



## **7. PLANNING**

Policy 7.8

VOLUNTARY PLANNING AGREEMENTS

**Version 4**

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### 7.8 VOLUNTARY PLANNING AGREEMENTS

#### **OBJECTIVES:**

This policy provides procedures concerning the use of Voluntary Planning Agreements (VPAs) in the Lithgow Local Government Area.

#### **DEFINITIONS:**

Developer - is a person who has sought a change to an environmental planning instrument 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 contribution - means the kind of provision made by a developer under a planning agreement being a monetary contribution, the dedication of land free of cost, and/or the provision of an other material public benefit.

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

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

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

#### **POLICY:**

#### **CIRCUMSTANCES IN WHICH COUNCIL WOULD ORDINARILY CONSIDER ENTERING INTO A PLANNING AGREEMENT<sup>1</sup>**

Council will consider entering into a planning agreement in connection with a proposed change to an environmental planning instrument or a proposed/submitted development application. Some examples of circumstances where VPAs may be appropriate include:

- Compensation for loss or damage caused by development - VPAs can provide for development contributions that compensate for the loss of or damage to a public amenity, service, resource or asset that will or is likely to result from the carrying out of the development the subject of the agreement.
- Compensation for use of public land - VPAs can provide for development contributions that

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<sup>1</sup> Council may implement Standard Working procedures from time to time to guide staff in the process of negotiating VPAs including potential level of contributions and/or rationale for calculation of contribution, compensation or other public benefit.

compensate for the use of public land for the installation of infrastructure where this cannot be accommodated on the development site.

- Meeting demand created by development - VPAs can provide for development contributions that meet the demand for new public infrastructure, amenities and services created by development the subject of the agreement.
- Prescribing inclusions in development - VPAs can be used to secure the implementation of particular planning policies by requiring development to incorporate particular elements that confer a public benefit such as open space, recreational facilities, retention of urban bushland etc.
- Providing planning benefits to the wider community - Through a VPA, development may provide an overall net benefit to the wider community rather than purely addressing the direct impacts of the development. Planning benefits may take the form of additional or better quality public facilities than is required to meet the demand created by the development.
- Recurrent funding - VPAs may provide for public benefits that take the form of development contributions towards recurrent costs of infrastructure, facilities and services.

Other examples of public purposes for which a development contribution may be the subject of a VPA between a developer and Council are listed in section 7.4(2) of the Environmental Planning and Assessment Act 1979 (Act). These lists are not intended to limit the kinds of public purposes for which Council will consider entering into a VPA.

While planning agreements may be used in a wide range of circumstances it is important to identify situations that may prevent Council from considering entering into a planning agreement. Such circumstances are included in the following:

- Where the suspicion may arise that a change to an environmental planning instrument or a development consent can be bought by the highest bidder via a planning agreement. In particular:
  - VPAs must not include public benefits wholly unrelated to the particular development; and
  - value capture should not be the primary purpose of a VPA.
- When the planning agreement incorporates or suggests an obligation for Council to grant consent to the application the subject of the VPA.
- Where a breach of the EP&A Act or other Act may result from the provisions of a planning agreement.
- Council will avoid, wherever possible, entering a VPA where Council has a direct stake in the development.

Council is required to consider any relevant practice notes issued by the Planning Secretary when negotiating or entering into a VPA. At the date when this Policy was last updated, the relevant practice note was Planning Agreements Practice Note – February 2021 (Practice Note).

Among other things, the Practice Note provides for a generally applicable test for determining the

acceptability of a planning agreement. This acceptability test requires that planning agreements:

- Are directed towards legitimate planning purposes, which can be identified in the statutory planning controls and other adopted planning strategies and policies applying to development.
- Provide for the delivery of infrastructure or public benefits not wholly unrelated to the development.
- Produce outcomes that meet the general values and expectations of the public and protect the overall public interest.
- Provide for a reasonable means of achieving the desired outcomes and securing the benefits.
- Protect the community against adverse planning decisions.

This policy has been prepared taking the Practice Note into consideration. It is intended to facilitate the consideration of the Practice Note in any instance where Council is negotiating or entering into a VPA as required by section 203(7) of the Environmental Planning and Assessment Regulation 2021 (Regulation).

### **FORM OF DEVELOPER CONTRIBUTIONS ORDINARILY SOUGHT UNDER A PLANNING AGREEMENT**

Development contributions to be used for, or applied towards a public purpose under a planning agreement can be:

- Monetary contributions,
- The dedication of land free of cost,
- Any other material public benefit, or
- Any combination of the above.

