

Planning Agreement Guidelines



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Part 1 - Introduction

Purpose

These Guidelines assist in the preparation of planning agreements under the *Environmental Planning and Assessment Act 1979 (NSW)*.

The objectives of the Guidelines are to:

- Establish a fair, transparent and accountable process for planning agreements in the City consistent with legislation;
- Support innovative and flexible approaches to the delivery of infrastructure and other public benefits consistent with the City's strategic and infrastructure plans; and
- Provide guidance to applicants on making a public benefit offer and entering into a planning agreement with the City.

These Guidelines are not legally binding, however it is intended that the City and all persons dealing with the City in relation to planning agreements will follow these Guidelines to the fullest extent possible.

Statutory Framework

Planning agreements are governed by:

- Division 7.1 of the Environmental Planning and Assessment Act 1979 (NSW);
- Part 9 Division 1 of the Environmental Planning and Assessment Regulation 2021 (NSW); and
- Planning Agreements - Practice Note issued by the Department of Planning, Industry and Environment in February 2021

These Guidelines apply to the use of planning agreements to which the City is a party.

Definitions

Term	Meaning
Act	<i>Environmental Planning and Assessment Act 1979 (NSW)</i>
City	Council of the City of Sydney
Contributions Plan	A Contributions Plan adopted by Council in accordance with section 7.11 or 7.12 of the Act
Developer	An owner of land or a developer engaged by an owner of land to develop the land on behalf of the owner either through a planning proposal or development application
Development Application	Has the same meaning as in the Act

Planning Agreement Guidelines

Term	Meaning
Development Contribution	A contribution provided by the Developer under a planning agreement being a monetary contribution, the dedication of land, or any other material public benefit or any combination of them, at no cost to the City.
Explanatory Note	Has the meaning given to that term in section 205 of the Regulation
Landowner	The registered owner of the land to which a planning proposal, development application or planning agreement applies
Local Environmental Plan	Has the meaning given to that term in the Act
Planning Agreement	Has the meaning given to that term in section 7.4 of the Act
Planning Obligation	An obligation imposed by a planning agreement on a developer requiring the Developer to make a development contribution.
Planning Proposal	A proposal to change an environmental planning instrument to facilitate a development the subject of a planning agreement
Practice Note	The <i>Planning Agreements Practice Note February 2021</i> published by the former Department of Planning, Industry and Environment (February 2021).
Public	The community as a whole or, where context requires, a section of the community
Public Benefit	The benefit enjoyed by the public as a consequence of a Development Contribution.
Public Purpose	Includes (without limitation) any of the following: <ul style="list-style-type: none"> (a) <i>The provision of (or the recoupment of the cost of providing) public amenities or public services;</i> (b) <i>The provision of (or the recoupment of the cost of providing) affordable housing;</i> (c) <i>The provision of (or the recoupment of the cost of providing) transport or other infrastructure relating to land;</i> (d) <i>The funding of recurrent expenditure relating to the provision of public amenities or public services, affordable housing or other infrastructure;</i> (e) <i>The monitoring of the planning impacts of a development;</i> (f) <i>The conservation and enhancement of the natural environment.</i>
Regulation	<i>Environmental Planning and Assessment Regulation 2021 (NSW)</i>

Overview of Planning Agreements

Planning agreements are voluntary agreements that allow development contributions such as the dedication of land, public infrastructure, community facilities, affordable housing, monetary contributions or any other material public benefit.

Planning agreements are separate from, but complement development contributions levied in accordance with section 7.11 and 7.12 of the Act and section 61 of the *City of Sydney Act 1988* (for certain historic development consents). In these guidelines all references to contributions under s 7.12 of the Act are taken to include any applicable contributions under s 61 of the City of Sydney Act 1988.

Planning agreements provide greater flexibility to target the delivery of public benefits to manage the impacts of development. Planning agreements also provide an efficient means of incrementally developing community infrastructure in conjunction with redevelopment in urban renewal areas.

How to Use these Guidelines

These Guidelines are structured as follows:

Part 1 – Provides an introduction and overview of planning agreements

Part 2 – Outlines the governance and probity for the use of planning agreements at the City

Part 3 – Provides guidance on the making of a public benefit offer, and the negotiation and operation of a planning agreement

Part 2 - Governance

Planning agreements are a mechanism to secure infrastructure and other material public benefits that contribute to the vision for the City as described in state and local strategic plans.

The Greater Sydney Region Plan's first direction is for 'a city supported by infrastructure' which includes the objective to align infrastructure with growth.

The City's use of planning agreements to secure and deliver infrastructure and other material public benefits is consistent with and contributes to the planning priorities of City's Local Strategic Planning Statement and City Plan 2036.

