



Draft Planning Agreements Policy

Policy Approval and Distribution

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RELEVANCE TO COMMUNITY STRATEGIC PLAN	4. Good governance: an actively engaged community and strong leadership team 4.1 Decision-making is based on collaborative, transparent and accountable leadership

Version Control

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Policy Statement

This policy has been developed to set out the policies and procedures relating to the use of planning agreements under section 7.4 of the *Environmental Planning and Assessment Act 1979* and to meet the requirements of the Practice Note for the Council in relation to such a policy.

Related CGRC Documents

- Cootamundra-Gundagai Regional Council Section 7.12 Fixed Development Consent Levy Contributions Plan 2018
- Gundagai Shire Council Contributions Plan -Development generating heavy vehicle usage of local roads

Review Period

This document is to be reviewed every four (4) years to ensure that it remains relevant and meets legislative requirements.

Administrative Changes

From time-to-time circumstances may change leading to the need for minor administrative changes to this document. Where an update does not materially alter this document, such a change may be made including branding, references to related policies, Council Officer titles or department changes and legislative name or title changes which are considered minor in nature and not required to be formally endorsed.

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Part 1 - Introduction

1. Definitions

Councillor	Cootamundra-Gundagai Regional Council elected representative
Council Officer	Cootamundra-Gundagai Regional Council members of staff (including full-time, part-time, casual, and contracted staff)
Contributions Plan	means a contributions plan within the meaning of the Act pursuant to which contributions can be required to be made under s7.11 or 7.12 of the Act.
Council Committee	means a group of internal stakeholders from relevant divisions of 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 (section 7.4(11) of the Act), 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 a material public benefit, to be used for or applied towards a public purpose.
EPA Act	means the Environmental Planning and Assessment Act 1979.
Environmental Planning Instrument	has the same meaning as in the Act.
Explanatory Note	means the written statement that is required to be exhibited with a Planning Agreement under clause 203 of the Regulation and that provides details of the objectives, nature, effect and merits of a Planning Agreement, or an amendment to or revocation of a Planning Agreement.
ICAC Audit Tool	the Development Assessment Internal Audit Tool published by the Independent Commission Against Corruption dated April 2010 in so far as it applies to planning agreements.
Instrument Change	means a change to an environmental planning instrument.
LEP	Local Environmental Plan
LGA	Local Government Area
local infrastructure contribution	a condition of development consent imposed under section 7.11 of the Act requiring the payment of a monetary contribution or the dedication of land free of cost or under section 7.12 requiring the payment of a levy.
Modification application	an application under section 4.55 or 4.56 of the EPA Act to modify a development consent.
Part 6 certificate	a certificate under Part 6 of the Act.
Planning Agreement	is a voluntary planning agreement within the meaning of s7.4(1) of the Act.

Planning Proposal	has the same meaning as in the Act
Policy	means this Policy
Practice Note	means Practice Note title “ <i>Council policies and procedures for planning agreement</i> ” published by NSW Department of Planning, Housing and Industry first published in May 2025 and periodically updated. Available at https://www.planningportal.nsw.gov.au/local-infrastructure-contributions/council-policies-procedures-planning-agreements
public	includes a section of the public
Public benefit	the benefit enjoyed by the public as a consequence of a development contribution made by a developer under a planning agreement.
public facilities	means public infrastructure, facilities, amenities and services
Public purpose	has the same meaning as in section 7.4(2) of the Act.
Public Notice	is a notification made to the public advising them of a proposed Planning Agreement in relation to an Instrument Change or Development Application.
Surplus value	the value of the developer’s contribution under a planning agreement for a Contributions Plan Category of facilities less the value of development contributions that are or could have been required to be made under section 7.11 or section 7.12 of the Act for that category in respect of the development the subject of the agreement.
Regulation	means the Environmental Planning and Assessment Regulation 2021.
VPA Officer	VPA Officer means a Council officer having the function of negotiating a proposed planning agreement on behalf of Council but does not include a person having the function of assessing a planning proposal or a development application or modification application.

2. Purpose

2.1 The purposes of this Policy are:

- 2.1.1 to set out Cootamundra-Gundagai Regional Council's policies and procedures relating to the use of planning agreements under section 7.4 of the Environmental Planning and Assessment Act 1979, and
- 2.1.2 to meet the requirement of the Practice Note for the Council in relation to such a policy.

3. Scope

- 2.2 This policy applies to any planning agreement that the Council enters into or proposes to enter into that applies to land or development within the Council's local government area.
- 2.3 This policy also applies to any planning agreement that the Council enters into or proposes to enter into jointly with another council or other planning authority that applies to land outside the Council's local government area.

4. What is a planning agreement?

4.1 For the purposes of this Policy, a planning agreement is a voluntary agreement or other arrangement under Subdivision 2 of Division 7.1 of the EPA Act between a planning authority and a developer, being a person who has:

- 4.1.1 sought a change to an environmental planning instrument; or
- 4.1.2 made or proposes to make a development application or application for a complying development certificate,

under which the developer is required to dedicate land free of cost, pay a monetary contribution, provide any other material benefit; or provide any combination of the above, to be used for or applied towards a public purpose¹.

4.2 Under the EPA Act, a public purpose relating to a planning agreement includes but is not limited to the following:

- 4.2.1 the provision of (or the recoupment of the cost of providing) public amenities or public services,
- 4.2.2 the provision of (or the recoupment of the cost of providing) affordable housing,
- 4.2.3 the provision of (or the recoupment of the cost of providing) transport or other infrastructure relating to land,
- 4.2.4 the funding of recurrent expenditure relating to the provision of public amenities or public services, affordable housing or transport or other infrastructure,
- 4.2.5 the monitoring of the planning impacts of development,
- 4.2.6 the conservation or enhancement of the natural environment².

4.3 Competitive tendering under section 55(1) of the *Local Government Act 1993* (NSW) is not feasible before the Council enters into a planning agreement and, for this reason, the Council has resolved that tenders will not be invited before the Council enters into such an agreement.

¹ See section 7.4(1) of the EPA Act.

² See section 7.4(2) of the EPA Act.

5. About this Policy

- 5.1 The Practice Note must be considered by the Council when negotiating or entering into a planning agreement³.
- 5.2 The Practice Note strongly encourages all councils to publish policies and procedures concerning their use of planning agreements, which:
 - 5.2.1 provide a generally applicable test for determining the acceptability of a planning agreement,
 - 5.2.2 contain specific measures to protect the public interest and prevent misuse of planning agreements,
 - 5.2.3 have published and accessible rules and procedures,
 - 5.2.4 provide for effective formalised public participation,
 - 5.2.5 extend fairness to all parties affected by a planning agreement, and
 - 5.2.6 guarantee regulatory independence of the planning authority.
- 5.3 It is intended that this Policy will be periodically reviewed and, depending on the outcome of any review, may be updated from time to time.
- 5.4 This Policy should be read in conjunction with the Practice Note.

6. Legislative and regulatory framework

- 6.1 Division 7.1 of the EPA Act and Division 7.1 of the Regulation establish a statutory scheme for contributions by developers to local councils in connection with development.
- 6.2 The statutory scheme has compulsory and voluntary elements.
- 6.3 The compulsory element contained in Subdivision 3 of Division 7.1 of the EPA Act and Division 2 of Part 9 of the Regulation provides for consent to be granted to proposed development subject to a condition requiring local infrastructure contribution in the form of a monetary contribution or levy or the dedication of land free of cost.
- 6.4 Subdivision 2 of Division 7.1 of the EPA Act and Division 1 of Part 9 of the Regulation set out the primary legislative framework for planning agreements.
- 6.5 A planning agreement must provide for the following:
 - 6.5.1 the land to which it applies,
 - 6.5.2 the planning proposal or the development (or both) to which it applies,
 - 6.5.3 details of the nature, manner and timing of the provision of public benefits to be made by the developer under the agreement,
 - 6.5.4 whether the agreement excludes (wholly or in part) or does not exclude the application of sections 7.11, 7.12 or 7.24 of the EPA Act to the development to which it applies,
 - 6.5.5 if the application of section 7.11 is not excluded, whether benefits under the agreement are or are not to be taken into consideration in determining a local infrastructure contribution under section 7.11,
 - 6.5.6 a dispute resolution mechanism,

³ See section 203(7) of the Regulation.

- 6.5.7 a suitable means of enforcing the agreement in the event of a breach of the agreement by the developer⁴.
- 6.6 There is no need for any connection between the development to which a planning agreement applies and the object of expenditure of any money paid under the agreement⁵.
- 6.7 A planning agreement may, but is not required to, be registered on the title to the land to which it applies⁶.
- 6.8 The Direction applies to planning agreements providing for affordable housing development contributions.
- 6.9 The Practice Note and the ICAC Audit Tool also form part of the regulatory framework covering planning agreements.