Public purpose is defined in section 7.4(2) of the EP&A Act to include the provision of, or the recoupment of the cost of providing public amenities and public services, affordable housing, transport or other infrastructure. It also includes the funding of recurrent expenditure relating to such things as the monitoring of planning impacts of development and the conservation or enhancement of the natural environment.

Section 7.4(4) of the EP&A Act provides that a provision of a planning agreement is not invalid by reason only that there is no connection between the development and the object of the expenditure of any money required to be paid under the provision. However, the Practice Note provides that planning agreements must not include public benefits wholly unrelated to the particular development.

## **KINDS OF PUBLIC BENEFITS ORDINARILY SOUGHT AND, IN RELATION TO EACH KIND OF BENEFIT, WHETHER IT INVOLVES A PLANNING BENEFIT**

The kinds of public benefits ordinarily sought are those often provided for by the developer contributions system including but not limited to open space provisions, recreational and sports facilities, community facilities, car parking, road and traffic facilities, drainage structures, environmental protection, streetscape and other public domain improvements. Each of these can include a planning benefit. Contributions made by developers towards public purposes that are wholly unrelated to their development are discouraged, as explained above.

In accordance with section 7.4(4) of the Act development contributions provided for in a planning agreement do not have to bear a connection with the development as required by section 7.11.

Examples of possible contributions, dedications or material public benefits that may be considered appropriate for a planning agreement include:

- A monetary contribution on an 'equivalent tenement' toward the provision of community facilities in the Lithgow Local Government Area.
- Embellishment of existing open space areas.
- Dedication and embellishment of active and passive open space.

The following provides an example of possible inclusions in a planning agreement:

- The developer shall pay to Council an amount of (to be negotiated) per allotment created for residential purposes toward the provision of community facilities in the Lithgow Local Government Area.
- Full embellishment of the passive open space generally as outlined in (the developer's offer) including weed removal, a shared access pathway/cycleway and seating.
- Provide as part of the lands the subject of the development application at least (area to be determined – for example in accordance with a DCP requirement) of land for active open space purposes and embellish the lands prior to the issue of a subdivision certificate with at least the following:
  - A mixture of (to Council's satisfaction) new playground equipment, greenspace, skateboard and/or bicycle "ramp" facilities, basketball/netball practice facilities (eg part of a court area and hoop)
  - Seating and tables
  - The area is to be suitably landscaped and turfed with low maintenance lawn and fitted with an irrigation system
  - Alternatively, the developer may choose to pay Council an amount of (to be negotiated) per allotment created for residential purposes in respect of active open space required as a result of the development.

### **Pooling and progressive application of contributions to various public benefits**

Council is required to disclose that monetary contributions paid under different planning agreements may be pooled and progressively applied towards the provision of public benefits that

relate to the various agreements. Planning agreements should specifically provide for this mechanism. Pooling may be appropriate to allow public benefits, particularly essential infrastructure, to be provided in a fair and equitable way.

Pooling may not be practicable or necessarily appropriate where few planning agreements are enacted, particularly if these are not geographically proximate.

## **PROCEDURES FOR REPORTING DRAFT VOLUNTARY PLANNING AGREEMENTS TO COUNCIL**

The passage of a Voluntary Planning Agreement shall be reported to Council at the following stages of the process:

- Details of draft Planning Agreement – seeking Council’s approval to place the draft agreement on public exhibition.
- Finalisation of Planning Agreement - Final endorsement to enter into the Voluntary Planning Agreement following public exhibition.

Public participation in the process will be conducted in accordance with the requirements in Division 1 of Part 9 of the Regulation. These include requirements relating to public notice of, explanatory notes for, and information about, planning agreements.

### **Discharging of Developer’s Obligations**

Other than complying with the terms of the agreement, other circumstances that may require the discharge of the developer’s obligations relating to a planning agreement include the following:

- Material changes to the planning controls applying to the land to which the agreement applies;
- A material modification to the development consent to which an agreement relates;
- The lapsing of the development consent to which an agreement relates;
- The revocation or modification of a development consent to which an agreement relates by the Minister;
- Other material changes in the overall planning circumstances of an area affecting the operation of the planning agreement.

### **Refunds**

Refunds of monetary development contributions made under the agreement are available if public benefits are not provided in accordance with the agreement and such a provision regarding a refund is included in the relevant agreement.

### **Dispute Resolution**

Council will provide dispute resolution provisions in every VPA.

## Enforcement Mechanisms

Council may provide enforcement provisions in each VPA.

## GST Considerations

VPA's under Section 7.4 of the Environmental Planning and Assessment Act are exempt from GST.  
(ATO Ruling CR 2013/13)

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