

COUNCIL POLICY



Policy name	Planning Agreements
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Abstract This policy establishes a framework to guide the preparation, negotiation and execution of Planning Agreements.	
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Endorsed by	EMT
Approved by	Gunnedah Shire Council, at its Ordinary Meeting of Council held 15 Aug 2018 Resolution number: 12.08/18
Policy Custodian	Director Planning and Environmental Services
Relevant to	Mayor and Councillors General Manager Council Planning and Infrastructure Staff Developers Community members.
Superseded Policies	N/A
Related documents	N/A
Related legislation	Environmental Planning and Assessment Act 1979 Environmental Planning and Assessment Regulation 2000
File number	1259273

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1. Purpose

1.1 This policy establishes a framework to guide the preparation of Planning Agreements. The purpose of this Policy is:

- (a) To establish an efficient, fair, transparent and accountable framework governing the use of Planning Agreements by Council;
- (b) To enhance planning flexibility for Council and development proponents through the use of Planning Agreements;
- (c) To enhance the range and extent of development contributions made by developments/developers toward public facilities;
- (d) To set out Council's specific policies on the use of Planning Agreements; and
- (e) To set out how, and by whom, negotiations are undertaken.

2. Scope

2.1 This policy applies to any proposed application by a developer for an instrument change or for development consent relating to any land in the Gunnedah Shire Council Local Government Area. The policy applies to all Planning Agreements, including Planning agreements pursuant to Local Development, State Significant Development and projects for which Council is not the Consent Authority.

3. Definitions

Term	Definition
Act	Environmental Planning and Assessment Act, 1979
Development Application	Has the same meaning as the Act.
Instrument Change	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 Agreement	A voluntary planning agreement between one or more planning authorities and a Developer: <ol style="list-style-type: none">(a) Who seeks to change an environmental planning instrument which may be for rezoning of other purposes; or(b) Who has made, or proposes to make, a Development Application.

Planning Benefit	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	An obligation imposed by a Planning Agreement on a developer requiring the developer to make a development contribution.
Public	The community as a whole or, where context requires, a section of the community.
Public benefit	The benefit enjoyed by the public as a consequence of a development contribution.
Public Facilities	Public infrastructure, facilities, amenities and services.
Public Purpose	Includes (without limitation) any of the following: <ul style="list-style-type: none"> (a) The provision of (or the recoupment of the cost of providing) public amenities or public services; (b) The provision of (or the recoupment of the cost of providing) affordable housing; (c) The provision of (or the recoupment of the cost of providing) transport or other infrastructure relating to land; (d) The funding of recurrent expenditure relating to the provision of public amenities or public services, affordable housing or other infrastructure; (e) The monitoring of the planning impacts of a development; and (f) The conservation and enhancement of the natural environment.
Regulation	The Environmental Planning and Assessment Regulation, 2000.

4. Policy principles

4.1 Fundamental Principles governing the use of planning agreements

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 will not be permitted because of planning benefits offered by developers that do not make the development acceptable in planning terms;
- (c) That Council will not use Planning Agreements to improperly influence 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 other purpose other than for a planning purpose;
- (e) The Council will not seek benefits under a Planning Agreement that are unrelated to particular development;

- (f) The Council will not allow the interests of individuals or groups to outweigh the public interest when considering a proposed Planning Agreement; and
- (g) The Council will not properly rely on its statutory position in order to extract unreasonable public benefits from developers under Planning Agreements.

5. Policy statement

5.1 The Council's strategic objectives with respect to the use of Planning Agreements are as follows:

- (a) To provide an enhanced and more flexible development contribution system for Council;
- (b) To supplement or replace, as appropriate, the application of Section 7.11 and 7.12 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 benefits;
- (d) To allow the community, through the public participation process under the Act, to gain an understanding as to the redistribution of the costs and benefits of development in order to realise community preferences for the provision of public benefits; and
- (e) To leverage planning benefits from development wherever appropriate.

5.2 Circumstances in which Council will consider negotiating a Planning Agreement.

Council may negotiate a Planning Agreement with a developer in connection with any proposed application by the developer for an instrument change or for development consent relating to any land in the Gunnedah Shire Council Local Government Area.

Some examples of circumstances where Planning Agreements may be appropriate include:

- (a) To 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 standards created by the developer for new public infrastructure, amenities and services;
- (c) Address a deficiency in the existing provision of public facilities in the Council's Local Government 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) Offset potential impacts elsewhere;
- (g) Monitor the planning impacts of development; and
- (h) Secure planning benefits for the wider community.

The acceptance of an offer to enter into a Planning Agreement is at the absolute discretion of Council.

