



SHIRE COUNCIL
Blayney

Voluntary Planning Agreements

Policy	18D
Officer Responsible	Director Planning and Environmental Services
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Strategic Policy

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1. Purpose

The purpose of this Policy is to provide a clear framework and sound governance for the negotiation and management of planning agreements in the Blayney local government area.

This Policy applies where a proponent voluntarily proposes a planning agreement referred to under section 7.4 of the Environmental Planning and Assessment Act, 1979.

2. Objectives

The objectives of the Policy are:

- To establish a clear, open, transparent and accountable framework to govern the negotiation, use, management and implementation of planning agreements by Council;
- To ensure that the framework is soundly based upon probity and enables efficient, fair, transparent and accountable negotiations and implementation;
- To promote public trust and confidence in the processes of negotiation, execution and implementation of planning agreements;
- To ensure that Council, Council officers and proponents understand their roles and responsibilities when negotiating, assessing and implementing planning agreements;
- To provide planning flexibility for Council to negotiate fair, reasonable and equitable development contributions by proponents of planning proposals and development applications
- To enhance the range and extent of development contributions towards the optimal delivery of public infrastructure services and facilities in the Council area; and
- To enable innovative approaches to the delivery of public infrastructure, services and facilities.

3. Definitions

In this Policy the following definitions are used:

Act means the Environmental Planning and Assessment Act (as amended) 1979;

Consent - The Development Consent that has initiated the Application;

Council means Blayney Shire Council;

Development application (DA) has the same meaning as in the Environmental Planning and Assessment Act 1979;

Development contribution means the kind of provision made by a developer under a planning agreement being a monetary contribution, the dedication of land free of cost or the provision of a material public benefit, or any combinations of the above;

Explanatory Note means a written statement that provides details of the objectives, nature, effects and merits of a planning agreement or an amendment to, or revocation of, a planning agreement;

Instrument Change means a change to an Environmental Planning Instrument to facilitate development which is the subject of a Planning Agreement;

Material Public Benefits (MPB) - consist of some physical (material) component, other than land dedication or monetary contribution, in settlement of the contributions levied upon the development consent, but does not include works nominated in a contribution plan's Work Schedule or planning agreement;

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 particular development on surrounding land or the wider community;

Proponent means a person who has sought a change to an Environmental Planning Instrument through the lodgement of a Planning Proposal or who has submitted or proposes to lodge a development application – or, by formal agreement, is a representative of an applicant for such changes;

Public facilities mean public infrastructure, facilities, amenities and services;

Plan - The applicable Section 7.11 contribution plan;

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

Planning Proposal means a proposed change to the Blayney Local Environmental Plan 2012 – a change to an Environmental Planning Instrument - to enable a development subject of an application to be made permissible and to carry out the development subject of the development application and planning agreement;

Practice Note means the practice notes on development contributions published by the Department of Infrastructure, Planning and Natural Resources on 19 July 2005; Revised Local Development Contributions Practice Note published by Department of Planning and Infrastructure in 2014; and Draft Practice Note on Planning Agreements published in November 2016 by NSW Planning and Environment.

Public includes a section of the public;

Public benefit means the benefit enjoyed by the public as a consequence of development contribution;

Public Purpose includes:

- Provision of, including recoupment of, the cost of public amenities or public services;
- Transport or other infrastructure relating to land;
- Funding of recurrent expenditure relating to the provision of public amenities of public services, transport or other infrastructure;
- Monitoring of the planning impacts of development; and
- Conservation or enhancement of the natural environment;

Regulation means the Environmental Planning and Assessment Regulation (as amended) 2000;

Surplus value means the value of the developers' provision under a planning agreement more than the sum of the value of public works required to be carried out by the developer under a condition imposed under section 4.17(1) of the Act and the value of development contributions that are or could have been required to be made under section 7.11 or section 7.12 of the Act in respect of the development subject of the Agreement.

Works In Kind (WIK) - is the undertaking of work, or the provision of amenities, services or facilities, or the dedication of land as nominated in the Plan's Work Schedule and includes reference to Contribution Offsets;

WIK Agreement - A formal agreement that must be entered into with Council following Council approval of an Application under this policy;

4. Policy Statement

Council is committed to the equitable and transparent approach to the negotiation, development and management of planning agreements to facilitate the delivery of public infrastructure to meet the needs of the community.

