



Policy Owner: Director City Strategy

Category: 3. Our Future Planning

1. STATEMENT OF INTENT

1.1 This Policy sets out North Sydney Council's policy and procedures relating to planning agreements under the *Environmental Planning and Assessment Act 1979*. It establishes a fair, transparent and accountable framework governing the use of voluntary planning agreements by Council.

1.2 The objectives of the policy are :

- To broaden the range and extent of development contributions (monetary contributions, dedication of land or material public benefits) made by developers towards public facilities in the North Sydney local government area (LGA);
- To give all stakeholders in development greater involvement in determining the type, standard and location of public facilities and other public benefits and;
- To facilitate public participation and to allow the community to gain an understanding of the benefits of appropriate planning agreements for the provision of public benefit; and
- Where applicable, to achieve outcomes from development which ensure that the public has full access to the North Sydney's public natural assets.

2. ELIGIBILITY

2.1 This policy applies to all proposed development within the North LGA and will be considered by all Council staff, Councillors and consultants when determining proposals that involve proposed planning agreements.

2.2 The current legal and procedural framework for planning obligations is set out in Subdivision 2 of Division 6 of Part 4 of the Act and Division 1A of Part 4 of the Regulation.

A Practice Note titled "Planning Agreements" dated July 2005 has been issued by the Department of Planning for the purposes of clause 25B of the Regulation. While Council is not legally bound to follow the Practice Note, Council will be guided by it. Should there be any inconsistency between this policy and the Practice Note, this policy will prevail.

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- 2.3 Section 93F of the Act sets out the circumstances under which a planning agreement may be entered into. It provides that a planning agreement may be made between a planning authority, such as Council (or two more planning authorities) and a person (the developer):
- a) who has sought a change to an environment planning instrument (such as a rezoning application); or
 - b) who has made or proposes to make a development application; or
 - c) who has entered into an agreement with or is otherwise associated with a person in one of the above two categories.
- 2.4 The Land and Environment Court has held that s93F of the Act authorises a voluntary planning agreement to be made between a planning authority and a developer who proposes to modify an existing development consent.
- 2.5 Council, in its complete discretion, may negotiate a voluntary planning agreement in connection with any application by the developer for an instrument change, a development consent or modification to a development consent relating to any land in the North Sydney LGA.

3. DEFINITIONS

- 3.1 Act - means the *Environmental Planning and Assessment Act 1979*.
- 3.2 Contribution Plan - means a contribution plan approved under Section 94 EA of the Act for the purpose of requiring contributions under Section 94 or 94A of the Act.
- 3.3 Council - is North Sydney Council.
- 3.4 Developer - is a person who has sought a change to an environmental planning instrument (which includes the making, amendment or repeal of an instrument (s93F(11)), 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.
- 3.5 Development application - has the same meaning as in the Act.
- 3.6 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.
- 3.7 Explanatory note - means a written statement that provides details of the objectives, nature, effect and merits of a planning agreement, or an amendment to or revocation of a planning agreement, as required under clause 25E of the Regulation.

- 3.8 Instrument change - means a change to an environmental planning instrument to facilitate a development the subject of a planning agreement.
- 3.9 Net public benefit - 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.
- 3.10 Planning benefit - means a development contribution that confers a net public benefit.
- 3.11 Planning obligation - means an obligation imposed by a planning agreement requiring a developer to make a development contribution.
- 3.12 Practice Note - means the *Practice Note on Planning Agreements* published by the former Department of Infrastructure Planning and Natural Resources (July 2005).
- 3.13 Public - includes a section of the public.
- 3.14 Public benefit- is the benefit enjoyed by the public as a consequence of a development contribution.
- 3.15 Public facilities - means public infrastructure, facilities, amenities and services.
- 3.16 Public purpose - means any purpose that benefits the public, including but not limited to a purpose specified in Section 93F (s) of the Act.
- 3.17 Regulation - means the *Environmental Planning and Assessment Regulation 2000*.

