEMENTS POLICY – PROCEDURES MANUAL (DRAFT)
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CITY STRATEGY OUTCOME:	5.1 – BE HONEST, TRANSPARENT AND ACCOUNTABLE IN ALL THAT WE DO 5.3 – BALANCE THE CREATION OF NEW PUBLIC ASSETS WITH THE UPGRDE OF EXISTING PUBLIC ASSETS
MEETING DATE:	26 NOVEMBER 2018

1. PURPOSE OF REPORT

To seek Council's approval to publicly exhibit the *Draft Planning Agreements Policy* and *Procedures Manual*.

2. OFFICER'S RECOMMENDATION

That Council approve the public exhibition of the *Draft Planning Agreements Policy & Procedures Manual* for a period of 28 days.

3. BACKGROUND

Council adopted its current *Voluntary Planning Agreements (VPA) Policy 2013* on 11 November 2013.

A report to Council on 14 December 2015 highlighted a need for greater clarity in relation to the provisions of that Policy, particularly in regards to value uplift sharing and the need to obtain expert assistance in negotiating such terms.

As a result, Council resolved to (amongst other things):

Refine its current practices in relation to Voluntary Planning Agreement (VPA), in particular in relation to:

- a. Determining and sharing the value of any uplift*
- b. Introducing strong internal governance arrangements*
- c. Engaging the services of expert consultants to advise it regarding the various legal, land use and commercial issues associated with VPAs*

Consequently, the *Draft Willoughby City Council Planning Agreements (WCC PA) Policy* has been prepared.

4. DISCUSSION

Council adopted the *Voluntary Planning Agreements (VPA) Policy 2013* in November 2013 following the regime for VPA being introduced by the *Environmental Planning & Assessment Amendment (Development Contributions) Act 2005* and the *Regulations* in May 2005. Since 2005, The State government released the *Development Contributions Practice Notes* (July 2005) and exhibited the *Draft Practice Notes for Planning Agreements* (November 2016) that explain the operation of the planning agreements system under Clause 25B of the *Environmental Planning & Assessment Regulations 2000*.

Council's 2013 Policy is now considered outdated and lacking a transparent process for accepting, negotiating and valuing public benefits, including value capturing contributions associated with the process of Planning Proposals. With this in mind, a review of the *VPA Policy 2013* has been undertaken to reflect the current legislative framework including updating the legislative clause references as a result of the *Environmental Planning & Assessment Act (EP&A Act)* reform.

Importantly, the *Draft PA Policy* will make explicit Council's position on value capture to assist proponents of Planning Proposals in making their offers to enter into planning agreements with Council.

Key Updates to the existing *Voluntary Planning Agreements Policy 2013*

A. Consistency with the legislative framework, Section 7.4 of the EP&A Act 1979

The *Draft PA Policy* improves on the structure of Council's existing *VPA Policy 2013* and its procedures relating to planning agreements, and is consistent with the requirements prescribed under section 7.4 of the EP&A Act.

B. Restructuring the existing Policy into 2 parts and improved readability of the Policy

The existing *VPA Policy 2013* has been re-structured into two (2) parts, by way of the *Draft PA Policy* which consists of the 'Policy' itself and the 'Procedures Manual'.

This is introduced to improve readability and the flow of both documents where the 'Policy' gives an overview of the *Draft PA Policy* and sets the benchmark for Council's value capture in planning agreements and the 'Procedures Manual' provides more detailed guidelines in the preparation and negotiations of planning agreements.

1) Outline of the Policy

a) Incorporation of Value Capturing Contributions (Section 3, *Draft PA Policy*)

The concept of Value Capturing Contributions is introduced in the Draft Policy to assist developers making an offer to enter into a planning agreement. This section explains Council's position in the amount of value capture contributions payable based on a formula where, on behalf of the community, Council accepts a 50% share of the increased land value of the development site as a result of development uplift.

It is important to note that, in response to the DPE's *Draft Practice Notes for Planning Agreements* (November 2016), the Independent Pricing and Regulatory Tribunal (IPART - the NSW government body that oversees, regulates and reviews policies relating to development contributions), provided a submission, dated 22 December 2016, stating the following:

(IPART) 'recommends introducing a guide for the starting point of negotiations between councils and developers, whereby councils capture 50% of the uplift in land value from a rezoning decision to fund community benefits. This would provide a price signal to stakeholders and support investment and innovation, subject to feasibility and negotiation between councils and developers in the context of the development.'

As such, Council's proposed 50% share of the increased land value of the development site as a result of development uplift follows IPART's recommended benchmark.

This share of increased land value will be used to fund works which are of public benefit such as improvements in traffic management and roads, public domain works, community facilities and amenities.

b) Revised objectives in the *Draft PA Policy* (Section 1, *Draft PA Policy*)

The objectives bring out the specifics of the intents of the Policy, namely:

- providing a consistent approach in the negotiation process / preparation of planning agreements;
- providing for planning agreements to achieve the outcomes of Council's key strategic documents; and
- emphasising in greater probity for the negotiation, preparation and implementation of planning agreements

c) Clarity in outlining Policy's Guiding Principles (Section 2, *Draft PA Policy*)

Clarity and expansion of the principles underlying the use, negotiation process, acceptance and assessment of planning agreements are delineated, particularly in regards to:

- Establishing a fair, transparent and accountable framework governing the use and preparation of planning agreements by the Council;
- Impartial assessments of planning agreements separate from establishing the planning merits of Development Applications (DAs) or Planning Proposals to ensure the process will not improperly fetter the exercise of its functions under the EP&A Act, Regulations or any other act or law; and
- Evaluation of public benefits offered

2) **Outline of the Procedures Manual**

The *Draft PA Policy – Procedures Manual* sets out clear steps to assist developers in preparing planning agreements and explains how Council will ensure there are probity arrangements in place for the assessment (and negotiation) of planning agreement offers, separate from the assessment on establishing planning merits of DA, CDC applications or Planning Proposals. Should there be any conflict of interest, it is made clear that Council will require independent third party consultant / expert assistance assessments functions.

5. CONCLUSION

Council's current *VPA Policy 2013* requires updating and needs to respond to the increased numbers of Planning Proposals offering to enter into planning agreements. As such, it is necessary to update the Policy to reflect contemporary practice.

The *Draft Planning Agreements (PA) Policy* reflects Council's position on entering into any planning agreement. In accordance with the guidelines stipulated by the *Environmental Planning and Assessment Act & Regulations* and DPE's Practice notes, the *draft Policy* and its supporting *Procedures Manual* set out the process for entering into, notification and drafting of planning agreements.

The amendments within the *Draft PA Policy* have addressed the issues as identified at the Council meeting on 14 December 2015.

Subject to Council's adoption, the final *PA Policy* will become one of the mechanisms for funding local infrastructure in the LGA and will be subject to regular review to ensure it responds to changes made to the *Willoughby Local Environmental Plan 2012*.

If endorsed by Council, the attached *Draft PA Policy* will be placed on public exhibition for a period of 28 days.

A public notice will also be placed in the *North Shore Times* and information on the proposed updates to the draft Policy will be published on Council's website.

At the close of the exhibition period, all submissions received will be considered and if required, changes will be made to the *Draft PA Policy*. The outcomes of the public exhibition of the *Draft PA Policy*, any necessary amendments to the draft Policy and its final version will be reported back to the Council for consideration.