5. Principles

5.1 Guiding Principles

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

- Development consent cannot be refused because a planning agreement has not been entered into or the proponent has not offered to enter into one;
- A condition of development consent can only require a planning agreement to be entered into by a proponent strictly in accordance with an offer made by the proponent;
- Planning agreements will not be used to fetter the development assessment process;
- Planning agreements will not improperly fetter the exercise of discretion and the functions of Council under the Act, Regulation or any other Act or law;

- Council will use planning agreements only for a proper planning purpose and a purpose which stands the tests of fairness, reasonableness and equity;
- The interests of individuals or interest groups will not outweigh the public interest when considering, negotiating and finalising a planning agreement;
- Council will not use its statutory position to gain unreasonable public benefits from proponents when considering, negotiating, finalising, executing and implementing planning agreements;
- Council will take appropriate steps to ensure that it avoids any conflict of interest between its role as a planning authority when it has a commercial interest in the outcomes of a planning agreement;
- Council will ensure that planning agreements are based upon sound, reasonable and accountable financial management;
- Council will ensure that all processes and content of a planning agreement are transparent and soundly based upon probity;
- Negotiation of a planning agreement is to be entered into in good faith by all parties; and

The planning agreement reflects the priorities of the community as identified in Council's Community Strategic Plan

5.2 Acceptability Test

Practice Notes issued by the State government sets out an Acceptability Test for assessing whether planning obligations are appropriate under a planning agreement. The Acceptability Test ensures planning agreements:

- Are directed towards proper or legitimate planning purposes, ordinarily ascertainable from the statutory planning controls and other adopted planning policies applying to development;
- Provide for public benefits that bear a relationship to development that is not de minimis (that is benefits that are not wholly unrelated to 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 relevant purposes and outcomes and securing the benefits; and
- Protect the community against planning harm.

5.3 Circumstances in which Council will consider the Negotiation of a Planning Agreement

Council at its complete discretion may consider the negotiation of a planning agreement with a proponent who has voluntarily offered to enter into such an agreement in association with a planning proposal or development application. A planning agreement may be considered for such purposes as to:

- Compensate for the loss of, or damage to, public infrastructure, facilities, amenities, services, resources or environmental assets

- caused by the proposed development through replacement, substitution, repair or regeneration;
- Meet the demands created by the development for new public infrastructure, amenities and services or when, in Council's opinion an environmental offset represents a planning and public benefit;
- Address deficiencies in existing provision of public infrastructure, amenities, services and facilities which have a connection with the planning proposal / development application. There should also be a clear rationale and public benefit to take this approach;
- Achieve recurrent funding in respect of public infrastructure, amenities, services and / or facilities and for on-going maintenance of land of environmental significance which is to be conserved;
- Prescribe inclusions in the development that meet specific planning and environmental objectives of the Council;
- Clearly secure public benefits for the wider community;
- Enable items in the work schedules of Council's contributions plans to be brought forward and/or when deficiencies and/or omissions in Council's existing Development Contributions Plans can be addressed;
- Not involve any unreasonable financial liabilities for the Council.

5.4 Application of Clause 4.6 Blayney Local Environmental Plan 2012

In relation to submissions seeking to vary development standards in accordance with Clause 4.6 of Blayney Local Environmental Plan 2012, Council will not accept a provision in a planning agreement to justify a variation from applicable development standards in relation to development unless the Council is of the opinion that the subject matter of the proposed planning agreement properly addresses the matters required to be addressed under that Policy in relation to the dispensation sought and there is a resulting urban design or other outcome which leads to improved planning and public benefit.

6. Requirements of a Planning Agreement

6.1 Mandatory Requirements

The mandatory requirements of a planning agreement are prescribed under section 7.4(3) of the Act. All planning agreements must include:

- A description of the land to which the agreement applies.
- A description of:
 - the change to the environmental planning instrument to which the agreement applies; or
 - the development to which the agreement applies.
- The nature and extent of the provisions to be made by the proponent under the agreement, the time or times by which the provision is to be made and the manner by which the provision is to be made.
- In the case of proposed development / planning proposal whether the agreement excludes (wholly or in part) or does not exclude the application of section 7.11, 7.12 or 7.24 of the Act to the development;

- If the agreement does not exclude the application of section 7.11 to the development, whether benefits under the agreement are or are not to be taken into consideration in determining a development contribution under section 7.11.
- A mechanism for the resolution of disputes under the agreement.
- The enforcement of the 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 proponent.

