

STATUTORY
PLANNING
POLICY

PLANNING AGREEMENTS POLICY 2006

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Acknowledgements

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1. Introduction

This Policy sets out Canada Bay Council's policy, principles and procedures relating to planning agreements under s93F of the Environmental Planning and Assessment Act 1979.

1.2 This Policy was adopted by resolution of the Council on 5th December, 2006.

1.3 In this policy, the following terminology is used:

- Act means the Environmental Planning and Assessment Act 1979,
- affordable housing has the same meaning as in the Act;
- 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;
- instrument change means a change to an environmental planning instrument to enable a development application to be made to carry out development the subject of a planning agreement;
- planning benefit means a development contribution that confers a net public benefit, that is, a benefit that exceeds the benefit derived from measures that would address the impacts of particular development on surrounding land or the wider community;
- planning obligation means an obligation imposed by a planning agreement on a developer requiring the developer to make a development contribution;
- Practice Note means the Practice Note on Planning Agreements published by the Department of Infrastructure Planning and Natural Resources (July 2005);
- public includes a section of the public;
- public benefit is the benefit enjoyed by the public as a consequence of a development contribution,
- public facilities means public infrastructure, facilities, amenities and services;
- public purpose means any purpose that benefits the public, including but not limited to a purpose specified in s93F (2) of the Act;
- Regulation means the Environmental Planning and Assessment Regulation 2000; and
- surplus value means the value of the developer's provision under a planning agreement less the sum of the value of public works required to be carried out by the developer under a condition imposed under s80A (1) of the Act and the value of development contributions that are or could have been required to be made under s94 or s94A of the Act in respect of the development the subject of the agreement.

1.4 The purposes of this policy are:

- to establish a framework governing the use of planning agreements by the Council;
- to ensure that the framework so established is efficient, fair, transparent and accountable;
- to enhance planning flexibility in the Council's area through the use of planning agreements;
- to enhance the range and extent of development contributions made by development towards public facilities in the Council's area;
- to set out the Council's specific policies on the use of planning agreements; and
- to set out procedures relating to the use of planning agreements within the Council's area.

1.5 The Council's planning agreements framework consists of the following:

- the provisions of Subdivision 2 of Division 6 of Part 4 of the Act;
- the provisions of Division 1A of Part 4 of the Regulation; and
- this Policy.

1.6 This Policy is not legally binding.

However, it is intended that the Council and all persons dealing with the Council in relation to planning agreements will follow this Policy to the fullest extent possible.

1.7 It is intended that this Policy will be periodically updated.

The updates may cover additional matters to those covered in this Policy or provide more detailed information or guidance on specific matters covered in this Policy.

2. Policy on the Use of Planning Agreements

Council's strategic objectives for the use of planning agreements

8.1 The Council's strategic objectives with respect to the use of planning agreements include:

- a. to provide an enhanced and more flexible development contributions system for the Council, which achieves net planning benefits from development wherever possible and appropriate,
- b. more particularly, to supplement or replace, as appropriate, the application of s94 and s94A of the Act to development,
- c. to give all stakeholders in development greater involvement in determining the type, standard and location of public facilities and other public benefits,
- d. to allow the public, through the public participation process under the Act, to agree to the redistribution of the costs and benefits of development in order to realise public preferences for the provision of public benefits,
- e. to adopt innovative and flexible approaches to the provision of infrastructure in a manner that is consistent with the Council's adopted management plan,
- f. to provide or upgrade infrastructure to appropriate levels that reflect and balance environmental standards (including, without limitation, the principles of ecologically sustainable development), public expectations and funding priorities,
- g. to ensure that developers make appropriate development contributions towards the cost of the provision and management of public facilities within the Council's area,
- h. to provide certainty for the public, developers and Council in respect to infrastructure and development outcomes, and
- i. where applicable, to achieve outcomes from development which ensure that the public has full access to that part of the Sydney Harbour foreshore which is within the Council's area.