Other adopted City strategies related to the City's social, economic, environmental and cultural aspirations may also provide guidance on public benefits and infrastructure priorities.

Principles

Planning agreements will be governed by the following principles:

- Planning decisions cannot be bought or sold through planning agreements;
- The City will assess the public benefit of the development contribution against the City's strategic land use and infrastructure planning when deciding whether to proceed with a planning agreement. Public benefits may be social, economic, environmental and/or cultural;
- The City will not allow planning agreements to improperly restrict the exercise of its functions under the Act, Regulation or any other act of law;
- The City will only use planning agreements for a proper planning purpose;
- The City will not use planning agreement as a means of general revenue raising or to overcome revenue shortfalls;
- Development that is unacceptable on planning grounds will not be supported even where public benefits offered by developers mitigate the impacts of development;
- When considering a development application or planning proposal, the City will not give undue weight to a planning agreement;
- The City will not allow the interests of individuals or interest groups to outweigh the public interest when considering a planning agreement;
- The City will act consistently, fairly and impartially in negotiating planning agreements; and
- The City will ensure that it manages any conflict of interest it has between its role as planning authority and its financial interest in the development, being the subject of a planning agreement.

Circumstances where the City may enter into a planning agreement

The City may enter into a planning agreement with a landowner and/or developer in connection with a development application or proposal to change a Local Environmental Plan (planning proposal).

Acceptability Test

The City will consider the following questions in order to assess the desirability of a proposed planning agreement:

- a. Is the proposed planning agreement directed towards a proper and legitimate planning purpose having regard to the statutory planning controls and other adopted planning policies and infrastructure strategies and the circumstances of the development?
 - b. Does the proposed planning agreement provide for a reasonable means of achieving the relevant planning purpose and securing the relevant public benefit?
 - c. Will the proposed planning agreement produce outcomes that benefit or protect the public interest against poor planning outcomes?
 - d. Does the proposed planning agreement promote the City's aim in relation to the use of agreements as set out in these Guidelines?
 - e. Are there any relevant circumstances that may preclude the City from entering into the proposed planning agreement?
 - f. Will the proposed planning agreement provide benefits that bear a relationship to the development or the wider community?
 - g. Is the public benefit proposed appropriate, having regard to the nature of the development?
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Relationship to planning proposals and development applications

When exercising its functions under the Act in relation to a development application or a proposal to change a Local Environmental Plan to which a proposed planning agreement relates, the City will consider:

- a. whether the proposed planning agreement is relevant to an application or proposal; and
- b. whether it should be considered in connection with the application or proposal.

If so, the proper planning consideration is to be given to the proposed planning agreement.

Relationship to contribution plans

Normally public benefits in planning agreements are additional to contributions required under a Contributions Plan. By exception, a planning agreement may partly or fully exclude the application of section 7.11 or 7.12 contributions to development the subject of a planning agreement. This may be in consideration of land dedication or works in kind.

The ability in a planning agreement to partly or fully exclude the application of section 7.11 or 7.12 contributions gives the City a degree of flexibility to redistribute the financial, social and

environmental costs and benefits of development. This flexibility provides the opportunity to address issues that may not have been anticipated or may not be able to be appropriately addressed with the more rigid requirements of section 7.11 or 7.12 contributions.

Where a planning agreement partly or fully excludes the application of section 7.11 or 7.12 contributions, the Act prevents the City from imposing a condition of development consent requiring the payment of those contributions except to the extent that requires the payment of the balance of those contributions where the planning agreement only partly excludes them.

A planning agreement may exclude the public benefits provided under such agreement being considered in the assessment of section 7.11 or 7.12 contributions. In such cases, the Act precludes the application of those sections which would otherwise require the consideration of any land, money or material public benefit when assessing contributions.

Types and forms of public benefits

To ensure that public benefits provided under planning agreements are directed towards appropriate and legitimate planning purposes, the City will consider whether the proposed public benefits:

- a. mitigate or compensate for the impact of the relevant development;
- b. meet the City's planning policy objectives including those set out in adopted strategic plans and any Contributions Plans;
- c. meet the requirements for new public infrastructure identified in the City's Capital Works Program; adopted strategic plans, Local Environmental Plans, Development Control Plans, Development Guidelines for Community Infrastructure, Green Square Developer's Rights Model, affordable housing programs;
- d. meet the objectives or needs of other relevant draft or adopted City policies, strategies, plans, technical standards and specifications.

The type and form of public benefit to be provided under a proposed planning agreement will be determined by the particulars of the development application or planning proposal to which the planning agreement relates.