Part 2 – Council’s policies on the use of planning agreements

7. Policy objectives

- 7.1 The objectives of this Policy are as follows:
- 7.1.1 to meet the requirement of the Practice Note for the Council in relation to such a policy and cover the matters recommended by the Practice Note,
 - 7.1.2 to set out the Council’s policies and procedures on its use of planning agreements,
 - 7.1.3 to establish a clear, transparent, ethical, efficient, fair and accountable framework governing the use of planning agreements by the Council,
 - 7.1.4 to promote consistency in the use of planning agreements by Council,
 - 7.1.5 to promote an enhanced and more flexible development contributions system for the Council,
 - 7.1.6 to align the negotiation and use of planning agreements by the Council with applicable standards of public sector probity and good governance,
 - 7.1.7 to align the use of planning agreements by the Council with the Council's corporate planning and strategic planning goals and to promote the attainment of those goals,
 - 7.1.8 in appropriate circumstances, to enable the provision of development contributions above those required to address the direct impact of a particular development on neighbouring land and the wider community.

8. Principles governing the use of planning agreements

- 8.1 The fundamental principles that are intended to safeguard the public interest and the integrity of the planning process in relation to the use of planning agreements are as follows:

⁴ See section 7.4(3) of the EPA Act.

⁵ See section 7.4(4) of the EPA Act.

⁶ See section 7.6 of the EPA Act.

- 8.1.1 planning authorities should always consider a development proposal on its merits, not on the basis of a planning agreement⁷,
 - 8.1.2 planning agreements must be underpinned by proper strategic land use and infrastructure planning carried out on a regular basis and must address expected growth and the associated infrastructure demand,
 - 8.1.3 strategic planning should ensure that development is supported by the infrastructure needed to meet the needs of the growing population,
 - 8.1.4 a consent authority cannot refuse to grant development consent on the grounds that a planning agreement has not been entered into in relation to the proposed development or that the developer has not offered to enter into such an agreement⁸,
 - 8.1.5 planning agreements should not be used as a means of general revenue raising or to overcome revenue shortfalls,
 - 8.1.6 planning agreements must not include public benefits wholly unrelated to the particular development⁹,
 - 8.1.7 value capture should not be the primary purpose of a planning agreement.
- 8.2 Additionally, the following principles will govern the Council's use of planning agreements:
- 8.2.1 planning decisions must not be bought or sold through planning agreements,
 - 8.2.2 the Council will not allow planning agreements to unlawfully or otherwise improperly fetter the exercise of its planning functions under the EPA Act, Regulation or any other Act or law,
 - 8.2.3 the Council will not use planning agreements for any purpose other than a proper planning purpose,
 - 8.2.4 the decision to negotiate a proposed planning agreement, the terms of the planning agreement and the decision whether or not to enter into the planning agreement will be undertaken within Council separately from the consideration of the proposed planning agreement as part of the merit assessment of a development application or a planning proposal,
 - 8.2.5 development that is unacceptable on planning grounds will not be permitted because of the public benefits offered by a developer under a planning agreement that do not make the development acceptable on planning grounds,
 - 8.2.6 in assessing a development application or planning proposal, the Council will not take into consideration planning agreements that are wholly unrelated to the subject matter of the development application or planning proposal, nor will the Council give disproportionate weight to a planning agreement in the assessment process,
 - 8.2.7 the Council will not allow the interests of developers, individuals or interest groups to outweigh the public interest when considering a proposed planning

⁷ However, section 4.15(1)(a)(iii) of the EPA Act requires that the consent authority considers, so far as relevant, 'any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4'; also, section 7.4(9) of the EPA Act provides that '[a] planning agreement cannot impose an obligation on a planning authority to grant development consent, or to exercise any function under this Act in relation to a change to an environmental planning instrument'.

⁸ This requirement is contained in section 7.7(2) of the EPA Act.

⁹ However, section 7.4(4) of the EPA Act provides that '[a] provision of a planning agreement in respect of development is not invalid by reason only that there is no connection between the development and the object of expenditure of any money required to be paid by the provision'.

agreement,

- 8.2.8 the Council will not improperly rely on its position in order to extract unreasonable public benefits from developers under planning agreements.

9. Acceptability test

- 9.1 The test adopted by this Policy that will be applied by Council in determining the acceptability of any planning agreement that is negotiated or entered into by the Council is as follows:
- 9.1.1 Do the procedures followed by the Council to negotiate and enter into a planning agreement, and the terms of the planning agreement, as relevant comply with the relevant requirements of:
- (a) the EPA Act, the Regulation and the Direction?
 - (b) the Audit Tool?
 - (c) this Policy?
- 9.1.2 Is the planning agreement directed towards legitimate planning purposes ascertainable from the statutory planning controls and other adopted planning policies applying to development and the circumstances of the case?
- 9.1.3 Does the planning agreement provide for the delivery of infrastructure or public benefits that are not wholly unrelated to the development?
- 9.1.4 Will the planning agreement produce outcomes that meet the general values and expectations of the public and protect the overall public interest?
- 9.1.5 Does the planning agreement provide for reasonable means of achieving the relevant outcomes and securing the relevant infrastructure and public benefits?
- 9.1.6 Will the planning agreement protect the community against adverse planning decisions?
- 9.1.7 Will the planning agreement be registered on title and, if not, has the developer provided alternative satisfactory security in lieu of registration?
- 9.1.8 Are there any relevant circumstances that may operate to preclude the Council from negotiating or entering into the proposed planning agreement?

10. Probity

- 10.1 To ensure that the planning agreement negotiations are transparent, consistent, efficient, fair, and accountable and to protect the public interest and integrity of the planning process, the Council will:
- 10.1.1 provide a copy of this policy to any person who seeks to enter into a planning agreement with Council;
 - 10.1.2 publish this Policy on Council's website and promote the general awareness of this Policy;
 - 10.1.3 negotiate planning agreements in accordance with this Policy,
 - 10.1.4 comply with public notification requirements in the EPA Act and Regulation;
 - 10.1.5 ensure appropriate delegations and separation of responsibilities in relation to:

- (a) the assessment of planning proposals and development applications; and
 - (b) the consideration and negotiation of planning agreements;
- 10.1.6 ensure that modifications to approved development must be subject to the same scrutiny as the original development application;
- 10.1.7 ensure that Councillors and Council staff understand their particular role and responsibility, some of which carry the potential for conflicts of interest; and
- 10.1.8 take appropriate steps to ensure that it avoids a conflict of interest between its role as a planning authority and its commercial interest in the development, such as appointing an independent person(s) and/or probity advisor where the Council has a commercial stake in development the subject of a planning agreement, including owning land the subject of the agreement that will be developed; and
- 10.1.9 take appropriate steps to ensure that it avoids any other conflicts of interest such as appointing a probity advisor in any other cases where there may be a risk of conflict of interest, or where there is significant public interest;
- 10.1.10 ensure that it will not enter into any contractual arrangement that purports to fetter Council's statutory discretion or guarantee outcomes that are subject to separate regulatory processes; and
- 10.1.11 ensure that all negotiations with a developer and their consultants are sufficiently documented.

10.2 These and other probity measures will be implemented by Council¹⁰.

11. Land use planning context

- 11.1 This section addresses how the use of planning agreements aligns with any relevant regional plans and policies.
- 11.2 The EPA Act authorises the Minister to review and make the regional plan prepared by the Department as the relevant strategic planning authority for the Riverina-Murray region, to which the Council's LGA belongs.
- 11.3 The EPA Act relevantly requires the Council's LEP to give effect to its local strategic planning statement¹¹. In this regard, the Council must prepare and make such strategic planning statement to include or identify the planning priorities for the Council's LGA that are consistent with the applicable regional plan, and (subject to any such strategic plan) any applicable community strategic plan¹².
- 11.4 The Council's use of planning agreements can align with the regional plan, the local strategic planning statement and their supporting documents when planning agreements are used by the Council to implement and achieve the planning priorities and directions outlined in these plans and policy documents.
- 11.5 At a practical level, such alignments are achieved when planning agreements are negotiated between the Council and developer to secure the funding or delivery of local infrastructure and public facilities that are contemplated by these plans and policy

¹⁰ See sections 43.6 - 43.13 of this Policy in relation to who will negotiate a planning agreement on behalf of Council and separation of Council's planning assessment and planning agreement negotiation roles.

¹¹ See section 3.33(2)(c) of the EPA Act.

¹² See sections 3.9(1), 3.9(2)(b) and 3.9(3A) of the EPA Act.

documents.

