

## Planning Agreements

### Policy Statement

This Policy sets out Northern Beaches Council's position relating to planning agreements (PAs) under section 7.4 of the *Environmental Planning and Assessment Act 1979* (the "Act").

The current legal and procedural framework for PA obligations is set out under the *Environmental Planning and Assessment Regulation 2000 as amended* (the "Regulation").

The *Planning Agreements Practice Note* (NSW Government, February 2021) and the *Infrastructure Contributions Practice Notes*<sup>1</sup> (NSW Government) should be read in conjunction with this Policy. If there is any inconsistency between the legislative provisions, the Practice Notes issued by NSW Government and this Policy, the legislative provisions and NSW Government Practice Notes prevails.

This Policy and any outcomes sought through the PA process will also be undertaken in the context of delivering the vision, goals and outcomes of the Northern Beaches Local Strategic Planning Statement – Towards 2040 and Community Strategic Plan.

### Scope and Application

This Policy applies to all Planning Agreements (PA) entered into by the Northern Beaches Council and applies to all land in the Northern Beaches Council local government area (LGA), including any land owned by the Council.

This Policy also applies to land outside of the Northern Beaches Council LGA in case of a joint PA between Council and another council or planning authority for land outside of the Northern Beaches Council LGA.

Section 7.4 of the Act sets out the circumstances under which a PA may be entered into. It provides that a '*...planning agreement is a voluntary agreement or other arrangement between a planning authority (or 2 or more planning authorities) and a person (the developer):*

- a) *who has sought a change to an environmental planning instrument, or*
- b) *who has made, or proposes to make, a development application or application for a complying development certificate, or*
- c) *who has entered into an agreement with, or is otherwise associated with, a person to whom paragraph (a) or (b) applies,*

*under which the developer is required to dedicate land free of cost, pay a monetary contribution, or provide any other material public benefit, or any combination of them, to be used for or applied towards a public purpose.'*

A diagram showing the process is in Attachment 1 of this Policy.

### Principles

The guiding principles of this Policy are:

- a) To establish a fair, transparent and accountable framework governing the use and preparation of PAs by Council.

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<sup>1</sup> <https://www.planning.nsw.gov.au/Policy-and-Legislation/Infrastructure/Infrastructure-Funding/Local-infrastructure-contributions-policy>

- b) To enhance the range and extent of public benefits arising from a PA.
- c) To ensure a consistent approach is undertaken in the negotiation and preparation of all PAs that is efficient, fair and accountable.
- d) To supplement the application of section 7.11 or section 7.12 of the Act.
- e) To align with Council's corporate and strategic planning context, including Council's Local Strategic Planning Statement, Community Strategic Plan, Delivery Plan, Operational Plan, Development Contribution Plans or other Infrastructure Planning Documents.
- f) To ensure greater probity and establish a probity framework for the negotiation, preparation and implementation of PAs.
- g) To facilitate public participation and to allow the community to gain an understanding of the benefits of appropriate PAs for the provision of public benefits.

### **Types of Contributions**

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

- a) a monetary contribution,
- b) provision of any material public benefit including (without limitation) public facilities,
- c) dedication of land free of cost, or
- d) a combination of the above,

to be used for or applied towards a public purpose<sup>2</sup>.

### **Offer to Enter into a Planning Agreement**

The Offer to Enter into a Planning Agreement (the "Offer") is initiated by a developer and can occur at any time – before an Application is lodged with Council, during the assessment phase of the Application, or after determination (such as once Council supports a Planning Proposal or a development consent is issued).

An Application means a development application, complying development certificate or application for instrument change (Planning Proposal).

#### *Consideration of the Offer*

Council will ultimately require that the contribution provides a positive planning outcome for the Northern Beaches community.

There must be a demonstrable public benefit arising from a PA and this should be clearly demonstrated in the Offer. This information will help Council to consider the Offer. An Information Guide has been developed to assist developers.

Council has the discretion not to enter into a PA for any reason, including if the contribution is not considered to deliver a sufficient demonstrable public benefit.

In consideration of an Offer, the following will be taken into account:

- a) Whether it is acceptable and reasonable to use a PA.
- b) Whether the offer proposed in a PA can be achieved via an alternate mechanism such as a condition of development consent.