5.3 Acceptability test to be applied to all Planning Agreements.

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

- (a) Is the 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 Planning Agreement result in a public benefit?
- (c) Does the Planning Agreement provide for a reasonable means of achieving the relevant purpose?
- (d) Can the Planning Agreement be taken into consideration in the assessment of the relevant rezoning application or development application?
- (e) Will the Planning Agreement produce outcomes that meet the general values and expectations of the community and protect the overall public interest?
- (f) Are there any relevant circumstances that may operate to preclude the Council from entering into the proposed Planning Agreement?

5.4 Relationship to Section 7.11 or Section 7.12 contributions

Normally public benefits in Planning Agreements are additional to required contributions. By exception, a Planning Agreement may partly or fully exclude the application of section 7.11 or section 7.12 (of the Act) contributions in relation to developments, the subject of a Planning Agreement.

The ability in a Planning Agreement to partly or wholly exclude the application of section 7.11 or section 7.12 contributions and benefits of a development gives Council a degree of flexibility to redistribute the financial, environmental and social costs and benefits of a development. This flexibility provides the opportunity to address issues that may not have been anticipated or may not be able to be appropriately addressed with the more rigid requirements of contributions contained in section 7.11 or section 7.12 of the Act.

Where a Planning Agreement partly or fully excludes the application of section 7.11 or section 7.12 of the Act, the Act prevents Council from imposing a condition of development consent requiring the payment of those contributions except to the extent that it requires the payment of the balance of those contributions where the Planning Agreement only partly excludes them.

A Planning Agreement may also exclude the benefits provided under such agreement being considered in the assessment of section 7.11 or section 7.12 contributions. In such cases, the Act precludes the application of section 7.11(6) which would otherwise require the consideration of any land, money or material public benefit contributed to the consent authority when assessing section 7.11 contributions or 7.12 contributions.

5.5 Public notification

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

If the Planning Agreement is in connection with a Development Application, the public notice shall be given, if practicable, as part of the public notification of the Development Application.

If the Planning Agreement is in connection with a proposal for an Instrument change, the public notice shall be given, if practicable, as part of any public notice of the relevant planning proposal.

Amendments may be required as a result of public submissions or for other reasons. Where amendments are required to a draft Planning Agreement, the amended draft Planning Agreement may be re-exhibited at Council's discretion.

5.6 Pooling of Development Contributions

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. Pooling may be appropriate to allow public benefits to be provided in a fair and equitable way, particularly essential infrastructure anywhere in the Gunnedah Shire Local Government Area.

5.7 Methodology for valuing public benefits under a Planning Agreement

The value of a benefit proposed under a Planning Agreement will be determined prior to the agreement being publicly notified.

(a) Dedication of Land

Where the Development Contribution under a Planning Agreement includes dedication of land and the value of that land is to be taken into account, Council may seek the services of an appropriately qualified land valuer or land economist as appointed by Council and at the cost of the developer in order to value the land being dedicated.

(b) Works for a public purpose

If a contribution under a Planning Agreement is for the carrying out of works for a public purpose, Council may value that development contribution on the basis of a cost estimate for the works. This may be prepared by a suitably qualified professional, such as a quantity surveyor or land economist appointed by Council and paid for by the proponent.

Works required as part of a development consent

In the event a Planning Agreement proposes works and services that would normally be provided as a condition of development consent, these works and services will be deemed to have no value under the Planning Agreement.

5.8 Costs

The costs of preparing, negotiating, executing, varying and monitoring compliance with the Planning Agreement, including any external or internal cost of employing independent consultants and/or independent third parties are all costs associated with entering into a Planning Agreement. Generally, Council will require that all reasonable costs are met by the developer.

5.9 Registration of Planning Agreements

In accordance with Section 7.6 of the Act, Council will generally require a Planning Agreement to contain a provision requiring the developer to agree to registration of the agreement on the title to land to which the agreement applies. The costs associated with the registration shall be borne by the developer.

5.10 Monitoring and review

Council will monitor the performance of the developer's obligations under the Planning Agreement.

6. Negotiation Procedures and Probity

6.1 Introduction

Council's negotiation system for Planning Agreements aims to be efficient, predictable, transparent and accountable. Council will aim to ensure that the final negotiation of planning agreements runs in parallel with applications for instrument changes or development applications so as not to unduly delay the approval.

Where possible, Council will publicly notify a planning agreement in the same manner and at the same time as the application for the instrument change or the development application to which it relates.

Council's preference is therefore to have the planning agreement negotiated and documented before it is publicly notified as required by the Act and Regulation. It is also preferable that a planning agreement is negotiated before lodgement of the relevant application and that it accompanies the application on lodgement.

In the case of State Significant Development staging of the Negotiation stage, may necessarily be different.