Fundamental principles governing the use of planning agreements

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

- a. planning decisions may not be bought or sold through planning agreements;
- b. development that is unacceptable on planning grounds (including, without limitation, environmental grounds) will not be permitted because of planning benefits offered by developers that do not make the development acceptable in planning terms;
- c. the Council will not allow planning agreements to improperly fetter the exercise of its functions under the Act, Regulation or any other Act or law;
- d. the Council will not use planning agreements for any purpose other than a proper planning purpose;
- e. the Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed planning agreement;
- f. the Council will not improperly rely on its statutory position, or otherwise act improperly, in order to extract unreasonable public benefits from developers under planning agreements, and will ensure that all parties involved in the planning agreement process are dealt with fairly; and
- g. if the Council has a commercial stake in development the subject of agreements, it will take appropriate steps to ensure that it avoids a conflict of interest between its role as a planning authority and its interest in the development.

Circumstances in which Council will consider negotiating a planning agreement

2.3 The Council, in its complete discretion, may negotiate a planning agreement with a developer in connection with any application by the developer for an instrument change or for development consent relating to any land in the Council's area.

Specific purposes of planning agreements

2.4 The Council may consider negotiating a planning agreement with a developer to:

- a. compensate for the loss of, or damage to, a public amenity, service, resource or asset caused by the development through its replacement, substitution, repair or regeneration;
- b. meet the demands created by the development for new public infrastructure, amenities and services;
- c. achieve the provision of affordable housing;

- d. address a deficiency in the existing provision of public facilities in the Council's area;
- e. achieve recurrent funding in respect of public facilities;
- f. prescribe inclusions in the development that meet specific planning objectives of the Council;
- g. monitor the implementation of development;
- h. ensure that public access to that part of the Sydney Harbour foreshore which is within the Council's area is preserved or enhanced; and
- i. secure planning benefits for the public.

Acceptability test to be applied to all planning agreements

2.5 The Council will apply the following test in order to assess the desirability of a proposed planning agreement:

- a. is the proposed planning agreement directed towards a proper or legitimate planning purpose having regard to its statutory planning controls and other adopted planning policies and the circumstances of the case?
- b. does the proposed planning agreement provide for a reasonable means of achieving the relevant purpose?
- c. can the proposed planning agreement be taken into consideration in the assessment of the relevant rezoning application or development application?
- d. will the planning agreement produce outcomes that meet the general values and expectations of the public and protect the overall public interest?
- e. does the proposed planning agreement promote the Council's strategic objectives in relation to the use of planning agreements?
- f. does the proposed planning agreement conform to the fundamental principles governing the Council's use of planning agreements? and
- g. are there any relevant circumstances that may operate to preclude the Council from entering into the proposed planning agreement?

Consideration of planning agreements in relation to instrument changes and development applications

2.6 When exercising its functions under the Act in relation to an application by a developer for an instrument change or a development consent to which a proposed planning agreement relates, the Council will consider to the fullest extent permitted by law:

- a. whether the proposed planning agreement is relevant to the application and hence may be considered in connection with the application; and
- b. if so, the proper planning weight to be given to the proposed planning agreement.

Application of s94 and s94A to development to which a planning agreement relates

2.7 The Council has no general policy on whether a planning agreement should exclude the application of s94 or s94A of the Act to development to which the agreement relates. This is a matter for negotiation between the Council and a developer having regard to the particular circumstances of the case.

2.8 However, where the application of s94 of the Act to development is not excluded by a planning agreement, the Council will generally not agree to a provision allowing benefits under the agreement to be taken into consideration in determining a development contribution under s94.

Form of development contributions under a planning agreement

2.9 The form of a development contribution to be made under a proposed planning agreement will be determined by the particulars of the instrument change or development application to which the proposed planning agreement relates. Without limitation, development contributions by a developer under a proposed planning agreement may include:

- a. the dedication of foreshore land to the Council;
- b. the provision of particular public facilities; or
- c. the making of a monetary contribution towards the cost of the provision of infrastructure.

Standard charges

2.10 Wherever possible, the Council will seek to standardise development contributions sought under planning agreements in order to streamline negotiations and provide fairness, predictability and certainty for developers. This, however, does not prevent public benefits being negotiated on a case by case basis, particularly where planning benefits are also involved.

Recurrent charges

2.11 The Council may request developers, through a planning agreement, to make development contributions towards the recurrent costs of public facilities.