12. Corporate strategic planning context

- 12.1 This section addresses how the use of planning agreements fits within the context of the broader organisational strategic planning and land use planning policies, goals, and strategies.
- 12.2 The Council is required to develop and implement a set of corporate strategic planning documents for its LGA under the *Local Government Act 1993*¹³, including a community strategic plan¹⁴, a community engagement strategy¹⁵, a resourcing strategy¹⁶, a delivery program¹⁷, and an operational plan¹⁸.
- 12.3 These documents are supported by a number of supporting policies and strategies of the Council. In particular, the Council is required to prepare and make a local strategic planning statement, which includes or identifies the planning priorities for the Council's LGA that are 'consistent with any strategic plan applying to the area and (subject to any such strategic plan) any applicable community strategic plan under section 402 of the Local Government Act¹⁹.
- 12.4 Planning agreements are one means of enabling the Council to fund and deliver some of the projects and infrastructure identified in the Council's corporate strategic planning documents. These documents provide guidance to the Council in relation to the planning priorities and projects that it should pursue via planning agreements.

13. When will Council consider a planning agreement?

- 13.1 This section addresses the circumstances in which the Council would consider entering into a planning agreement.
- 13.2 This section should be read in conjunction with sections 14-17 of the Policy.

Relationship of planning agreements with development applications and planning proposals

- 13.3 A planning agreement can be entered into in connection with a planning proposal, the grant of development consent (including a complying development certificate), or the modification of a development consent.
- 13.4 Council intends to use planning agreements in connection with all of these, including particularly where the impacts of proposed new development cannot be addressed adequately or at all through local infrastructure contributions, or through affordable housing contributions imposed under section 7.32 of the EPA Act.

Planning proposals

¹³ See Part 2 of Chapter 13 of the Local Government Act 1993.

¹⁴ See section 402 of the Local Government Act 1993.

¹⁵ See section 402A of the Local Government Act 1993.

¹⁶ See section 403 of the Local Government Act 1993.

¹⁷ See section 404 of the Local Government Act 1993.

¹⁸ See section 405 of the Local Government Act 1993.

¹⁹ See section 3.9(2)(b) of the EPA Act.

- 13.5 The Council from time to time receives planning proposals from developers seeking to rezone land for a more intense land use or to increase the permissible development density on land under the existing zoning through reductions in minimum lot size requirements or changes to other provisions applying to the land.
- 13.6 Such development typically requires the provision of new or additional public facilities including (but not limited to) new or upgraded public parks and open space, new or upgraded public footpaths, and improvements to local roads and traffic management facilities.
- 13.7 The Regulation requires the Contributions Plan to predict the expected types of development in the Council's area and the demand for additional public amenities and public services to meet the expected development in the period covered by the plan²⁰. The local infrastructure contribution rates specified in the plan relate to the development predicted by the plan and the cost of providing new or additional public facilities to meet the demands of that development.
- 13.8 Proposed development the subject of planning proposals seeking to rezone land for a more intense land use or increase the permissible development density on land, and the demand for additional public facilities required to meet such development, are often beyond the predictions and funding outcomes of the Contributions Plan.
- 13.9 The Council will seek to enter into planning agreements with developers in relation to such planning proposals in order to obtain development contributions to meet the demand for public facilities not covered by the Contributions Plan.

Development applications & modification applications: Objections to development standards in the LEP

- 13.10 The Council from time to time receives development applications accompanied by objections under clause 4.6 of the LEP to density development standards in the LEP, such minimum lot size requirements ²¹.
- 13.11 The additional development density proposed by such development applications, and the demand for additional public facilities required to meet such development, are beyond the predictions and funding outcomes of the Contributions Plan.
- 13.12 The Council will seek to enter into planning agreements with developers in relation to such development applications in order to obtain development contributions to meet the demand for public facilities not covered by the Contributions Plan.
- 13.13 The Council's position is that the benefits provided under a planning agreement must not be exchanged for a variation from a development standard under any circumstances. Variations to development standards under Clause 4.6 of the Standard Instrument LEP must be justified on planning grounds.
- 13.14 The use of a planning agreement in connection with the variation of a development standard is not prohibited per se but the Council's position is that the benefit under the agreement should contribute to achieving the planning objective of the development standard.

²⁰ See section 212(1) of the Regulation.

²¹ Clause 4.6(2) of the LEP provides that '*Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument...*' An objection to a development standard under clause 4.6 must demonstrate that '*...compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and... that there are sufficient environmental planning grounds to justify contravening the development standard*'.

Other circumstances

- 13.15 Other circumstances in which the Council may seek or agree to enter into a planning agreement with a developer in relation to proposed development include (but are not limited to) the following:
- 13.15.1 where the demand for public facilities is not covered adequately or at all by the Contributions Plan and cannot be addressed through local infrastructure contributions,
 - 13.15.2 where the demand for public facilities is outside of the permissible scope of local infrastructure contributions or affordable housing contributions under the EPA Act,
 - 13.15.3 where the Council and a developer agree to the provision of additional or different public benefits than those addressed in the Contributions Plan,
 - 13.15.4 where the Council and a developer agree that the developer may deliver one or more works contained in the Contributions Plan works schedule instead paying monetary local infrastructure contributions towards the works pursuant to a development consent,
 - 13.15.5 where the planning agreement provides for affordable housing contributions and is entered into in connection with a development application or proposed development application (see immediately below).

Affordable housing contributions

- 13.16 The Council must comply with the Direction when entering into planning agreements to obtain affordable housing contributions in connection with a development application or proposed development application²².
- 13.17 The Direction requires the Council to consider a number of specified matters when negotiating the terms of a proposed planning agreement that includes provision for affordable housing in connection with a development application or proposed development application.
- 13.18 In relation to development applications, in addition to the matters specified in the Direction which the Council must consider when negotiating a planning agreement that includes provision for affordable housing, the Council will also consider the following additional matters as relevant to the development to which the planning agreement relates:
- 13.18.1 whether the development will be likely to reduce the availability of affordable housing within the Council's area,
 - 13.18.2 whether the development will be likely to create a need for affordable housing within the Council's area.
- 13.19 In relation to planning proposals, the Council will consider the matters specified in the Direction and in clause 13.18, so far as relevant, when negotiating a planning agreement that includes provision for affordable housing.

Land use planning & development objectives

- 13.20 This section addresses the land use planning and development objectives that are sought to

²² See section 5(1) of the Direction.

be promoted or addressed by the use of planning agreements and the role served by planning agreements in Council's development contributions and infrastructure funding systems.

- 13.21 Those systems include the provisions of the EPA Act providing for local infrastructure contributions, affordable housing contributions and development contributions through planning agreements, as well as provisions under other Acts²³ and arrangements with the other levels of Government for infrastructure funding through grants and the like.
- 13.22 Planning agreements provide flexibility in the Council's development contributions and infrastructure-funding systems under the EPA Act as discussed in the following paragraphs.
- 13.23 Conditions requiring local infrastructure contributions and those requiring affordable housing contributions under section 7.32 of the EPA Act may only be imposed on the grant of development consent. In some circumstances, it is appropriate from a planning perspective to address local infrastructure and affordable housing requirements in connection with proposed new development at the planning proposal stage. Planning agreements enable the Council to do so.
- 13.24 Some demands for public facilities arising from proposed new development are not covered adequately or at all by the Contributions Plan and cannot be addressed through local infrastructure contributions. This may be so, for example, where the demands exceed the predictions in the contributions plan and cannot be adequately funded through the plan or they relate to public facilities not anticipated or covered by the plan. Planning agreements enable the Council to address such demands either in connection with planning proposals or the grant of development consents, as appropriate.
- 13.25 The EPA Act imposes limitations on conditions of development consent requiring local infrastructure contributions. For example, local infrastructure contributions may not be imposed for the recurrent funding of public facilities, and generally cannot be imposed for the conservation or enhancement of the natural environment and the relocation or the replacement or repair of public assets required in connection with proposed new development. Planning agreements enable the Council to obtain development contributions for those and other purposes outside of the permissible scope of local infrastructure contributions either in connection with planning proposals or the grant of development consents, as appropriate.
- 13.26 Planning agreements may be used to obtain development contributions additional to or instead of local infrastructure contributions. The EPA Act requires a planning agreement to provide for whether the application of the local infrastructure contributions provisions of the Act²⁴ are excluded in whole or part in relation to the development to which the agreement applies²⁵.
- 13.27 Examples of where it may be appropriate to exclude the application of the local infrastructure provisions of the EPA Act to proposed development include (but are not limited to):
 - 13.27.1 where the Council and a developer enter into a planning agreement to provide different public benefits than those addressed in the Contributions Plan,

²³ See for example section 495 of the Local Government Act 1993, which allows a council A council may make a 'special rate' for or towards meeting the cost of any works, services, facilities or activities provided or undertaken, or proposed to be provided or undertaken, by the council within the whole or any part of the council's area.

²⁴ See sections 7.11 and 7.12 of the EPA Act

²⁵ See section 7.4(3)(d) of the EPA Act.

- 13.27.2 to enable the developer to deliver one or more works contained in the Contributions Plan works schedule instead of paying monetary local infrastructure contributions towards the works pursuant to a development consent.

14. Types of development planning agreements relate to

- 14.1 Planning agreements will ordinarily relate to development the subject of planning proposals or development applications that will or are likely to require the provision of or increase the demand for public facilities in the Council's area.