6.2 Steps in the negotiation process:

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

1. Prior to the lodgement of the relevant application by the developer, Council and the developer (and any other relevant person) will decide whether to negotiate a planning agreement. The initial point of contact will be the Director Planning and Environmental Services.
2. The parties will decide whether to appoint an independent person to facilitate or otherwise participate in negotiations or aspects of it, and appoint such person.
3. A timetable for negotiations and the protocols and work practices governing their negotiations will be agreed between the parties.
4. The key issues for negotiation will be identified by the parties, and the negotiations over these issues will take place.
5. If agreement is reached, the developer (and any other relevant party) will prepare the proposed planning agreement including the explanatory statement, and provide a copy of it to Council.
6. The parties may undertake further negotiation on the specific terms of the proposed planning agreement as necessary.
7. Once agreement is reached on the terms of the proposed planning agreement, the developer may then make the relevant application to the Consent Authority accompanied either by a copy of the proposed agreement or by an offer to enter into such agreement with specifics of the agreement set out in detail.
8. Public Exhibition, in accordance with the Act and Regulations, will then take place.

The Parties may be required to undertake further negotiations and, hence, a number of the abovementioned steps may need to be repeated as a result of the public exhibition phase.

All costs associated with the negotiation of a planning agreement, such as the appointment of an independent person, are to be borne by the developer.

Developers should also be aware that depending on the scope of the development, the consent authority may not be Gunnedah Shire Council in all circumstances.

It should also be noted that it is customary for Council to seek the advice of appropriately qualified legal practitioners and specialist consultants at various stages of the negotiation and the Planning Agreement process generally.

6.3 Probity

Probity is important to Gunnedah Shire Council and it will ensure that the negotiation of any planning agreement is fair, transparent and is directed at achieving public benefits in an appropriate manner which is free of corruption.

Council will:

- Notify planning agreements to ensure they are open and transparent – specifically achieving maximum public awareness of the matters contained in a planning agreement and the potential benefits of an agreement.
- Ensure appropriate delegations and separation of responsibilities in considering development applications that involve planning agreements – specifically the need to ensure processes adequately address the level of risk and corruption of a process while at the same time being appropriate to the likely level of risk.
- Ensure that modifications to approved development should be subject to the same scrutiny as the original development application.
- Ensure that Councillors and Council staff understand their varied roles, some of which have potential to conflict.
- Take every step to ensure that conflicts of interest are ameliorated to the greatest extent possible, specifically, independent assessment by third parties where Council has an interest in not entering into any contractual arrangement which purport to guarantee outcomes that are subject to separate regulatory processes.

Apart from the above procedures, further procedures that will be implemented to address these matters may also include, but not be limited to the following:

- Councillors may be (where deemed desirable by Council, but not usually) involved in the face to face negotiation of the agreement and will ultimately execute the planning agreement as part of their role as Councillors.
- Council will:
 - Outline to their negotiating team/officer their clear expectations of an outcome of a VPA with a proponent prior to negotiations commencing;
 - Receive regular reports on the progress of negotiations.
- A Council officer (or negotiating team appointed by Council) with appropriate delegated authority, (and in consultation with Council as per the dot point above), will negotiate a planning agreement on behalf of Council in accordance with this policy.
- Council may involve an independent person to facilitate or otherwise participate in the negotiations or aspects of it, particularly where this will lead to a better planning outcome.

- The Council will ensure that all negotiations with a developer and their consultants are sufficiently documented.
- Where the Council has a commercial stake in the development, which is the subject of a Planning Agreement, it will take appropriate steps to ensure that it avoids a conflict of interest between its role as planning authority and its commercial interest in the development.

7. Accountability, roles and responsibilities

7.1 Policy Custodian

The Policy Custodian, the Director Planning and Environmental Services, is the officer accountable for managing policy compliance and initiating the policy review process. They will also have the responsibility for all aspects of policy implementation, unless appropriately delegated to another officer. These responsibilities include being the primary contact point for advice on the policy or its implementation; establishing and maintaining Council's records in relation to the policy; proposing amendments; and managing the consultation process when the policy is due for review.

8. Acknowledgements

The following acknowledgements are made recognising organisations or documents that have provided a basis, instructive comment or templates that have been used to develop this policy:

- Draft Dubbo Regional Council Policy – Planning Agreements
- Waverly Council Planning Agreement Policy.

9. Version control and change history

Date	Version	Approved by & resolution no.	Amendment
9/4/2018	Draft		Initial draft for Council endorsement for exhibition
22/5/2018	Draft		Draft for Councillor Workshop
5/6/2018	Draft		Post Workshop Draft
25/6/2018	Draft	Council Resolution 9.06/18	Public Exhibition Version
15/8/2018	Final	Council Resolution 12.08/18	Adopted Version