



CUMBERLAND  
CITY COUNCIL

# Planning Agreements Guidelines

## AUTHORISATION & VERSION CONTROL

<b>Guideline Number</b>	GDL-012
<b>Guideline Owner</b>	Director Environment and Planning
<b>Date Approved</b>	16 December 2020
<b>Version No</b>	2.0
<b>Document ID</b>	8676960
<b>Review Date</b>	December 2024

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## **Draft Cumberland Planning Agreements Guidelines**

These Guidelines support the Cumberland Planning Agreements Policy (Policy) and explain how agreements can be negotiated, publicly exhibited for comments, and implemented.

## Definitions

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

**Council** means Cumberland City Council.

**DCP** means a DCP applying to the site of the proposed development or planning proposal. Note that there is more than one DCP applying in the Cumberland City Council area following Council amalgamations.

**Developer** is a person who has sought a change to an environmental planning instrument (which includes the making, amendment or repeal of an instrument (s7.4(1)), or who has made or proposes to make a development application, or who has entered into an agreement with or is otherwise associated with such a person.

**Development application** has the same meaning as in the Act.

**Development contribution** means the provision made by a developer under a planning agreement, being a monetary contribution, the dedication of land free of cost or the provision of a material public benefit to be used for or applied towards a public purpose.

**Development proposal** means a development application or a planning proposal.

**Draft Secretary's Practice Note on Planning Agreements** means the Draft Practice Note Planning Agreements published by the NSW Department of Planning, Industry and Environment (April 2020).

**Explanatory note** means a written statement that summarises the objectives, nature and effect of the proposed planning agreement, amendment or revocation, and contains an assessment of the merits of the proposed planning agreement, an amendment or revocation including the impact (positive or negative) on the public or any relevant section of the public.

**LEP** means a Local Environmental Plan applying to the site of the proposed development or planning proposal.

**Low household income** means 50% – 80% of the median Sydney income.

**Moderate household income** means 80 – 120% of median Sydney income.

**Net public benefit** means an overall gain to the public resulting from the consideration of the effects of both the development proposal and the development contributions under a planning agreement.

**Planning agreement** has the meaning given in s7.4(1) of the Act.

**Planning benefit** means a planning agreement contribution that confers a net public benefit, that is, a benefit that exceeds the benefit derived from measures that would address the impacts of particular development on surrounding land or the wider community.

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

**Planning proposal** has the same meaning as in the Act.

**Planning proposal request** is a planning proposal requested or applied for by a developer.

**Practice Note (2005)** means the Practice Note on Planning Agreements published by the Department of Infrastructure Planning and Natural Resources (July 2005).

**Practice Notes** includes both Practice Note (2005) and the Draft Secretary's Practice Note on Planning Agreements (2020).

**Public** includes a section of the public.

**Public benefit** is the benefit enjoyed by the public as a consequence of a development contribution.

**Public facilities** means public infrastructure, facilities, amenities and services.

**Public purpose** is defined in s7.4(2) of the Act.

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

**Very low household income** means 50% (or less) of the median Sydney income.

# **1 INTRODUCTION**

## **1.1 Name of Guidelines**

These Guidelines are known as the Cumberland City Council Planning Agreements Guidelines ("Guidelines").

## **1.2 Application of Guidelines**

These Guidelines apply to all planning agreements proposed or entered into by Council and apply to all land in the local government area of Council (LGA), including any land owned by Council. These Guidelines apply to land outside of the Council LGA in the case of a joint planning agreement between Council and another council or planning authority for land outside of the Council LGA.

The appendices do not form a formal part of these Guidelines and may be amended at any time without a resolution of Council.

## **1.3 Purpose**

These Guidelines sets out Council's procedures relating to planning agreements under s7.4 of the Act. The purpose of these Guidelines is to establish a framework to guide the use of planning agreements by Council.

## **1.4 Objectives for using Planning Agreements**

Council's objectives for using planning agreements include:

- a) Establish a fair, transparent, consistent and accountable framework that governs the negotiation, preparation and implementation of planning agreements by Council.
- b) Facilitate flexible and innovative approaches to the delivery of infrastructure and services that is consistent with Council's corporate and strategic planning context.
- c) Broaden the range and extent of development contributions for public purposes arising from development.
- d) Enable development contributions under a planning agreement to fairly apportion the costs and benefits of development.
- e) Ensure that development delivers a planning outcome that contributes to a net public benefit for the wider community, consistent with relevant Council policies and priorities.

## **1.5 What do these Guidelines set out?**

These Guidelines set out Council's approach to the use of planning agreements when considering development applications and applications for a change to LEPs in the Cumberland LGA. In particular, these Guidelines set out:

- a) the circumstances in which Council may consider entering into a planning agreement.
- b) the matters ordinarily covered by a planning agreement.
- c) the form of development contributions which may be sought under a planning agreement.
- d) the kinds of public benefits which may be negotiated.
- e) the method for determining the value of public benefits.
- f) when, how and where public benefits will be provided.
- g) probity measures and the procedures for negotiating and entering into planning agreement.

- h) Council's policies on other matters relating to planning agreements.

## **1.6 Statutory Framework**

The current legal and procedural framework for planning agreements is set by Division 7.1 of Part 7 of the Environmental Planning and Assessment Act 1979 and Division 1A of Part 4 of the Environmental Planning and Assessment Regulation 2000.

These Guidelines have been guided by the following:

- The Practice Note on Planning Agreements, Department of Infrastructure Planning and Natural Resources (July 2005)
- The Draft Practice Note Planning Agreements and the Ministerial Direction for Planning Agreements – Draft for Consultation published by the Department of Planning, Industry and Environment (April 2020)
- The Development Assessment Internal Audit Tool, Independent Commission against Corruption (2010)
  - The Submission to the Draft Voluntary Planning Agreement Policy, IPART (December 2016)
  - Direct Negotiations – Guidelines for Managing Risks in Direct Negotiations, Independent Commission Against Corruption (May 2006)
- Economic Advice on Value Sharing for Planning Agreements, SGS Economics and Planning (August 2017)

Whilst Council is not legally bound to follow the Practice Note, it will be guided by the Practice Note. If there is any inconsistency between the Practice Note and the Policy or these Guidelines, Council will be guided by the Policy and these Guidelines. The Department of Planning and Environment issued a further Draft Practice Note on Planning Agreements in April 2020 for comment. The Policy and these Guidelines may be amended, if required, for consistency with any revised Practice Note.

These Guidelines are not legally binding. It is intended to provide a guide for Council officers and all persons dealing with Council concerning planning agreements. Council considers that the process involved in negotiating and finalising planning agreements will be more efficient and effective if the Policy and these Guidelines are followed to the fullest extent possible but recognises that each offer to enter into a planning agreement must be assessed on its merits having regard to the particular circumstances.

## **1.7 Mandatory Requirements of a Planning Agreement**

s7.4(3) of the Act requires planning agreements to include provisions specifying:

- a) A description of the land to which the planning agreement applies.
- b) A description of the change to the environmental planning instrument to which the planning agreement applies, or the development to which the planning agreement applies.
- c) The nature and extent of the provision to be made by the developer under the planning 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 planning agreement excludes (wholly or in part) or does not exclude the application of s7.11, s7.12 or s7.24 of the Act to the development.



- e) If the planning agreement does not exclude the application of s7.11 of the Act to the development, whether benefits under the agreement are or are not to be taken into consideration in determining a development contribution under s7.11 of the Act.
- f) A mechanism for the resolution of disputes under the planning agreement.
- g) The enforcement of the planning agreement by a suitable means, such as the provision of a bond or guarantee, in the event of a breach of the agreement by the developer.

The Act does not preclude a planning agreement containing other provisions that may be necessary or desirable in particular cases, except as provided by law. Planning agreements will also contain clauses that reflect Council's requirements as set out in these Guidelines.

A template planning agreement is provided that is Council's basic preferred form. This form may be amended to suit particular circumstances. The specific terms of each planning agreement will be negotiated with and determined by Council in accordance with the Policy and these Guidelines. Please refer to Appendix B.

## **1.8 Explanatory Note**

Clause 25E(1) of the Regulation requires that an explanatory note to be exhibited with each proposed planning agreement. The explanatory note must:

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

The explanatory note must be prepared jointly by the parties proposing to enter into the planning agreement. The specific terms of each explanatory note will depend on the terms of the planning agreement to which it relates. A template explanatory note is provided. Please refer to Appendix C.

## **1.9 Relationship to other Corporate Strategic Documents**

Planning agreements should align with, or not be inconsistent with, the infrastructure and services priorities identified in key Council documents such as Council's corporate strategic plans, strategies, and land use planning frameworks.

## **1.10 Relationship to the Local Infrastructure Contributions Plan and Infrastructure Delivery Plans**

Development contributions achieved via planning agreements can be used to deliver the following:

- a) Land, infrastructure and services identified in the Cumberland Local Infrastructure Contributions Plan and infrastructure delivery plans.
- b) Land, infrastructure and services identified in these Guidelines.
- c) Land, infrastructure or services not identified in the Cumberland Local Infrastructure Contributions Plan or infrastructure delivery plans but that are of a higher priority.

Acceptance of any land, infrastructure or services not identified in Council's existing local infrastructure contributions plan and/or other infrastructure delivery plans or in these Guidelines will be at the sole discretion of Council.

## **2 PLANNING AGREEMENT FRAMEWORK**

### **2.1 Principles underlying the use of planning agreements**

- 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.
- d) The consideration, negotiation and assessment of a planning agreement will, to the extent reasonably practicable and as required by law, be separated from the consideration of the planning merits of a development application or a planning proposal.
- e) Council will not use planning agreements as a means to overcome revenue raising or spending prohibitions to which it is subject or for other improper purposes.
- f) 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.
- g) Council will prefer benefits under a planning agreement to have some broad public benefit in relationship to particular development or the locality of the development, unless the benefit aligns to Council's corporate strategic documents, existing contribution plan, infrastructure identified in these Guidelines, or other infrastructure delivery documents adopted by Council.
- h) When considering a planning proposal or development application, Council will not give undue weight to a planning agreement.
- i) Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed planning agreement.
- j) Council will not improperly rely on its position in order to extract unreasonable public benefits from developers under planning agreements.
- k) Where Council has a commercial interest in development that 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 a planning authority and its interest in the development.
- l) The community is entitled to a share of the unearned increment of land value uplift as a consequence of the actions of Council as a planning authority.
- m) Council will generally not agree to a planning agreement which seeks any alleged surplus value being refunded to the developer. Council will also not agree to an offset against s7.11 contributions or s7.12 levies required to be made by the developer for other (future) development in the Council LGA.