ATTACHMENT 1

IMPLICATIONS	COMMENT
City Strategy Outcome	5.1 - Be honest, transparent and accountable in all that we do 5.3 - Balance the creation of new public assets with the upgrade of existing public assets
Business Plan Objectives, Outcomes/ Services	To keep Councillors and the community informed to ensure transparency and confidence in the organisation. The <i>Draft Planning Agreements (PA) Policy</i> will enable Council to deliver a capital works program which will facilitate and enhance social outcomes for current and future residents within the LGA.
Policy	If adopted by Council, the <i>Draft PA Policy</i> will become one of the mechanisms for local infrastructure funding for the LGA and will be subject to regular review to ensure it responds to changes made to Council's Environmental Planning Instruments. The amendments ensure that this Policy is contemporary and in accord with legislative requirements.
Consultation	Community consultation was undertaken to the initial roll-out of Council's first VPA Policy in 2013. This <i>Draft PA Policy</i> is a review of the existing <i>VPA Policy 2013</i> . The <i>Draft PA Policy</i> is to be placed on public exhibition for a period of 28 days and a public notice will also be placed in the <i>North Shore Times</i> . Information on the proposed updates to the draft Policy will be published on Council's website and a hardcopy of the <i>Draft PA Policy</i> and its supporting documents will be made available for viewing at the Customer Service Centre.
Resource	Not applicable
Risk	The <i>Draft PA Policy</i> has been prepared to ensure that Council's mechanism for funding local infrastructure is up-to-date and accords with all legislative requirements. An ongoing review of the Policy will be undertaken to ensure a sound level of risk management.
Legal	The <i>Draft PA Policy</i> sets out guidance on how to draft planning agreements (contracts) including the provision of templates for Planning Agreements and Explanatory Note in the final version of this Policy. In the event that complexities arise from a planning agreement offer, Council will seek legal advice from either Council's internal Legal Counsel or where required, an independent legal consultant.
Legislation	The <i>Draft PA Policy</i> has been updated with guidelines that are in accordance with the process for entering into, notification and drafting of planning agreements as set out in the <i>Environmental Planning and Assessment Act 1979 & Regulations 2000</i>
Financial	The <i>Draft PA Policy</i> is one of the mechanisms to raise funds for the provision of essential infrastructure within the LGA. Opportunities derived from offers such as Value Capturing Contributions made via planning agreements as a result of development uplift (increased density) will allow Council to benefit from a renewed interest in investments in the CBD thus enabling an alternative source of funding for public domain / traffic / roads improvement works and community amenities and facilities to ensure a timely delivery of necessary infrastructure within the LGA.

ATTACHMENT 2



Planning Agreements Policy (DRAFT)

For Public Exhibition – December 2018

Date Adopted/ Approved:	
Review Date:	
Version:	
Responsible Positions:	Planning Manager, Planning & Infrastructure Development Contributions Officer
ECM Doc ID:	

1. Purpose

To ensure the community is not burdened by development and development in the city provided appropriate contributions in accord with their impact.

To provide a framework for council to enter into planning agreements with developers to provide public benefits in conjunction with a development or rezoning.

This policy explains how Council will deal with the planning agreements to avoid any perception or actual improper behaviour, how to enter into the planning agreement and any implications of having a planning agreement.

Willoughby City Council abides by the fundamental principle that planning decisions may not be bought or sold. Planning Agreements cannot be used to circumvent the planning controls for a site to enable development which otherwise lacks planning merit. Planning agreements are not to be used to give a special advantage to one developer over another.

This Policy outlines Council's policy and procedures relating to planning agreements under section 7.4 of the *EP&A Act*. This policy is consistent with Council's role as a regulator in demonstrating leadership and best practice.

The key objectives of this Policy are to:

- establish a fair, transparent and accountable framework governing the use and preparation of planning agreements by the Council;
- ensure a consistent approach is undertaken in the negotiation and preparation of all planning agreements that is efficient, fair and accountable;
- facilitate through a value capture approach the provision of public facilities, services and amenity outcomes that are consistent with Council's key strategic documents, in particular the Community Strategic Plan, Delivery Plan, Long Term Financial Plan and Development Contributions plans;
- to facilitate a flexible means of achieving tailored development outcomes and focused public benefits; including agreement by communities to the redistribution of the costs and benefits of development;
- ensure greater probity and establish a probity framework for the negotiation, preparation and implementation of planning agreements;
- provide a level of certainty for developers when negotiating planning agreements; and
- facilitate public participation and to allow the community to gain an understanding of the benefits of appropriate planning agreements for the provision of public benefits.

2. City Strategy Outcome:

- 5.1 – Be honest, transparent and accountable in all that we do
- 5.3 – Balance the creation of new public assets with the upgrade of existing public assets

3. Application

This Policy applies to:

- all Planning Agreements proposed or entered into by Council
- all land within the Willoughby Local Government Area (LGA) including any land owned by the Council
- any land outside the LGA in the case of a joint Planning Agreement between Council and another council or planning authority and this Policy shall prevail to the extent of

any inconsistency with such other policies as may otherwise apply in those circumstances

- situations where the developer (or any person) is seeking a change to an Environmental Planning Instrument (i.e. to make a change to *Willoughby Local Environmental Plan 2012* ('WLEP 2012') via a Planning Proposal), or proposing to make an application via Development Application ('DA') or Complying Development Certificate ('CDC').

4. Policy Principles

The outcomes to be achieved from this policy are to ensure planning agreements:

- are directed towards proper or legitimate planning purposes in accord with all relevant planning controls;
- provide for public benefits that bear a relationship to development;
- facilitate the provision of public facilities and amenity outcomes that align with, or are not inconsistent with, Council's corporate and strategic planning documents; and
- produce outcomes that meet the general values and expectations of the public, protect the overall public interest and enable the public to share the public benefits provided under the planning agreements.

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

- When considering a planning proposal or development application Council will not give undue weight to a planning agreement.
- The Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed planning agreement.
- The Council will not improperly rely on its position in order to extract unreasonable public benefits from developers under planning agreements.
- Where Council has a commercial interest 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.
- The community is entitled to a share of the unearned increment of land value uplift as a consequence of the actions of Council as a planning authority.

The benefits Council will consider under a planning agreement may but will not necessarily comprise one or more of the following:

- a monetary contribution; and/or
- delivery of infrastructure free of costs, including any ongoing contribution towards ongoing maintenance of those works; and / or
- dedication of land / affordable housing or the like free of cost; or
- any combination of the above, towards public purposes

5. Policy Statement

Council is committed to supporting the growing population of the Willoughby LGA and meeting the demands of infrastructure and servicing requirements resulting from development growth by providing high quality public amenities and services.

Authorised by the *EP&A Act*, Council's commitment relies on having access to offers which are of public benefits made under planning agreements to ensure there is adequate funding

to deliver the infrastructure works covered under Council's *Delivery Program and Operational Plan*.

6. Responsible Officer

The Policy is the responsibility of the Planning Manager, Planning & Infrastructure, his / her function in relation to this Policy is:

- point of contact about the application of this Policy
- education, communication and training of staff
- periodical review of this Policy and consultation with the Executive Leadership Team

7. Monitoring and Review

Council's Development Contributions Officer, or an officer nominated by the Director – Planning and Infrastructure, shall be responsible for administering this Policy and will be responsible for the following:

- Administration, implementation and management of planning agreements in accordance with *EP&A Act and Regulations*
- Maintaining and monitoring records of offers made under planning agreements
- Reporting
- Point of contact about the meaning and application of this Policy.
- Review process – as required

8. Supporting information

Planning Agreements Policy – Procedures Manual is the supporting document to this Policy. This Policy should be read in conjunction with the Procedures Manual.

Value Capture Contributions

Where Council considers that value capture contributions are appropriate in respect of particular offer to enter into a planning agreement, the amount of value capture contributions payable will be determined in accordance with the following formula:

$$C = [RLV - MV] \times 50\%$$

Where:

C = Monetary contribution

RLV = Hypothetical residual land value of the subject land as a development site following either an instrument change, plus associated or consequential changes to gazetted Willoughby LEP or Development Control Plan(s), applying to the site, or the consent to development on the site allowing an exceedance of development standards or other planning controls, which in both cases allow intensified development. RLV is to be expressed as \$/m² of gross floor area (GFA) for transparency and public record.

MV = Current Market value (MV) of subject site having regard to the highest and best use of site being determined to be either its current residual land value consistent with the existing development standards/planning controls under the gazetted planning controls or its existing improved value void of any price premium that might occur in the purchase price for any speculated land rezoning.

