
Planning Agreement Guidelines

PART 1 - INTRODUCTION

Purpose

These guidelines assist in the preparation of planning agreements under Part 4, Division 6, Subdivision 2 of the *Environmental Planning and Assessment Act 1979*.

The Guidelines objectives are to:

- Establish a fair, transparent and accountable framework governing the use of planning agreements by the Council of the City of Sydney;
- Give stakeholders in development greater involvement in the type, standard and location of public facilities and other public benefits; and
- Adopt innovative and flexible approaches to the provision of infrastructure and other public benefits in a manner that is consistent with Council's strategic and infrastructure plans.

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

Scope

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

Definitions

Term	Meaning
Act	Environmental Planning and Assessment Act 1979
Council	Council of the City of Sydney
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
Development Contribution	A contribution provided by the Developer under a planning agreement being a monetary contribution, the dedication of land free of cost to Council, any other material public benefit or any combination of them.
Explanatory Note	Has the meaning given to that term in clause 25E of the Regulation
Local Environmental Plan	Has the meaning given to that term in the Act
Planning Agreement	Has the meaning given to that term in section 93F 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>Practice Note on Planning Agreements</i> published by the former Department of Infrastructure Planning and Natural Resources (July 2005).
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 Facilities	Public infrastructure, facilities, amenities and services.
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	Environmental Planning and Assessment Regulation 2000

Note: These Guidelines adopt the terms used in the *Practice Note on Planning Agreements* published by the former Department of Planning and Natural Resources (July 2005) and the

definitions of the *Environmental Planning and Assessment Act 1979* and *Environmental Planning and Assessment Regulation 2000*.

Overview of planning agreements

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

Planning agreements are separate from, but complement Council's section 94 contribution plans levied in accordance with the Act and section 61 contribution plans levied in accordance with the *City of Sydney Act 1988*.

Planning agreements provide greater flexibility to target the range of public facilities and services that can be provided for the public benefit in order 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. Planning agreements may arise through either a development application or a proposal to change a Local Environmental Plan.

PART 2 – GUIDELINES ON THE USE OF PLANNING AGREEMENTS

Principles

Planning agreements will be governed by the following principles:

- Planning decisions cannot be bought or sold through planning agreements;
- Council will assess the public benefit of the development contribution when deciding whether to proceed with the planning agreement. Public benefits may be social, economic, environmental and cultural;
- Council will not allow planning agreements to improperly restrict the exercise of its functions under the Act, Regulation or any other act of law;
- Council will not use planning agreements for any purpose other than a proper planning purpose;
- Development that is unacceptable on planning grounds will not be supported because of public benefits offered by developers that do not mitigate the impacts of development;
- When considering a development application or planning proposal, Council will not give undue weight to a planning agreement;
- Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a planning agreement;
- Council will act consistently, fairly and impartially in negotiating planning agreements with developers; and
- Council 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 Council may enter into a planning agreement

Council may negotiate a planning agreement with a developer in connection with any development application or proposal to change a Local Environmental Plan relating to any land in the Council's area.

Acceptability test to be applied to all planning agreements

Council 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 Council's aim in relation to the use of agreements as set out in these Guidelines
- (e) Are there any relevant circumstances that may operate to preclude Council 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?

Consideration of planning agreements in relation 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, Council will consider:

- (a) whether the proposed planning agreement is relevant to an application or proposal and whether it should be considered in connection with the application or proposal; and
- (b) if so, the proper planning consideration to be given to the proposed planning agreement.

Types and forms of contributions

To ensure that development contributions provided under planning agreements are directed towards appropriate and legitimate planning purposes, Council will consider whether the proposed development contribution:

- (a) mitigates or compensates for the impact of the relevant development;
- (b) meets Council's planning policy objectives including those set out in section 94 and section 61 contributions plans;
- (c) meets the requirements for new public infrastructure identified in Council's public works program; Local Environmental Plans, Development Control Plans, Development Guidelines for Community Infrastructure, Green Square Developer's Rights Scheme, affordable housing programs;
- (d) meets the objectives or needs of other relevant draft or adopted Council policies, strategies, plans, technical standards and specifications.

The form of a development contribution to be made under a proposed planning agreement will be determined by the particulars of the development application or planning proposal to which the planning agreement relates.

Relationship to section 94 and section 61 contributions

Normally public benefits in planning agreements are additional to required contributions. By exception, a planning agreement may partly or fully exclude the application of section 94 or section 61 contributions to development the subject of a planning agreement.

The ability in a planning agreement to partly or fully exclude the application of section 94 or section 61 contributions gives Council 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 94 or section 61 contributions.

Where a planning agreement partly or fully excludes the application of section 94 or section 61 contributions, the Act prevents Council 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 benefits provided under such agreement being considered in the assessment of section 94 contributions. In such cases, the Act precludes the application of section 94(6) which would otherwise require the consideration of any land, money or material public benefit contributed to the consent authority when assessing section 94 contributions.

Public Benefit Offer

The process for Council to negotiate a planning agreement commences with the submission of a written public benefit offer by the developer. The offer must adequately describe the public benefit and must be signed by the landowner.

Assessing proposed provisions under a planning agreement?

The matters that Council will consider in any negotiations for 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 Council;
- (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 Contributions Plans;
- (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 Council as a result of the planning agreement.

Valuing public benefits under a planning agreement

The public benefit proposed under a planning agreement will be attributed a value in the agreement. This attributed value will be agreed between Council and the developer as part of the negotiation and drafting process using a suitably qualified quantity survey, valuer or Council's standard rates and costs where appropriate.