4. PROVISIONS

4.1 Guiding Principles

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

- a) Planning decisions will not be bought or sold through planning agreements;
- b) Council will not allow planning agreements to improperly fetter the exercise of its functions under the Act, Regulation or any other act or law;
- c) Council will not use planning agreements for any purpose other than a proper planning purpose;

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- d) Development that is unacceptable on planning grounds will not be permitted because of public benefits offered by developers, unless those public benefits address or offset the impacts of concern;
 - e) Council will not seek benefits under a planning agreement that are wholly unrelated to a particular development, however a developer may offer benefits that are not connected to the proposed development;
 - f) When considering the merits of a proposed development or instrument change, the provision of any public facility or public benefits proposed in the planning agreement that is wholly unrelated to the application will be given little to no weight;
 - g) When considering a development or instrument change, Council will not give undue weight to a planning agreement;
 - h) Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed planning agreement; and
 - i) Council will not improperly rely on its position in order to extract unreasonable public benefits from developers under planning agreements.

Council generally will not agree to a planning agreement providing for any alleged 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 North Sydney LGA.

4.2 Timing of negotiation

Council is required to ensure that a proposed planning agreement is publicly notified as part of, in the same manner as and where practicable, at the same time as the application for the instrument change or development application to which it relates.

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

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

4.3 Matters for consideration

The matters that the Council may consider in any such negotiation may include, but are not limited to the need for contributions to provide for the following:

- a) compensation 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) meeting the demands created by the development for new public infrastructure, amenities and services;
- c) achieving the provision of affordable housing;

- d) addressing a deficiency in the existing provision of public facilities in the North Sydney LGA;
- e) achieving recurrent funding in respect of public facilities;
- f) prescribing inclusions in the development that meet specific planning objectives of Council;
- g) monitoring the planning impacts of development; and
- h) securing planning benefits for the wider community.

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, Council will consider to the fullest extent permitted by law:

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

4.4 Acceptability test to be applied to all planning agreements

Council will apply the following test in order to assess the desirability of a proposed voluntary 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 strategies and the circumstances of the case?
- b) Does the proposed planning agreement provide for a reasonable means of achieving the relevant purpose and outcomes and securing the benefits?
- c) Can the proposed planning agreement be taken into consideration in the assessment of the relevant instrument change or development application?
- d) Will the proposed planning agreement produce outcomes that meet the general values and expectations of the public and protect the overall public interest against planning harm?
- e) Does the proposed planning agreement promote Council's objectives in relation to the use of planning agreements as set out in this policy?
- f) Does the proposed planning agreement conform to the principles governing Council's use of planning agreements as set out in this policy?
- g) Are there any relevant circumstances that may operate to preclude Council from entering into the proposed planning agreements?
- h) Will the proposed planning agreement provide public benefits that bear a relationship to the development or is there justification for the provision of unrelated benefits?

4.5 Mandatory requirements of a planning agreement

- 4.5.1 Section 93F of the Act requires planning agreements to include provisions specifying:

- a) a description of the land to which the agreement applies;
- b) a description of the change to the environmental planning instrument to which the agreement applies or the development to which the agreement applies;
- c) 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;
- d) in the case of development, whether the agreement excludes (wholly or in part) or does not exclude the application of Section 94, 94A or 94 EF of the Act to the development;
- e) if the agreement does not exclude the application of section 94 to the development, whether benefits under the agreement are or are not to be taken into consideration in determining a development contribution under Section 94;
- f) mechanism for the resolution of disputes under the agreement;
- g) the enforcement of the agreement, in the event of a breach of the agreement by the developer;

4.5.2 Clause 25E(1) of the Regulation requires that an explanatory note must accompany a planning agreement that:

- a) summarises the objectives, nature and effect of the proposed agreement, amendment or revocation; and
- b) that contains an assessment of the merits of the proposed agreement, amendment or revocation, including the impact (positive or negative) on the public or any relevant section of the public.

4.6 Application of Section 94, Section 94A and Section 94EF to development to which a planning agreement relates

Council has no general policy on whether a planning agreement should exclude the application of Section 94, Section 94A or Section 94EF of the Act to development which the agreement relates. This is a matter for negotiation between Council and a developer having regard to the particular circumstances of the case.