Matters for consideration

The matters that the City will consider in the preparation of a planning agreement include whether:

- a. the demands created by the development for new public infrastructure, amenities or services are addressed;
- b. the facilities and/or services to be provided meet the planning and strategic objectives of the City;
- c. mitigation of the impact of development is addressed;
- d. recurrent funding of public facilities is required;
- e. improving or augmenting past deficiencies in infrastructure provision are addressed;
- f. monitoring the planning impacts of development is required;
- g. the public benefits provide an opportunity for innovation or technology not anticipated in a Contributions Plan;
- h. the timing of the development aligns with the delivery of the public benefit;
- i. public benefits for the wider community accrue from the planning agreement; and

- j. there are any initial or ongoing costs for the City as a result of the planning agreement.

Contributions – standardising, pooling and recurrent

Wherever possible, the City will seek to standardise development contributions sought under planning agreements in order to streamline negotiations and provide fairness, predictability and certainty for developers. The value attributed to works-in-kind or land will be considered on their merits using the processes outlined in this document.

Where a proposed planning agreement provides for a monetary contribution by the developer, the City may seek to include a provision permitting the monetary contribution to be pooled with money paid under other planning agreements or contributions plans. This will be applied progressively for the different purposes under those agreements or plans, subject to the specific requirements of the relevant agreements or plans. Pooling may be appropriate to allow public benefits to be provided in a fair and equitable way, particularly essential infrastructure.

The City may request developers to make development contributions towards recurrent costs of public facilities through a planning agreement in accordance with the practice note.

Probity

To manage the potential for conflict of interest and ensure transparency and good governance, the City will ensure the definition and separation of roles and responsibilities between the negotiation of the planning agreement and the assessment of the development application or planning proposal. This will be supported by good record keeping of decision making and monitoring of the end to end process.

Staff involved with the negotiation, decision making and reporting of planning agreements sign Conflict of Interest declarations prior to the commencement of negotiations for each planning agreement.

Part 3 – Negotiation and Operation of Planning Agreements

Preferred negotiation process

Planning agreements will be negotiated by City staff on behalf of Council under delegation. Developers are encouraged to flag with the City at an early stage of their investigations of an intention to enter into a planning agreement. The preferred negotiation process will then follow the following indicative steps:

1. Submission of a public benefit offer
2. Valuation of the proposed public benefits
3. Assessment/Consideration of the public benefit offer
4. Drafting of the planning agreement
5. Confirmation of all parties to the draft planning agreement
6. Formal acceptance of the public benefit offer by the City and approval to exhibit the draft planning agreement

Public benefit offers

The process for the City to negotiate a planning agreement commences with the submission of an initial public benefit offer by the landowner and/or developer, generally at the same time as a request for a planning proposal or lodgement of a development application. The offer must:

- Be in writing;
- Be addressed to the planning authority to whom it is made;
- Be signed by the developer, landowner and any other proposed parties to the planning agreement other than the City (where signing by all landowners is not practicable, consent of the landowners may suffice);
- Adequately describe the public benefit and the land and development to which it applies;
- Propose the timing of the delivery of the public benefits;
- State whether the applicant is seeking an offset or reduction of section 7.11, 7.12 or 7.24 contributions by the delivery of the public benefits; and
- Include the key commercial terms it proposes to include in the planning agreement.

Valuation of public benefits

The public benefits proposed under a planning agreement will be attributed a value in the agreement. This attributed value will be agreed between the City and the landowner/developer as

part of the negotiation and drafting process using suitably qualified quantity surveyors, valuers or the City's standard rates and costs where appropriate.

If the public benefit under a planning agreement is works-in-kind, then the City will generally attribute a value to those works based on a cost estimate prepared by a suitably qualified quantity surveyor engaged by the landowner/developer at their cost. The cost estimate will then be peer reviewed by the City's quantity surveyor. Alternatively, and by agreement between the parties, the City's standard rates and costs may be used.

For land within the Green Square Urban Renewal Area, the City will use the standard rate provided in its Development Guidelines for Community Infrastructure. For land identified in a contribution plan, the City will use the rates identified in that plan.

Any developer's works and services that would normally be provided as a condition of development consent will be deemed to have no value under the planning agreement.

In the event that the costs incurred for any works provided by a landowner/developer exceed the value attributed in a planning agreement:

- a. the City will not agree for those additional costs to be:
 - i. refunded to the developer; or
 - ii. off-set against any development contributions required to be made by the developer; and
- b. the developer will not be able to make any further claim against the City for those additional costs.

Provision of security and acquisition rights

The City will require a planning agreement to make provision for security to cover the landowner's and/or developer's obligations under the agreement. This may include for monetary contributions not paid at the time the agreement is executed.

The form of security will be a performance bond provided in accordance with the City's Performance Bond Policy.

The security must be in favour of the City to the full value of the landowner's and/or developer's obligations under the planning agreement.