### **2.2 Acceptability test to be applied to all planning agreements**

The Practice Note sets out guidelines and safeguards in the application of planning agreements. These include determining the acceptability and reasonableness of planning agreements. Planning Agreements will be tested for acceptability against the following tests:

- a) Does the proposed planning agreement satisfy the requirements contained in the Act and Regulation?
- b) Does the proposed planning agreement comply with the principles set out in clause 2.1 of these Guidelines?
- c) Is the proposed planning agreement directed towards legitimate planning purposes, that can be identified in the statutory planning controls and other adopted planning

strategies and policies applying to development and the particular circumstances of the case?

- d) Does the proposed planning agreement provide for public benefits that bear a relationship to the development? If the benefits are wholly unrelated to the development, is there planning justification for the provision of such benefits?
- e) Is there a planning justification for the provision of particular public benefits offered by the developer?
- f) Do the proposed benefits align with Council's corporate strategic documents, existing development contribution plan, infrastructure identified in these Guidelines or other infrastructure delivery documents adopted by Council?
- g) Will the proposed planning agreement produce outcomes that meet the general values and expectations of the public and protect the overall public interest?
- h) Does the proposed planning agreement provide for a reasonable means of achieving the desired outcomes as well as adequate security in the event of default?
- i) Will the proposed planning agreement cause unreasonable, adverse environmental or amenity impacts?
- j) Is the quantum of public benefits being offered in Council's view commensurate with the value of development contributions that Council considers are reasonably due in the circumstances?
- k) Are there any relevant circumstances that may operate to preclude Council from entering into the proposed planning agreement?

Notwithstanding the above, Council is not obliged to enter into a planning agreement with a developer.

## **2.3 What matters may Council consider?**

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

- a) Whether the planning agreement delivers a public purpose as defined by s7.4 of the Act.
- b) Whether the proposed development contribution is needed and aligns with Council's strategic corporate documents, existing local infrastructure contributions plan, infrastructure identified in these Guidelines, or other infrastructure delivery documents adopted by Council.
- c) Whether the proposed development contribution can be achieved via an alternative mechanism such as a condition of development consent.
- d) The extent to which the proposed development contribution satisfies a community need and would secure planning benefits for the wider community.
- e) Whether the planning agreement(s) meets the demands created by the development for new public infrastructure, amenities and services.
- f) Whether rectification of an existing deficiency in the existing provision of public facilities in Council's area will occur.
- g) What impact the proposed development contribution will have on Council's asset management strategy, including the ongoing operational and maintenance costs of unplanned infrastructure being dedicated to Council.
- h) Whether recurrent funding of public facilities is required or provided and any long-term cost implications to Council.
- i) The extent to which Council needs to monitor the planning impacts of development.
- j) Whether the development contribution under the proposed planning agreement would provide 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.

- k) Whether the development contribution under the proposed planning agreement would achieve the provision of affordable housing in accordance with these Guidelines.

## **2.4 When may Council consider entering into a planning agreement?**

Council will consider entering into a planning agreement when a developer or the person who has entered into an agreement with the developer or is otherwise associated with a developer:

- proposes to, or has made a planning proposal request to enable the carrying out of development, or
- proposes to, or has made, a development application or a modified development application, or
- proposes to, or has made, a complying development application.

Council can require a planning agreement to be entered into as a condition of development consent, but only if it requires a planning agreement that is in the terms of an offer made by the developer in connection with the development application, a complying development certificate, or a change to an environmental planning instrument sought for the purposes of making the development application or complying development certificate.

Under s4.15(1)(a)(iia) of the Act, Council is required to take into consideration any draft planning agreement that a developer has offered to enter into or has been entered into, when determining a development application.

Notwithstanding the above, Council is not obliged to enter into a planning agreement with a developer.

## **2.5 Planning agreement contributions Council will consider in a planning agreement**

The planning agreement contribution negotiated under a planning agreement could comprise one or more of the following (to Council):

- a monetary contribution.
- dedication of land free of cost.
- partial or full delivery of new or enhanced infrastructure works / facilities free of cost, including any contribution towards ongoing maintenance of those works.
- dedication of affordable housing or the like free of cost.
- expansion, upgrades, augmentations, embellishments, fit outs and resourcing of existing infrastructure / public spaces / facilities.
- any other public benefit, as agreed to by Council.
- a combination of the above.

See Appendix D for a list of infrastructure, facilities and services that could constitute a material public benefit.

See Appendix E for matters to be considered in the assessment of land dedication.

Any planning agreement contribution must be for a public purpose as defined by the Act, and meet the criteria nominated below:

- Long lived infrastructure works that are identified in an existing local infrastructure contributions plan, corporate strategic document, in these Guidelines or other infrastructure delivery document or policy adopted by Council.
- Dedication of land in keeping with Council's existing land reservation maps, an existing development contributions plan, corporate strategic instrument, that is identified in these Guidelines or other infrastructure delivery document or policy adopted by Council.
- Affordable housing as outlined in these Guidelines and consistent with the intent of Council's strategies and policies in this area.
- Monetary contributions toward infrastructure delivery and/or land acquisition (including recoupment cost or recurrent expenditure), in line with criteria above.
- Planning agreement contributions that meet the following criteria and are endorsed by Council.
  - Will provide for a substantial material benefit to the community, and
  - Meet a need of the community that was not identified (or known) at the time the contributions plan or corporate strategic documents were written, and/or
  - Deliver infrastructure needs identified in relevant regional or district strategic plans, or similar metropolitan strategy documents applying to Council.

## **2.6 Value of the Planning Agreement**

The value of the development contributions to be negotiated under a planning agreement must be consistent with the provisions of any relevant planning instrument (including draft) and development control plan. Clause 2.19 describes how Council will value public benefits under a planning agreement.

In the absence of any draft or adopted planning instrument, Council will consider, as a matter of public interest, whether satisfactory arrangements have been or will be made for the provision of community infrastructure, given the likely increase in demand for services and infrastructure. Council may also consider the appropriateness of value capture contributions, particularly in connection with identified infrastructure needs not met by the Local Infrastructure Contributions Plan (Appendix G).

When considering the value of contributions offered under a planning agreement, Council will take into account all circumstances of the particular case, including any open book analysis, that enables Council to consider other matters that affect the project viability specifically as a result of the planning agreement.

The documents provided by the developer for an open book analysis will be determined by Council in accordance with any internal procedure for undertaking the assessment.

## **2.7 Value Capture Contributions**

Where Council considers that value capture contributions are appropriate in respect of a particular offer to enter into a planning agreement, the amount of value capture contributions payable will be determined in accordance with the following formula:

$$C = [RLV - MV] \times A\%$$

Where:

C = Development contributions

RLV = Hypothetical residual land value of the subject land as a development site following either an instrument change, plus associated or consequential changes to gazetted Cumberland LEP or Development Control Plan(s), applying to the site, or the consent to development on the site allowing an exceedance of development standards or other planning controls, which in both cases allow intensified development. RLV is to be expressed as \$/m<sup>2</sup> of gross floor area (GFA) for transparency and public record. See Appendix F for details on how RLV is calculated.

MV = Current Market value (MV) of subject site having regard to the highest and best use of the site being determined to be either its current residual land value consistent with the existing development standards/planning controls under the gazetted planning controls or its existing improved value void of any price premium that might occur in the purchase price for any speculated land rezoning.

A = The percentage of value capture to be considered. A rate of 50% is considered by Council as a starting point for negotiations.

The developer will be required to provide Council with sufficient details to determine a fair market value under the existing statutory planning controls and the hypothetical RLV from the exceedance of existing development standards/planning controls. The uplift in land value shall be expressed as \$/sqm of GFA of additional floor space achieved and may be informed by relevant recent market sales in the area. Such documentation provided to Council is to be verified by a certified practising valuer and/or qualified and experienced land economist. Council staff responsible for the planning agreement may engage an independent land economist and other specialists, such as a quantity surveyor, to review information provided by the developer. Costs incurred by Council will be met by the developer.

## **2.8 Dedication of land**

Dedication of land to Council negotiated under a planning agreement must be at no cost to Council. Council may, at its discretion, offset the value of land against monetary contributions for the same contribution type identified in Council's local infrastructure contributions plan or infrastructure schedule, but only land ascribed a value under this plan shall be entitled to an offset.

Where Council requires dedication of land or the creation of an interest in land as a condition of development consent, and such dedication or interest is not covered by the Cumberland Local Infrastructure Contributions Plan (for example, to create a splay corner to achieve improved sight lines or the creation of an easement or right of way), such dedication / interest creation shall be at no cost to Council. However, the dedication is to be disregarded for the purpose of calculating the floor space ratio, which shall continue to be calculated on the area of land pre dedication.

## **2.9 Delivery of infrastructure works**

As not all infrastructure can be funded through the Infrastructure Contributions Plan and other funding sources, a list of infrastructure identified for delivery by 2025 is listed. Development contributions negotiated under a planning agreement may consist of infrastructure identified in the Cumberland Local Infrastructure Contributions Plan, in these Guidelines (Appendix G), or other infrastructure delivery plans.

## **2.10 Provision of Affordable Housing**

It is estimated that over 10,700 new affordable housing dwellings will be required in Cumberland between 2016 and 2036, of which approximately 70% will be needed for very low-income households, and 50% of which will need to be larger dwellings. Council recognises the need for affordable housing in its LGA and has demonstrated its commitment to affordable housing for the community through relevant strategies and policies. The Central City District Plan sets a target of 5% to 10% of new residential floor space to be dedicated to affordable rental housing for people on low or very low incomes. Council also has strategies and policies in relation to affordable housing that provide a framework for the delivery of Cumberland City's affordable housing needs, in partnership with State and Federal Government, and other partners. Negotiation of planning agreements is to take into consideration any relevant Council policies on affordable housing.

Given the current limitations on the use of mandatory and voluntary inclusionary zoning, planning agreements provide an appropriate and flexible mechanism for the provision of affordable housing in the Council LGA where a planning agreement is proposed to be entered for affordable housing in connection with a planning proposal, development application or proposed development application.

Contributions towards affordable housing may be in the form of dedicated land or dwellings (on- or off-site) or a monetary contribution.

Where affordable housing (and not monetary contributions towards affordable housing) is to be provided, the following should be taken into consideration and relevant clauses should be included in the planning agreement:

- a) The proposed affordable housing must be for households with low or very low incomes, or a combination of both.
- b) Where three or more dwellings are provided, there must be a range of dwelling sizes, from 1 to 3+ bedrooms, in accordance with the Central City District Plan. At least 20% of these dwellings must incorporate the Livable Housing Design Guidelines' universal design features. At least half of these are to be at the platinum level and half at the silver level.
- c) Dedication to Council and the timing of such dedication.
- d) Criteria for assessment of future tenants, or reference to a policy of the nominated housing provider/manager which specifies such criteria.
- e) The lodgement of a security and any other mechanisms to ensure due delivery of the contribution.
- f) Any other relevant matters.