If a planning agreement excludes the application of Section 94 or Section 94A to a particular development, the consent authority for the development or the Minister must be a party to the agreement.

The application of Section 94EF may not be excluded under a planning agreement without the consent of the Minister or a development corporation designated by the Minister to give such an approval.

4.7 Provision of security under a planning agreement

Council will generally require a planning agreement to make provision for security to cover the developer's obligations under the agreement. The form of security will generally be an unconditional bank guarantee from an Australian Bank in favour of the Council, to the full value of the developer's obligations under the planning agreement and on terms otherwise acceptable to Council.

The Council will consider other forms of security provided that the agreement provides for means of enforcement that, in the Council's opinion, eliminate or reduce the risk that the obligations under the planning agreement will not be performed.

4.8 Provision of Contributions

Council will require a planning agreement to include details relating to the provision of contributions, including:

- 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 work required by the planning agreement to be undertaken by the developer;
- c) the manner in which work is to be handed over to 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 of maintenance of land or works following handover to Council; and
- f) Council's involvement in any construction contracts to be entered into, including any tendering requirements.

There may be some circumstances where the parties are not able to resolve the specific details of these matters at the time the agreement is entered into, particularly if the agreement accompanies an application for an instrument change. If this is the case, Council may require the planning agreement to include clauses that require or specify the following:

- a) Designs to be subject to Council specification and approved by Council prior to the works being carried out;
- b) The outcomes or objectives the work must achieve and criteria for assessing those outcomes or objectives;
- c) Inspections of the work by Council and the correction of defects identified on inspection;
- d) Certification by the Council and the developer on completion of the works;
- e) Assignment of any rights and warranties under a construction contract held by the developer to the Council, so that the Council can enforce any rights under that contract regarding defects liabilities or otherwise;

- f) Terms for construction contracts such as defects liability periods and security for defects;
- g) Invitations to tender for construction contracts and/or the Council to be involved in awarding construction contracts; or
- h) Works and maintenance activities to be carried out to the satisfaction of the Council.

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

Council will require a planning agreement to make provision for payment by the developer of Council's reasonable costs of and incidental to preparing, negotiating and entering into the agreement. These costs will include any costs Council incurs in obtaining external legal advice.

Council may also require the payment of a monetary contribution for administration of the planning agreement, including enforcing and monitoring the agreement.

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

4.10 Notifications on certificates

Council will require a planning agreement to contain an acknowledgement by the developer that the Council will make a notation under Section 149(2) of the Act relating to the land that is the subject of the agreement or any other land associated with the agreement in accordance with Schedule 4 of the Regulation.

4.11 Registration of planning agreements

Council may require a planning agreement to contain a provision requiring the developer to agree to registration of the agreement pursuant to Section 93H of the Act and to obtain the agreement of any other relevant entities to the registration.

4.12 Dispute resolution

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

4.13 Assignment and dealings by the developer

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

- a) Council has given its consent to the proposed assignment or dealing;
- b) the developer has, at no cost to Council, first secured the execution by the person with whom it is dealing, of all necessary documents in favour of 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 planning agreement.

This restriction will cease to apply if the obligations under the planning agreement are fulfilled.

4.14 Entering into a planning agreement

Council will require a planning agreement to be entered into as a condition of consent to which the agreement relates in accordance with section 93I of the Act.

Where a planning agreement relates to an instrument change, the agreement will need to be entered into prior to the instrument change, however the agreement may become operational when a later event occurs, such as the grant of development consent that relies on the instrument change. This will depend on the circumstances in each case and can be negotiated between the parties.

If there are any indications that a developer has decided not to execute the planning agreement after it has been exhibited with a planning proposal, the Council will consider that to be a significant change to the planning proposal and will request the Minister not to proceed with the proposed amendment under s58(4) of the Act.

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

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

4.15 Planning agreement register

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. 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).

Council will make the following available for public inspection during ordinary office hours:

- a) This Policy (Voluntary Planning Agreements Policy);
- b) The planning agreement register kept by the Council;
- c) Copies of all planning agreements (including amendments) that apply to the area of the Council; and

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- d) Copies of the explanatory notes relating to those agreements or amendments.