If a development contribution under a planning agreement is the carrying out of works for a public purpose, Council will generally attribute a value to that development contribution. This is based on a cost estimate for the works prepared by a suitably qualified quantity surveyor engaged by the developer at their cost or by reference to Council's standard rates and costs where appropriate.

Where the development contribution under a planning agreement includes the transfer or dedication of land, Council may seek the services of an appropriately qualified land valuer in order to attribute a value to the land being transferred or dedicated. For land within the Green Square Urban Renewal Area, Council will use the standard rate provided in its community infrastructure and bonus floor space guidelines.

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 of any works-in kind that are to be provided by a developer exceed the costs of those works as agreed with Council in a planning agreement, excluding a change in scope agreed by Council:

- (a) Council will not agree to a planning agreement providing for those additional costs to be:
 - refunded to the developer; or
 - 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 Council for those additional costs.

Pooling of development contributions

Where a proposed planning agreement provides for a monetary contribution by the developer, Council may seek to include a provision permitting money paid under the agreement to be pooled with money paid under other planning agreements 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.

Recurrent Contributions

The Council may request developers to make development contributions towards recurrent costs of public facilities through a planning agreement. Generally, the planning agreement will only require the developer to make contributions towards the recurrent costs of the facility until a public revenue stream is established to support the on-going costs of the facility, or for a time agreed between the parties.

Standard Contributions

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

Parties to a planning agreement

The parties to the planning agreement are Council and the landowner. Council will consider proposals for a developer that is not the landowner to enter into a planning agreement on a case by case basis. In such a case, 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 Council under the planning agreement.

Public notification of planning agreements

A planning agreement cannot be entered into, amended or revoked unless public notice is given and the planning agreement is first made publicly available for inspection for a minimum period of 28 days.

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.

If the planning agreement is in connection with a proposal to change a Local Environmental Plan, the public notice will be given, if practicable, as part of and contemporaneously with, and in the same manner as, any public notice of the relevant planning proposal that is required under the Act. This is so that Council can ensure that the public can consider all elements of the change to the Local Environmental Plan as a whole at the same time.

Where it is not practicable to give public notice at such times, the Regulation requires that it be given as soon as possible after as determined by Council.

Amendments may be required as a result of public submissions or for other reasons. Where amendments are required to a draft planning agreement, the amended draft planning agreement and explanatory note will be re-exhibited.

Certain particulars relating to executed planning agreements will be included in the City's annual report for that year.

Modification

Planning Agreements can be modified by agreement between the parties. Either party can initiate modification. Modification will generally occur by means of a deed of variation to the planning agreement in a form prepared by Council. The party proposing the modification must bear the other party's cost of the modification. The public notification obligations set out above apply to any modification.

Costs of entering into planning agreements

Council 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. Generally, Council will require that all reasonable costs for the drafting, legal negotiations, exhibition, execution and registration of the agreement are met by the developer.

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. This will include monetary contributions not paid at the time the agreement is executed by the parties.

The form of security will be a performance bond provided in accordance with Council's performance bond policy, as amended from time to time.

The security must be in favour of the Council to the full value of the developer's obligations under the planning agreement and on terms otherwise acceptable to Council.

Where the development contribution under a planning agreement includes the transfer or dedication of land, Council will generally require a planning agreement to contain a right for Council to acquire the land in the event that the developer fails or is unable to meet its transfer or dedication obligations under the agreement.

Notations on certificates under section 149(5) of the Act

Council will require a planning agreement to contain an acknowledgement by the developer that Council will make a notation about a planning agreement on any certificate issued under section 149(5) of the Act relating to the land the subject of the agreement.

Registration of planning agreements and caveat

Council will generally require a planning agreement to contain a provision requiring the developer to agree to registration of the agreement on the title to the developer's land pursuant to section 93H of the Act.

On execution of the planning agreement and until it is registered on title, the developer may be required to consent to Council lodging a caveat on the title of the relevant land.

Council will require the relevant registered land owner to consent to and procure the consent of any other prior registered interests to the registration of the planning agreement and the caveat.

Probity

To manage the ongoing potential for conflict of interest and ensure transparency and good governance, Council's internal procedures will ensure the definition and separation of roles and responsibilities; 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 development. If necessary, a probity plan will be prepared.

Council's register of planning agreements is available for inspection by the public along with copies of each planning agreement.

Implementation agreements

Council may require a planning agreement to provide that before the commencement of development, subject to the agreement, the parties are to enter into an implementation or side agreement for matters such as:

- The design process, technical specification and standard of any work required by the planning agreement to be undertaken by the developer; or
- The terms on which the developer will provide Council with access to the land; or
- The manner in which completed work is to be handed over to Council;

Template for Planning Agreement

Council has prepared an example of the type of planning agreement that Council proposes for planning agreements under the Act. The template is available on Council's website [link].

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, in order for the planning agreement to comply with section 93F(3) of the Act. Council will prepare the planning agreement.

Monitoring and review of a planning agreement

Council will monitor and enforce the performance of the developer's obligations under a planning agreement.

References

Laws and standards

- Environmental Planning and Assessment Act 1979
- Environmental Planning and Assessment Regulation 2000
- Practice Note on Planning Agreements – Department of Infrastructure Planning and Natural Resources, July 2005

Review

Review period	Next review date	TRIM reference
The Director City Planning, Development and Transport will review these Guidelines every four (4) years	July 2020	2016/380802