## **2.11 Affordable housing in connection with planning proposals**

Where the planning proposal includes a residential component, a minimum of 5% of the additional residential floor space is to be dedicated to Council as affordable housing for low and very-low income households. Any proposed affordable housing provision in a planning agreement more than this minimum requirement may be directed to moderate income households (e.g. housing for key workers).

Where this would result in floor space that would otherwise be part of the floor space of a dwelling, an equivalent monetary contribution will be provided to Council for that part of the floor space.

Site specific conditions will be taken into consideration when negotiating public benefits.

## **2.12 Affordable housing in connection with development applications**

Where the development application or proposed development application includes a residential component, the affordable housing to be dedicated to Council for low and very-low income households will be based on the consideration of the following matters:

- a) the type of development, residential or commercial.
- b) the development size (smaller developments may be exempt or be allowed to contribute off-site or through a monetary contribution).
- c) whether a planning agreement is proposed to be entered in connection with a development application for a clause 4.55 modification.
- d) the creation of need for affordable housing by the proposed development in the LGA, for example, to enable key workers who provide essential services to live close to the local communities they support.
- e) the income group being targeted for affordable housing.
- f) the likely reduction by the proposed development of the availability of affordable housing, for example, by displacing existing lower income communities as land values and housing costs rise when land is up zoned or redeveloped.
- g) access of the proposed development to facilities, jobs and other opportunities which, without such measures, may only be available to higher income groups.
- h) whether the provision of affordable housing would not adversely impact on the development feasibility of the site.
- i) the local housing market, land values and the type of development occurring in the area.

## **2.13 Works in kind and Material Public Benefits**

In the case of a planning agreement proposing to deliver works in kind or material public benefit in lieu of payment of s7.11 contributions or s7.12 levies, where the works to be delivered are not identified in an existing local infrastructure contributions plan, in these Guidelines, or corporate strategic document, the value of the contribution offered under the agreement must be demonstrated to Council's satisfaction by an independent registered quantity surveyor with at least ten (10) years' experience at the developer's cost. If a planning agreement proposes to deliver works listed in Council's local infrastructure contributions plan, the work will be taken to have the value as specified in the contributions plan.

Where a planning agreement provides for another type of material public benefit, Council and the developer will negotiate the manner in which the benefit is to be valued for the purposes of the planning agreement. Such benefits may include for instance, affordable housing, training facilities, childcare facilities within a development, or intersection improvements nearby, among others.

In assessing the value to the community of community facilities or public spaces proposed in a planning agreement, Council will consider the criteria for location, function, size and operation in the best practice guidelines in Council's studies and strategies on community, open space and recreational needs assessments.

## **2.14 Recurrent charges and life cycle maintenance costs**

Where a planning agreement proposes works or dedication of land and/or building assets, Council may require the developer to provide supporting documentation outlining the lifecycle costs to Council, including operation or ongoing service delivery, as well as the likely



maintenance and replacement costs. This information will assist Council in determining whether to accept a planning agreement offer.

All planning agreements that involve the provision of public infrastructure through works to be carried out by the Developer should include a reasonable contribution towards ongoing maintenance and replacement costs of the infrastructure. Council may request developers, through a planning agreement, to make development contributions towards the recurrent costs of public facilities or to maintain infrastructure delivered for a certain period of time after handover.

Where the public infrastructure primarily serves the development to which the planning agreement relates or neighbouring development, the arrangement for recurrent funding may be in perpetuity. Where the public infrastructure or public benefit is intended to serve the wider community, the planning agreement may, where appropriate, only require the developer to make contributions towards the recurrent costs of the facility for a set period which will be negotiated according to the impact of the development.

The amount of any monetary contribution acceptable to Council will depend on the type and value of the works being handed over, whether repair and maintenance are likely to be needed and the anticipated cost of maintenance and repair works.

If the developer proposes to maintain works after completion, a bond or bank guarantee will be required by Council to cover the likely maintenance in the event the developer defaults.

## **2.15 Pooling of development contributions**

Where a proposed planning agreement provides for a monetary contribution by the developer for a purpose for which the payment was required, the money should be applied towards that purpose within a reasonable time. Council may, however, in accordance with s7.3 of the Act Division 7.1 part 7 and the *Environmental Planning and Assessment (Local Infrastructure Contributions – Pooling of Contributions) Direction 2020* dated 18 May 2020, pool money paid for different purposes (other than Special Infrastructure Contributions) and apply that money progressively for those purposes, subject to the requirements of the relevant contributions plan. Pooling may be appropriate to allow public benefits, particularly essential infrastructure, to be provided in a fair and equitable way but also in a timely manner.

## **2.16 Do other development contributions apply?**

The offset (or exclusion) of s7.11 contributions or s7.12 levies for development contributions offered under a planning agreement will be a matter for negotiation between Council and the developer based on the particular circumstances of the case. Council could negotiate to offer the following offset of s7.11 contributions or s7.12 levies:

- No offset
- Partial offset
- Full offset

Generally, Council will only consider offering an offset of s7.11 contributions or s7.12 levies if the value of development contributions offered under the planning agreement is equal to or greater than the value of contributions that would otherwise be payable under the Cumberland Local Infrastructure Contributions Plan. When offsets are negotiated, to ensure sufficient s7.11/s7.12 funding is available for works identified in Council's Local Infrastructure Contributions Plan, Council will generally only accept an offset against contributions for land

or works of the same contribution type identified in Council's contribution plan or infrastructure schedule.

In general, Council's position is that if works are proposed in lieu of development contributions, those works would ideally already be identified in an adopted contribution plan, these Guidelines or other corporate document. In some instances, Council may accept land or material public benefits which are not set out in the Local Infrastructure Contributions Plan and offset them against the monetary contribution earmarked for the same contribution type identified in Council's contribution plan or infrastructure schedule, but only after careful consideration of the following:

- a) the likely public benefit of the land or material public benefits proposed.
- b) the impact of reduced s7.11/s7.12 contributions for the delivery of works scheduled in the Infrastructure Contributions Plan and its appropriateness.
- c) how this impact will be managed.

Except to the extent otherwise required by law, where the application of s7.11 or s7.12 of the Act to development is not excluded by a planning agreement, benefits under the agreement are not to be taken into consideration in determining a development contribution under s7.11 or s7.12.

In exceptional circumstances where the contributions proposed under a planning agreement well exceed the s7.11 contributions or s7.12 levies, Council, at its absolute discretion, may consider that the s7.11 contributions or s7.12 levies are not required in addition to the contributions proposed under the planning agreement.

## **2.17 Relationship to payment of s7.11 or s7.12 Contributions**

Planning agreements to deliver works in kind or material public benefits in lieu of payment of s7.11 or s7.12 contributions, will generally only be considered where the applicable development contribution value exceeds \$500,000, or otherwise at the discretion of Council.

Arrangements related to planning agreements for advertising signage in accordance with State Environmental Planning Policy No 64—Advertising and Signage shall rely on Council's Large Display Advertising Policy.

No credits or refunds will be agreed to by Council when negotiating planning agreements should the development contribution value exceed the required s7.11 or s7.12 contributions.

## **2.18 Relationship to conditions of development consent**

Planning agreements should not be utilised where infrastructure delivery can be achieved via a condition of development consent in accordance with s4.17 of the Act. No value will be attributed under a planning agreement to works or land dedication that would otherwise be required by a condition of development consent.

## **2.19 How will Council value public benefits under a planning agreement?**

Development contributions offered under a planning agreement will generally need to be valued if the contribution is intended to offset s7.11 or s7.12 contributions, or for the purpose of calculating the amount of security to be provided under the planning agreement.

Unless otherwise agreed, all benefits under a planning agreement will be dedicated at no cost to Council and free of all and any encumbrances, except any permitted encumbrances agreed by Council.

Unless otherwise agreed in a particular case, benefits under a planning agreement will be valued as follows:

- Where land is dedicated under a planning agreement, the value for the purposes of the planning agreement will generally be the market value of the land determined in accordance with Division 4 of Part 3 of the Land Acquisition (Just Terms Compensation) Act 1991. Council may require the Developer, at its cost, to provide Council with a written opinion on the estimated value of the land by a suitably qualified and experienced valuer. If negotiations are protracted, then Council may require the Developer to provide an updated valuation before execution of the planning agreement.
- However, if development cannot take place on the land to be dedicated or where any FSR entitlement is transferred from the land proposed to be dedicated to Council to the development component of the remaining parcel, a nominal value of one (1) dollar will be attributed to the land.
- The value of land provided by the proponent will be verified by an independent registered valuer with at least ten (10) years' experience in valuing land in New South Wales.
- In the case of works for a public purpose, Council will attribute a value to the works in accordance with a cost estimate prepared by an independent registered quantity surveyor with at least ten (10) years' experience.
- In the case of a dwelling unit for affordable housing, the value to be attributed will be based on a market analysis of comparable sales in the previous 12 months, taking into account any other deliverables in connection with the transfer of the unit.
- In the case of any other type of benefit, Council may, at its discretion, consult with the developer and apply an appropriate valuation methodology to determine the value to be attributed to those benefits.
- As specified in Clause 2.18 of these Guidelines, in the event that a planning agreement proposes works and services that would otherwise be required as a result of the development and therefore included as a condition of development consent, then those works and services will be deemed to have no value under the planning agreement as they would not be works of a wider public benefit. These works could include, for instance; mitigation of the impacts of a development proposal; the provision of squares, forecourts or additional pedestrian linkages for public use as identified in a Development Control Plan; and minor land acquisition (e.g. for road widening) that would be a requirement for the development to proceed, among others.

All costs associated with the determination of values will be borne by the developer.

## **3 NEGOTIATION PROCEDURES AND PROBITY**

### **3.1 Introduction**

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

The Regulations require that notification of a proposed planning agreement occurs at the same time as a development application or planning proposal is notified, or if it is not practicable as soon as possible after.

Where practical, Council will seek to publicly exhibit a proposed planning agreement concurrently with the development proposal to which it relates, and to carry out final negotiations of the planning agreement at the same time as assessment of the development proposal, so as to not unduly delay the determination. 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.

To ensure efficiency, Council prefers that a planning agreement is discussed before lodgement of the relevant planning proposal or development application and that a letter of offer accompanies the application on lodgement. Details of what the letter of offer should include can be found at Appendix A.

Once the terms in the letter of offer are negotiated, a draft planning agreement and explanatory note can be prepared and lodged with Council. The letter of offer should be consistent with the draft planning agreement and explanatory note and should be updated, if required. In the case of planning proposals, final negotiations are likely to take place after Gateway Determination is received, whereas in the case of development applications, after Council resolves to accept the planning agreement offer.

### **3.2 In what form shall a planning agreement offer be made?**

Any formal planning agreement offer must be made in writing by the developer and landowners (if the developer does not own the land) in the form of the Planning Agreement template (Appendix A) including in principle agreement to the terms set out in the Planning Agreement template.