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<sup>2</sup> Public purpose as defined under Section 7.4(2) of the Act

- c) Whether the PA meets the requirements of the Act and the Regulation.
- d) Whether the PA meets the current and future demands created by the development for new public infrastructure, amenities and services.
- e) Whether the PA aligns with Council's strategic documents.
- f) Whether compensation is required for the loss of, or damage to, a public amenity, service, resource, the natural environment or asset caused by the development through its replacement, substitution, repair or regeneration.
- g) Whether the PA rectifies an existing deficiency in the provision of public facilities and services on the Northern Beaches.
- h) Whether future recurrent funding<sup>3</sup> related to the proposed public benefit is sustainable.
- i) Whether the public benefit accrues over time.
- j) Whether the PA is directed towards proper or legitimate planning purposes, ordinarily ascertainable from the statutory planning controls and other adopted planning policies applying to development.
- k) Whether or not there is a nexus between the public benefit and the development application or application for instrument change (note section 7.4(4) of the Act does not require any nexus between the public benefit and the development application or application for instrument change).
- l) Producing outcomes that meet the general values and expectations of the public and protect the overall public interest.
- m) Providing for a reasonable means of achieving the relevant purposes and outcomes and securing the benefits.
- n) Protecting the environment and community against planning harm or adverse planning decisions.
- o) Whether there any relevant circumstances that may operate to preclude Council from entering into the proposed PA.

Notwithstanding the above, Council is not obliged to enter into a PA.

In addition, Council will ensure:

- a) All dealings relating to PAs, including assessment and implementation, will be subject to strict compliance with the Northern Beaches Council Code of Conduct.
- b) That planning decisions will not be bought or sold through PAs.
- c) That a PA will not improperly fetter the exercise of its functions under the Act, Regulation or any other act or law.

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<sup>3</sup> All Planning Agreements that involve the carrying out of works for a public purpose by the Developer should include a reasonable contribution toward ongoing maintenance and replacement costs of the infrastructure. The developer may make monetary contributions towards ongoing maintenance and replacement costs or may offer to maintain infrastructure delivered for a certain period of time after handover; or make contributions towards other recurrent costs of public facilities such as operational or service provision costs.

- d) That PAs are not used for any purpose other than that contemplated by section 7.4 of the Act.
- e) That undue weight is not given to a PA in consideration of a development application or application for instrument change.
- f) That the consideration, negotiation and assessment of a proposed PA will be separate from the consideration of the planning merits of a development application or an application for instrument change. Council will, consistent with section 4.15 of the Act, take into consideration relevant provisions of a proposed PA when evaluating a development application.
- g) That the interests of individuals or interest groups will not outweigh the public interest when considering a PA.
- h) That it will not improperly use its position to extract disproportionate public benefits from developers under PAs.
- i) That it will not use PAs as a means to overcome revenue raising or spending prohibitions to which it is subject or for other improper purposes.

## **Probity**

Public probity is important to Council and it will ensure that the consideration of an Offer/proposed PA is fair, transparent and is directed at achieving public benefits in an appropriate manner free of corruption or perception of bias.

In this regard, Council will:

- a) Comply with the requirements of the Act and Regulation in respect of PAs.
- b) Provide a copy of this Policy to any person who seeks to enter into a PA with Council.
- c) Ensure all parties operate in accordance with Council's Code of Conduct.
- d) Ensure that Council officers and Councillors understand the circumstances in which PAs are appropriate.
- e) Ensure that Council officers and Councillors understand their particular role and responsibility, some of which carry the potential for conflicts of interest.
- f) Ensure that the community understands Council's role, including how the PA operates and how Council will assess an Offer and proposed PAs objectively.
- g) Notify PAs in accordance with the Act and Regulation, to ensure they are open and transparent, and to achieve maximum public awareness of the matters contained in a PA and the potential benefits of a PA.
- h) Ensure appropriate delegations and separations of responsibilities in considering development applications or applications for instrument change that involve PAs. This involves ensuring processes adequately address the level of risk of corruption of a process while at the same time being appropriate to the likely level of risk.
- i) Ensure that modifications to approved development should be subject to the same scrutiny as the original development application and include notification to the Development Contributions Working Group prior to determination.
- j) Take every step to ensure that conflicts of interest are ameliorated to the greatest extent possible. This may include independent assessment by a third party where Council has an interest, and not entering into any contractual arrangement which purport to guarantee outcomes that are subject to separate regulatory processes.

- k) Ensure that appropriate probity mechanisms are in place.