15. Planning agreements for different development types

- 15.1 The Council will determine whether it seeks to enter into a planning agreement and the benefits that it may require under the planning agreement on a case by case basis having regard to the public interest. This may result in planning agreements differing for different types of development.

16. Thresholds for use of planning agreements

- 16.1 The base threshold the Council will consider in deciding whether it seeks to enter into a planning agreement is whether development the subject of a planning proposal or development application will or is likely to require the provision of or increase the demand for public facilities in the Council's area.

17. Usual matters covered by planning agreements

- 17.1 This section addresses the matters ordinarily covered by planning agreements entered into by the Council.
- 17.2 The EPA Act sets out matters that must be provided for in all planning agreements²⁶, being:
- 17.2.1 a description of the land to which the agreement applies,
 - 17.2.2 a description of:
 - (a) the change to the environmental planning instrument to which the agreement applies, or
 - (b) the development to which the agreement applies,
 - 17.2.3 the nature and extent of the provision to be made by the developer under the agreement, the time or times by which the provision is to be made and the manner by which the provision is to be made,
 - 17.2.4 in the case of development, whether the agreement excludes (wholly or in part) or does not exclude the application of sections 7.11, 7.12 or 7.24 of the EPA Act to the development,
 - 17.2.5 if the agreement does not exclude the application of section 7.11 of the EPA Act 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,
 - 17.2.6 a mechanism for the resolution of disputes under the agreement,

²⁶ See section 7.4(3) of the EPA Act.

- 17.2.7 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.
- 17.3 In addition to the above, the Council will require that a planning agreement cover matters contained in the Council's currently publicly available template planning agreement, subject to the requirements for the particular agreement, which may necessitate the deletion of some of those matters or the inclusion of other matters.
- 17.4 The Council's template planning agreement requires the agreement to be registered on the title to the land to which the agreement applies, and the Council will require registration in every case except where all public benefits under the agreement are provided at the time of the execution of the agreement.
- 17.5 The Council will also require that particular planning agreements cover additional matters relevant to the particular planning proposal or proposed development concerned to which they relate.

18. Form of development contributions under planning agreements

- 18.1 This section addresses the form of development contributions the Council will seek under planning agreements.
- 18.2 The form of development contributions to be provided by a developer under a planning agreement can be monetary contributions, the dedication of land free of cost, other material public benefits such as (but not limited to) the carrying out of works, or any combination of the those.
- 18.3 The Council will generally seek monetary development contributions through planning agreements, towards the provision of public facilities or infrastructure and other material public benefits on a case by case basis based on an assessment of the most efficient and effective means of providing public facilities to meet the demands created by proposed development on a case by case basis.

19. Kinds of public benefits through planning agreements

- 19.1 This section should be read in conjunction with section 18 of this Policy.
- 19.2 This section addresses the kinds of public benefits the Council will seek through planning agreements.
- 19.3 The Council will generally seek development contributions through planning agreements towards the provision of new, additional or upgraded public facilities or the need for affordable housing in connection with proposed development the subject of planning proposals or objections to development standards made under clause 4.6 of the EPA Act accompanying development applications.
- 19.4 The public facilities that will typically be funded through monetary contributions in such cases include (but are not limited to) new or upgraded public parks and open space, new or upgraded libraries and public facilities, new or upgraded public footpaths, and improvements to local roads and traffic management facilities and the provision of affordable housing.

20. Valuing public benefits

- 20.1 This section addresses the method for determining the value of public benefits provided under a planning agreement.
- 20.2 The EPA Act does not require a planning agreement to set out the dollar value of non-monetary benefits provided by the developer under the agreement.
- 20.3 However, valuing non-monetary benefits is relevant in some circumstances, such as determining the extent of a non-monetary benefit, credits and offsets against local infrastructure contribution or determining the amount of security to be provided by the developer under the agreement.
- 20.4 The Council will decide on a case-by-case basis whether non-monetary benefits provided under a planning agreement are required to be valued.
- 20.5 Where a planning agreement provides for the dedication of land free of cost, the value for the purposes of the agreement will generally be the market value of the land determined in accordance with Division 4 of Part 3 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).
- 20.6 Where land required to be dedicated under a planning agreement is required to be valued, the Council will engage, at the developer's cost, a suitably qualified and experienced valuer independent of the parties to provide a written opinion on the estimated value of the relevant land to the Council.
- 20.7 Where a planning agreement provides for the carrying out of works, the value for the purposes of the agreement will be the estimated design and construction costs of the works agreed to by Council.
- 20.8 Where works to be provided under a planning agreement are required to be valued, the Council will engage, at the developer's cost, a suitably qualified and experienced quantity surveyor independent of the parties to provide a written opinion on the estimated value of the works.
- 20.9 Notwithstanding the above, if the land or works to be valued for the purposes of a planning agreement are included in the works schedule in the Council's contributions plan, the value for the purposes of the agreement will be the dollar value stated in the plan, unless the Council otherwise agrees.

21. When, how and where public benefits are provided

- 21.1 The Council will consider when, how and where public benefits will be provided having regard to the demand for public facilities arising from proposed development the subject of a planning proposal or development application and the public interest.

22. Access to information

- 22.1 The Council must include in its annual report particulars of compliance with and the effect of the planning agreement during the year to which the annual report relates²⁷.
- 22.2 The Council must also keep a register of any planning agreements that apply to land within

²⁷ See section 7.5(5) of the EPA Act.

the Council's area, whether or not the Council is a party to a planning agreement²⁸.

- 22.3 The Council must publish matters regarding planning agreements on the NSW planning portal and the Council's website²⁹.

23. Deciding the parties to a planning agreement

- 23.1 The Council and the developer must always be parties to a planning agreement³⁰.
- 23.2 Where a planning agreement requires the dedication of land, the granting of a charge to the Council as security for performance, or the registration of any other instrument on title, the landowner of the land to which the planning agreement applies must also be a party to the agreement in order to bind the landowner to the relevant obligation concerning the land³¹.

24. Documentation & drafting of planning agreement

- 24.1 The parties to a planning agreement should agree on which party is to draft the agreement to avoid duplication of resources and costs. This also encourages planning authorities to publish and use standard form planning agreements or standard clauses for inclusion in planning agreements in the interests of process efficiency.
- 24.2 The Council has an electronic planning agreement template that is publicly available on the Council's website. The template is revised and updated from time to time.
- 24.3 All planning agreements to which the Council is a party (other than planning agreements to which another planning authority is also a party) must be prepared using the Council's currently publicly available electronic template.
- 24.4 A planning agreement is different to a commercial agreement in that it imposes obligations on a developer to provide public benefits in connection with proposed development and the Council is party to the agreement to receive the benefits on behalf of the public and to protect the public interest.
- 24.5 The provisions of the Council's template are intended to protect the Council and the public interest. The provisions must not be altered by a party to a proposed planning agreement (other than Council) who is using the Council's template without the Council's express agreement.
- 24.6 If a party to a proposed planning agreement wishes to alter the provisions of the template, electronic comments should be inserted in the right-hand margin on the template identifying, explaining and justifying the proposed alterations.
- 24.7 The Council will arrange for the preparation of the planning agreement on its template at the developer's cost.
- 24.8 A developer who proposes to enter into a planning agreement with Council must pay to the Council an assessment fee in order for the Council to consider the proposal as specified in the Council's fees and charges policy in its operational plan.

²⁸ See section 206(1) of the Regulation. The Register must set out: (a) the day on which the agreement was entered into, (b) the names of the parties to the agreement, (c) a description of the development to which the agreement relates, if relevant, (d) the land to which the agreement applies.

²⁹ See section 206(2) of the Regulation. The matters are: (a) the Council's planning agreements register, (b) each relevant planning agreement and its explanatory note, (d) financial records for planning agreements for each financial year.

³⁰ See section 7.4(1) of the EPA Act.

³¹ See section 7.6(3) of the EPA Act; see also section 32 of this Policy.

- 24.9 Before preparing the planning agreement, the Council will require the developer to provide to the Council a non-refundable security deposit for the Council's estimated costs of preparing, negotiating, finalising and executing the planning agreement.

25. Development feasibility

- 25.1 Changes in property market conditions from time to time may potentially materially adversely affect the feasibility of development to which a planning agreement applies. Where a developer considers this to be the case, the onus is on the developer, at its cost, to submit a detailed written development feasibility analysis to the Council.
- 25.2 The form and content of the feasibility analysis must be satisfactory to the Council. Ordinarily, the Council will require the feasibility analysis to be prepared using a residual land value analysis applying to the development site.
- 25.3 Upon receipt of the feasibility analysis in the circumstances referred to, the Council may engage, at the developer's cost, a suitably qualified and experienced person independent of the parties to review and advise the Council on the feasibility analysis.
- 25.4 Following consideration of a feasibility analysis, the Council may, in its absolute discretion, agree to modify the planning agreement to postpone, reduce or otherwise change the development contributions or security obligations of the developer under the agreement. The Council may require the modified agreement to contain a 'clawback' provision that operates if development feasibility improves at a future time.
- 25.5 The Council may require:
- 25.5.1 a submitted feasibility analysis to be re-assessed from time to time at the developer's cost,
 - 25.5.2 the developer, at its cost, to submit a revised feasibility analysis from time to time.
- 25.6 If a re-assessed or revised feasibility analysis shows that the feasibility of development to which a planning agreement applies has improved and subject to the terms of the planning agreement, the Council may seek to 'clawback' development contributions or security obligations that have been reduced or postponed under the agreement based on the previous feasibility analysis.