Any potential variations to the template Planning Agreement should be identified in the planning agreement offer, accompanied by reasons for the proposed variation. The planning agreement offer should address each of the requirements under s7.4 of the Act.

### **3.3 Delegation to negotiate a draft planning agreement or amendment to a planning agreement**

Council staff will have delegation to negotiate a planning agreement or amendments to an existing planning agreement on behalf of Council. That delegation will occur in accordance with Council's standard delegation procedures.

Councillors will not be involved in the face to face negotiation of the planning agreement, but will, in their role as Councillors, ultimately endorse and approve the planning agreement by resolution to exhibit and execute the agreement or alternatively, resolve to reject an offer to enter into a planning agreement.

Subject to compliance with Clause 3.4 below, Council staff may negotiate a planning agreement prior to or after public exhibition of the draft planning agreement or draft amendment to a planning agreement.

### **3.4 Council to endorse planning agreements**

Once the terms of the planning agreement have been negotiated by Council staff, Council must endorse by resolution, in principle, the terms of the agreement or a draft planning agreement or amendment to an existing planning agreement prior to its notification. Council may choose to delegate the preparation of a draft planning agreement to Council staff prior to notification once they have agreed, in principle, to the terms of a draft planning agreement.

A draft planning agreement must be publicly notified in accordance with the Act and Regulation (currently for a period of not less than 28 days).

Council staff will also be involved in the finalisation of the draft planning agreement or amendment to an existing planning agreement following its notification.

Prior to finalisation and execution of a planning agreement or amendment to an existing planning agreement, a further resolution of Council is required to address any submissions and endorse the final planning agreement or amendment to an existing planning agreement for the purpose of execution.

### **3.5 Renegotiation of a planning agreement**

A planning agreement that is in the process of being negotiated and has not been executed by the parties may be further negotiated as agreed between Council and the developer. Further negotiations may, for example, be required in response to public submissions or where the assessment results in a change in infrastructure needs to that initially negotiated.

An updated letter of offer should be submitted to Council to commence renegotiations. Once the terms have been agreed upon by Council, an updated planning agreement and explanatory note should be lodged with Council. Dependent upon the nature of changes made to a draft planning agreement following its public exhibition, renotification may be required.

### **3.6 Assessing the planning agreement offer**

The General Manager will nominate Council staff to be the representative of Council in all negotiations regarding the key commercial terms of any proposed planning agreement. This staff member will carry out a separate, independent assessment of the proposed planning agreement and will not be involved in the assessment of the planning merits of the development proposal, to be carried out by the relevant planning officer.

The relevant planning officer will consider the proposed planning agreement and any submissions made in relation to that planning agreement as part of the overall merit assessment.

Planning agreement offers will be assessed by the nominated Council staff. An independent third party may be engaged to participate in the negotiation and assessment of a planning agreement offer (see clause 3.7 of these Guidelines).

Face to face discussions with developers will be held with at least two Council staff attending.

Councillors will not be involved in any direct face to face negotiations.

Council staff involved in the negotiation of a planning agreement will not have any involvement in the assessment of the related development application or planning proposal. Council will ensure the staff member does not have any conflict of interest, pecuniary or otherwise, within the meaning of Council's Code of Conduct in regards to the subject matter of the planning agreement or the development application, complying development certificate application or planning proposal to which it refers.

If the Council staff involved in the negotiation of a planning agreement considers they may have such a conflict, that person must immediately advise their supervisor and a different officer or if necessary, an independent third party must be appointed.

The Council staff member considering the proposed planning agreement should receive input from relevant Council officers in the following circumstances:

- From the Director Environment and Planning prior to acceptance of a formal Planning Agreement Offer, and through the process as appropriate.
- From Council's development planners if the draft planning agreement proposes to offset any contributions under s7.11 or s7.12 of the Act, or to exclude the application of those sections to the development which the planning agreement will relate, or to dedicate land or provide works that are otherwise set out in a development contributions plan.
- From relevant officers with responsibility for the types of work proposed in a planning agreement (such as roads or open space) regarding the need or identification in corporate strategic documents for such works, and / or specifications for such works.
- From the relevant asset management officers where a planning agreement proposes the dedication of any land and the creation of new assets.

### **3.7 Involvement of independent third parties in the negotiation and assessment process**

Council may at any time appoint an independent person to facilitate or otherwise participate in the negotiation or assessment of a planning agreement, or aspects of it, such as where:

- An independent assessment of a proposed instrument change or development application is necessary or desirable, particularly in circumstances where Council may have interest or stake in the development proposed or where Council owns the land being developed.
- Factual information requires validation in the course of negotiations.
- Sensitive financial or other information must be verified or established in the course of negotiations.
- Facilitation of complex negotiations (including legal advice) is required in relation to large projects or where numerous parties or stakeholders are involved.
- Independent valuation or independent quantity surveying is required.

The cost of independent third parties will be borne by the developer.

### **3.8 Key steps in the planning agreement preparation process**

The negotiation of a planning agreement will generally involve the following key steps (See Appendices H and I for further details):

### Step 1 – Initiation

- Prior to the lodgement of a development application or a planning proposal application, either a developer or Council and developer (and any other relevant person) may decide to commence discussions about whether a planning agreement is appropriate in connection with any development application or modification application or complying development certificate application or planning proposal.

### Step 2 – Lodgement of Development Application or Planning Proposal

- An initial planning agreement offer (letter of offer) should be made by the developer in conjunction with the lodgement of a planning proposal or development (or modification) application or application for a complying development certificate with Council.
- Council and the developer are to nominate the persons that will represent them in the negotiations.
- Council's staff will advise the developer to submit their draft planning agreement in the form required by the Planning Agreement template (Appendix B).
- Council may at any time nominate a third party at its discretion.

### Step 3 – Negotiation of commercial terms

- Council's staff will be responsible for all functions with regard to negotiating the proposed planning agreement including overseeing the valuation of public benefits in accordance with these Guidelines, subject to resolutions of Council and / or requirements in these Guidelines to seek support and approval from other Council officers or legal advisors.
- If the developer is not the owner of the relevant land, the landowner must be an additional party to the proposed planning agreement and negotiations.
- Council staff and the developer should conduct initial discussions to identify the broad terms of the planning agreement being proposed. The key commercial issues for negotiation will be identified by the Council staff and the developer and the negotiations over these issues will then take place.
- Council staff will consult with relevant stakeholders or third-party experts as required during the commercial negotiations.
- Council staff will seek in principle support from Council's Director Environment and Planning prior to the completion of the commercial terms.
- If agreement is reached, the developer (and any other relevant party) will prepare the proposed planning agreement including the explanatory statement, and then make the relevant application to Council accompanied either by a copy of the proposed agreement or by an offer to enter into such an agreement with specifics of the agreement set out in detail.

### Step 4 – Report to Council

- The outcomes of the negotiation and assessment of the formal written Planning Agreement offer are to be reported to Council seeking a resolution that a draft planning agreement be prepared for public notification purposes.

### Step 5 – Notification

- Council will publicly exhibit the development application or modification application or complying development certificate application or planning proposal and notify the draft planning agreement in accordance with the Act, Council's Notification Policy and Part 4 of these Guidelines.

- Where possible, the notification of the draft planning agreement should occur concurrently with the public exhibition of the associated planning proposal or development application, modification application or complying development certificate application.
- Following the completion of the notification, a further report will only be put to Council detailing the outcomes of the notification, if any submissions have been made, and shall include details of the submissions and any discussions undertaken with the developer to address matters raised, and where necessary recommending further changes to the draft planning agreements as a result of the notification and above considerations. The report will include recommendations about how to proceed with the planning agreement, (i.e. seek execution of the agreement, amend the agreement or not proceed with the agreement).
- A report regarding the associated development application/modification application/complying development certificate application/planning proposal may be put to Council concurrently with the report referred to above.
- Re-notification of the draft planning agreement may be necessary following amendments to the draft planning agreement.

#### Step 6 – Execution of Planning Agreement

- Should Council endorse a planning agreement for execution, the planning agreement must be executed before Council will finalise any instrument change associated with an accompanying planning proposal or development application. If the developer refuses to execute a planning agreement offered in connection with a planning proposal, Council will ask the Minister not to proceed with the relevant instrument change under s3.35(4) of the Act.
- Where a planning agreement is made in conjunction with a development application (or modification application), the development consent will be subject to conditions requiring the planning agreement to be complied with. If the agreement is not executed prior to the development consent being granted or modified, a condition will be imposed requiring execution of the planning agreement in accordance with the offer made and subsequent registration of the agreement. Conditions requiring the execution and registration of a planning agreement may be deferred commencement conditions that must be satisfied before the consent becomes operational.



## **4 NOTIFICATION AND EXHIBITION**

### **4.1 Public notification of planning agreements**

In accordance with the Act, a planning agreement must be publicly notified and available for public inspection for a minimum period of 28 days. Council may decide to notify a planning agreement for a longer period.

The Regulations require that notification of a proposed planning agreement occurs at the same time as a development application or planning proposal is notified, or if it is not practicable as soon as possible after. Where practical, Council will therefore seek to publicly exhibit a proposed planning agreement concurrently with the development proposal to which it relates, and to consider it at the same time as the development proposal so as to not unduly delay the determination.

The advertising costs relating to public exhibition of the planning agreement will be borne by the developer.

### **4.2 Re-notification**

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

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

### **4.3 Public comment on planning agreements**

Council encourages the public to make submissions on the notification of planning agreements. All public submissions will be considered before finalisation of the planning agreement.

Public submissions on draft planning agreement notifications will be assessed by Council when it considers whether it should enter into the proposed planning agreement. This will occur separate to any consideration and determination of an officer's report on the associated planning proposal or development application/modification application.

## **5 IMPLEMENTATION AND CONDITIONS**

### **5.1 Preparation of the planning agreement**

Unless otherwise agreed by the parties, the developer will make its formal offer and draft planning agreement in accordance with the Policy and these Guidelines and the template at Appendix B. The planning agreement will be accompanied by an explanatory note in accordance with the template at Appendix C.

In order to ensure efficiency, the proponent should ensure that:

- Negotiations are held as early as possible in the planning process, to avoid delays that result from the duplication of processes such as exhibition processes.
- The formal letter of offer is updated consistent with the outcome of the negotiations.
- The planning agreement and explanatory note is prepared using the template at Appendices B and C respectively, as a basis.

Council will require a planning agreement to make provision for payment by the developer of Council's costs of and incidental to negotiating, preparing and entering into the agreement as well as administering and enforcing the agreement.

### **5.2 Parties to the planning agreement**

Council and the developer will be parties to the planning agreement.

If Council is not the consent authority, or another entity is involved in the agreement (for example another council) that other entity may be required to be a party to the agreement.