The procedures that will be implemented to address these matters may include, but not be limited by, the following:

- a) The Councillors will not be involved in the negotiation and preparation of the PA but will ultimately decide whether to accept any PA as part of their duties as Councillors.
- b) The Development Contributions Working Group and Development Infrastructure Contributions Panel will assess the Offer on behalf of Council in accordance with this Policy and make appropriate recommendations to Council.
- c) The Responsible Officer, with instructions from the Development Infrastructure Contributions Panel, will manage Council's negotiations for the obligations to be included in the PA.
- d) Council will, in all cases, ensure that Council staff with key responsibility for providing advice on development application approvals, approving development applications or ensuring compliance, do not have a role in the assessment of the commercial aspects of the PA nor on the conditions of the PA except where advice is required on matters relating to the conditions of consent for a particular proposal.
- e) Council may involve an independent person(s) to facilitate or otherwise participate in the consideration of an Offer particularly where this will lead to a better outcome.
- f) Council will ensure that all discussions with a developer and their consultants relating to a PA are sufficiently documented.
- g) Council will ensure that Council staff involved in PA considerations are free from conflicts of interest.
- h) Where Council has a commercial stake in a development that is the subject of a PA, it will take appropriate steps to ensure that it avoids a conflict of interest between its role as a planning authority and its commercial interest role in the development consistent with the ICAC strategies for managing dual roles in its publication *Corruption Risks in NSW development approval processes: Position Paper (September 2007)*.

#### **How will Council value contributions the subject of the Offer?**

Council will seek to value the public benefit of the Offer as follows:

- a) If the Offer is for provision of land for a public purpose, the value of the benefit is on the basis of the market value of that part of the land the subject of the Offer. This market value is to be prepared by a registered property valuer and provided by the developer.
- b) If the Offer is the carrying out of works for a public purpose, the value of the benefit is on the basis of the estimated value of the completed works via a cost estimate prepared by an independent quantity surveyor provided by the developer. The Quantity Surveyor's cost estimate of the said works should reference and attach the plans that informed the cost estimate.

If the Offer contribution(s) is identified in the Works Schedule of an adopted Contributions Plan, the estimated cost of the infrastructure item is in the adopted Contributions Plan however, the public benefit value will still need to be assessed.

If required:

- a) the market value assessment will be independently verified by a registered property valuer commissioned by Council.

- b) the valuation will be independently verified by an independent quantity surveyor commissioned by Council.

In all instances, the costs of the valuation will be at no cost to Council.

It is acknowledged that in some cases the public benefit may be an intangible benefit that can only be assessed in qualitative terms, such as a particular design outcome for a proposed building. In this case, the Council will determine the manner in which the Offer's contribution is to be valued.

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

The Council may attribute a value to benefits provided under a PA, for the purposes of determining the value of the contributions being offered by the developer.

### **Application of Section 7.11 or Section 7.12 development contributions**

If an adopted Contributions Plan applies, development contributions under section 7.11 or section 7.12 of the Act will apply to the development.

A developer should assume that section 7.11 or section 7.12 development contributions will be payable to Council in addition to any PA contribution should Council decide to execute the Planning Agreement.

In the event that Council has resolved to execute a PA and the application is not yet determined, and the PA is proposed to deliver land or material public benefit identified in the applicable Contributions Plan in lieu of paying the section 7.11 or section 7.12 development contributions levied on an existing development consent (either in full or part), the proposed section 7.11 or section 7.12 conditions of consent should expressly state what contributions are payable including the PA contribution identified in the Contributions Plan.

An application to modify the consent by deletion or modification of the existing section 7.11 or section 7.12 conditions of consent would may also need to be made following execution of the PA.

Where certain infrastructure provision or works are critical to a development occurring and required to be provided as part of a development by way of a condition of development consent<sup>4</sup>, then these are considered to be in addition to any PA contribution. No reduction in the PA contribution would be accepted in recognition of works required to be carried out in connection with the proposed development or already required via a condition of consent unless those works are identified in a contributions plan. This will be at Council's discretion.

In all other circumstances, Council will generally only favourably consider excluding the application of section 7.11 or section 7.12 where the public benefit to be delivered via the PA contribution exceeds the public benefit to be delivered under a Development Contributions Plan. A PA cannot exclude the application of sections 7.11 or 7.12 to a particular development, unless the consent authority for the development or the Minister is a party to the planning agreement (section 7.4(3A) of the Act).

Where section 7.11 or section 7.12 is not excluded by a PA, Council will generally not agree to a provision allowing benefits under the PA to be taken into consideration in determining a development contribution under section 7.11 or section 7.12.

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

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

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<sup>4</sup> Refer to Section 4.17(1) of the Environmental Planning and Assessment Act 1979 as amended

- a) The developer's obligations have been fully carried out in accordance with the PA, or
- b) The development consent to which the PA relates has lapsed, or
- c) The developer is able to satisfy the Council that good reason exists for some change to the PA and that the public benefits provided under the modified PA are appropriate in the circumstances, or
- d) The developer has fully and completely assigned the developer's interest under the PA in accordance with its terms.

Such a provision may require the modification or revocation of the PA in accordance with the Act and Regulation.

### **Costs of Entering a Planning Agreement**

An Offer to Enter into a Planning Agreement is to be accompanied by an application fee payable to Council. The application fee covers the assessment and administration costs associated with the consideration of the Offer.