Governing laws and standards	<ul style="list-style-type: none"> ▪ <i>Local Government Act 1993 (NSW)</i> ▪ <i>Local Government (General) Regulation 2005 (NSW)</i> ▪ <i>Environmental Planning and Assessment Act 1979 (NSW)</i> ▪ <i>Environmental Planning and Assessment Regulations 2000 (NSW)</i>
Related policies and other documents	<ul style="list-style-type: none"> ▪ <i>Department of Planning & Environment's Development Contributions Practice notes – July 2005</i> ▪ <i>Department of Planning & Environment's Draft Practice Note – Planning Agreements (November 2016)</i> ▪ <i>Willoughby City Strategy 2013-2029</i> ▪ <i>Willoughby City Council – Delivery Program and Operational Plan</i> ▪ <i>WLEP 2012 - Willoughby Local Environmental Plan 2012</i> ▪ <i>Planning Agreements Policy - Procedures Manual</i>

Appendix

Definitions

Act means the *Environmental Planning and Assessment Act 1979* (NSW).

asset management strategy means Council's asset management planning as described in the Council's Resourcing Strategy prepared in accordance with Section 403 of the *Local Government Act 1993*.

corporate strategic documents means the documents required to be prepared by Council in accordance with Part 2 of Chapter 13 of the *Local Government Act 1993*.

Council means Willoughby City Council.

developer is a person who has sought a change to an environmental planning instrument (which includes the making, amendment or repeal of an instrument (s7.4 (11)), or who has made or proposes to make a development application, or who has entered into an agreement with or is otherwise associated with such a person.

development application has the same meaning as in the Act.

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

Draft practice note means the *Draft Practice Note on Planning Agreement published by the Department of Planning and Environment and dated November 2016*.

explanatory note means a written statement that summarises the objectives, nature and effect of a proposed planning agreement (or an amendment to or revocation of a planning agreement) and an assessment of the merits of a planning agreement, amendment or revocation.

Floor space ratio (FSR) has the meaning given in the Willoughby Local Environment Plan (2012), or any replacement environmental planning instrument, or any other planning instrument applicable in the City of Willoughby LGA and applies to the land the subject of the planning proposal.

Instrument change means a change to an environmental planning instrument to facilitate a development the subject of a planning agreement.

Land when used in the context of "dedication of land" as required by a planning agreement, includes a Torrens Title lot or part of such a lot, vacant or improved land, land that is the subject of a strata or stratum subdivision, a part of a building or road, or any other form of real property.

open book analysis means a procedure used by Council to review the likely costs, feasibility analysis and profitability of a proposed development based on documents provided by the developer.

Planning agreement has the meaning given in Section 7.4 (1) of the Act.

Definitions

planning benefit means a development contribution that confers a net public benefit, that is, a benefit that exceeds the benefit ordinarily derived from measures that would address the impacts of development on surrounding land or the wider community.

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

planning proposal has the meaning given in Section 3.33 of the Act.

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

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

public facilities mean public infrastructure, facilities, amenities and services.

public purpose includes the purposes listed in Section 7.4 (2) of the Act.

Regulation means the *Environmental Planning and Assessment Regulation 2000 (NSW)*.

WLEP 2012 means the Willoughby Local Environmental Plan 2012.

WDCP means the Willoughby Development Control Plan.

Value capture means capturing for the community benefit, some portion of the increase in unimproved land value that has or will arise from:

- a) an instrument change which facilitates development plus associated or consequential changes to any Willoughby development control plans; or
- b) the granting of a development consent which allows development to exceed development standards or other development controls under the Willoughby Local Environmental Plan 2012 or another environmental planning instrument.

VPA Officer means the person appointed by the General Manager, and delegated the function of negotiating and considering a proposed planning agreement on behalf of Council.

ATTACHMENT 3



Planning Agreements Policy Procedures Manual (DRAFT)

For Public Exhibition – December 2018

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Draft Willoughby City Council (WCC) Planning Agreements Policy – Procedures Manual December 2018

This Procedures Manual supports the Planning Agreements Policy and explains how agreements can be negotiated, publicly exhibited for comment, what sort of things they can and can't cover, how Council will deal with the agreements to avoid any perception or actual improper behaviour, how to enter into the agreement and any implications of having an agreement.

- Part A – Policy Framework**
- Part B – Guiding Principles**
- Part C – Negotiation Procedures and Probity**
- Part D – Notification and Exhibition Procedure**
- Part E – Implementation and Conditions**
- Part F – Process Flow Chart**

Part A – Policy Framework

A.1 Name of this Policy

This Policy is known as the *Willoughby City Council Planning Agreements Policy* ("Policy").

A.2 Application of the Policy and commencement

This Policy applies to all planning agreements proposed or entered into by Willoughby City Council ("Council"), and applies to all land within the local government area of Willoughby City Council ("LGA"), including any land owned by the Council. This Policy also applies to land outside the Willoughby City LGA in the case of a joint planning agreement between the Council and another council or planning authority in regard to land outside the Willoughby City LGA and this Policy shall prevail to the extent of any inconsistency with such other policies as may otherwise apply in those circumstances.

A.3 Purpose of this Policy

The purpose of this Policy is to set out Council's policy and procedures relating to planning agreements under section 7.4 of the Environmental Planning and Assessment Act 1979.

A.4 Objectives of this Policy

The objectives of this Policy are to:

- (a) establish a fair, transparent and accountable framework governing the use and preparation of planning agreements by the Council;
- (b) expand the range and extent of development contributions that may be made by developers towards public facilities and other public benefits in the Council's area;
- (c) set out the Council's specific policies and procedures relating to the use of planning agreements within the Council's area and whenever Council is a party to a planning agreement outside Council's LGA;
- (d) ensure a consistent approach is undertaken in the negotiation and preparation of all planning agreements that is efficient, fair and accountable;
- (e) supplement the application of section 7.11 or section 7.12 of the Act;
- (f) facilitate, including by means of value capture approach, the provision of public facilities, services and amenity outcomes that are consistent with Council's key strategic documents, in particular the Community Strategic Plan, Delivery Plan, Long Term Financial Plan and Development Contributions plans;
- (g) facilitate a flexible means of achieving tailored development outcomes and focused public benefits; including agreement by communities to the redistribution of the costs and benefits of development;
- (h) ensure greater probity and establish a probity framework for the negotiation, preparation, exhibition and implementation of planning agreements;
- (i) provide a level of certainty for developers when negotiating planning agreements; and
- (j) facilitate public participation and to allow the community to gain an understanding of the benefits of appropriate planning agreements for the provision of public benefits.

A.5 What does the Policy set out?

This Policy sets out the Council's approach to the use of planning agreements through negotiation when considering development applications and applications for a change to WLEP 2012 in the Willoughby Local Government Area. In particular this Policy sets out:

- (a) the circumstances in which the Council may consider entering into a planning agreement;
- (b) the matters ordinarily covered by a planning agreement;
- (c) the form of development contributions which may be sought under a planning agreement;
- (d) the kinds of public benefits which may be negotiated and, in relation to each kind of benefit, whether it involves a planning benefit;
- (e) the method for determining the value of public benefits;
- (f) whether money paid under different planning agreements is to be pooled and progressively applied towards the provision of public benefits to which the different agreements relate;
- (g) when, how and where public benefits will be provided;
- (h) probity measures and the procedures for negotiating and entering into planning agreement; and
- (i) Council's policies on other matters relating to planning agreements.

A.6 Statutory Framework

The current legal and procedural framework for planning agreements is set in Division 7.1 of Part 7 of the *Environmental Planning and Assessment Act 1979* and Division 1A of Part 4 of the *Environmental Planning and Assessment Regulation 2000*.

A Practice Note titled "Planning Agreements" dated July 2005 has been issued by the Department of Planning and Environment for the purposes of Clause 25B of the Regulation. While the Council is not legally bound to follow the Practice Note, Council will be guided by the Practice Note and if there is any inconsistency between the Practice Note and this Policy, then Council will be guided by the Policy. The Department of Planning and Environment issued a further Draft Practice Note on Planning Agreements in November 2016 for comment. This Policy may be amended, if required, for consistency with any revised Practice Note.