Where the developer does not own all the land to which the planning agreement relates, Council will (unless Council otherwise agrees at its sole discretion) require the landowner or landowners to be parties to the agreement so the agreement can be registered on the title of the land.

### **5.3 When is a planning agreement required to be executed?**

A planning agreement is executed when it is signed by all the parties, including by way of executing separate counterparts of the agreement.

A planning agreement can be entered into at any time after the planning agreement is publicly notified in accordance with the Act and regulation and subject to Council resolution to enter the planning agreement.

Council will usually require a developer to give an irrecoverable offer and execute the planning agreement at the following times:

- In respect of a planning proposal, Council will expect to have the planning agreement executed prior to Council requesting that the Minister make the instrument change referred to in the planning proposal, or before Council makes that instrument change under delegation.
- In respect of a development application (or modification application), Council will seek to have the planning agreement executed prior to the grant of development consent. If the planning agreement is not executed prior to the grant of development consent, Council will impose a condition requiring the planning agreement to be entered into and, if relevant, registered on title either as a deferred commencement condition or

prior to the issue of a Construction Certificate, depending on the proposed timing for the delivery of contributions.

Council may also impose conditions of consent requiring compliance with the planning agreement and the delivery of relevant contributions at the required time.

Council cannot impose a condition of consent that requires a developer to enter into a planning agreement on terms different to those offered, or if a planning agreement was not offered.

If a planning agreement in connection with a planning proposal is not executed at the appropriate time set out above, Council may request the Minister not to proceed with the instrument change, in accordance with s3.35 of the Act.

#### **5.4 When will planning obligations arise?**

The obligations under a planning agreement will arise as agreed between the parties but generally upon execution of the planning agreement by all parties, and the timing for the delivery of each contribution must be specified in the planning agreement. Council will generally require development contributions under a planning agreement to be provided as follows:

- In the case of a monetary contribution
  - 25% of the contribution on execution of the planning agreement
  - 50% of the monetary contribution prior to the issue of a construction certificate, and
  - 25% of the monetary contribution prior to the issue of any occupation certificate (interim or final) or prior to the registration of a Strata plan, whichever is earlier.

Council may accept the provision of bank guarantees in lieu of the first two payments due above. In those circumstances, full payment of the contribution will be due prior to the issue of any occupation certificate (interim or final).

- In the case of works, after any required embellishment and maintenance periods are complete and prior to the issue of the first occupation certificate for development on the land (including any interim occupation certificate). Council will require any works on land to be dedicated (for example fit out of an affordable housing unit or embellishment of a public reserve) to be completed prior to dedication.
- In the case of land dedication for affordable housing, land is to be dedicated to Council prior to the issue of any occupation certificate.
- In the case of other land dedication, prior to occupation of the development or the issue of an occupation certificate for the development. This timing may be varied depending on how the development will be staged and the location of the land to be dedicated. Council will require this information from developers so that it can be properly informed when negotiating the likely timing for the dedication of the land.
- Dedication of public reserves or public roads can be made on registration of a subdivision plan creating the lot to be dedicated in accordance with the relevant provisions of the Local Government Act 1993 or the Roads Act 1993.

- Council in agreement with the developer may choose to add a final date or maximum time period in which contributions are to be delivered, for example, within X years of the execution of the agreement.

## **5.5 Monitoring and review of a planning agreement**

Council will regularly monitor the performance of the developer's obligations under a planning agreement and report them in accordance with the Act. This may include Council requiring the developer (at the developer's cost) to report periodically to Council on its compliance with obligations under the planning agreement.

Council will require the planning agreement to contain provisions establishing a mechanism under which the planning agreement is periodically reviewed with the involvement of all parties. The purpose of the review is to manage the developer's delivery of the developer's obligations to Council and their timely delivery.

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

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 regards to the outcome of the review.

## **5.6 Modification or discharge of obligations**

Council may agree to a provision in a planning agreement permitting the developer's obligations under the agreement to be modified or discharged in the following circumstances:

- The developer's obligations have been fully carried out in accordance with the agreement.
- The development consent to which the agreement relates has lapsed.
- The instrument change to which the agreement relates did not proceed.
- The development consent to which the agreement relates has been modified to such an extent that the planning obligations may not be appropriate.
- The performance of the planning agreement has been frustrated by an event or events beyond the reasonable control of the parties.
- The developer has sought and obtained Council's permission to fully and completely assign the developer's interest under the agreement in accordance with its terms.
- Other material changes affecting the operation of the planning agreement have occurred.
- Council and the developer agree to the modification or discharge of the agreement.

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

If there are any indications that a developer has decided not to execute the agreement after it has been exhibited, Council will consider that to be a significant change to the development or planning proposal and may inform the developer to lodge a new development application or revised planning proposal.

## **5.7 Assignment and dealings by the developer**

Council will only consider permitting the assignment of any or all the developer's rights or obligations under the agreement, or any dealing in relation to any part or the whole of the land the subject of the agreement if:

- The developer has, at no cost to Council, first procured the execution by the assignee of all necessary documents in favour of Council under which the assignee agrees to be bound by the original planning agreement.
- The developer has, at no cost to Council, first procured replacement security from the assignee. Council may require the assignee to provide more security than the original developer if the assignee does not have the same financial standing as the original developer.
- If the proposed dealing involves a mortgage, charge or other encumbrance in relation to the party's right, title and interest in the land, such documents provide for an agreement by the person to the effect that they, and any receiver appointed by them, will not enjoy rights greater than those of that party.
- The party is not in breach of this Agreement.
- Council is satisfied the incoming party is financially capable of delivering on the outgoing party's obligations under the planning agreement.

## **5.8 Provision of security under a planning agreement**

Council will require a planning agreement to make provision for security to cover the developer's obligations under the agreement. Council will require any security (such as bank guarantees) for contributions that do not involve monetary payment to be provided prior to the issue of a construction certificate, or at such other appropriate times, depending on the nature and timings of the contributions.

The form of security for obligations to make monetary contributions or deliver works will generally be an unconditional bank guarantee from an Australian Bank in favour of Council to the full value of the developer's obligations under the Agreement and on terms otherwise acceptable to Council.

Any amount to be secured by a bank guarantee or bond will be adjusted on each anniversary date in accordance with increases in the consumer price index. The formula for adjustment of security amounts will be consistent with the indexations of contributions specified in the planning agreements (see Clause 5.10 of these Guidelines).

Council may also require, in appropriate cases, the creation of a charge over land, and may require the landowner to agree to not object to Council lodging caveats on the title of all or any of the land the subject of the planning agreement. In particular, Council will generally require a planning agreement to include provisions acknowledging Council has a caveatable interest over:

- a) The whole of the land until the planning agreement is registered.
- b) Any land to be dedicated to Council, once the relevant portion of land has been created.

The security for performance of planning agreement obligations required under a planning agreement is dependent on the type of obligation, as set out below.

### **5.8.1 Monetary development contributions**

Generally, the appropriate security is to require monetary contributions to be paid before the issuing of a specified kind of Part 6 Certificate under the Act, usually a subdivision certificate or a construction certificate.

In some cases, particularly where the payment of monetary contributions is deferred until after the issuing of a construction certificate, Council may require financial security such as a bank guarantee or bond or a registered charge over land or assets.

Where security is required under a planning agreement for monetary contribution, the security will be provided as follows:

- Stage 1: a bank guarantee for 25% of the monetary contribution upon execution of the planning agreement.
- Stage 2: a bank guarantee for 50% of the monetary contribution prior to the issue of a construction certificate.

### **5.8.2 Dedication of land**

Where land is required to be dedicated or transferred to Council or where Council is to receive the benefit of an encumbrance over land not to be owned by Council, Council will require the landowner to be a party to the planning agreement.

Generally, the dedication or transfer of land under a planning agreement will be tied to the issuing of a specified kind of Part 6 Certificate under the Act, which will usually be an occupation certificate or a subdivision certificate.

Generally, Council will require a planning agreement to include provisions allowing Council to acquire any land to be dedicated or register any encumbrance on the land benefitting Council for one Australian dollar, if the developer defaults. Compulsory acquisition by Council is provided for in the Land Acquisition (Just Terms Compensation) Act 1991.

The provision in the planning agreement will constitute a pre-acquisition agreement between the landowner and Council for the purposes of that Act.

In some cases, the landowner may be required to give Council an irrevocable option to purchase land for a nominal sum, or a power of attorney enabling Council to do such things as may be necessary in the name of the landowner to cause the relevant land to be dedicated or transferred to Council.

If the landowner does not agree to the above arrangements, Council may require the landowner provide a financial security such as a bond or bank guarantee or a charge over land or assets equal to the full market value of the land.

The landowner will be required to warrant to Council in the planning agreement that it has done all things necessary to ensure that nothing, including the interests of third parties, prevents the relevant land from being dedicated or transferred to Council in accordance with the planning agreement.

### **5.8.3 Works**

The Developer will be required to provide security to Council for the carrying out of works for an amount determined by Council.

The security must be in the form of a cash deposit, bond or bank guarantee, on terms acceptable to Council.

The amount of security will depend on the circumstances of the case, and other security mechanisms in the planning agreement, and may be up to 100% of the estimated value of the works to be carried out by the developer, but may be greater based on a risk assessment undertaken by Council.

A bond or bank guarantee must be issued by a financial institution approved by Council.

Council at its discretion may require a charge over land or assets in addition to a bond or bank guarantee.

## **5.9 Indexation of monetary contributions and security**

Monetary contributions included with a planning agreement are to be subject to indexation to reflect increases in the consumer price index between the execution of the agreement and timing of payments. Indexation shall be undertaken in accordance with the following formulae.

\$ Monetary Contribution	X	The CPI at the time of payment
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The CPI at the date of the agreement

CPI is the All Groups Consumer Price Index applicable to Sydney published by the Australian Bureau of Statistics.

Securities such as bank guarantees required under a planning agreement will also be subject to annual indexation requirements.

## **5.10 GST and planning agreements**

All planning agreements are to be consistent with A New Tax System (Goods and Services Tax) Act 1999 and Regulation.

Monetary contributions provided under a planning agreement are exclusive of GST. Council and the proponent should obtain advice in every case on whether a potential GST liability attaches to the agreement. If GST is or becomes payable on any contribution under a planning agreement, the developer will be required to pay the GST or pay an amount to Council equivalent to the GST.

## **5.11 Registration of planning agreements**

Council will require a planning agreement to contain a provision requiring the developer to register the agreement, at the developer's expense, pursuant to s7.6 of the Act.

Council will require a planning agreement to acknowledge that Council has a caveatable interest in the land and may register a caveat against the title to the land prior to the planning agreement being registered. Once the agreement is registered, Council will withdraw any caveat it has.

The developer is to provide evidence of registration of the planning agreement through provision of each relevant property title within the timelines outlined in the planning agreement.

If the planning agreement is not registered prior to the grant of development consent, Council will require registration of the planning agreement as a condition of development consent and may require registration of the planning agreement as a deferred commencement condition.