Council will also make this policy and the planning agreement register available to the public on its website.

4.16 Recurrent charges

Planning agreements may require a developer to make contributions towards the recurrent costs of public facilities. Details regarding charges will need to be negotiated between the developer and the planning authority and documented within the draft agreement.

Where the public facility or public benefit is intended to serve the wider community, the planning agreement may 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.

4.17 Modification and discharge of the developer's obligations

Council will generally only agree to a provision in a planning agreement permitting the developer's obligation 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 out 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 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) Council and the developer otherwise agree to the modification for discharge of the agreement

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

4.18 Public notification of planning agreements

A proposed planning agreement must be publicly notified and available for public inspection for a minimum period of 28 days. Council is required to ensure that a proposed planning agreement is publicly notified as part of, in the same manner as and, where practicable, at the same time as the proposed instrument change or development application to which it relates. Where it is not practicable to notify the planning agreement at the same time as the instrument change or application it

must be notified as soon as possible afterwards.

Council will publicly re-notify and make available for public inspection a planning agreement and application to which it relates, if in the Council's opinion, a material change is made to the terms of the agreement 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, or the formal consideration by the Council or any other reason.

Council encourages the public to make submissions on planning agreements. Public submissions to planning agreement notifications will be considered by the Council in accordance with *North Sydney Development Control Plan 2013 - Part A, Section 4. Notification of Applications*.

4.19 Pooling of development contributions

Where a proposed planning agreement provides for a monetary contribution by the developer, Council may seek to include a provision permitting money paid under the agreement to be pooled with money paid under other planning agreements and applied progressively for the different purposes under those agreements. Pooling may be appropriate to allow public benefits to be provided in a fair, equitable and timely way.

5. RESPONSIBILITY/ACCOUNTABILITY

- 5.1 Staff with appropriate delegated authority will negotiate a planning agreement on behalf of Council.
- 5.2 Councillors will not be involved in the face-to-face negotiation of the agreement.
- 5.3 If Council has a commercial interest in the subject matter of a planning agreement as a landowner, developer or financier, Council will ensure that the Council officer who assesses the application to which a planning agreement relates is not the same Council officer, or a subordinate of the officer, who negotiated the terms of the planning agreement on behalf of Council in its capacity as landowner, developer or financier.
- 5.4 Council may appoint an independent person to facilitate or otherwise participate in the negotiation of a planning agreement, 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 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.

The cost of the independent person will be borne by the developer, unless otherwise agreed by the Council prior to the independent person being engaged.

6. RELATED POLICIES/DOCUMENTS/LEGISLATION

The Policy should be read in conjunction with the following Council instruments, policies and documents:

- Access to Council Information Policy
- Community Engagement Policy
- North Sydney Council Privacy Management Plan
- North Sydney Development Control Plan 2013
- North Sydney Local Environmental Plan 2013
- Open Government Policy

The Policy should be read in conjunction with the following legislation:

- Environmental Planning and Assessment Act 1979
- Environmental Planning and Assessment Regulation 2000
- Government Information (Public Access) Act 2009
- Local Government Act 1993
- Privacy and Personal Information Protection Act 1998
- State Records Act 1998

Version	Date Approved	Approved by	Resolution No.	Review Date
1	12 November 2012	Council	664	2012/13
2	18 February 2013	Council	61	2016/17
3	25 June 2018	Council	214	2020/21

Appendix 1 - Procedures relating to the use of planning agreements

Council's negotiation system for planning agreements aims to be efficient, transparent and accountable. Council will seek to ensure that negotiations of planning agreements run in parallel with applications for instrument changes or development applications so as not to unduly delay ordinary planning processes.