This policy is not legally binding. It is intended to provide a guide for Council officers and all persons dealing with Council concerning Planning Agreements. Council considers that the process involved in negotiating and finalising planning agreements will be more efficient and effective if this policy is followed to the fullest extent possible but recognises that each offer to enter into a planning agreement must be assessed on its merits having regard to the particular circumstances.

A.7 When may Council enter into a planning agreement

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

- (a) who has sought a change to an environment planning instrument (such as a rezoning application); or
- (b) who has made or proposes to make a development application or application for a complying development certificate; or
- (c) who has entered into an agreement with or is otherwise associated with a person in one of the above two categories.

A.8 What are the mandatory requirements of a planning agreement?

Section 7.4 (3) of the Act requires planning agreements to include provisions specifying:

- (a) a description of the land to which the agreement applies;
- (b) a description of the change to the environmental planning instrument to which the agreement applies, or the development to which the agreement applies;
- (c) the nature and extent of the provision to be made by the developer under the planning agreement, the time or times by which the provision is to be made and the manner by which the provision is to be made;
- (d) in the case of development, whether the agreement excludes (wholly or in part) or does not exclude the application of section 7.11, 7.12, or 7.24 of the Act to the development;
- (e) if the agreement does not exclude the application of section 7.11 to the development, whether benefits under the agreement are or are not to be taken into consideration in determining a development contribution under section 7.11 of the Act;
- (f) a mechanism for the resolution of disputes under the agreement; and
- (g) the enforcement of the agreement by a suitable means, such as the provision of a bond or guarantee, in the event of a breach of the agreement by the developer

The Act does not preclude a planning agreement containing other provisions that may be necessary or desirable in particular cases, except as provided by law. However, any planning agreement entered into by Council must contain the provisions as required by section 7.4 (3) of the Act.

Council has prepared a template agreement that will form the basis for a planning agreement and this must be used by developers as the basis for any agreement. This is attached as Part F.

A.9 Explanatory Note

Clause 25E (1) of the Regulation requires that an explanatory note must accompany a planning agreement, or an agreement that revokes or amends a planning agreement that:

- (a) summarises the objectives, nature and effect of the proposed agreement, amendment or revocation, and
- (b) contains an assessment of the merits of the proposed agreement, amendment or revocation, including the impact (positive or negative) on the public or any relevant section of the public.

Clause 25E (3) of the Regulation requires the parties to jointly prepare the explanatory note. Council's explanatory note template is attached as Part G and must be used by developers as the basis for any explanatory note.

A.10 Relationship to corporate strategic documents

A planning agreement should facilitate the provision of public facilities and amenity outcomes that advance delivery of Council's corporate and strategic planning objectives. This includes permitting the provision of public benefits by developers out of sequence with Council's broader strategic planning processes.

Council's corporate strategic plans include the Community Strategic Plan, the Four Year Delivery Plan and the one year operational plan as well as other strategic planning documents endorsed by Council to achieve appropriate planning outcomes for the City.

A.11 Relationship to development contributions plans and infrastructure plans

Planning agreements provide an additional opportunity for Council to achieve objectives and infrastructure identified in Council's development contribution plans or other infrastructure delivery plans. Ideally such contributions ought to aim to achieve an overall public benefit whilst maintaining a relationship to the development and the locality in which the development is situated.

This does not mean that contributions offered under planning agreements can only be used for infrastructure or public amenities specified or identified in corporate or contributions plans. Planning agreements provide additional flexibility to deliver items not already identified (as referred to in section 7.18 of the Act) by Council, but in certain circumstances may achieve delivery of higher priority projects not identified at the time the contributions plan or corporate plans were created.

Acceptance of any contributions not identified in Council's existing development contributions plan and / or other corporate planning documents will be at the sole discretion of Council.

Part B – Guiding Principles

B.1 Principles underlying the use of planning agreements

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

- (a) Planning decisions will not be bought or sold through planning agreements.
- (b) Council will not allow planning agreements to improperly fetter the exercise of its functions under the Act, Regulation or any other act or law.
- (c) Council will not use planning agreements for any purpose other than a proper planning purpose.
- (d) The consideration, negotiation and assessment of a planning agreement will, to the extent reasonably practicable and as required by law, be separated from the consideration of the planning merits of a development application or a planning proposal.
- (e) Development that is unacceptable on planning grounds will not be permitted because of planning benefits offered by developers that do not make the development acceptable in planning terms.
- (f) Council will prefer benefits under a planning agreement to have some broad public benefit in relationship to particular development or the locality of the development, unless the benefit aligns to Council's corporate strategic documents, existing contribution plans or other infrastructure delivery documents adopted by Council.
- (g) When considering a planning proposal or development application Council will not give undue weight to a planning agreement.
- (h) The Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed planning agreement.
- (i) The Council will not improperly rely on its position in order to extract unreasonable public benefits from developers under planning agreements.
- (j) Where Council has a commercial interest 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.
- (k) The community is entitled to a share of the unearned increment of land value uplift as a consequence of the actions of Council as a planning authority.

B.2 Acceptability Test to be applied to all planning agreements

The Practice Note sets out guidelines and safeguards in the application of planning agreements. These include determining the planning agreements acceptability and reasonableness. Planning Agreements will be tested for acceptability against the following tests:

- (a) Does the proposed planning agreement satisfy the requirements contained in the Act and Regulation?
- (b) Does the proposed planning agreement comply with the principles set out in clause B.1 of this Policy?
- (c) Is the proposed planning agreement directed towards legitimate planning purposes, that can be identified from the statutory planning controls and other adopted planning policies applying to development and the particular circumstances of the case?
- (d) Does the proposed planning agreement provide for public benefits that bear a relationship to the development that are not wholly unrelated to the development?
- (e) Is there a planning justification for the provision of particular public benefits offered by the developer?
- (f) Do the proposed benefits align with Council's corporate strategic documents, existing development contribution plans or other infrastructure delivery documents adopted by Council?
- (g) Will the proposed planning agreement produce outcomes that meet the general values and expectations of the public and protect the overall public interest?
- (h) Does the proposed planning agreement provide for a reasonable means of achieving the relevant purposes and outcomes and for securing the provision of public benefits?
- (i) Will the proposed planning agreement cause unreasonable, adverse environmental or amenity impacts?
- (j) Is the quantum of public benefits being offered in Council's view commensurate with the value of development contributions that Council considers are reasonably due in the circumstances?
- (k) Are there any relevant circumstances that may operate to preclude Council from entering into the proposed planning agreement?

Generally the planning agreement should be offered, negotiated and documented before lodgement of a development application, application for a complying development certificate or Planning Proposal so as to coincide with public notification.

B.3 What matters may Council consider?

The matters that Council may consider in any such negotiation may include, but not be limited to, the following:

- (a) Whether the planning agreement delivers a public purpose as defined by Section 7.4 of the Act.
- (b) Whether the proposed development contribution is needed and aligns with Council's strategic corporate documents, existing development contributions plans or other infrastructure delivery documents adopted by Council.
- (c) Whether the proposed development contribution can be achieved via an alternative mechanism such as a condition of development consent.
- (d) The extent to which the proposed development contribution satisfies a community need and would secure planning benefits for the wider community.
- (e) Whether the planning agreement(s) meets the demands created by the development for new public infrastructure, amenities and services.
- (f) Whether rectification of an existing deficiency in the existing provision of public facilities in the Council's area will occur.
- (g) What impact the proposed development contribution will have on Council's asset management strategy, including the ongoing operational and maintenance costs on unplanned infrastructure being dedicated to Council.
- (h) Whether recurrent funding of public facilities is required or provided and any long term cost implications to the Council.
- (i) The extent to which the Council needs to monitor the planning impacts of development.
- (j) Whether the development contribution under the proposed planning agreement would provide compensation 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.
- (k) Whether the development contribution under the proposed planning agreement would achieve the provision of affordable housing over and above that required in accordance with Council's adopted Affordable Housing Policy and/or in accordance with the WLEP 2012.