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

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

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.

6.2 Contents of a Planning Agreement

6.2.1 Cost and Value Estimations

Council will provide standard and consistent values and costs for capital and recurrent aspects of planning agreements as much as possible.

Council may require the proponent to fund an independent Quantity Surveyor to provide cost estimates to form the basis of planning agreement costs for capital and recurrent items. Council may use its own values or engage qualified independent persons to determine values.

Where the benefit under a planning agreement is the provision of land for a public purpose, the Council will require a valuation at the proponent's cost and seek to value the benefit on the basis of the estimated amount of compensation to which the proponent would be entitled under the Land Acquisition (Just Terms Compensation) Act 1991 upon the compulsory acquisition of the land.

6.2.2 Recurrent Costs

Council may request proponents, through a planning agreement, to make contributions towards the recurrent costs of public facilities. Where the amenity, service, or public facility primarily serves the development to which the planning agreement relates or neighbouring development, the arrangement for recurrent funding may be in perpetuity.

If the funding of recurrent costs is required to be part of the planning agreement, the planning agreement will include the following matters:

- The specific purpose of the recurrent funding;
- The nature and extent of the recurrent funding
- The time period over which the funding shall be provided;
- Any mechanisms for the indexing of the recurrent funding;
- The heads of consideration for any endowment fund or trust that may be required to be established to manage the recurrent funding;
- The provision of security such as bank guarantee, bond or other form of security to secure the ongoing funding;
- Circumstances in which funding would be renegotiated or revoked; and
- Any other matter relevant to securing the public interest in the achievement of an ongoing public benefit.

6.2.3 Land Dedication

In the case of land identified within a contributions plan, the value of land in that plan will be considered in determining the initial contribution rates.

Land to be dedicated is required to be valued by a suitably qualified expert. Only land required for a specific community benefit and purpose can be considered for dedication. A long term maintenance cost will need to be included and factored into the final valuation to ensure Council minimises the long term financial burden on the community and the organisation.

The land is to be fit for purpose having specific regard to size, accessibility, topography and location.

Council may refuse the dedication of land when the amount proposed to be dedicated exceeds the minimum area required in a relevant plan and/or the burden of maintenance exceeds the long term benefit of the land to the community.

6.2.4 Monetary Contributions

A planning agreement may make provision for monetary contributions other than contributions under an adopted and in force section 7.11 or section 7.12 Contributions Plan. Council's acceptance of such contributions will be based upon alignment with other Council plans, a clearly articulated public purpose, and the matters stated below.

Where a planning agreement provides for monetary contributions, the following matters are to be stated:

- The amount of the monetary contribution;
- The purpose and extent of the monetary contribution;
- When such contributions are to be paid;
- In the case of staged payments, the nature of the staging or the dates at which time payments are to be made;

- Any mechanisms for the indexing of the monetary contribution against inflation over time;
- Details of any security that is to be provided in lieu of the monetary contribution until such time as it becomes due and payable;
- Any obligations on Council for the expenditure of the monetary contributions and related financial reporting; and
- Any other matter relevant to securing the public interest in the management and expenditure of the monetary contributions

6.2.5 Works In Kind and Material Public Benefit

Council, at its discretion, may accept the provision of a material public benefit or works in kind by a proponent in lieu of the payment of development contributions.

6.2.6 Provision of security under a planning agreement

The Council may require a planning agreement to make provision for a security payment of a minimum of 10 percent of the value of the proponent's obligations under the agreement. (Note: the 10% can be applied per stage only if undertaken in accordance with a staged development consent).

The form of security will generally be the unconditional bank guarantee from an Australian Bank in favour of the Council and on terms otherwise acceptable to the Council

A flat rate of \$20,000 may be applied as security if no civil works are included in the planning agreement.