1. Process to entering into a planning agreement

The Council's preferred method for negotiation of a planning agreement will generally involve the following key steps:

1. Prior to lodgement of the relevant application by the developer, the Council (represented by an authorised delegate) and Developer (and any other relevant person) will decide whether to negotiate a planning agreement;
2. The parties will then appoint a person to represent them in the negotiations and also appoint a third person to attend and take minutes of all negotiations;
3. The parties will decide whether to appoint an independent person to facilitate or otherwise participate in the negotiations or aspects of it, and appoint such a person.
4. The parties will also agree on a timetable for negotiations and the protocols and work practices governing their negotiations;
5. The parties will then identify the key issues for negotiation and undertake the negotiations, including any negotiations or consultations with relevant public authorities;
6. If agreement on the general contributions to be offered is reached, the developer will prepare the proposed planning agreement including the explanatory note and provide a copy to Council;
7. The parties may undertake further negotiations on the specific terms of the proposed planning agreements;
8. Once agreement is reached on the terms of the proposed planning agreement, the developer may then make the relevant application to Council accompanied by a copy of the proposed agreement;
9. The proposed agreement and explanatory note will be notified and exhibited together with the relevant application;
10. Submissions will be considered and further amendments to the proposed agreement may be negotiated.

See clause 4.14 for details regarding execution and entering into a planning agreement.

Parties may be required to undertake further negotiations and a number of the above steps may need to be repeated as a result of the public notification process or its formal consideration by the Council in connection with the relevant application.

Throughout the process, the matter may be reported to Council for determination, depending on the complexity of the matter and relevant delegations. Developers should be aware that negotiations with Council staff are aimed at producing the terms of a proposed planning agreement that can be exhibited and formally considered by the Council (or the relevant staff with delegated authority) at the time the relevant application is considered. A preliminary

agreement with Council staff about the terms of the proposed agreement does not mean that the Council will ultimately agree to enter into the proposed agreement in the terms offered, or that the relevant application will be approved.

2. Preparation and form of a planning agreement

The developer will prepare a draft planning agreement relating to a particular application for an instrument change or development application which reflects the policies and procedures set out in this document. All planning agreements are to be accompanied by an explanatory note. Base templates for planning agreements and explanatory notes are set out at Appendix 2 and Appendix 3. The templates should be used as base documents only and as a guide for determining the types of matters that must be included in the relevant documents.

3. Methodology for valuing public benefits under a planning agreement

Unless otherwise agreed in a particular case, public benefits will be valued as follows:

3.1 Provision of land for a public purpose

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 who is experienced in valuing land in New South Wales (and who is acceptable to Council), on the basis of a scope of work which is prepared by Council. All costs of the independent valuer in carrying out such a valuation will be borne by the developer.

If the land to be dedicated is specified in a Contributions Plan, the provisions of that Plan must be considered when determining the value of the land.

3.2 Carrying out of works for a public purpose

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 (who is acceptable to Council), on the basis of the estimated value of the completed works being determined using the method that would ordinarily be adopted by a quantity surveyor. Council will prepare the scope of work for the independent quantity surveyor. All costs of the independent quantity surveyor in carrying out the work will be borne by the developer.

3.2 Material public benefit

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

4. Monitoring and reviewing of planning agreements

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

Council will require the planning agreement to contain a provision establishing a mechanism and relevant criteria for periodic review of the planning agreement with the involvement of all parties. This will include a review of the developer's performance under the agreement.

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

5. Hand-over of works

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 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.

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.

6. Management of land or works after hand-over

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 management and maintenance of the land or works to be carried out to the satisfaction of the Council or to achieve particular outcomes or objectives (see clause 4.8 of this policy).

Any dispute regarding the Council's specifications for the management and maintenance of the land or works may be dealt with under the dispute resolution provisions of the planning agreement.

7. Public use of privately-owned facilities

If a planning agreement provides for the developer to make a privately-owned facility available for public use, Council may require clauses to be inserted into the planning agreement to specify the arrangement or particular outcomes or objectives for the arrangement. Leases, licences or access agreements may be entered into separately to formalise the arrangement if required.

Appendix 2 - Planning Agreement Template

This template provides the general basis for a planning agreement. The specific terms of each agreement will be negotiated with and determined by the Council in accordance with this policy.