B.5 Value of the Planning Agreement

The value of the development contributions to be delivered under a planning agreement must be consistent with the provisions of any relevant planning instrument (including draft) and development control plan. Clause B.13 describes how Council will value public benefits under a planning agreement.

In the absence of any draft or adopted planning instrument, Council will consider, as a matter of public interest, whether satisfactory arrangements have been or will be made for the provision of community infrastructure, given the likely increase in demand for services and infrastructure. Council may also consider the appropriateness of value capture contributions.

When considering the value of contributions offered under a planning agreement, Council will take into account all circumstances of the particular case including any open book analysis that enables Council to consider other matters that affect the project viability specifically as a result of the planning agreement.

The documents provided by the developer for an open book analysis will be determined by Council in accordance with any internal procedure for undertaking the assessment.

B.6 Value Capture Contributions

Where Council considers that value capture contributions are appropriate in respect of particular offer to enter into a planning agreement, the amount of value capture contributions payable will be determined in accordance with the following formula:

$$C = [RLV - MV] \times 50\%$$

Where:

C = Monetary contribution

RLV = Hypothetical residual land value of the subject land as a development site following either an instrument change, plus associated or consequential changes to gazetted Willoughby LEP or Development Control Plan(s), applying to the site, or the consent to development on the site allowing an exceedance of development standards or other planning controls, which in both cases allow intensified development. RLV is to be expressed as \$/m² of gross floor area (GFA) for transparency and public record.

MV = Current Market value (MV) of subject site having regard to the highest and best use of site being determined to be either its current residual land value consistent with the existing development standards/planning controls under the gazetted planning controls or its existing improved value void of any price premium that might occur in the purchase price for any speculated land rezoning.

The developer will be required to provide Council with sufficient details for an open book feasibility approach to determine a fair market value under the existing statutory planning controls and the hypothetical RLV from the exceedance of existing development standards/planning controls. The uplift in land value shall be expressed as \$/sqm of GFA of additional floor space achieved.

Such documentation provided to the Council is to be verified by a certified practising valuer and/or qualified and experienced land economist. The Council staff responsible for the planning agreement may engage an independent land economist and other specialists such as quantity surveyor, to review information provided by the developer. Costs incurred by the Council will be met by the developer.

B.7 Works in kind and Material Public Benefits

In the case of a planning agreement proposing to deliver works in kind or material public benefit in lieu of payment of Section 7.11 or Section 7.12 development contributions, where the works to be delivered are not identified in an existing development contributions plan, or corporate strategic document, the value of the contribution offered under the agreement must be demonstrated to Council's satisfaction by an independent registered quantity surveyor with at least ten (10) years' experience at the developer's cost.

When considering the value of contributions offered in lieu of payment of Section 7.11 or Section 7.12 development contributions under a planning agreement, Council will take into account all circumstances of the particular case including any open book analysis that enables Council to consider other matters that affect the project viability specifically as a result of the planning agreement.

The documents provided by the developer for an open book analysis will be determined by Council in accordance with any internal procedure for undertaking the assessment.

B.8 Recurrent charges and life cycle maintenance costs

Where a planning agreement proposed works or dedication of land and / or building assets, Council may require the developer to provide supporting documentation outlining the lifecycle costs to Council, including operation or ongoing service delivery, as well as the likely maintenance and replacement costs. This information will assist Council in determining whether to accept a planning agreement offer.

All planning agreements that involve the provision of public infrastructure through works to be carried out by the Developer should include a reasonable contribution towards ongoing maintenance and replacement costs of the infrastructure. Council may request developers, through a planning agreement, to make development contributions towards the recurrent costs of public facilities or to maintain infrastructure delivered for a certain period of time after handover.

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

Where the public infrastructure or public benefit is intended to serve the wider community, the planning agreement may, where appropriate, only require the developer to make contributions towards the recurrent costs of the facility for a set period which will be negotiated according to the impact of the development.

The amount of any monetary contribution acceptable to Council will depend on the type and value of the works being handed over, whether repair and maintenance are likely to be needed and the anticipated cost of maintenance and repair works.

If the developer proposes to maintain works after completion, a bond or bank guarantee will be required by Council to cover the likely maintenance in the event the developer defaults.

B.9 Pooling of development contributions

Where a proposed planning agreement provides for a monetary contribution by the developer, the Council may, in accordance with s7.3 of the Act Division 7.1 part 7; pool money paid for different purposes (other than under Subdivision 4) and apply that money progressively for different purposes.

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

B.10 Do other development contributions apply?

Generally Council will only consider entering into a planning agreement that excludes the application of s7.11 or s7.12 of the Act to development to which the agreement relates where the value of contributions offered under the planning agreement is at least equivalent to or greater than the value of development contributions that would otherwise be payable under an adopted development contributions plan.

This, however, is a matter for negotiation between the Council and a developer having regard to the particular circumstances of the case. In general, Council's position is that if works are proposed in lieu of development contributions those works would ideally be already identified in an adopted contribution plan, or other corporate document.

Except to the extent otherwise required by law, where the application of s7.11 or s7.12 of the Act to development is not excluded by a planning agreement, benefits under the agreement are not to be taken into consideration in determining a development contribution under s7.11 or s7.12.

B.11 Relationship to payment of Section 7.11 or Section 7.12 Contributions

Planning agreements to deliver works in kind or material public benefits in lieu of payment of Section 7.11 or Section 7.12 contributions as required by a condition of development consent, will generally only be considered where the applicable development contribution value exceeds \$500,000, or otherwise at the discretion of Council.

B.12 Relationship to conditions of development consent

Planning agreements should not be utilised where infrastructure delivery can be achieved via a condition of development consent in accordance with Section 4.17 of the Act.

No value will be attributed under a planning agreement to works or land dedication that would otherwise be required by a condition of development consent.

B.13 How will Council value public benefits under a planning agreement?

Unless otherwise agreed, all benefits under a planning agreement will be dedicated at no cost to Council and free of all and any encumbrances, except any permitted encumbrances agreed by Council. Council may attribute a "value" to benefits provided under a planning agreement for the purpose of determining the "value" of the contributions being offered by the developer.

Unless otherwise agreed in a particular case, benefits under a planning agreement will be valued as follows:

- (a) In the case of the dedication of land for a public purpose, the Council will attribute a value to the land in accordance with the Land Acquisition (Just Terms Compensation) Act 1991. However, where any FSR entitlement is transferred from the land proposed to be dedicated to Council to the development component of the remaining parcel, a nominal value of one (1) dollar will be attributed to the land.
- (b) The value of land to be dedicated will be determined by an independent registered valuer with at least ten (10) years' experience in valuing land in New South Wales.
- (c) In the case of works for a public purpose, the Council will attribute a value to the works in accordance with a cost estimate prepared by an independent registered quantity surveyor with at least ten (10) years' experience.
- (d) In the case of a dwelling unit for affordable housing, the value to be attributed will be based on a market analysis of comparable sales in the previous 12 months, taking into account any other deliverables in connection with the transfer of the unit.
- (e) In the case of any other type of benefit, Council may, at its discretion, consult with the developer and apply an appropriate valuation methodology to determine the value to be attributed to those benefits.
- (f) As specified in Clause B.12 of this policy, in the event that a planning agreement proposes works and services that would otherwise be provided as a condition of development consent, then those works and services will be deemed to have no value under the planning agreement.

All costs associated with the determination of values will be borne by the developer.

Part C - Negotiation Procedures and Probity

C.1 Introduction

Council's negotiation process for planning agreements aims to be efficient, predictable, transparent and accountable. Council will seek to ensure that the final negotiation of planning agreements runs in parallel with applications for Planning Proposals or development applications and complying development certificates so as not to unduly delay the approval.

Where possible Council will publicly notify a planning agreement at the same time as the application for the Planning Proposal or the development application or complying development certificate to which it relates.

Council's preference is therefore to have the planning agreement negotiated and documented before it is publicly notified as required by the Act and Regulation. It is also preferable that a planning agreement is negotiated before lodgement of the relevant application and that it accompanies the application on lodgement.