Where the public facility primarily serves the development to which the planning agreement relates or neighbouring development, the arrangement for recurrent funding may be in perpetuity. However, where the public facility or public benefit is intended to serve the public, the planning agreement will only require the developer to make contributions towards the recurrent costs of the facility until a public revenue stream is established to support the ongoing costs of the facility.

Pooling of development contributions

2.12 Where a proposed planning agreement provides for a monetary contribution by the developer, the Council may seek to include a provision permitting money paid under the agreement to be pooled with money paid under other planning agreements and applied progressively for the different purposes under those agreements, subject to the specific requirements of the relevant agreements.

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

Methodology for valuing public benefits under a planning agreement

2.13 Unless otherwise agreed in a particular case, where the benefit under a planning agreement is the provision of land for a public purpose, the value of the benefit will be determined by an independent valuer of at least 10 years experience in valuing land in New South Wales (and who is acceptable to the Council), on the basis of a scope of work which is prepared by the Council.

All costs of the independent valuer in carrying out such a valuation will be borne by the developer.

2.14 Unless otherwise agreed in a particular case, where the benefit under a planning agreement is the carrying out of works for a public purpose, the value of the benefit will be determined by an independent quantity surveyor of at least 10 years' experience (and who is acceptable to the Council), on the basis of the estimated value of the completed works determined using the method that would be ordinarily adopted by a quantity surveyor.

The scope of work for this independent quantity surveyor will be prepared by the Council. All costs of the independent quantity surveyor in carrying out this work will be borne by the developer.

2.15 Where the benefit under a planning agreement is the provision of a material public benefit, the Council and the developer will negotiate the manner in which the benefit is to be valued for the purposes of the agreement.

Credits and refunds

2.16 The Council generally will not agree to a planning agreement providing for the surplus value under a planning agreement being refunded to the developer or offset against development contributions required to be made by the developer in respect of other development in the Council's area.

Time when developer's obligations arise under a planning agreement

2.17 The Council will generally require a planning agreement to provide that the developer's obligations under the agreement take effect when the first development consent operates in respect of development that is the subject of the agreement, and will operate progressively, in accordance with its terms, as the relevant development proceeds from the issue of the first construction certificate in respect of that development until the grant of the final occupation certificate.

Implementation agreements

2.18 In appropriate cases, the Council may require a planning agreement to provide that before the development the subject of the agreement is commenced, the parties are to enter into an implementation agreement that provides for matters such as:

- a. the times at which and, if relevant, the period during which, the developer is to make provision under the planning agreement;
- b. the design, technical specification and standard of any work required by the planning agreement to be undertaken by the developer;
- c. the manner in which a work is to be handed over to the Council;
- d. the manner in which a material public benefit is to be made available for its public purpose in accordance with the planning agreement; and
- e. the management or maintenance of land or works following hand-over to the Council.

Monitoring and review of a planning agreement

2.19 The Council will continuously monitor the performance of the developer's obligations under a planning agreement. This may include the Council requiring the developer (at its cost) to report periodically to the Council on its compliance with obligations under the planning agreement.

2.20 The Council will require the planning agreement to contain a provision establishing a mechanism under which the planning agreement is periodically reviewed with the involvement of all parties. This will include a review of the developer's performance of the agreement.

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

Modification or discharge of the developer's obligations under a planning agreement

2.22 The Council will generally only agree to a provision in a planning agreement permitting the developer's obligations under the agreement to be modified or discharged where the modification or discharge is linked to the following circumstances:

- a. the developer's obligations have been fully carried in accordance with the agreement;
- b. the developer has assigned the developer's interest under the agreement in accordance with its terms and the assignee has become bound to the Council to perform the developer's obligations under the agreement;
- c. the development consent to which the agreement relates has lapsed;
- d. the performance of the planning agreement has been frustrated by an event beyond the control of the parties; and
- e. the Council and the developer otherwise agree to the modification or discharge of the agreement.

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

Assignment and dealings by the developer

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

- a. the Council has given its consent to the proposed assignment or dealing;
- b. the developer has, at no cost to the Council, first procured the execution by the person with whom it is dealing of all necessary documents in favour of the Council by which that person agrees to be bound by the agreement as if they were a party to the original agreement; and
- c. the developer is not in breach of this planning agreement.