(Between Council and Developer)

PLANNING AGREEMENT

Parties

of, New South Wales (**Council**)

and

of, New South Wales (**Developer**)

Background

(For Development Applications)

- A. On _____, the Developer made a Development Application to the Council for Development Consent to carry out the Development on the Land.
- B. That Development Application was accompanied by an irrevocable offer by the Developer to enter into this Agreement to make Development Contributions towards the Public Facilities if that Development Consent was granted.

(For Changes to Environmental Planning Instruments)

- A. On _____, the Developer made an application to the Council for the Instrument Change for the purpose of making a Development Application to the Council for Development Consent to carry out the Development on the Land.
- B. The Instrument Change application was accompanied by an offer by the Developer to enter into this Agreement to make Development Contributions towards the Public Facilities if that Development Consent was granted.

Operative provisions

1. Planning agreement under the Act

The Parties agree that this Agreement is a planning agreement governed by Subdivision 2 of Division 6 of Part 4 of the Act.

2. Application of this Agreement

[Specify the land to which the Agreement applies and the development to which it applies.]

3. Operation of this Agreement

[Specify when the Agreement takes effect]

4. Definitions and interpretation

4.1 In this Agreement the following definitions apply:

Act means the Environmental Planning and Assessment Act 1979 (NSW).

Dealing, in relation to the Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the Land.

Development means [describe the subject development by reference to the Land, application numbers and the general description of the proposal]

Development Application has the same meaning as in the Act.

Development Consent has the same meaning as in the Act.

Development Contribution means a monetary contribution, the dedication of land free of cost or the provision of a material public benefit.

GST has the same meaning as in the GST Law.

GST Law has the meaning given to that term in A New Tax System (Goods and Services Tax) Act 1999 (Cth) and any other Act or regulation relating to the imposition or administration of the GST.

Instrument Change means the change to the Local Environmental Plan sought by the Developer and more particularly described in Schedule ___.

Land means Lot _____ DP _____, known as _____.

Local Environmental Plan means the North Sydney Local Environmental Plan 2001.

Party means a party to this agreement, including their successors and assigns.

Public Facilities means infrastructure, facilities, amenities and services that serve a public purpose.

Regulation means the Environmental Planning and Assessment Regulation 2000 (NSW).

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- 4.2 In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:
- (a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
 - (b) A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
 - (c) If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.
 - (d) A reference in this Agreement to dollars or \$ means Australian dollars and all amount payable under this Agreement are payable in Australian dollars.
 - (e) A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
 - (f) A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
 - (g) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
 - (h) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
 - (i) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
 - (j) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
 - (k) References to the word 'include' or 'including' are to be construed without limitation.
 - (l) A reference to this Agreement includes the agreement recorded in this Agreement.

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- (m) A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.
 - (n) Any schedules and attachments form part of this Agreement.

5. Development Contributions to be made under this Agreement

[Specify the development contributions to be made under the agreement; when they are to be made; and the manner in which they are to be made.]

6. Application of the Development Contributions

[Specify the times at which, the manner in which and the public purposes for which development contributions are to be applied.]

7. Application of s94, s94A and s94EF of the Act to the Development

[Specify whether and to what extent s94, s94A and s94EF apply to development, the subject of this Agreement.]

8. Registration of this Agreement

[Specify whether the Agreement is to be registered as provided for in s93H of the Act.]

9. Review of this Agreement

[Specify whether, and in what circumstances, the Agreement can or will be reviewed and how the process and implementation of the review is to occur.]

10. Dispute Resolution

[Specify an appropriate dispute resolution process that provides for mediation of disputes prior to exercising any other legal rights.]

11. Enforcement

[Specify the means of enforcing the Agreement.]

12. Notices

12.1 Any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:

- (a) Delivered or posted to that Party at its address set out below.
- (b) Faxed to that Party at its fax number set out below.
- (c) Emailed to that Party at its email address set out below.