The registration of the planning agreement against the title to land can be removed once all the contributions have been delivered. Where contributions are to be delivered after the registration of a subdivision or strata plan, Council may agree to removal of the planning agreement from the title to final lots (lots that are not to be further subdivided), subject to adequate security being provided to Council for any outstanding contributions to be delivered.

This may include:

- A requirement to register the planning agreement against the title to the common property.
- Caveats to be registered over any land to be dedicated to Council.
- Bank guarantees or bonds to secure the cost of any works and/or monetary contributions that remains outstanding.

### **5.12 Dispute resolution**

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

Should further dispute resolution be required, any other appropriate form of dispute mechanism may be used, as agreed upon by Council and the proponent. Mediation may be suitable to deal with disputes arising from grievances while expert determination may be suitable to resolve disputes of a technical nature.

### **5.13. Council's costs 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 costs of and incidental to negotiating, preparing, advertising and entering into the agreement (including reasonable legal costs in obtaining advice in connection with the planning agreement, any necessary independent advice, valuations and reports) as well as administering and enforcing the agreement.

Council may require the planning agreement to make provision for a contribution by the developer towards the ongoing administration of the agreement (see Clause 5.17 of these Guidelines).

### **5.14. Detailed design plans and specifications**

Council will require a planning agreement to make provision requiring detailed design plans and / or specifications to be provided to Council for approval prior to the commencement of any works to be delivered under a planning agreement.

### **5.15. Inspections**

Council will require a planning agreement to make provision for the inclusion of mandatory inspections where works are to be delivered and / or land is to be dedicated under a planning agreement, and in any other circumstance it considers appropriate.



### **5.16. Defects Liability Period**

Where a planning agreement includes the delivery of works or dedication of land or housing, Council will require a planning agreement to make provision for the inclusion of a defects liability period and provisions of security for the defects liability period.

In the case of structural or below ground works, the defects liability period shall be two years from issue of certificate of practical completion. In the case of the establishment of parks and open space, the defects liability period shall be two years from issue of certificate of practical completion for hardworks (e.g. works constructed on site) and one year from issue of certificate of practical completion for softworks (e.g. new planting and turf works) and shall include the replacement of any dead or dying plants within the period. In all other circumstances, the defects liability period will be one year from issue of certificate of practical completion.

Security in the form of an unconditional bank guarantee will be held for the defects liability period. The amount of security will be determined by Council at its discretion, generally the amount will be 2.5% of the cost of works. In some cases, a higher rate may be applied depending on the risks involved for Council if there is a defect in the works.

### **5.17. Administrative fees**

In accordance with these Guidelines and Council's Fees and Charges Schedule, an administration fee will be levied by Council for the following, where relevant:

- Registration and withdrawing of caveats.
- Registration and variation of easements or covenants or other instruments to be registered against the title to land.
- Release and discharge of planning agreements, including costs of removing a planning agreement from title.
- Exhibiting the planning agreement or any variation of the planning agreement.

### **5.18. Notations on Certificates under S10.7 (5) of the Act**

Council will generally require a planning agreement to contain an acknowledgement by the developer that Council may, at its absolute discretion, make a notation under s10.7 (5) of the Act about a planning agreement on any certificate issued under s10.7 (2) of the Act relating to the subject of the agreement or any other land.

### **5.19. Amendment of planning agreements**

A planning agreement may only be amended in accordance with the Act and the Regulation, which require any amendment to be in writing and publicly notified. The costs associated with amending a planning agreement will be borne by the developer. These Guidelines apply equally to applications to amend an existing planning agreement.

### **5.20. Classification of Land**

Where land or housing is dedicated or transferred to Council, Council will consider the classification of that land or housing under Chapter 6 Part 2 of the Local Government Act 1993. Council shall resolve to classify the land or housing accordingly at the time Council endorses the execution of the planning agreement.

### **5.21. Access to planning agreements**

Council will provide public access to executed planning agreements, explanatory notes and a planning agreement register in accordance with the Act and Regulation.

As required by the Regulation, the register will record the date an agreement was entered into and a short description of the agreement.

## **Appendix A – Letter of offer**

To ensure efficiency in the consideration of a planning agreement, a letter of offer should be lodged with Council.

It should:

- a) be in writing and be signed by or on behalf of all parties to the planning agreement.
- b) consider the matters outlined in the Policy and these Guidelines.
- c) outline the matters required to be included in a planning agreement as specified in s7.4(3) of the Act.
- d) include sufficient detail to allow proper consideration by Council.

## Appendix B – Template Planning Agreement between Council and Developer

Note: The template below is based on a template provided by the NSW Department of Planning, Industry and Environment, which may change from time to time. All planning agreements shall have regard to the relevant sections of the Act and Regulation.

### 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 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 that Development Consent was granted.

C. The Instrument Change was published in NSW Government Gazette No. ## on ## and took effect on ##.

D. On, ##, the Developer made a Development Application to the Council for Development Consent to carry out the Development on the Land.

### Operative Provisions

#### 1 Planning agreement under the Act

The Parties agree that this Agreement is a planning agreement governed by Subdivision 2 of Division 7.1 of Part 4 of the Act

## Application of this Agreement

[Drafting Note 2: Specify the land to which the Agreement applies and the development to which it applies]

## Operation of this Agreement

[Drafting Note 3: Specify when the Agreement takes effect and when the Parties must execute the Agreement]

## Definitions and interpretation

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 ##

**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 ## Local Environmental Plan ##.

**Land** means Lot ## DP ##, known as ##.

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

**Public Facilities** means ##.

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

In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:

Headings are inserted for convenience only and do not affect the interpretation of this Agreement.

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.

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.

A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.

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.

A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.

A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.

An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.

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.

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.

References to the word 'include' or 'including' are to be construed without limitation.

A reference to this Agreement includes the agreement recorded in this Agreement.

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.

Any schedules and attachments form part of this Agreement.

## **Development Contributions to be made under this Agreement**

[Drafting Note 5: 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]

## **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]

## **Application of s7.11 and s7.12 of the Act to the Development**

[Drafting Note 7: Specify whether and to what extent s7.11 and s7.12 apply to development the subject of this Agreement]

## **Registration of this Agreement**

[Drafting Note 8: Specify whether the Agreement is to be registered as provided for in s7.6 of the Act]

## Review of this Agreement

[Drafting Note 9: 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].

## Dispute Resolution

[Drafting Note 10: Specify an appropriate dispute resolution process]

## Enforcement

[Drafting Note 11: Specify the means of enforcing the Agreement]

## Notices

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:

Delivered or posted to that Party at its address set out below.

Faxed to that Party at its fax number set out below.

Emailed to that Party at its email address set out below.

### **Council**

Attention: ##

Address: ##

Fax Number: ##

Email: ##

### **Developer**

Attention: ##

Address: ##

Fax Number: ##

Email: ##

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.

Any notice, consent, information, application or request is to be treated as given or made at the following time:

If it is delivered, when it is left at the relevant address.

If it is sent by post, 2 business days after it is posted.

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.

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.

## 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.

## Assignment and Dealings

[Drafting Note 14: Specify any restrictions on the Developer's dealings in the land to which the

Agreement applies and the period during which those restrictions apply]

## Costs

[Drafting Note 15: Specify how the costs of negotiating, preparing, executing, stamping and registering the Agreement are to be borne by the Parties]

## 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.

## Further acts

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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.

## Governing law and jurisdiction

This Agreement is governed by the law of New South Wales. The Parties submit to the nonexclusive 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.

## 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.

## 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.

## Representations and warranties

The Parties represent and warrant that they have power to 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.

## 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.

## 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.

## 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.

## 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.

## Execution

Dated: ##

Executed as an Agreement: ##

## Appendix C – Explanatory Note Template

Note: The template below is based on a template provided by the NSW Department of Planning, Industry and Environment, which may change from time to time. All Explanatory Notes shall have regard to the relevant sections of the Act and Regulation.

### Explanatory Note Template

Environmental Planning and Assessment Regulation 2000 (Clause 25E)

Explanatory note for planning agreements under section 7.4 of the Environmental Planning and Assessment Act 1979

#### 1. Introduction

The purpose of this explanatory note is to provide a plain English summary to support the notification of the draft planning agreement (the **planning agreement**). This explanatory note explains what the planning agreement is proposing, how it delivers public benefit and whether it is an acceptable means of achieving the proposed planning outcomes.

#### 2. The parties to this planning agreement are:

[Planning authority name] as the planning authority

[Developer name] as the developer

#### 3. The land subject to the planning agreement is:

Lot and deposited plan	Address or description of location

A map of the subject land is attached to this explanatory note.

Will the planning agreement be registered on the subject land titles? Yes / No

#### 4. Description of the proposed [development application/application for complying development certificate / change to the environmental planning instrument] (delete as appropriate)

The developer is seeking approval for subdivision of the subject land into approximately [xx] residential lots / approval for development of approximately [xx] dwellings in accordance with Development Application [DA reference] and has made an offer to enter into the planning agreement in connection with the proposed development.

OR

The developer is seeking an amendment to the planning controls for the subject land in accordance with Planning Proposal [PP reference] and has made an offer to enter into a planning agreement in connection with the planning proposal. The amendments outlined in the related planning proposal are:

	Current	Proposed
Zone		
Floor space ratio		
Max height		
Dwelling yield		
Non-residential floor space		
(add others as appropriate)		

*Note: Provide new tables for separate lot/DP where appropriate (e.g. if the existing zones, or proposed planning controls are different between each lot.)*

#### 5. Description of the planning agreement (delete as appropriate)

The objectives of the planning agreement are **[describe]**. The effect of the planning agreement will be **[describe]**.

*Will the contributions be in the form of land, works or a monetary contribution?*

The contributions required by the planning agreement will be provided in the form of a monetary contribution paid to **[describe]**. The contribution is for approximately **[\$xxx per lot / \$xxxx for the subject land]**.

OR

The contributions required by the planning agreement will be provided in the form of works undertaken by the Developer. The scope of works is **[describe works]**.

OR

The contributions required by the planning agreement will be provided in the form of dedication of land **[describe land]**. A map of the proposed land to be dedicated is attached to this explanatory note.

*Will the contributions be provided in addition to or in lieu of other contributions?*

The contributions required by the planning agreement will be provided in addition to contributions under **[relevant contributions plan]**.

OR

The contributions required by the planning agreement will be provided in lieu of the contributions under **[relevant contributions plan]**, which would have required the development to contribute **[\$xxx]**.

OR

The contributions required by the planning agreement will be provided partially in lieu of the contributions under **[relevant contributions plan]**, which would have required the development to contribute **[\$xxx]**. The planning agreement will reduce the payment under the local contributions plan to **[\$xxx]**.