C.2 In what form shall a planning agreement offer be made?

Any formal planning agreement offer must be made in writing by the developer and landowners (if the developer does not own the land) in the form of the Planning Agreement template (Part A) including in principle agreement to the terms set out in the Planning Agreement template.

Any potential variations to the template Planning Agreement should be identified in the planning agreement offer, accompanied by reasons for the proposed variation. The planning agreement offer should address each of the requirements under section 7.4 of the Act and Regulation.

C.3 Delegation to negotiate a draft planning agreement or amendment to a planning agreement

The Planning Agreement Officer (VPA Officer) will have delegation to negotiate a planning agreement or amendments to an existing planning agreement on behalf of the Council. That delegation will occur in accordance with Council's standard delegation procedures.

Councillors will not be involved in the face to face negotiation of the planning agreement, but will, in their role as Councillors, ultimately endorse and approve the planning agreement by resolution to exhibit and execute the agreement or alternatively, resolve to reject an offer to enter into a planning agreement.

Subject to compliance with Clause C.4 below, the VPA Officer may negotiate a planning agreement prior to or after, public exhibition of the draft planning agreement or draft amendment to a planning agreement.

C.4 Council to endorse planning agreements

Once the terms of the Planning Agreement have been negotiated by the VPA Officer, Council must endorse by resolution, in principle, a draft planning agreement or amendment to an existing planning agreement prior to its exhibition.

A draft planning agreement will need to be endorsed by Council for public exhibition purposes as follows:

- (a) In the case of a planning proposal application, before the planning proposal is sent to the Department for gateway determination, with the intention of exhibiting the draft agreement with the planning proposal;
- (b) In the case of a development application (or modification of consent), or application for complying development certificate (CDC) before or concurrent with the Council's consideration of the development application (or modification of consent or CDC application), with the intention of exhibiting the draft agreement as soon as practicable after lodgement of the development (or modification or CDC) application.

A draft planning agreement must be publically exhibited in accordance with the Act and Regulation (currently for a period of not less than 28 days).

The VPA Officer will also be involved in the finalisation of the draft planning agreement or amendment to an existing planning agreement following its exhibition.

Prior to finalisation and execution of a planning agreement or amendment to an existing planning agreement, a further resolution of Council is required to address any submissions and obtain endorsement of the final planning agreement or amendment to an existing planning agreement for the purpose of execution.

Council prefers that a planning agreement is discussed before lodgement of the relevant application and that an initial offer accompanies the application on lodgement. Once the terms of the planning agreement are negotiated a formal written offer can be finalised.

C.5 Renegotiation of a planning agreement

A planning agreement that is in the process of being negotiated and has not been executed by the parties may be further negotiated as agreed between Council and the developer. Further negotiations may, for example, be required in response to public submissions or where the assessment results in a change in infrastructure needs to that initially negotiated.

Dependent upon the nature of changes made to a draft planning agreement following its public exhibition, re-notification may be required in accordance with Clause D.2 of this policy.

C.6 Assessing the planning agreement offer

The General Manager will nominate the VPA Officer to be the representative of the Council in all negotiations regarding the key commercial terms of any proposed planning agreement.

Planning agreement offers will be assessed by the VPA Officer. An independent third party may be engaged to participate in the negotiation and assessment of a planning agreement offer (see clause C.7 of this policy).

Face to face discussions with developers will be held with at least two Council officers attending.

Councillors will not be involved in any direct face to face negotiations.

The VPA Officer will not have any involvement in the assessment of the development application or planning proposal. Council will ensure the VPA Officer does not have any conflict of interest, pecuniary or otherwise, within the meaning of Council's Code of Conduct in respect to the subject matter of the planning agreement or the development application, complying development certificate application or planning proposal to which it refers.

If the VPA Officer considers they may have such a conflict, that person must immediately advise their supervisor and a different officer or if necessary an independent third party must be appointed. The VPA Officer should receive input from relevant Council officers in the following circumstances:

- From Council's Executive Team prior to acceptance of a formal Planning Agreement Offer, and through the process as appropriate
- From Council's development planners if the draft planning agreement proposes to offset any contributions under s7.11 or s7.12 of the Act, or to exclude the application of those sections to the development which the planning agreement will relate, or to dedicate land or provide works that are otherwise set out in a development contributions plan;
- From relevant officers with responsibility for the types of work proposed in a planning agreement (such as roads or open space) regarding the need or identification in corporate strategic documents for such works, and / or specifications for such works, and
- From the relevant Asset management officers where a planning agreement proposes the dedication of any land and the creation of new assets.

C.7 Involvement of independent third parties in the negotiation and assessment process

Council may at any time appoint an independent person to facilitate or otherwise participate in the negotiation or assessment of a planning agreement, or aspects of it, such as where:

- (a) An independent assessment of a proposed instrument change or development application is necessary or desirable, particularly in circumstances where Council may have interest or stake in the development proposed or where Council owns the land being developed;
- (b) Factual information requires validation in the course of negotiations;
- (c) Sensitive financial or other information must be verified or established in the course of negotiations;
- (d) Facilitation of complex negotiations (including legal advice) is required in relation to large projects or where numerous parties or stakeholders are involved; or
- (e) Independent valuation or independent quantity surveying is required.

The cost of independent third parties will be borne by the developer.

C.8 Key steps in the planning agreement preparation process

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

Step 1 – Initiation

- (a) Prior to the lodgement of a development application or a planning proposal application, either a developer or the Council and developer (and any other relevant person) may decide to commence discussions about whether a planning agreement is appropriate in connection with any development application or modification application or complying development certificate application or planning proposal.

Step 2 – Lodgement of Development Application or Planning Proposal

- (a) An initial planning agreement offer should be made by the developer in conjunction with the lodgement of a planning proposal or development (or modification) application or application for complying development certificate with Council.
- (b) The VPA Officer will advise the developer to submit their draft planning agreement in the form required by Council's Planning Agreement template, Part G.
- (c) Council and the developer are to nominate the persons that will represent them in the negotiations. Council may at any time nominate a third party at its discretion.

Step 3 – Negotiation of commercial terms

- (a) Council's VPA Officer will be responsible for all functions with regard to negotiating the proposed planning agreement including overseeing the valuation of public benefits in accordance with this Policy, subject to resolutions of Council and / or requirements in this policy to seek support and approval from other Council officers or legal advisors.
- (b) If the developer is not the owner of the relevant land, the landowner must be an additional party to the proposed planning agreement and negotiations.
- (c) The VPA Officer and the developer should conduct initial discussions to identify the broad terms of the planning agreement being proposed. The key commercial issues for negotiation will be identified by the VPA Officer and the developer and the negotiations over these issues will then take place.
- (d) The VPA Officer will consult with relevant stakeholders or third party experts as required during the commercial negotiations.
- (e) The VPA Officer will seek in principle support from Council's executive team prior to the completion of the commercial terms.
- (f) If agreement is reached, the developer (and any other relevant party) will prepare the proposed planning agreement including the explanatory statement, and then make the relevant application to the Council accompanied either by a copy of the proposed agreement or by an offer to enter into such an agreement with specifics of the agreement set out in detail.

Step 4 – Report to Council

- (a) The outcomes of the negotiation and assessment of the formal written Planning Agreement offer are to be reported to Council seeking a resolution that a draft planning agreement be prepared for public exhibition purposes.
- (b) In the case of a planning agreement offer made in conjunction with a planning proposal, the report to Council will ordinarily occur concurrently with a report seeking that the planning proposal be referred to the Department of Planning and Environment for Gateway Determination.