26. Works & Works-in-kind

- 26.1 The Council requires specific provisions to be included in all planning agreements that require the carrying out of works.
- 26.2 Provisions relating to the carrying out of works are contained in the Council's currently publicly available template planning agreement.
- 26.3 The provisions of a particular planning agreement applying to the carrying out of works are subject to the circumstances of each case, which may require the deletion or modification of some of the provisions contained in the template or the inclusion of other provisions.

27. Land dedication

- 27.1 In this section, a reference to land includes a reference to a lot or common property in a strata plan or land defined in stratum.

- 27.2 A planning agreement may provide for the dedication of land to Council where the land is required for or in connection with the provision, extension or augmentation of public facilities associated with development the subject of a planning proposal or development application.
- 27.3 Ordinarily, land dedicated to Council under a planning agreement must:
- 27.3.1 serve a planning purpose,
 - 27.3.2 be fit for the purpose for which the land will be dedicated,
 - 27.3.3 unless otherwise agreed by Council, be free of encumbrances,
 - 27.3.4 unless otherwise agreed by Council, be dedicated free of cost to the Council.
- 27.4 The developer will be responsible for preparing all documents and meeting all costs associated with the dedication of land under a planning agreement, including all costs associated with any subdivision of land necessary to facilitate the dedication.
- 27.5 Where the Council acquires land for value under a planning agreement, the value will be the market value of the land determined in accordance with section 56 *Land Acquisition (Just Terms Compensation) Act 1991* by a suitably qualified and experienced valuer who is appointed by Council and is independent of, and at arms-length from, the parties to the planning agreement.
- 27.6 Where Council agrees in a planning agreement to offset part or all of the value of land dedicated to Council under the agreement against section 7.11 contributions or section 7.12 levies under the EPA Act, the value of the land for offsetting purposes will not exceed the agreed contribution value of the land set out in the planning agreement, which value may be less than its market value determined in accordance with section 56 *Land Acquisition (Just Terms Compensation) Act 1991*.
- 27.7 The timing of the dedication of land under a planning agreement will ordinarily be determined by the planning purpose served by the dedication and whether the planning agreement is associated with a planning proposal or a development application.

28. Recurrent funding

- 28.1 The EPA Act provides that the public purposes towards which development contributions may be applied under a planning agreement include the funding of recurrent expenditure relating to the provision of public amenities or public services and affordable housing³².
- 28.2 There is a distinction between recurrent funding of public facilities that primarily serve the development to which the planning agreement applies or neighbouring development' and public facilities providing 'broader benefits.
- 28.3 In respect of public facilities that primarily serve the development to which the planning agreement applies or neighbouring development, Council may require development contributions to be provided towards the recurrent costs of those facilities in perpetuity.
- 28.4 In respect of public facilities that provide 'broader benefits', Council will only require development contributions to be provided towards the recurrent costs of those facilities until a public revenue stream is established to support the ongoing costs of the facility.

29. Credits & offsets

- 29.1 Planning agreements may be used to obtain development contributions additional to or instead of local infrastructure contributions. A planning agreement can be entered into to

³² See section 7.4(2)(d) of the EPA Act.

require provision of public benefits that are different to those addressed in the Contributions Plan, or to enable the delivery of one or more works or land items contained the Contributions Plan.

29.2 The Council will, on a case by case basis, consider whether contributions under section 7.11 of the EPA Act should be reduced in consideration of the benefits provided under a planning agreement.

29.3 Typical circumstances where this may occur include, but are not limited to the following:

29.3.1 where a planning agreement requires the provision of a work or land identified in the works schedule in a Contributions Plan but the demand for the work or the land is spread among a number of future developments and other developers have contributed or will contribute towards a proportion of the cost of the work or land item through s7.11 contributions,

29.3.2 where a planning agreement requires the provision of a work or land which will wholly or partly replace an item in the works schedule in the Contributions Plan,

29.3.3 where a planning agreement requires the provision of a work or land identified in the works schedule in the Contributions Plan and the cost of constructing work, or the value of the land determined in accordance with this Policy, exceeds the amount identified in the Contributions Plan,

29.3.4 where a planning agreement requires the provision of a work that falls within a particular category of contributions in the Contributions Plan (e.g. open space) and the planning agreement applies the value of the work determined in accordance with this Policy as an offset against section 7.11 monetary contributions in another category of contributions in the Contributions Plan (e.g. to offset roads s7.11 contributions).

30. Refunds

30.1 There is no legal obligation on the Council to refund to developers monetary contributions paid to the Council under a planning agreement and the Council will not do so under any circumstances.

30.2 Where monetary contributions paid under a planning agreement exceed the funds necessary for the public purpose for which they are paid, Council may, in its complete discretion, apply those contributions towards another public purpose having regard to the public interest prevailing at the time.

31. Timing of provision of benefits by developer

31.1 The EPA Act requires a planning agreement to provide for the time or times by which the provision of development contributions are to be made³³.

31.2 The timing of provision of development contributions may differ from case to case depending on factors that Council will take into consideration in so far as relevant, such as:

31.2.1 whether the planning agreement is associated with a planning proposal or a development application,

³³ See section 7.4(3)(c) of the EPA Act.

- 31.2.2 the particular development to which the planning agreement relates, including whether the development is staged or otherwise has significant milestones,
 - 31.2.3 the time or times at which the demand or need for public facilities arising from development the subject of a planning agreement arises,
 - 31.2.4 the public purposes and objects of development contributions under the planning agreement (ie., public utility infrastructure, public services, public amenities, environmental protection, or enhancement, affordable housing, etc.),
 - 31.2.5 the manner in which development contributions will be provided under the planning agreement (ie. monetary contributions, land dedication, works, recurrent and instalment payments, etc.),
 - 31.2.6 the nature and extent of security for the developer's performance provided under the planning agreement,
 - 31.2.7 whether the planning agreement will be registered on the title to the land to which the planning agreement applies,
 - 31.2.8 any requirements of public authorities affecting the timing of provision of development contributions,
- 31.3 So far as security for performance is concerned and subject to consideration of the above factors, Council will seek, where appropriate, to tie the provision of development contributions under a planning agreement to the issuing of certificates under Part 6 of the EPA Act relating to the development to which the planning agreement relates.

32. Registration

- 32.1 The EPA Act provides for the registration of a planning agreement on the title to land. The effect of registration is that the planning agreement becomes binding on, and is enforceable against, the owner of the land from time to time (ie. future owners) as if each owner for the time being had entered into the planning agreement³⁴.
- 32.2 Registration is important to inform people of the existence of a planning agreement affecting the land and for the enforcement of a planning agreement.
- 32.3 To ensure that the intention of the parties to register the planning agreement is not defeated, the developer must ordinarily get written agreement to the registration from each person with an estate or interest in the land to which the planning agreement applies and provide this to the Council as a precondition to the execution of the planning agreement.
- 32.4 Registration requires the written consent of all persons having a registered interest in the land. Such persons include the registered proprietor, caveators, mortgagees, chargees, lessees and the like³⁵.
- 32.5 Council requires all planning agreements to be registered on the title. For this reason, the landowner, if different to the developer, will generally be required to be an additional party to the planning agreement³⁶.

³⁴ See section 7.6 of the EPA Act.

³⁵ See section 7.6(1) of the EPA Act; see also Registrar General's Guidelines in relation to requests for registering planning agreements which require the registered proprietor and every lessee, mortgagee, chargee, covenant chargee and caveator to execute the registrable instrument or provide their written consent.

³⁶ See section 32 of this Policy.