Provision of security under a planning agreement

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

2.26 Unless otherwise agreed by the parties in a particular case, the form of security required by the Council will generally be the unconditional bank guarantee from an Australian Bank in favour of the Council to the full value of the developer's provision under the planning agreement and on terms otherwise acceptable to the Council.

Preparation and form of the planning agreement

2.27 Unless otherwise agreed by the parties in a particular case, a planning agreement will be prepared by the Council.

2.28 The Council will generally require the planning agreement to be in or to the effect of the standard-form planning agreement.

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

2.29 The Council will generally require a planning agreement to make provision for payment by the developer of the Council's costs of and incidental to:

- a. negotiating, preparing and entering into the agreement,
- b. enforcing the agreement.

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

However as a general rule, the Council considers that whether the planning agreement relates to an application by the developer for an instrument change, or relates to a development application, in each case it is fair and reasonable that the developer will pay the whole of the Council's costs.

2.31 In particular cases, the Council may require the planning agreement to make provision for a development contribution by the developer towards the ongoing administration of the agreement.

Notations on Certificates under s149 (5) of the Act

2.32 The Council will generally require a planning agreement to contain an acknowledgement by the developer that the Council may, in its absolute discretion, make a notation under s149 (5) of the Act about a planning agreement on any certificate issued under s149 (2) of the Act relating to the land the subject of the agreement or any other land.

Registration of planning agreements

2.33 The Council and the developer will negotiate in each particular case whether a planning agreement is to contain a provision requiring the developer to agree to registration of the agreement pursuant to s93H of the Act if the requirements of that section are satisfied.

Dispute resolution

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

Unless the parties agree otherwise, the planning agreement will provide that such mediation will be conducted pursuant to the Mediation Rules published by the Law Society of New South Wales current at the time the agreement is entered into.

Hand-over of works

2.35 The Council will generally not accept the hand-over of a public work carried out under a planning agreement unless the developer furnishes to the Council a certificate to the effect that the work has been carried out and completed in accordance with the agreement and any applicable development consent (which certificate may, at

the Council's discretion, be a final occupation certificate, compliance certificate or a subdivision certificate) and, following the issue of such a certificate to the Council, the work is also certified as complete by a Council building surveyor or engineer.

2.36 The Council will also require the agreement to provide for a defects liability period during which any defects must be rectified at the developer's expense.

Management of land or works after hand-over

2.37 If a planning agreement provides for the developer, at the developer's cost, to manage or maintain land that has been dedicated to the Council or works that have been handed-over to the Council, the Council will generally require the parties to enter into a separate implementation agreement in that regard (see paragraph 2.18 of this Policy).

2.38 The failure of the parties to reach agreement in relation to management and maintenance of the land or works may be dealt with under the dispute resolution provisions of the planning agreement.

Public use of privately-owned facilities

2.39 If a planning agreement provides for the developer to make a privately-owned facility available for public use, the Council will generally require the parties to enter into a separate implementation agreement in that regard (see paragraph 2.18 of this Policy).

2.40 Such an agreement may, subject to the Council's agreement, provide for payment to the developer of a reasonable fee by a member of the public who desires to use the relevant facility.

3. Procedures Relating to the Use of Planning Agreements

Council's negotiation system

3.1 The Council's negotiation system for planning agreements aims to be efficient, predictable, transparent and accountable.

3.2 The system seeks to ensure that the negotiation of planning agreements runs in parallel with applications for instrument changes or development applications.

3.3 The system is based on principles of fairness, co-operation, full disclosure, early warning, and agreed working practices and timetables.

When should a planning agreement be negotiated?

3.4 The Council is required to ensure that a planning agreement is publicly notified as part of and in the same manner as and contemporaneously with the application for the instrument change or the development application to which it relates.

3.5 The planning agreement must therefore be negotiated and documented before it is publicly notified as required by the Act and Regulation.

3.6 The Council prefers that a planning agreement is negotiated before lodgement of the relevant application and that it accompanies the application on lodgement.