*When will the contributions be provided?*

The contributions required by the planning agreement will be provided before **[describe timeframe for provision, whether the provision will be linked to the release of subdivision/construction certificates etc]**.

#### **6. Assessment of the merits of the planning agreement**

How is the planning agreement in the public interest?

What is the impact, positive or negative, of the planning agreement on the public or any section of the public?

How does the planning agreement conform with the planning authority's capital works program, if any?

Are there any other matters which a reasonable member of the public would wish to know in understanding this planning agreement?

## **Appendix D – Potential Public Benefits**

The following is a list of infrastructure, facilities and services that could constitute a material public benefit. For consideration as part of a planning agreement, development contributions should provide a wider public benefit beyond that normally required for the development.

The following list is not exhaustive, and developers are encouraged to discuss these or other public benefits that may be included in a planning agreement. The suitability of the proposed benefit/s will be considered on a case by case basis and in line with Council's plans and strategies.

### **Development contributions under a planning agreement may include:**

- a monetary contribution.
- dedication of land free of cost.
- partial or full delivery of new or enhanced infrastructure works / facilities free of cost, including any contribution towards ongoing maintenance of those works.
- dedication of affordable housing or the like free of cost.
- expansion, upgrades, augmentations, embellishments, fit outs and resourcing of existing infrastructure / public spaces / facilities.
- any other public benefit, as agreed to by Council.
- a combination of the above.

### **Infrastructure**

- Accessibility improvements – accessible under cover parking, kerb ramps, modifications to public buildings or areas, accessible toilets, walkways, lighting.
- Open space – parks and green spaces, squares, sports courts, playing fields and supporting infrastructure.
- Drainage and stormwater work – drainage amplification, integrated water treatment facilities, large scale detention basins, overland flow paths and storm water channel improvements and sediment control measures.
- Water and energy minimising devices.
- Flood management / mitigation works.
- Roads – design and construction.
- Traffic management measures - bus and traffic turning lanes, public and “green” transport outcomes.
- Pedestrian and cycleway linkages, through site links and footpaths, construction of cycleways.
- Bicycle parking stations/bike racks and lockers.
- Bridges (vehicular and pedestrian).
- Public transport – works that facilitate and enhance existing public transport facilities such as transport interchanges, bus layovers and turning lanes, bus stops and shelters
- Shuttle bus services operated by a developer.
- Community-scale energy generation facilities.
- Undergrounding of overhead power lines.
- Telecommunication networks.

### **Public Community Facilities**

- Community facilities – e.g. multi-purpose meeting rooms, halls, libraries, galleries.
- Childcare centres.
- Public toilets.

- Youth spaces and recreation facilities (e.g., basketball, soccer).
- Performance, rehearsal, event spaces.
- Civic spaces.
- Public, commuter parking.
- Education, health facilities.
- Sport, recreation, leisure and activity centres (indoor and outdoor).
- Co-working spaces.

### **Public Spaces**

- Paving – paths, streets and open space areas.
- Planting – streets and open space areas.
- Furniture, facilities, lighting – shaded seats, bins, banners, tables, kiosk, shelter, water bubblers, lockers.
- Kerbs and gutters.
- Treatment, features, public art in public places.
- Play environments – accessible, all abilities and for a range of ages, adventure equipment, landscaping for nature play, hard stand for mobility devices, water play, soft-fall, sand.
- Restoration and management of natural areas.
- Signage including suburb identification, way finding, parking, interpretation and information signs for pedestrians, cyclists and vehicular users.
- Improvements in local or regional corridors (e.g. Duck River).

### **Other**

- Affordable housing.
- Affordable rental spaces – labs, offices – for business, research, community services and creative industries.
- Incubator space and ancillary spaces/facilities for business, research, social or community enterprise and creative industries.
- Aboriginal site protection.
- Heritage restoration works.
- Funding for major studies.
- Cash contributions for any of the above.
- Provision for maintenance in perpetuity – e.g. pest control, bush regeneration.

## **Appendix E – Matters to be considered in the assessment of land dedication**

Council will also consider the following matters (without limitation) in assessing the proposed dedication of land:

- The extent, if any, to which any development potential attaching to that part of the land to be dedicated has been incorporated elsewhere within the development.
- Whether the land proposed to be dedicated has been identified by Council in any Local Environmental Plan, Development Control Plan, Local Infrastructure Contributions Plan or other policy of Council.
- The location of the land in relation to a centre and good public transport.
- Whether the land will create or improve accessibility within the area whether by pedestrians, cyclists, private vehicles, public transport or any combination of these.
- Connectivity to existing open space, riparian corridor or bushland and whether the land can be consolidated into that area.
- Whether the land supports the habitat of threatened or endangered species of fauna or endangered ecological communities of flora.
- Any factors which may affect the usability of the land such as size, shape and topography, flood liability, soil and geotechnical conditions, potential contamination, easements, public accessibility and safety, proximity to existing uses, the current use of the land, the cost of embellishment or construction of any proposed facility on the land.
- The potential to carry out works within a reasonable time and, as a consequence, any measures required to secure or maintain the land in the event that works cannot be carried out for some time.
- In the case of a material public benefit not anticipated by a Local Infrastructure Contributions Plan and proposed to be offset against monetary contributions, the impact on the achievement of works identified within any adopted contributions plan of Council.
- The on-going costs to Council of care, control and management both prior to and after any improvement works are carried out on the land.
- Any other relevant matter in the circumstances of the case.

## Appendix F – Use of Residual Land Values to Ascertain Value Uplift

Source: SGS Economics and Planning (August 2017) Economic Advice on Value Sharing for Planning Agreements

### Residual land value (RLV)

Residential land value is defined as the price a rational developer would pay for a development site, based on the highest and best uses (e.g. the maximum amount of floor space allowed by the existing planning controls), and an average target rate for profit and risk.

Residual land valuation is an approach used to establish the value of land based on its development potential. Simply put, residual land value (RLV) is the total revenue from the potential development minus all development costs, including the developers' profit margin.

The cost of land is deliberately excluded as the primary purpose of the residual land value calculation is to determine how much the land is worth for the hypothetical development. All other development costs are included: the developer's margin for profit and risk, construction and site preparation costs, professional fees, marketing and finance costs, statutory fees and charges including s7.11 payments, inclusionary requirements and a consideration for impact mitigation measures (see Figure 1).

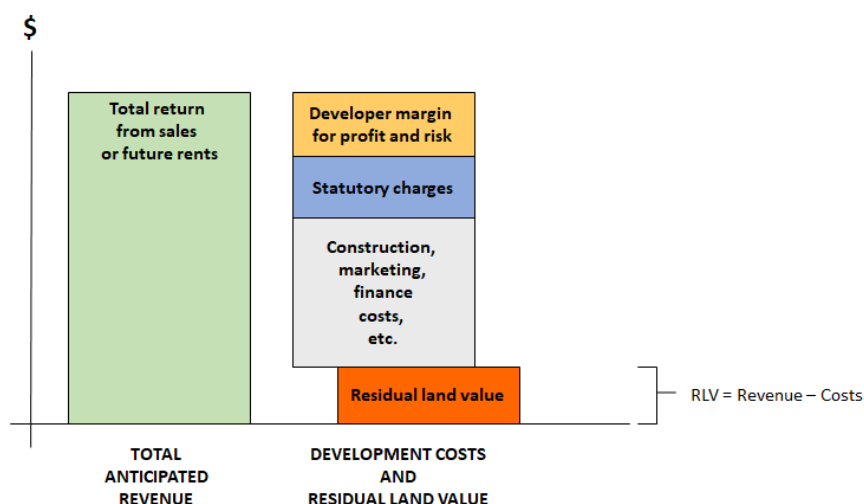


Figure 1: Residual land value approach to valuing land

Residual land values will vary between sites, based on the specific location, amenity, size and shape, and other idiosyncrasies. Regardless of these variations, valuers can estimate average residual land values for particular precincts, centres, or suburb using data on site sales and/or feasibility studies. These average RLVs can also be expressed as residual land value per square metre of floor space for different types of development.

For example, say the residual land value of a site on which 1,000 sqm of commercial development is permissible is \$500,000, then the residual land value per square metre of commercial development is \$500. Or if the RLV of a site that can accommodate 20 apartments is \$2,000,000, the RLV per dwelling would be \$100,000, or, assuming the gross floor space per dwellings is 100 sqm, \$2000 per square metre of gross floor space. In both these examples it follows that if the site was twice as large, or the planning controls allowed twice the density, the RLV of the site would also double.



## Uplift in residual land value resulting from planning changes

When a particular parcel of land is rezoned or has its development potential increased, the landowner is effectively granted additional 'development rights' which are not available to all landowners. This represents a 'rationing' of development rights which the community allows or understands as appropriate planning, as opposed to a 'free for all', which would result if there were no restrictions on development rights.

This rationing of development rights creates special development opportunities for particular landowners. The value of these opportunities is reflected in an increase in land value.

After a change to the zone or other development controls, all costs, which include user pays, impact mitigation and inclusionary development contributions, as well as the profit expectation, will increase for the higher value and denser development. All other things being equal, the residual land value can also be expected to rise. The figure below highlights these concepts and shows pre- and post- rezoning 'development values'.

This increase in land value (orange hatched box in Figure 2) is generated wholly independently of any investment by the landowner or developer and is separate from the profit received by the developer (yellow hatched box in Figure 2). It is therefore reasonable that a share of the uplift in value be extracted for broader community benefit.