- 32.6 The Council will only consider entering into a planning agreement where the landowner is not a party in circumstances where:
- 32.6.1 the only obligation on the landowner is registration of the planning agreement, and
 - 32.6.2 the Council has been provided with written consent from the landowner to the registration of the planning agreement on title prior to execution of the planning agreement.
- 32.7 The Council will require the landowner to provide the following documents immediately upon commencement of the planning agreement:
- 32.7.1 an instrument requesting registration of the planning agreement in registrable form identifying the Council as the applicant on the instrument, and
 - 32.7.2 the landowner's written consent and the written consent of all persons having a registered interest in the land to the registration of a planning agreement.
- 32.8 This means that the landowner is expected to liaise with relevant interest holders prior to the execution of the planning agreement, and Council will generally not execute a planning agreement unless and until it has been provided with the required documents.
- 32.9 The Council will lodge the planning agreement for registration. The developer or landowner or both under the planning agreement will be required to meet the Council's costs of and incidental to registering the planning agreement.
- 32.10 The landowner will be required to promptly address any requisitions issued by NSW Land Registry Services relating to the registration that is relevant to the landowner and any interest holders.
- 32.11 Provision should be made in a registered planning agreement about when the notation of the planning agreement on the title to land can be removed. Some relevant examples include:
- 32.11.1 the developer has complied with the obligations under the planning agreement in respect of a part of the land and the notation of the planning agreement will be removed from that part of the land.
 - 32.11.2 land the subject of the planning agreement is subdivided and titles for new lots are created and the developer has complied with all relevant planning agreement obligations relating to the subdivision.
 - 32.11.3 additional valuable security for performance of the planning agreement acceptable to the planning authority is provided by the developer in exchange for removal of the registration of the planning agreement from the title to land.
- 32.12 The Council's currently available template planning agreement contains registration clauses reflecting the above.

33. Security for performance

- 33.1 The EPA Act requires a planning agreement to provide for 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 developer³⁷.
- 33.2 The most suitable means of enforcement may depend on:

³⁷ See section 7.4(3)(g) of the EPA Act.

- 33.2.1 the circumstances of the planning agreement,
- 33.2.2 the nature and extent of the developer's obligations under the planning agreement, and
- 33.2.3 the planning authority's reasonable assessment of the risk and consequences of non- performance.
- 33.3 Security for the enforcement of a planning agreement may be achieved using a number of different means or a combination of them, including:
 - 33.3.1 registration of the planning agreement on title,
 - 33.3.2 requiring the provision of development contributions prior to the issuing of Part 6 certificates for the development to which the agreement³⁸,
 - 33.3.3 in the case of a planning proposal, requiring the provision of development contributions prior to or in conjunction with the taking effect of the amendment to the relevant local environmental plan,
 - 33.3.4 bonds or bank guarantees,
 - 33.3.5 granting and registration of a charge over land in the Council's favour,
 - 33.3.6 in the case of an obligation for the developer to dedicate land, a provision in the planning agreement providing for the compulsory acquisition by the Council of the relevant land.
- 33.4 In addition to registration of a planning agreement, the Council will generally require the following security for the following types of development contributions under an agreement:
 - 33.4.1 for monetary development contributions, payment to be tied to the issuing of Part 6 certificates, where possible otherwise, the Council will require a bond or bank guarantee on terms acceptable to the Council to be provided for the full value of the contributions, or a charge encumbering land with sufficient value to secure the payment of the monetary contribution to be registered on the title to the land.
 - 33.4.2 for the dedication of land, the inclusion of a provision in the planning agreement allowing the compulsory acquisition of the relevant land for \$1 in the event the land is not dedicated as required under the planning agreement,
 - 33.4.3 for the carrying outworks:
 - (a) completion of the works or stages of the works to be tied to the issuing of Part 6 certificates for the development to which the agreement applies, and provision of a bank guarantee in an amount determined by the Council in the circumstances having regard to the construction cost of the work,
 - (b) for works that are not tied to the issuing of a Part 6 certificate, or where the developer seeks to defer the timing for completion of a work, provision of a bank guarantee equal to 100% of the estimated construction cost of the work, and
 - (c) provision of bank guarantee in an appropriate amount not exceeding 50% of the construction cost of a work to secure the defects liability and

³⁸ See section 6.15(1)(d) of the EPA Act in relation to subdivision certificates; see also *Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021*, section 21 in relation to construction certificates, section 34(2)(d) in relation to subdivision works certificate, and section 48 in relation to occupation certificates.

maintenance obligations relating to the work under the planning agreement.

- 33.5 The Council will require security to be provided on and from the date of execution of the planning agreement.
- 33.6 In addition to the above, if a planning agreement is not registered on title on and from the commencement of the planning agreement, the Council may require the provision, on commencement of the agreement, of a bond or bank guarantee equal to the full value of all of the development contributions to be provided until such time as the planning agreement is registered.

34. Other means of enforcement by Council

- 34.1 The Council will require provisions to be included in all planning agreements relating to the procedure for dealing with a breach of the planning agreement.
- 34.2 Such provisions will allow the Council to issue a notice of breach requiring the developer to rectify the breach within a specified period. If the developer fails to comply with the notice, the Council may take action to remedy the developer's breach including by calling up any security provided under the planning agreement, stepping in to carry out works, or doing any other thing to remedy the breach.
- 34.3 The Council will generally be required to follow such procedures before it may exercise any rights that it may have at law to commence legal proceedings, except where urgent interlocutory relief is sought.
- 34.4 If a dispute resolution mechanism is triggered, the Council will also generally be required to complete the resolution process before it may exercise any rights to commence legal proceedings, except where urgent interlocutory relief is sought.
- 34.5 The Council's currently available template planning agreement contains enforcement clauses reflecting the above.

35. Dispute resolution

- 35.1 The EPA Act requires a planning agreement to provide for a mechanism for the resolution of disputes under the agreement³⁹.
- 35.2 Different kinds of dispute resolution mechanisms may suit different disputes, and this should be reflected in a planning agreement.
- 35.3 The Council will require planning agreements to make provision for mediation and expert determination. The relevant dispute resolution method to be applied in any case will depend on the nature of the dispute.
- 35.4 Expert determination will ordinarily be applicable in relation to disputes about technical or quantifiable matters such as costs and values, designs and specifications and the like, which lend themselves to resolution by independent experts.
- 35.5 Mediation will apply in all other cases.
- 35.6 The Council's currently available template planning agreement contains dispute resolution clauses reflecting the above.

³⁹ See section 7.4(3)(f) of the EPA Act.

36. Monitoring & performance reporting by developer

- 36.1 The Council endeavours to require standardised systems to monitor the implementation of planning agreements in a systematic and transparent way.
- 36.2 One means of enabling the Council to monitor the implementation of a planning agreement is to require the developer to provide a periodic performance report to the Council.
- 36.3 The report is to contain such information as the Council may require in order for Council to determine the progress of the development to which the planning agreement relates and the developer's compliance with the obligations under the planning agreement.
- 36.4 A performance report may typically include:
 - 36.4.1 a summary of the status of all the development contributions under the planning agreement, including a list of all development contributions due to be commenced or completed within the next 12 months,
 - 36.4.2 a list of securities provided to the Council under the planning agreement and a statement about the current value of each such security.
- 36.5 The Council's currently available template planning agreement contains a clause reflecting the above.

37. Review of planning agreement

- 37.1 Planning agreements should contain a mechanism for their periodic review that should involve the participation of all parties.
- 37.2 The Council will require a planning agreement to be reviewed periodically. The Council may also allow a planning agreement to be reviewed where there has been, or will be, an unexpected change in circumstances that materially affects the operation of the planning agreement.
- 37.3 In respect of a planning agreement that is entered into in connection with a planning proposal, a change of circumstance triggering a review of the planning agreement may include the circumstance where a development standard which can be numerically quantified (such as maximum building height or floor space ratio) that is effected by the instrument change pursuant to the planning proposal differs by more than 10% from the numerical development standard sought in the planning proposal that has been subject to and as varied by a gateway determination⁴⁰.
- 37.4 For the purposes of addressing any matter arising from a review of a planning agreement, the parties will be required to use all reasonable endeavours to agree on and implement appropriate amendments to the planning agreement. However, any failure by a party to agree to take action requested by another party as a consequence of a review is not a dispute for the purposes of the planning agreement and is not a breach of the planning agreement.
- 37.5 The Council's currently available template planning agreement contains a clause reflecting the above.

⁴⁰ See section 3.34(3) of the EPA Act, which allows a planning proposal to be varied by a gateway determination.

38. Amendment of planning agreement

- 38.1 This section sets out the Council's policy on the amendment of planning agreements.
- 38.2 Where the developer or another party to a planning agreement (other than Council) requests an amendment to a planning agreement, they must provide a request in writing and supporting justification to the Council.
- 38.3 The Council will consider the request and supporting information in good faith and will liaise with the developer or other party in deciding whether to agree to the amendment.
- 38.4 However, the Council may, in its complete discretion, decide whether or not to agree to the amendment or whether to propose a varied or different amendment to meet the circumstances identified by the developer or other party in requesting the amendment.
- 38.5 Where the Council seeks an amendment to a planning agreement, the developer and any other party to the planning agreement must work co-operatively and in good faith with the Council with a view to achieving the amendment.
- 38.6 The Regulation provides that a planning agreement can be amended by agreement between the parties to the planning agreement.
- 38.7 An amendment to a planning agreement must be documented in a deed of variation to be entered into in a form and on terms acceptable to the Council.
- 38.8 A developer seeking to amend a planning agreement must bear the Council's costs of the modification.