Council

Attention:

Address:

Fax Number:

Email:

Developer:
Attention:
Address:
Fax Number:
Email:

- 12.2 If a Party gives the other Party 3 business days notice of a change of its address or fax number, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.
- 12.3 Any notice, consent, information, application or request is to be treated as given or made at the following time:
- (a) If it is delivered, when it is left at the relevant address.
 - (b) If it is sent by post, 2 business days after it is posted.
 - (c) If it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.
- 12.4 If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

13. Approvals and consent

Except as otherwise set out in this Agreement, and subject to any statutory obligations, a Party may give or withhold an approval or consent to be given under this Agreement in that Party's absolute discretion and subject to any conditions determined by the Party. A Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

14. Assignment and Dealings

[Specify the following and any other restrictions on the Developer's dealings in the land to which the Agreement applies and the period during which those restrictions apply. The developer may not assign its rights and obligations under the agreement nor have any dealings in relation to the land the subject of the agreement unless, in addition to any other requirements of the agreement:

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

15. Costs

The developer will pay the Council's reasonable costs of negotiating, preparing, executing, stamping and registering the Agreement.

[Specify any other provisions relating to costs of the Agreement.]

16. Entire agreement

This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with. No Party can rely on an earlier document, or anything said or done by another Party, or by a director, officer, agent or employee of that Party, before this Agreement was executed, except as permitted by law.

17. Further acts

Each Party must promptly execute all documents and do all things that another Party from time to time reasonably requests to affect, perfect or complete this Agreement and all transactions incidental to it.

18. Governing law and jurisdiction

This Agreement is governed by the law of New South Wales. The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them. The Parties will not object to the exercise of jurisdiction by those courts on any basis.

19. Joint and individual liability and benefits

Except as otherwise set out in this Agreement, any agreement, covenant, representation or warranty under this Agreement by 2 or more persons binds them jointly and each of them individually, and any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.

20. No fetter

Nothing in this Agreement shall be construed as requiring Council to do anything that would cause it to be in breach of any of its obligations at law, and without limitation, nothing shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

21. Representation and warranties

The Parties represent and warrant that they have power or enter into this Agreement and comply with their obligations under the Agreement and that entry into this Agreement will not result in the breach of any law.

22. Severability

If a clause or part of a clause of this Agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Agreement, but the rest of this Agreement is not affected.

23. Modification

No modification of this Agreement will be of any force or effect unless it is in writing and signed by the Parties to this Agreement.

24. Waiver

The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another Party. A waiver by a Party is only effective if it is in writing. A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

25. GST

If any Party reasonably decides that it is liable to pay GST on a supply made to the other Party under this Agreement and the supply was not priced to include GST, then recipient of the supply must pay an additional amount equal to the GST on that supply.

26. Section 149 Certificate

The developer acknowledges and agrees that the Council will include a notation that this Agreement has been entered into on any certificate issued under section 149 of the Act relating to the Land.

Execution

Dated:

Executed as an Agreement:

Appendix 3 - Explanatory Template

Environmental Planning and Assessment Regulation 2000
(Clause 25E)

Explanatory Note

Draft Planning Agreement
under s93F of the Environmental Planning and Assessment Act 1979

1. **Parties**

(Planning Authority)
(Developer)
2. **Description of Subject Land.**
3. **Description of Proposed Change to Environmental Planning Instrument/
Development Application.**
4. **Summary of Objectives, Nature and Effect of the Draft Planning Agreement.**
5. **Assessment of the Merits of the Draft Planning Agreement.**
6. **The Planning Purposes served by the Draft Planning Agreement.**
7. **How the Draft Planning Agreement promotes the Objects of the Environmental
Planning and Assessment Act 1979.**
8. **How the Draft Planning Agreement promotes the Public Interest.**
9. **How the Draft Planning Agreement promotes the Objects of the Local Government
Act 1993 under which the Council is constituted.**
10. **Whether the Agreement specifies that certain requirements must be complied with
prior to the issue of a construction certificate, occupations certificate or subdivision
certificate.**
11. **How the Draft Planning Agreement promotes the Elements of the Council's
Charter.**
12. **Whether the Draft Planning Agreement conforms with the Council's Capital Works
Program.**

13. The Impact of the Draft Planning Agreement on the Public or Any Section of the Public.

14. Other Matters

Signed and dated by All Parties