Who will negotiate a planning agreement on behalf of the Council?

3.7 The Council's General Manager, or another Council officer with appropriate delegated authority will negotiate a planning agreement on behalf of the Council.

3.8 The councillors will not be involved in the face to face negotiation of the agreement.

Separation of the Council's commercial and planning assessment roles

3.9 If the Council has a commercial interest in the subject matter of a planning agreement as a landowner, developer or financier, the Council will ensure that the person who assesses the application to which a planning agreement relates is not the same person or a subordinate of the person who negotiated the terms of the planning agreement on behalf of the Council in its capacity as landowner, developer or financier.

Role of the governing body of the Council in relation to development applications to which planning agreements relate

3.10 The governing body of the Council will, in all cases, determine development applications to which planning agreements relate.

Involvement of independent third parties in the negotiation process

3.11 The Council may encourage the appointment of an independent person to facilitate or otherwise participate in the negotiations or aspects of it, such as where:

- a. an independent assessment of a proposed instrument change or development application is necessary or desirable;
- b. factual information requires validation in the course of negotiations;
- c. sensitive financial or other confidential information must be verified or established in the course of negotiations;
- d. facilitation of complex negotiations are required in relation to large projects or where numerous parties or stakeholders are involved; or
- e. dispute resolution is required under a planning agreement.

3.12 The costs of the independent person will be borne by the developer.

Key steps in the negotiation process

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

- a. before lodgement of the relevant application by the developer, the parties will decide whether to negotiate a planning agreement;
- b. the parties will then appoint a person to represent them in the negotiations;
- c. the parties may also appoint a third person to attend and take minutes of all negotiations;
- d. the parties will also decide whether to appoint an independent person to facilitate or otherwise participate in the negotiations or aspects of it;
- e. the parties will also agree on a timetable for negotiations and the protocols and work practices governing their negotiations;
- f. the parties will then identify the key issues for negotiation and undertake the negotiations;
- g. if agreement is reached, the Council will prepare the proposed planning agreement and provide a copy of it to the developer;
- h. the parties will undertake further negotiation on the specific terms of the proposed planning agreement;
- i. once agreement is reached on the terms of the proposed planning agreement, the developer will be required to execute the agreement;
- j. the developer may then make the relevant application to the Council accompanied by a copy of the proposed agreement; or
- k. the parties may be required to undertake further negotiations and, hence, a number of the above steps as a result of the public notification and inspection of the planning agreement or its formal consideration by the Council in connection with the relevant application.

Public notification of planning agreements

3.14 A planning agreement must be publicly notified and available for public inspection for a minimum period of 28 days.

3.15 As mentioned, the Council is required to ensure that a planning agreement is publicly notified as part of and in the same manner as and contemporaneously with the application for the instrument change or the development application to which it relates.

3.16 Where the application to which a planning agreement relates is required by or under the 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.

3.17 Where the application to which a planning agreement relates is permitted by or under the Act or Regulation to be publicly notified and available for public inspection for a period of less than 28 days, the Council will publicly notify the application and make it available for public inspection for a minimum period of 28 days.

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

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

When is a planning agreement required to be entered into?

3.19 A planning agreement is entered into when it is signed by all of the parties.

3.20 A planning agreement can be entered into at any time after the agreement is publicly notified in accordance with the Act and Regulation.

3.21 The Council will usually require a planning agreement to be entered into as a condition of granting development consent to the development to which the agreement relates.

3.22 Generally the Council will sign the planning agreement on the same day, or as soon as possible after the day, that the development consent or instrument change to which the agreement relates, is granted or made.

Planning Agreement Register

3.23 The Council is required keep a register of planning agreements applying to land within the Council's area, whether or not the Council is a party to a planning agreement.

The Council is required to record in the register the date an agreement was entered into and a short description of the agreement (including any amendment).

3.24 The Council will make the following available for public inspection (free of charge) during ordinary office hours:

- a. the planning agreement register kept by the Council;
- b. copies of all planning agreements (including amendments) that apply to the area of the Council; and
- c. copies of the explanatory notes relating to those agreements or amendments.

3.25 The Council will also make its planning agreement register available to the public on its website.