39. Novation & assignment by developer

- 39.1 Unless and until all planning agreement obligations are completed by the developer, the agreement will impose restrictions on:
 - 39.1.1 the sale or transfer the land to which the planning agreement applies,
 - 39.1.2 the assignment of the developer's rights or obligations under the planning agreement, and
 - 39.1.3 novation of the planning agreement.
- 39.2 The Council will not allow any of the above dealings unless it is satisfied that any incoming landowner or developer party will be bound by the provisions of the planning agreement and are capable of performing the obligations under the planning agreement, and that there is no existing unremedied breach of the planning agreement.
- 39.3 If any of the above dealings occur in breach of the requirements in the planning agreement, the developer will continue to be liable to perform the obligations under the planning agreement until those requirements have been complied with.
- 39.4 If a planning agreement is registered on the title to the land the Council may agree that the restrictions referred to above do not apply to a sale or transfer of the land on the basis that any new landowner will be bound by the provisions of the planning agreement⁴¹.
- 39.5 However, unless and until a deed of novation of the planning agreement is entered into in connection with the sale or transfer, the original developer and landowner parties

⁴¹ See section 7.6(3) of the EPA Act.

will continue to be bound by the contractual obligations under the planning agreement.

- 39.6 The Council's currently available template planning agreement contains a clause reflecting the above. The Council can also provide a standard form of a deed or novation or deed of assignment to be used for any assignment or novation of a planning agreement.

40. Discharge of developer from planning agreement

- 40.1 Planning agreements should not impose obligations on developers indefinitely but instead should set out the circumstances in which the parties agree to discharge the developer's obligations under the agreement.
- 40.2 The Council will discharge a developer from its obligations under the planning agreement where all the obligations have been completed in accordance with the planning agreement. The discharge will be effected by means of written correspondence to the developer and take effect according to the terms of the correspondence.
- 40.3 Where the developer's obligations under a planning agreement have not been completed, the Council may discharge a developer from its obligations in the following circumstances:
- 40.3.1 in respect of a planning agreement that is entered into in connection with a planning proposal, where the planning proposal authority has requested the Minister for Planning that the matter not proceed,
- 40.3.2 in respect of a planning agreement that is entered into in connection with a development application, where the development consent to which the agreement relates has lapsed and the development has not commenced.

41. Costs

- 41.1 This section addresses the Council's policy on payment of costs relating to the preparation, negotiation, execution, monitoring and other administration of planning agreements.
- 41.2 The Council requires a developer party to be responsible for all costs and expenses related to a planning agreement.
- 41.3 This will include (without limitation) Council's costs and expenses of:
- 41.3.1 preparing, negotiating, executing, registering and stamping (if required) a planning agreement,
- 41.3.2 an amendment of a planning agreement other than amendment requested by Council or an amendment required because of an error or omission by Council,
- 41.3.3 removing registration of a planning agreement from title,
- 41.3.4 preparing and registering any related instrument on title such as any easements, covenants, restrictions, charges and caveats required or allowed by the planning agreement,
- 41.3.5 any other document related to the specific planning agreement, such as any deed of novation or assignment,
- 41.3.6 enforcing and remedying a breach of the planning agreement, including costs and expenses incurred by the Council in connection with investigating a non-compliance by the developer and enforcing compliance by the Developer with this Deed

(including the costs and expenses of preparing and issuing notices for those purposes).

42. Notification on planning certificates

- 42.1 Pursuant to section 10.7(5) of the EPA Act, Council will include a notation about the existence of a planning agreement on a Planning Certificate issued in respect of land to which the planning agreement applies.

Part 3 – Procedures for planning agreements

43. Basic procedures for entering into planning agreement

- 43.1 This section sets out the indicative steps for entering into planning agreements.
- 43.2 Planning agreements should ordinarily be negotiated before the relevant development application is determined or the instrument change takes effect so that the draft planning agreement is publicly notified alongside the relevant development application and planning proposal.
- 43.3 Wherever possible, planning agreement negotiations should run in parallel with the relevant planning processes. As far as practicable, the Council will seek to ensure that the process for negotiation, assessment and public notification of a planning agreement runs in parallel with the process for public exhibition, assessment and determination of a development application, or the public exhibition of a planning proposal and making of an instrument change.
- 43.4 The Council will implement the procedures set out below which may be varied on a case by case basis.
- 43.5 Indicative flow charts showing the general steps to be followed during a planning agreement negotiation for a planning proposal and a development application or modification application appear in Appendix2.

Who will negotiate on behalf of the Council

- 43.6 The Council 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.
- 43.7 The VPA Officer will negotiate a planning agreement on behalf of the Council.
- 43.8 Where Council is the determining authority for a development application involving a planning agreement the Councillors will not be involved in the negotiation of the planning agreement but a decision on whether the Council will enter into a planning agreement will be made by resolution of the governing body of the Council.

Separation of roles within Council

- 43.9 The Council will ensure that the Council staff responsible for assessing and determining a development application, modification application or planning proposal, to which a planning agreement relates, do not have a role in negotiating or assessing the key commercial terms of the planning agreement.
- 43.10 The VPA Officer will not have any involvement with the assessment of the development application, modification application or planning proposal to which the proposed planning agreement relates.
- 43.11 If any person reporting to the VPA Officer is involved with the draft planning agreement, that person shall be bound by the same provisions of this policy in respect of interaction with Council officers assessing the development application, modification application or planning proposal and conflicts of interest.
- 43.12 The Council will ensure that the VPA Officer does not have any conflict of interest, pecuniary or otherwise, within the meaning of Council's Code of Conduct in respect of the subject matter of the planning agreement or the development application, modification application or planning proposal to which it relates.
- 43.13 If the VPA Officer considers that she or he may have such a conflict, that person must immediately advise the Council in writing and a different VPA Officer, or if necessary an independent third party, must be appointed.

44. Offer & negotiation steps for planning agreements

Commencement

- 44.1 Before the lodgement of the relevant development application or modification application or request for a planning proposal by the developer, the Council staff and the developer will meet to discuss whether to negotiate a planning agreement.
- 44.2 At this time, the Council's VPA Officer will be responsible for all functions with regard to the proposed planning agreement. The Council's General Manager or their delegate or nominee may also be involved in negotiating the proposed planning agreement, at the General Manager's discretion.
- 44.3 If the developer is not the owner of the relevant land, the landowner should also be a party to any discussion and negotiation.
- 44.4 If the parties decide to negotiate a planning agreement:
 - 44.4.1 the parties will decide whether any independent third parties need to be engaged for the negotiation and assessment for the planning agreement,
 - 44.4.2 the developer will advise the Council of the person that will represent them in the negotiations, and
 - 44.4.3 a timetable for negotiations will be agreed between the VPA Officer and developer.

Preliminary negotiation and offer

- 44.5 The VPA Officer and the developer will identify the key commercial issues and the negotiations in relation to those issues will then take place.
- 44.6 The VPA Officer will assess the merits of a proposed planning agreement when negotiating the key commercial terms and consider relevant stakeholders and any

relevant Council's policies when negotiating the planning agreement.

- 44.7 If agreement is reached on commercial terms, the developer must give the Council a letter of offer to enter into the planning agreement with the Council⁴².
- 44.8 The Council requires a letter of offer to specify that it is an irrevocable offer by the developer, pursuant to section 7.7(3) of the EPA Act, to enter into a planning agreement on these terms set out in the document.
- 44.9 A letter of offer should:
 - 44.9.1 be in writing,
 - 44.9.2 be addressed to the Council,
 - 44.9.3 be signed by or on behalf of all parties to the proposed planning agreement other than the Council,
 - 44.9.4 set out the key terms of the planning agreement,
 - 44.9.5 outline in sufficient detail the matters required to be included in a planning agreement as specified in section 7.4 (3) of the EPA Act to allow proper consideration of the offer by the Council.
 - 44.9.6 address in sufficient detail any relevant matters as specified in this Policy to allow proper consideration by the Council.
 - 44.9.7 outline in sufficient detail all other key terms and conditions proposed to be contained in the planning agreement to allow proper consideration by the Council.
- 44.10 The developer may also submit a draft planning agreement with a letter of offer prepared based on the Council's template.

Preparation of draft planning agreement & further negotiations

- 44.11 In preparing the draft planning agreement document, the parties are to negotiate any other relevant terms of the planning agreement.
- 44.12 The VPA Officer will generally consult any relevant public authorities in relation to the planning agreement and consider relevant Council's policies when negotiating the terms of the planning agreement.
- 44.13 When the VPA Officer is satisfied with the terms of the draft planning agreement, the developer is to provide the Council with a further letter of offer that:
 - 44.13.1 is in writing,
 - 44.13.2 is addressed to the Council,
 - 44.13.3 is signed by or on behalf of all parties to the proposed planning agreement other than the Council,
 - 44.13.4 expressly provides that it is an offer pursuant to section 7.7(3) of the EPA Act, and
 - 44.13.5 attaches the draft planning agreement and expressly offers to enter into that version of the planning agreement.
- 44.14 If required by the Council, the version of the planning agreement attached to the further

⁴² See section 7.7(3) of the EPA Act.

letter of offer is to be signed by the developer and any landowner.

