



Planning Agreements Policy

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OBJECTIVE

This Policy establishes a framework to guide the preparation of planning agreements in a manner that is efficient, fair, transparent and accountable.

POLICY STATEMENT

Planning agreements are one of a number of alternative mechanisms under Council's S94A Development Contributions Plan 2007 for developers to contribute to the public facilities needs arising in Randwick City.

Council has adopted this policy in order to provide developers and the community with an understanding of the objectives, principles and procedures applying to the preparation of planning agreements.

Introduction

- 1.1 This Policy sets out Randwick City Council's policy, principles and procedures relating to planning agreements under the *Environmental Planning and Assessment Act 1979* (the Act).

Planning agreements form one part of Council's development contributions system. Randwick City Council's development contributions system aims to implement contribution schemes as described under sections 93C and 94 of the Act to best manage the demands arising from new development on public facilities provision within the City.

- 1.2 In this Policy, the following terminology is used:

Act means the *Environmental Planning and Assessment Act 1979*,

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 to Council 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, 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 to the wider community,

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

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 means a section of the public,

Regulation means the *Environmental Planning and Assessment Regulation 2000*,

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 to which the agreement applies.

- 1.3 The purposes of this Policy are:

- (a) to establish a framework governing the use of planning agreements by the Council
- (b) to ensure that the framework so established is efficient, fair, transparent and accountable

- (c) to enhance planning flexibility in Randwick City through the use of planning agreements
- (d) to enhance the range and extent of development contributions made by development towards public facilities in the City
- (e) to set out the Council's specific objectives and procedures relating to the use of planning agreements within the City.

1.4 The Council's planning agreement framework is based on:

- (a) the provisions of Subdivision 2 of Division 6 of Part 4 of the Act
- (b) the provisions of Division 1A of Part 4 of the Regulation, and
- (c) this Policy.

1.5 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.

1.6 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

Strategic Objectives

2.1 The Council's strategic objectives for the use of planning agreements are:

- (a) To advance Council's adopted vision for our City in accordance with *The Randwick City Plan*
- (b) to provide an enhanced and more flexible development contributions system for the Council
- (c) more particularly, to supplement or replace, as appropriate, the application of s94 and s94A of the Act on development
- (d) to give all stakeholders in development, greater involvement in determining the type, standard and location of public facilities and other public benefits
- (e) to facilitate public participation to gain an understanding of community preferences for the provision of public benefits
- (f) to adopt innovative approaches to the provision of infrastructure
- (g) to fund new or upgrade existing infrastructure to appropriate levels that reflect and balance of environmental standards, community expectations and funding priorities, and
- (h) to provide certainty for the community, developers and Council in respect to infrastructure and development outcomes.

Principles

2.2 The Council's use of planning agreements will be guided by these principles:

- (a) planning decisions may not be bought or sold through planning agreements
- (b) development that is unacceptable on planning grounds will not be permitted because of planning benefits offered by developers that do not make the development acceptable in planning terms
- (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 ensure that all parties involved in the Planning Agreement process are dealt with fairly
- (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 in order to extract unreasonable public benefits under planning agreements
- (g) if the Council has a commercial stake in a development the subject of an agreement, it will take appropriate steps to ensure that it avoids a

conflict of interest between its role as a planning authority and its interest in the development.

Circumstances in which Council will consider negotiating a planning agreement

- 2.3 The Council, at 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 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) address a deficiency in the existing provision of public facilities in the Council area
 - (d) achieve recurrent funding in respect of public facilities
 - (e) prescribe inclusions in the development that meet specific planning objectives of the Council
 - (f) monitor the implementation of development
 - (g) provide affordable housing
 - (h) 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) will the planning agreement produce outcomes that meet the general values and expectations of the community and protect the overall public interest?
 - (d) does the proposed planning agreement promote the Council's strategic objectives in relation to the use of planning agreements?
 - (e) does the proposed planning agreement conform to the principles governing the Council's use of planning agreements?

- (f) 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.

Relationship between planning agreements and SEPP 1

- 2.8 The benefits proposed by the developer under an agreement should not be used to justify a dispensation with applicable development standards under *State Environmental Planning Policy No.1 – Development Standards* in relation to development.

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.

For example, whether the contribution shall be cash, provided as material public benefit, land dedication or a combination of the above.

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.

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 sought in perpetuity. However, where the public facility or public benefit is intended to serve the wider community, the planning agreement will only require the developer to make contributions

towards the recurrent costs of the facility until a public revenue stream is established to support the on-going costs of the facility.

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, more efficient 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 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 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 to be refunded to the developer or offset against development contributions required to be made by the developer in respect of other development in the City.

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.