Council and the developer will each meet their own costs in the process of the commercial negotiations for a planning agreement, together with the cost of employing independent consultants and third parties if necessary.

Generally, Council will require that all reasonable costs for the drafting, legal negotiations, exhibition, execution and registration of the agreement are met by the developer.

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

Council will not permit the assignment of any or all of the developer's rights or obligations under the PA, nor will Council permit any dealing in relation to any part or the whole of the land the subject of the PA unless:

- a) The developer has, at no cost to Council, first procured the execution by the person with whom it is dealing of all necessary documents in favour of Council by which that person agrees to be bound by the PA as if they were a party to the original ~~V~~PA, and
- b) 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 a ~~V~~PA by the person to the effect that they, and any receiver appointed by them, will not enjoy rights greater than those of that party, and
- c) The party is not in breach of the PA, and
- d) The Council is satisfied that the assignee is capable of complying with the obligations under the PA.

The reassignment of the developer's rights or obligations will require a Deed of Novation, to be approved and executed by all parties, and does not affect the operation or any of other requirements of the PA.

### **Provision of security under a PA**

Council will generally require a PA to make provision for security to cover the developer's obligation under the PA. The form of security will generally be an unconditional bank guarantee from an Australian bank in favour of Council to the full value of the developer's obligation plus a reasonable contingency under the PA and on terms otherwise acceptable to Council. This is to manage Council's risk especially in relation to payment for works in lieu.

The provision of no security may be considered where the PA seeks the dedication of land.

## Notations on Certificates under Section 10.7(5) of the Act

Council will generally require a PA to contain an acknowledgement by the developer that Council will make a notation under section 10.7(5) of the Act about the PA on any certificate issued under section 10.7(2) of the Act relating to the land the subject of the VPA or any other land.

## Registration of PAs

A PA will contain a provision requiring the developer to register the PA under the *Real Property Act 1900* at the developer's expense pursuant to section 7.6 of the Act.

The developer will be required to provide the Council with the written agreement of each person with an estate or interest in the land in a form sufficient to effect the registration of the PA at NSW Land Registry Services.

## Dispute resolution

Council will require a PA to provide for mediation of disputes between the parties to the PA before the parties may exercise any other legal rights in relation to the dispute.

## References and Related Documents

- *Environmental Planning and Assessment Act 1979*, particularly Subdivision 2 of Part 7
- *Environmental Planning and Assessment Regulation 2021*
- *Real Property Act 1900*
- *Planning Agreement Practice Note* (February 2021) and *Infrastructure Contributions Practice Notes* issued by NSW Government
- Northern Beaches Council Code of Conduct

## Definitions

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

**Contribution** means the kind of provision made by a developer under a Planning Agreement, being a monetary contribution, the dedication of land free of cost or the provision of a material public benefit to be used for or applied towards a public purpose,

**Council** means the Northern Beaches Council,

**Developer** is a person who has sought a change to an environmental planning instrument (which includes the making, amendment or repeal of an 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 application** has the same meaning as in the Act,

**Development Infrastructure Contributions Panel** means the Northern Beaches Council panel responsible for the preparation, implementation and management of development contributions Plans in the Northern Beaches area, and making recommendations to Council regarding Planning Agreements,

**Development Contributions Working Group** means the Northern Beaches Council group that supports the Development Contributions Committee in the preparation, implementation and management of development contributions plans and Planning Agreements in the Northern Beaches area. The Working Group undertakes assessments of offers for a Planning Agreement,

**Instrument Change** means a change to an environmental planning instrument to facilitate a development the subject of a Planning Agreement,

**Obligation** means an obligation imposed by a Planning Agreement on a developer requiring the developer to make a contribution,

**Practice Notes** means the Practice Notes expressly related to Planning Agreements and Infrastructure Contributions issued by NSW Government,

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

**Public benefit** is the benefit enjoyed by the public as a consequence of a development contribution which may be tangible and/or intangible,

**Public facilities** means public infrastructure, facilities, amenities and services not including water supply or sewerage services,

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

**PA** means a Planning Agreement.

### Responsible Officer

- Executive Manager Strategic & Place Planning
- Executive Manager Environment and Climate Change
- Executive Manager Financial Planning & Systems
- Executive Manager Property
- Manager Strategic and Place Planning or Principal Development Infrastructure Officer

### Review Date

March 2026

### Revision History

Revision	Date	Status	TRIM Ref
1	October 2019	Drafted VPA Policy	2019/489894
2	17 Dec 2019	Adopted by Council	2019/489894
3	March 2022	Draft Planning Agreement Policy (Clean Copy for Exhibition)	2022/101684

# ATTACHMENT 1

## Flowchart of Planning Agreement Process