Notification

- 44.15 The draft planning agreement and its explanatory note must be publicly notified in accordance with the EPA Act and Regulation⁴³.
- 44.16 The draft planning agreement must be reported to the governing body of the Council prior to public notification and will only proceed to public notification if supported by the Council. The Council's VPA Officer will further assess the merits of a draft planning agreement and prepare a report to the Council for public notification.
- 44.17 In addition to the above paragraph, for draft planning agreement which relate to a planning proposal:
 - 44.17.1 the draft planning agreement is to be reported to a Council meeting, together with the planning proposal, prior to proceeding to a Gateway Determination under section 3.34 of the Act, and
 - 44.17.2 the draft planning agreement will only proceed to public notification if the Gateway Determination determines that the planning proposal should proceed.
- 44.18 The Council may require re-notification of the draft planning agreement in certain circumstances.
- 44.19 See section 50 below for more detail in relation to the procedure for public notification and re-notification of a draft planning agreement.
- 44.20 If any changes are made to the draft planning agreement, the Council will generally require a further letter of offer from the developer to be provided which attaches the amended draft planning agreement.

Consideration of planning agreement in planning processes

- 44.21 A draft planning agreement and public submissions will be considered by Council in the determination of the related application. The weight given to the draft planning agreement and public submissions is a matter for Council acting reasonably.
- 44.22 For the avoidance of doubt, the VPA Officer's assessment of the merits of the draft planning agreement when negotiating the terms of the VPA is separate to any consideration by the Council's development assessment staff of the planning agreement as required under section 4.15(1)(a)(iia) of the EPA Act in determining a development application.
- 44.23 The fact that the VPA Officer approves the terms of a draft planning agreement will not necessarily mean that the development application or planning proposal, to which the proposed planning agreement relates, is acceptable on its merits on planning grounds.

Entering into a planning agreement

- 44.24 A planning agreement can generally be entered into at any time after the planning agreement is publicly notified in accordance with the EPA Act and Regulation. In some cases, the planning agreement may need to be reported to the Council before Council's execution. This may be in connection with the Council's determination of the development application or decision to proceed with the planning proposal.

⁴³ See section 7.5(1) of the EPA Act; section 204 of the Regulation.

- 44.25 Where possible, planning agreements should be negotiated with Council before a development application is determined or a gateway determination relating to a planning proposal is made by Council.
- 44.26 Council will typically require the developer to sign the planning agreement, or provide a further letter of offer, before it determines the development application to which the planning agreement relates or prior to Council requesting that the Minister make the instrument change referred to in the planning proposal.
- 44.27 If the Council determines the development application before the planning agreement is signed, then the Council will generally require the planning agreement to be entered into as a deferred commencement condition in the terms of the developer's letter of offer⁴⁴.
- 44.28 In such a case, a deferred condition of consent may be imposed.
- 44.29 Any documents that are required to be provided to Council on commencement of the planning agreement such as instruments and letters of consents to the registration of a planning agreement or any security should be provided to Council before the planning agreement is executed by the Council.
- 44.30 A planning agreement is entered into when it is signed by all of the parties⁴⁵. It must also be submitted on the NSW planning portal. The Council's Planning Agreements Register, which appears on the NSW planning portal, contains links to planning agreements entered into by Council.
- 44.31 The Council will generally require a provision to be included in a planning agreement to the effect that the planning agreement operates as a deed poll in favour of the Council on and from the date of execution by the developer until the date on which this deed is signed by all the parties.

45. Involvement of independent third parties

- 45.1 In some cases, the use of independent third parties during the negotiation of a planning agreement may be appropriate.
- 45.2 The Council will encourage the appointment of an independent person to facilitate or participate in the negotiations of a planning agreement in circumstances where:
- 45.2.1 an independent assessment of a proposed instrument change, development application or modification application is necessary or desirable;
 - 45.2.2 there is a risk of conflict of interests,
 - 45.2.3 factual information requires validation in the course of negotiations;
 - 45.2.4 sensitive financial or other confidential information must be verified or established in the course of negotiations;
 - 45.2.5 facilitation of complex negotiations are required in relation to large projects or where numerous parties or stakeholders are involved; and
 - 45.2.6 dispute resolution is required under a planning agreement.
- 45.3 The costs of the independent person will be borne by the developer.

⁴⁴ See section 7.7(3) of the EPA Act.

⁴⁵ See section 203 of the Regulation.

46. Procedure relating to development of Council owned land

- 46.1 This policy is intended to apply as far as practicable to planning proposals relating to Council-owned or controlled land, and to development by or on behalf of the Council on Council owned or controlled land, in the same way as it applies to other land.
- 46.2 In such circumstances, the Council will seek to provide a public benefit in accordance with this policy by one of the following means:
 - 46.2.1 registering a covenant on title under s88D of the *Conveyancing Act 1919*,
 - 46.2.2 entering into a planning agreement via a deed poll and registering the agreement on title, or
 - 46.2.3 making provision in the relevant local environmental plan to require provision of the public benefit in respect of the development of the land.
- 46.3 The Council will generally prefer to register a covenant on title as described above. However, if that is not practicable, the Council will provide for the public benefit by one of the other specified means.

47. Procedure for dispute resolution

- 47.1 See section 35 of this Policy above in relation to Council's policy on dispute resolution under a planning agreement.

48. Costs & charges

- 48.1 See section 41 above in relation to Council's policy on costs related to a planning agreement.
- 48.2 See section 28 above in relation to Council's policy on requiring funding for recurrent costs.

49. Registration and administration

Standard form & documentation of planning agreement

- 49.1 See section 24 above in relation to Council's policy on documentation and drafting of a planning agreement.

Monitoring & review of planning agreements

- 49.2 See section 36 above in relation to Council's policy on monitoring and review of a planning agreement.

Security for enforcement

- 49.3 See sections 33 above in relation to Council's policy on security and enforcement of a planning agreement.

Registration

- 49.4 See section 32 above in relation to Council's policy on registration of planning agreements.

Discharge

- 49.5 See section 40 above in relation to Council's policy on discharge of planning agreements.

50. Public participation & notification

Public notification

- 50.1 The EPA Act requires a proposed planning agreement to be publicly notified and available for public inspection for a minimum of 28 days⁴⁶.
- 50.2 The Regulation requires public notification of the draft planning agreement to occur as part of, and at the same time and in the same way as public exhibition of the planning proposal, development application or modification application unless it is not practicable to do so. In which case, public notification of the planning agreement must occur as soon as practicable.
- 50.3 Where the development application or planning proposal to which a planning agreement relates is required by or under the EPA Act or Regulation to be publicly notified and available for public inspection for a period exceeding 28 days, the Council will publicly notify the planning agreement and make it available for public inspection for that longer period.

Public submissions

- 50.4 Public submissions that are received during the public notification period of a draft planning agreement will be considered by the VPA Officer.
- 50.5 The VPA Officer may negotiate changes to the draft planning agreement having regard to any matters raised following public notification.

Re-notification

- 50.6 A draft planning agreement may be amended by the parties to address any issues arising from submissions that are received or for any other reason.
- 50.7 The EPA Act does not provide for re-notification of a draft planning agreement after it has been notified.
- 50.8 A draft planning agreement should be re-notified where changes are made to the draft planning agreement that materially affect:
 - 50.8.1 how any of the matters specified in section 7.4 of the EPA Act are dealt with by the planning agreement,
 - 50.8.2 other key terms and conditions of the planning agreement,
 - 50.8.3 the planning authority's interests or the public interest under the planning agreement, or
 - 50.8.4 whether a non-involved member of the community would have made a submission objecting to the change if it had been publicly notified.
- 50.9 The Council will publicly re-notify a draft planning agreement and the associated development application, modification application or planning proposal to which it relates if, in the Council's opinion, a material change as described above has been made to the terms of the agreement.
- 50.10 The amended draft planning agreement may need to be reported to the Council and if so, the VPA Officer will again assess the merits of the amended draft planning agreement before it is reported to the Council and before any re-notification.

⁴⁶ See section 7.5(1) of the EPA Act.

51. Explanatory Note

- 51.1 The Regulation requires an explanatory note in relation to a draft planning agreement to be prepared and exhibited with the draft planning agreement⁴⁸.
- 51.2 An explanatory note is to help the broader community to simply and clearly understand what a planning agreement is proposing, how it delivers public benefit, and why it is acceptable and in the public interest. An explanatory note must be prepared in plain English and address the specific matters set out in the Practice Note.
- 51.3 The Council has an explanatory note template that is publicly available on the Council's website. The template is revised and updated from time to time.

Schedule 1 - VPA process relating to a planning proposal and development application