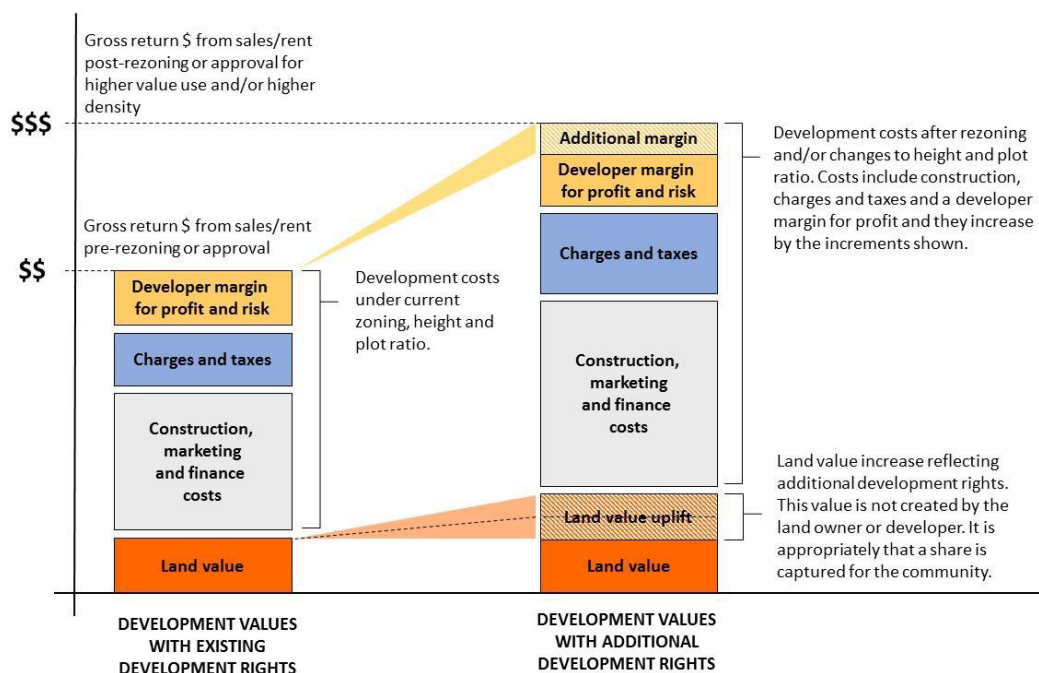


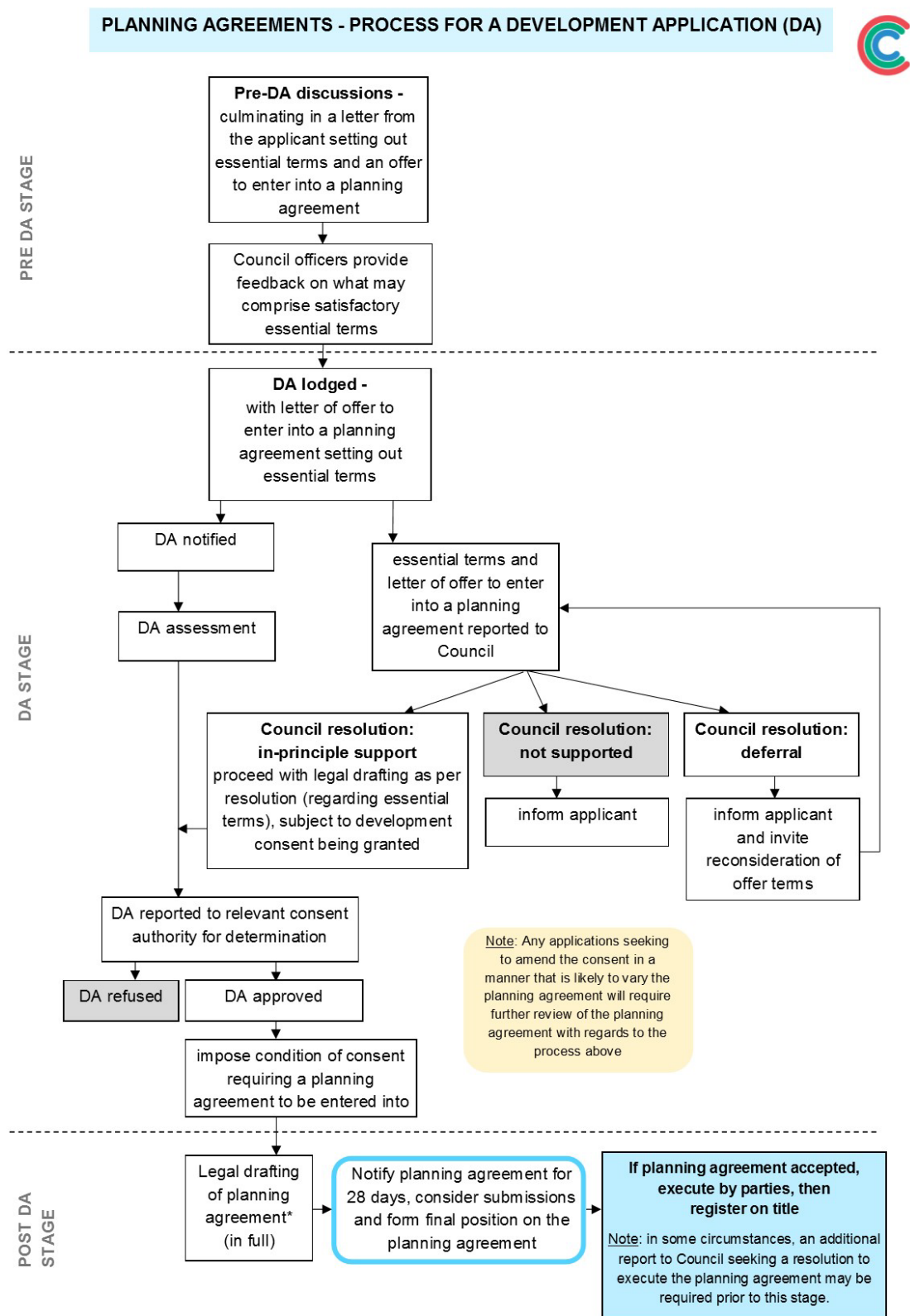
Figure 2: Residual land value and additional development rights

## Appendix G – Infrastructure Identified for Delivery by 2025

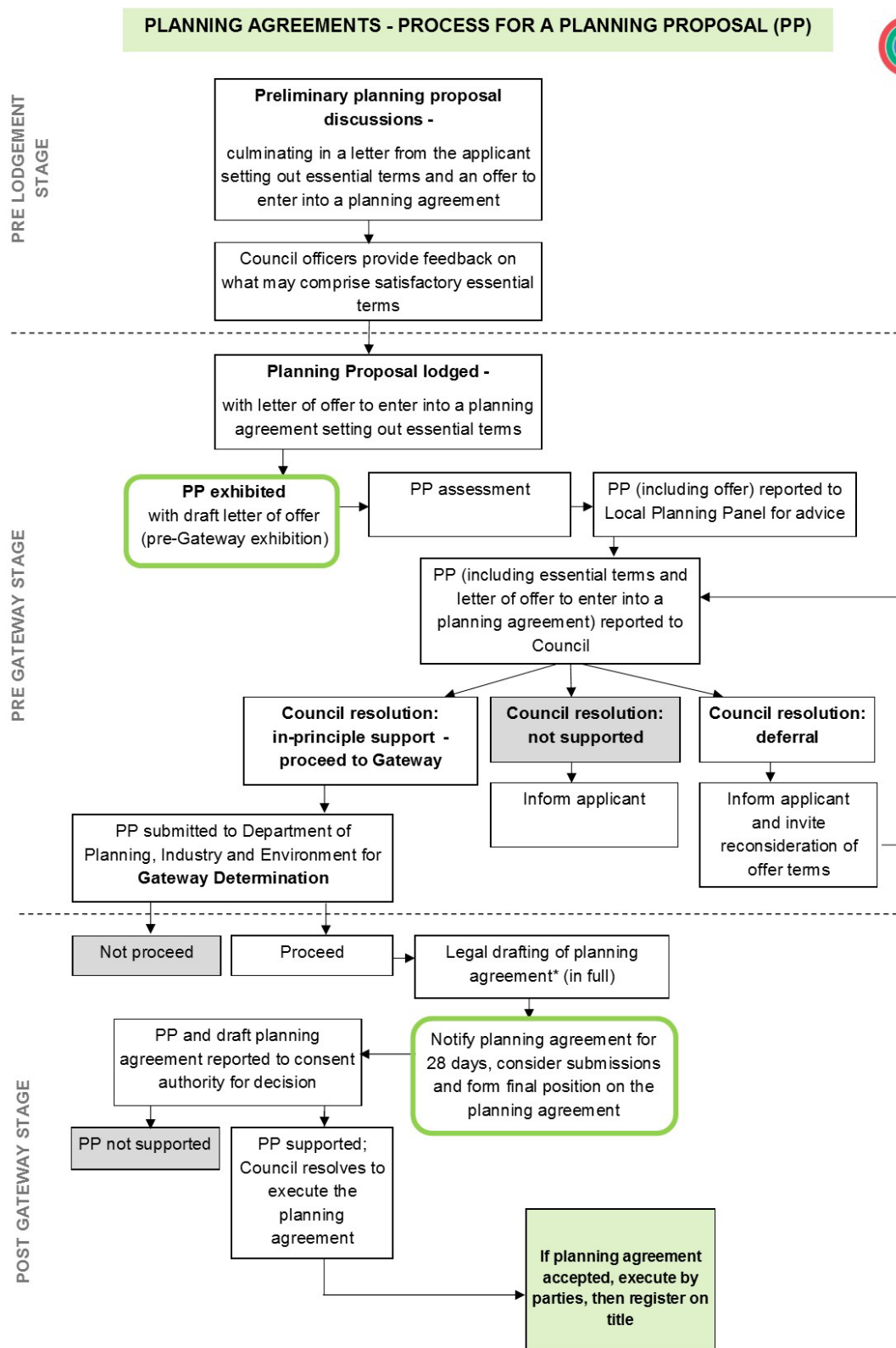
As not all infrastructure can be funded through the Infrastructure Contributions Plan and other funding sources, a list of infrastructure identified for delivery by 2025 is listed below. Development contributions negotiated under a planning agreement may consist of infrastructure identified in the Local Infrastructure Contributions Plan, in this table, or other infrastructure delivery plans.

SN	Project Name	Project Description	Assessments undertaken	Estimated Cost
1	The Duck River Parklands Draft Strategic Masterplan	Various projects to improve accessibility, water quality, vegetation and open space and recreation along the corridor.	Duck River Master Plan	Refer to Duck River Master Plan
2	Intersection of Lane Street and Veron Street, Wentworthville	Construction of roundabout	Traffic study, community requests, traffic incidents	\$300,000
3	Toongabbie CBD Precinct Streetscape Upgrade	Streetscape Upgrade – town centre beautification and assets upgrade and renewal of end of life assets	Assets management strategy, community requests	\$3,000,000
4	Dellwood Street, Granville – Streetscape upgrade	Improving the streetscape along the shop frontage including construction of a raised crossing on Blaxcell Street	Assets management strategy, community requests	\$750,000
5	Road widening, Hereford Place, South Wentworthville	Widening of road including drainage and construction of footpath	Current road is narrow and causing safety issues. Not enough width for two cars to pass and lack of footpath - Community request and compliance	\$1,000,000
6	Construction of pedestrian bridge on Duck creek along The Avenue, Granville	Construction of a pedestrian bridge to provide pedestrian access and continuation of the existing footpath	Community requests, footpath connectivity and pedestrian safety	\$250,000
7	Stormwater renewal	Renewal of stormwater assets (pipes and pits) identified as poor and very poor over the next 5 years	Stormwater condition audit, Assets management strategy	\$5,000,000
8	Replacement/renewal of Building components - Community buildings	Replacement/ renewal of building components identified as poor and very poor condition	Building condition audit/ Risk Assessment, Building Assets Management Plan	\$9,600,000

## Appendix H – Indicative Flowchart: VPA related to a Development Application



# Appendix I – Indicative Flowchart: VPA related to a Planning Proposal



\* cost of legal drafting to be borne by applicant