Where the public benefit under a planning agreement includes the transfer or dedication of land, the City will generally require a planning agreement to contain a right for the City to acquire the land at no cost in the event that the landowner and/or developer fails or is unable to meet its transfer or dedication obligations under the agreement.

Parties to a planning agreement

The parties to the planning agreement are the City and the landowner. The City will consider proposals for a developer that is not the landowner to be a party to a planning agreement on a case by case basis. Without exception, the landowner must still be a party to the planning agreement for the purpose of consenting to the registration of the planning agreement on the certificate of title to the land and the enforcement rights granted to the City under the planning agreement.

Drafting of planning agreements

The City has prepared a template for planning agreements to which it will be party. The template is available on the City's website

Depending on the nature of the public benefit on offer, some of the clauses in the template may not apply (for example, if the public benefit is solely a monetary contribution then clauses regarding developer's works will be deleted). Some provisions are standard for every planning agreement to comply with the Act and Regulations.

The City will prepare each draft planning agreement.

Public notification

In accordance with the Act, all draft planning agreements and explanatory notes are publicly notified for a minimum of 28 days.

If the planning agreement is in connection with a proposal to change a Local Environmental Plan, the public notice of the draft planning agreement and explanatory note will be given, if practicable, with the public notice and community consultation period of the relevant planning proposal. This is so that the City can ensure that the public can consider all elements of the change to the Local Environmental Plan as a whole at the same time.

If the planning agreement is in connection with a development application, the public notice will be given as soon as possible after a draft agreement has been prepared and agreed by the parties.

Amendments may be required as a result of public submissions or for other reasons. Where amendments are required to a draft planning agreement that materially affect the nature, scope or timing of the public benefits or the key terms of the planning agreement, the amended draft planning agreement and explanatory note will be re-exhibited.

Amendment & re-notification

Planning agreements can be amended by agreement between the parties. Either party can request an amendment. Amendment will generally occur through a deed of variation to the planning agreement. The draft deed will be prepared by the City. The public notification obligations set out above apply to amendments. Applicable fees for the amendment and public re-notification may apply.

Fees & charges

The City and the developer will each meet their own costs in the process of the commercial negotiations for a planning agreement, together with the cost of employing independent consultants and third parties if necessary. The developer must pay the City all reasonable costs for the drafting, exhibition, execution and registration of the agreement (and any amendment, in accordance with the City's Revenue Policy applicable at the time of completion of negotiation of the planning agreement. The costs will depend on the nature and complexity of the agreement.

Registration on title

The City requires all planning agreements to be registered on the property title of the land unless all public benefits are provided in full at the time of execution of the agreement (for example, where the agreement is for monetary contributions only).

On execution of the planning agreement and until it is registered on title, the City may lodge a caveat on the title of the relevant land.

The City will require the relevant registered landowner to consent to and procure the consent of any other prior registered interests to the registration of the planning agreement.

The City will require a planning agreement to contain an acknowledgement by the landowner and developer that the City will make a notation about a planning agreement on any certificate issued under section 10.7(5) of the Act relating to the land the subject of the agreement.

Once the public benefits under the planning agreement have been provided, the City will do all things reasonably required to release the planning agreement from the title of the land.

Enforcement

The City uses a range of enforcement methods to ensure delivery of public benefits at no cost under planning agreements. The type or types of enforcement methods depend on the nature of the public benefit being provided. Types of enforcement include but are not limited to:

- a. provision of a bank guarantee or insurance bond (typically for the full value of the works) to secure the delivery of works and maintenance in any defects liability period;
- b. rights to compulsorily acquire land from the developer at no cost if the developer fails to dedicate or transfer the land to the City;
- c. rights for the City to step in and complete works at the developer's cost if the developer fails to undertake the works;
- d. warranties, and/or covenants, restrictions or easements on title to ensure the ongoing operation of public benefits after delivery; and
- e. linking construction certificates or occupation certificates to delivery of public benefits.

The City's objective in imposing these enforcement methods is to secure the delivery of the public benefit without the City spending public funds on enforcement.

Discharge of obligations

The developer must ensure that the public benefits are provided by the date or milestone identified in the planning agreement. For works in kind, the City will inspect and provide confirmation in writing that the works have reached completion.

The City may terminate the planning agreement when:

- a. for agreements relating to a Planning Proposal, the local environmental plan is
 - i. subsequently amended by an environmental planning instrument made after the Planning Proposal in a way that prevents the development from proceeding; or
 - ii. declared to be invalid by a Court of competent jurisdiction.
- b. for agreements relating to a development application, the development consent lapses or is surrendered.

Planning agreement register

The City maintains a register of all planning agreements which is available for inspection by the public, along with copies of each planning agreement, on the City's website.

The City includes information about executed planning agreements in its Annual Report.