Step 5 – Public exhibition

- (a) Council will publicly exhibit and notify the development application or modification application or complying development certificate application or planning proposal and draft planning agreement in accordance with the Act and Council's Notification policy and Part D of this policy.
- (b) Where possible, the public exhibition of the draft planning agreement should occur concurrently with the public exhibition of the associated planning proposal or development application, modification application or complying development certificate application.
- (c) Following the completion of the public exhibition period a further report will only be put to Council detailing the outcomes of the public exhibition, if any submissions have been made, and shall include details of the submissions and any discussions undertaken with the developer to address matters raised, and where necessary recommending further changes to the draft planning agreements as a result of the exhibition and above considerations. The report will include recommendations about how to proceed with the planning agreement, (i.e. seek execution of the agreement, amend the agreement or not proceed with the agreement).
- (d) A report regarding the associated development application/modification application/complying development certificate application/planning proposal may be put to Council concurrently with the report referred to above in Step 5 (c).
- (e) Re-notification of the draft planning agreement as necessary following amendments to the draft planning agreement.

Step 6 – Execution of Planning Agreement

- (a) Should Council endorse a planning agreement for execution, the planning agreement must be executed before Council will finalise any instrument change associated with an accompanying planning proposal application. If the developer refuses to execute a planning agreement offered in connection with a planning proposal, Council will ask the minister not to proceed with the relevant instrument change under section 3.35(4) of the Act.
- (b) Where a planning agreement is made in conjunction with a development application (or modification application), the development consent will be subject to conditions requiring the planning agreement to be complied with. If the agreement is not executed prior to the development consent being granted or modified, a condition will be imposed requiring execution of the planning agreement in accordance with the offer made and subsequent registration of the agreement. Conditions requiring the execution and registration of a planning agreement may be deferred commencement conditions that must be satisfied before the consent becomes operational.

Part D - Notification and Exhibition**D.1 Public notification of planning agreements**

In accordance with the Act, a planning agreement must be publicly notified and available for public inspection for a minimum period of 28 days. Council may decide to notify a planning agreement for a longer period.

Where practical, Council will aim to notify the planning agreement with the associated planning proposal and / or development application/modification application or complying development certificate application.

The advertising costs relating to public exhibition of the planning agreement will be borne by the developer, in accordance with Council's adopted Fees and Charges Schedule.

D.2 Re-notification

Council may publicly re-notify and make available for public inspection a revised planning agreement and the application to which it relates if, in the Council's opinion, a material change is made to the terms of the agreement or the application after it has been previously publicly notified and inspected.

Such a change may arise as a consequence of public submissions made in respect of the previous public notification and inspection of the agreement or the application, or their formal consideration by the Council, or for any other reason.

D.3 Public comment on planning agreements

Council encourages the public to make submissions on planning agreements. All public submissions will be considered before finalisation of the planning agreement.

Public submissions on draft planning agreement notifications will be assessed by the Council when it considers whether it should enter into the proposed planning agreement. This will occur separate to any consideration and determination of an Officers report on the associated planning proposal or development application/modification application.

Part E - Implementation and Conditions

E.1 Preparation of the planning agreement

Unless otherwise agreed by the parties the developer will make its formal offer and draft planning agreement in accordance with this Policy and Part G. The planning agreement will be accompanied by an explanatory note in accordance with the Template at Part H.

The Council will require a planning agreement to make provision for payment by the developer of the Council's costs of and incidental to negotiating, preparing and entering into the agreement as well as administering and enforcing the agreement.

E.2 Parties to the planning agreement

Council and the developer will be parties to the planning agreement.

If Council is not the consent authority, or another entity is involved in the agreement (for example another council) that other entity may be required to be a party to the agreement.

Where the developer does not own all the land to which the planning agreement relates, the Council will (unless the Council otherwise agrees at its sole discretion) require the landowner or landowners to be parties to the agreement so the agreement can be registered on the title of the land.

E.3 When is a planning agreement required to be executed?

A planning agreement is executed when it is signed by all of the parties, including by way of executing separate counterparts of the agreement.

A planning agreement can be entered into at any time after the planning agreement is publicly notified in accordance with the Act and regulation and subject to Council resolution to enter the planning agreement.

Council will usually require a developer to give an irrevocable offer and execute the planning agreement at the following times:

- (a) In respect of a development application (or modification application), Council will seek to have the planning agreement executed prior to the grant of development consent. If the planning agreement is not executed prior to the grant of development consent, Council will impose a condition requiring the planning agreement to be entered into and, if relevant, registered on title either as a deferred commencement condition or prior to the issue of a Construction Certificate, depending on the proposed timing for the delivery of contributions.
- (b) In respect of a planning proposal, Council will expect to have the planning agreement executed prior to Council requesting that the minister make the instrument change referred to in the planning proposal, or before Council makes that instrument change under delegation.

Council may also impose conditions of consent requiring compliance with the planning agreement and the delivery of relevant contributions at the required time.

Council cannot impose a condition of consent that requires a developer to enter into a planning agreement on terms different to those offered, or if a planning agreement was not offered.

If a planning agreement in connection with a planning proposal is not executed at the appropriate time set out above, Council may request the Minister not to proceed with the instrument change, in accordance with s3.35 of the Act.

E.4 When will planning obligations arise?

The obligations under a planning agreement will arise as agreed between the parties but generally upon execution of the planning agreement by all parties, and the timing for the delivery of each contribution must be specified in

the planning agreement. Council will generally require development contributions under a planning agreement to be provided as follows:

- (a) In the case of a monetary contribution
 - 25% of the contribution on execution of the planning agreement
 - 50% of the monetary contribution prior to the issue of a construction certificate, and
 - 25% of the monetary contribution prior to the issue of any occupancy certificate (interim or final) or prior to the registration of a Strata plan, whichever is earlier.

Council will accept the provision of bank guarantees in lieu of the first two payments due above. In those circumstances, full payment of the contribution will be due prior to the issue of any occupation certificate (interim or final).

- (b) In the case of works, prior to the issue of the first occupation certificate for development on the land (including any interim occupation certificate). Council will require any works on land to be dedicated (for example fit out of an affordable housing unit or embellishment of a public reserve) to be completed prior to dedication.
- (c) In the case of land dedication for affordable housing, within two months of the registration of any subdivision of the development creating the areas to be dedicated or within 6 months of the issue of an Occupation Certificate, whichever occurs later.
- (d) In the case of other land dedication, prior to occupation of the development or the issue of an occupation certificate for the development. This timing may be varied depending on how the development will be staged and the location of the land to be dedicated. Council will require this information from developers so that it can be properly informed when negotiating the likely timing for the dedication of the land.
- (e) Dedication of public reserves or public roads can be made on registration of a subdivision plan creating the lot to be dedicated in accordance with the relevant provisions of the *Local Government Act 1993* or the *Roads Act 1993*.
- (f) Council in agreement with the developer may choose to add a final date or maximum time period in which contributions are to be delivered, for example, within X years of the execution of the agreement.

E.5 Monitoring and review of a planning agreement

Council will regularly monitor the performance of the developer's obligations under a planning agreement and report them in accordance with the Act.

Council will require the planning agreement to contain provisions 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 under the agreement.

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

E.6 Modification or discharge of obligations

Council may agree to a provision in a planning agreement permitting the developer's obligations under the agreement to be modified or discharged in the following circumstances:

- (a) The developer's obligations have been fully carried out in accordance with the agreement; or
- (b) The development consent to which the agreement relates has lapsed; or
- (c) The instrument change to which the agreement relates did not proceed; or
- (d) The development consent to which the agreement relates has been modified to such an extent that the planning obligations may not be appropriate; or
- (e) The performance of the planning agreement has been frustrated by an event or events beyond the reasonable control of the parties, or
- (f) The developer has sought and obtained Council's permission to fully and completely assign the developer's interest under the agreement in accordance with its terms, or
- (g) Other material changes affecting the operation of the planning agreement have occurred, or
- (h) Council and the developer agree to the modification or discharge of the agreement.

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

If there are any indications that a developer has decided not to execute the agreement after it has been exhibited, the Council will consider that to be a significant change to the development or planning proposal and may inform the developer to lodge a new development application or revised planning proposal.