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
- (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 costs) to report periodically to Council on its compliance with obligations under the planning agreement.
- 2.20 The Council may require a planning agreement to contain a provision establishing a mechanism under which the planning agreement is periodically reviewed with the involvement of all parties.
- 2.21 The Council will require a planning agreement to contain a provision requiring the parties to use their best endeavours to agree on any 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
 - (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 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 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 the 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 agreement.
- 2.26 Unless otherwise agreed by the parties in a particular case, the form of security will usually but not necessarily be an unconditional bank guarantee from an Australian Bank in favour of the Council to the full value of the developer's provision under the agreement and on terms otherwise acceptable to the Council.

Preparation of the planning agreement

- 2.27 The Council and the developer will, in each case, decide who will prepare the planning agreement relating to a particular application for an instrument change or development application.
- 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 may require a planning agreement to make provision for payment by the developer of part or all of the Councils' 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.
- 2.31 In particular cases, the Council may require the planning agreement to make provision for a development contribution by the developer towards the on-going administration of the agreement.

Notations on Certificates under s149 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 of the Act relating to the land the subject of the agreement or any other land.

Registration of planning agreements

- 2.33 The Council may require a planning agreement 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.
- 2.34 In the event of the sale or transfer of the land to which a planning agreement applies, the consent of the Council will be required to any assignment of the planning agreement notwithstanding its registration under s93H of the Act, having regard to the ability of the transferee to perform the terms and conditions of the planning agreement including the provision of any security, bank guarantee or bond which may be required by the agreement.

Dispute resolution

- 2.35 The Council will generally require a planning agreement to provide for mediation of disputes between the parties to the agreement, at their own costs, 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.

Hand-Over of Works

- 2.36 The Council will generally not accept the hand-over of a public work carries 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 consents (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.
- 2.37 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

- 2.38 If a planning agreement provides for the developer, at the developers 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 may require the parties to enter into a separate implementation agreement in that regard (see 2.18).
- 2.39 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

- 2.40 If a planning agreement provides for the developer to make a privately-owned facility available for public use, the Council may require the parties to enter into a separate implementation agreement in that regard (see 2.18).
- 2.41 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.

3. Procedures Relating to the Use of Planning Agreements

Council's negotiation process

- 3.1 The Council's negotiation process for planning agreements aims to be efficient, predictable, transparent and accountable.
- 3.2 The process 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?

- 3.3 The Council is required to ensure that a planning agreement is publicly notified as part of and in the same manner as the application for the instrument change or the development application to which it relates.
- 3.4 The planning agreement must therefore be negotiated and documented before it is publicly notified as required by the Act and Regulation.
- 3.5 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?

- 3.6 A Council Officer or officers with appropriate delegated authority will negotiate a planning agreement on behalf of the Council. No planning agreement shall become binding until it is approved and accepted by a resolution of Council.
- 3.7 The Councillors will not be involved in the face to face negotiation of the agreement.

Separation of Council's commercial and planning assessment roles

- 3.8 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

- 3.9 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

- 3.10 The Council may encourage the appointment of an independent person (the costs of the independent person will be borne by the developer) to facilitate or otherwise participate in the negotiations or aspects of it, particularly 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,
- (e) dispute resolution is required under a planning agreement.

Key steps in the negotiation process

3.11 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 persons to represent them in the negotiations, generally involving a minimum of 2 and maximum of 3 persons per party
- (c) the parties may appoint an additional 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 agreed party (Council or developer) will prepare the proposed planning agreement and provide a copy to the other party
- (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
- (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

3.12 A planning agreement must be publicly notified and be available for public inspection for a minimum period of 28 days as prescribed by the Act and Regulation.

- 3.13 The Council is required to ensure that a planning agreement is publicly notified as part of and in the same manner as with the application for the instrument change or the development application to which it relates.
- 3.14 Where the application, to which a planning agreement relates, is required by 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.
- 3.15 Where the application to which a planning agreement relates is permitted by 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.
- 3.16 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, or the formal consideration by the Council, or for any other reason.

When is a planning agreement required to be entered into?

- 3.17 A planning agreement is entered into when it is signed by all of the parties.
- 3.18 A planning agreement can be entered into at any time after the agreement is publicly notified in accordance with the Act and Regulation.
- 3.19 The Council will usually require a planning agreement to be entered into prior to the issue of the determination to the development to which the agreement relates under s.80 of the Act.
- 3.20 The Council will usually require a planning agreement to be entered into prior to the gazettal of any instrument change.

Planning Agreement Register

- 3.21 The Council is required to 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).
- 3.22 The Council will make the following available for public inspection (free of charge) during ordinary office hours:
- (a) the planning agreement register
 - (b) copies of all planning agreements (including amendments) that apply to the area of the Council
 - (c) copies of the explanatory notes relating to those agreements.
- 3.23 The Council will also make its planning agreement register available to the public on its website.