E.7 Assignment and dealings by the developer

The Council will only consider permitting the assignment of any or all of the developer's rights or obligations under the agreement, or any dealing in relation to any part or the whole of the land the subject of the agreement if:

- (a) The developer has, at no cost to the Council, first procured the execution by the assignee of all necessary documents in favour of the Council under which the assignee agrees to be bound by the original planning agreement.
- (b) The developer has, at no cost to the Council, first procured replacement security from the assignee. The Council may require the assignee to provide more security than the original developer if the assignee does not have the same financial standing as the original developer.
- (c) If the proposed dealing involves a mortgage, charge or other encumbrance in relation to the party's right, title and interest in the land, such documents provide for an agreement by the person to the effect that they, and any receiver appointed by them, will not enjoy rights greater than those of that party.
- (d) The party is not in breach of this Agreement.
- (e) Council is satisfied the incoming party is financially capable of delivering on the outgoing party's obligations under the planning agreement.

E.8 Provision of security under a planning agreement

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

The form of security for obligations to deliver works or make monetary contributions will generally be an unconditional bank guarantee from an Australian Bank in favour of the Council to the full value of the developer's obligations under the Agreement and on terms otherwise acceptable to the Council.

In respect to development contributions in the form of land, Council may require a planning agreement to include provisions allowing Council to acquire any land to be dedicated for one Australian dollar if the developer defaults.

Council may also require, in appropriate cases, the creation of a charge over land, and may require the landowner to agree to not object to Council lodging caveats on the title of all or any of the land the subject of the planning agreement. In particular, Council will generally require a planning agreement to include provisions acknowledging Council has a caveatable interest over:

- (a) The whole of the land until the planning agreement is registered; and
- (b) Any land to be dedicated to Council, once the relevant portion of land has been created.

Any amount to be secured by a Bank Guarantee or bond will be adjusted on each anniversary date in accordance with increases in the consumer price index. The formula for adjustment of security amounts will be consistent with the indexations of contributions specified in the planning agreements (see Clause E.10 of this policy).

E.9 Timing for provision of Security

Council will require any security (such as bank guarantees) for contributions that do not involve monetary payment to be provided prior to the issue of a construction certificate, or at such other appropriate times, depending on the nature and timings of the contributions.

Where security is required under a planning agreement for a monetary contribution, the security will be provided as follows:

- (a) Stage 1: a bank guarantee for 25% of the monetary contribution upon execution of the planning agreement; and
- (b) Stage 2: a bank guarantee for 75% of the monetary contribution prior to the issue of a construction certificate.

The developer may pay the monetary contribution instead of providing a bank guarantee for a particular stage in accordance with Clause E.4 of this policy.

E.10 Indexation of monetary contributions and security

Monetary contributions included with a planning agreement are to be subject to indexation to reflect increases in the consumer price index between the execution of the agreement and timing of payments. Indexation shall be undertaken in accordance with the following formulae.

$\begin{array}{r} \$ \text{ Monetary} \\ \text{Contribution} \end{array} \times \frac{\text{The CPI at the time of payment}}{\text{The CPI at the date of the agreement}}$
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CPI is the All Groups Consumer Price Index applicable to Sydney published by the Australian Bureau of Statistics.

Securities such as bank guarantees required under a planning agreement will also be subject to annual indexation requirements.

E.11 GST and planning agreements

All planning agreements are to be consistent with *A New Tax System (Goods and Services Tax) Act 1999* and Regulation.

Monetary contributions provided under a planning agreement are exclusive of GST. If GST is or becomes payable on any contribution under a planning agreement, the developer will be required to pay the GST or pay an amount to the Council equivalent to the GST.

E.12 Registration of planning agreements

Council will require a planning agreement to contain a provision requiring the developer to register the agreement, at the developer's expense, pursuant to s7.6 of the Act.

Council will require a planning agreement to acknowledge that Council has a caveatable interest in the land and may register a caveat against the title to the land prior to the planning agreement being registered. Once the agreement is registered, Council will withdraw any caveat it has.

The developer is to provide evidence of registration of the planning agreement through provision of each relevant property title within the timelines outlined in the planning agreement.

If the planning agreement is not registered prior to the grant of development consent, Council will require registration of the planning agreement as a condition of development consent and may require registration of the planning agreement as a deferred commencement condition.

The registration of the planning agreement against the title to land can be removed once all the contributions have been delivered. Where contributions are to be delivered after the registration of a subdivision or strata plan, Council may agree to removal of the planning agreement from the title to final lots (lots that are not to be further subdivided), subject to adequate security being provided to Council for any outstanding contributions to be delivered.

This may include:

- (a) A requirement to register the planning agreement against the title to the common property;
- (b) Caveats to be registered over any land to be dedicated to Council; and
- (c) Bank guarantees or bonds to secure the cost of any works and/or monetary contributions that remains outstanding.

E.13 Dispute resolution

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

E.14 Council's costs of negotiating, entering into, monitoring and enforcing a planning agreement

Council will require a planning agreement to make provision for payment by the developer of the Council's costs of and incidental to negotiating, preparing, advertising and entering into the agreement (including reasonable legal costs in obtaining advice in connection with the planning agreement) as well as administering and enforcing the agreement.

Council may require the planning agreement to make provision for a contribution by the developer towards the ongoing administration of the agreement (see Clause E.18 of this policy).

E.15 Detailed design plans and specifications

Council will require a planning agreement to make provision requiring detailed design plans and / or specifications to be provided to Council for approval prior to the commencement of any works to be delivered under a planning agreement.

E.16 Inspections

Council will require a planning agreement to make provision for the inclusion of mandatory inspections where works are to be delivered and / or land is to be dedicated under a planning agreement, and in any other circumstance it considers appropriate.

E.17 Defects Liability Period

Where a planning agreement includes the delivery of works or dedication of land or housing, Council will require a planning agreement to make provision for the inclusion of a defects liability period and provisions of security for the defects liability period.

In the case of structural, or below ground works or landscaping/planting, the defects liability period shall be two years from issue of certificate of practical completion. In all other circumstances the defects liability period will be one year from issue of certificate or practical completion.

Security in the form of an unconditional bank guarantee will be held for the defects liability period. The amount of security will be determined by Council at its discretion, generally the amount will be 2.5% of the cost of works. In some cases, a higher rate may be applied depending on the risks involved for Council if there is a defect in the works.

E.18 Administrative fees

In accordance with this policy and Councils Fees and Charges Schedule, an administration fee will be levied by Council for the following, where relevant:

- (a) Participation in any design process.
- (b) Approval of detailed design plans and specifications.
- (c) Inspections and reporting, including on defects in works.
- (d) Issuing certificates of practical completion.
- (e) Contract administration.
- (f) Enforcing a planning agreement, including costs associated with calling on bank guarantees or letters of demand.
- (g) Registration of planning agreements
- (h) Registration and withdrawing of caveats.
- (i) Registration and variation of easements or covenants or other instruments to be registered against the title to land.
- (j) Release and discharge of planning agreements, including costs of removing a planning agreement from title.
- (k) Exhibiting the planning agreement or any variation of the planning agreement.

E.19 Notations on Certificates under S10.7 (5) of the Act

Council will generally require a planning agreement to contain an acknowledgement by the developer that the Council may, at its absolute discretion, make a notation under s10.7 (5) of the Act about a planning agreement on any certificate issued under s10.7 (2) of the Act relating to the subject of the agreement or any other land.

E.20 Amendment of planning agreements

A planning agreement may only be amended in accordance with the Act and the Regulation, which require any amendment to be in writing and publicly notified. The costs associated with amending a planning agreement will be borne by the developer. This policy applies equally to applications to amend an existing planning agreement.

E.21 Classification of Land

Where land or housing is dedicated or transferred to Council, Council will consider the classification of that land or housing under *Chapter 6 Part 2 of the Local Government Act 1993*. Council shall resolve to classify the land or housing accordingly at the time Council endorses the execution of the planning agreement.

E.22 Access to planning agreements

Council will provide public access to executed planning agreements, explanatory notes and a planning agreements register in accordance with the Act and Regulation.

Part F – Process Flow Chart

Basic Flow Chart – Planning Agreement Process