6.3 Pooling of development contributions

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

7. Probity

Public probity is fundamentally important and it will ensure that the negotiation of any planning agreement is fair, transparent and is directed at achieving public benefits in an appropriate manner, free of corruption.

In this regard, Council will:

- Exhibit in accordance with the Act all planning agreements to ensure openness and transparency;
- Ensure appropriate delegations and separation of responsibilities in considering development applications that involve planning agreements including, the need to ensure processes are soundly based upon documented risk management;

- Ensure that there is clarity of roles for councillors, council management and staff;
- Take every step to ensure that conflicts of interest (actual and perceived) are ameliorated to the greatest extent possible through independent assessment by third parties where Council has a commercial interest (.i.e. landowner or proponent).
- Not enter into any contractual arrangement which purports to guarantee outcomes that are subject to separate regulatory processes and/or fetters the discretion of the assessment and determination of applications.

Council managers and professional officers with appropriate delegated authority will negotiate a planning agreement on behalf of Council in accordance with this Policy.

Council will ensure that all negotiations with proponents and their representatives are sufficiently documented.

The Council's process for the preparation, negotiation and execution of planning agreements aims to be efficient, predictable, transparent and accountable. The process seeks to ensure that the negotiation of planning agreements runs in parallel with applications for instrument changes or development applications.

When agreed by the parties, the concluded range of public infrastructure, amenities, services and facilities, together with the dedication and on-going management of environmentally significant land will be embodied in a Heads of Agreement to be formally endorsed by the parties. This will be the basis for drafting of the planning agreement.

Councillors have the responsibilities for:

- Setting the Policy which directs negotiations of planning agreements,
- Endorsing a planning agreement for public notification; and
- Endorsing the planning agreement in conjunction with determining the Planning Proposal for referral to the Department of Planning and Environment or determining the relevant development application.

8. Involvement of independent third parties in negotiation process

The Council may at its sole discretion, appoint an independent person to facilitate or otherwise participate in the negotiations or aspects of it, particularly where:

- an independent assessment of a proposed instrument change or development application is necessary or desirable;
- factual information requires validation in the course of negotiations;
- sensitive financial or other confidential information must be verified or established in the course of negotiations;
- facilitation of complex negotiations are required in relation to large projects or where numerous parties or stakeholders are involved; and
- dispute resolution is required under a planning agreement.

9. Public Notification and Engagement

The planning agreement must be negotiated and documented before it is publicly notified as required by the Act and Regulation. The Act states that a minimum period for notification is 28 days.

10. Implementation

10.1 When is a planning agreement required to be executed?

A planning agreement is entered into when it is signed by all of the parties and may include timing and/or staging commitments for the proponent to meet in regard to the completion of works etc.

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

10.2 Implementation Agreement

In appropriate cases, the Council may require a planning agreement to provide, prior to commencement of the development the subject of the agreement commences, that Parties enter into an implementation agreement that provides for matters such as:

- the times at which and, if relevant, the period during which, the proponent is to fulfil commitments under the planning agreement;
- the design, technical specification and standard of any work required by the planning agreement to be undertaken by the proponent;
- the manner in which a work is to be handed over to the Council; and
- the manner in which a material public benefit is to be made available for its public purpose in accordance with the planning agreement.

The Council will generally require a planning agreement to provide that the proponent's obligations under the agreement take effect when the first development consent operates in respect of development that is the subject of the agreement or within an alternative prescribed time frame.

10.3 Monitoring, Review and Enforcement of a Planning Agreement

The Council will monitor the performance of the proponent's obligations under a planning agreement.

The Council will require the planning agreement to contain a provision establishing a mechanism under which the planning agreement is periodically reviewed with the involvement of all parties.

The 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 having regard to the outcomes of the review.

10.4 Modification or discharge of the proponent's obligations under a Planning Agreement

The Council will generally only agree to a provision in a planning agreement permitting the developer's obligations under the agreement to be modified or discharged where the modification or discharge is linked to the following circumstances:

- the proponent's obligations have been fully carried out in accordance with the agreement;
- the development consent to which the agreement relates has lapsed;
- the performance of the planning agreement has been frustrated by an event beyond the control of the parties;
- other material changes affecting the operation of the planning agreement have occurred
- the Council and the proponent otherwise agree to the modification or discharge of the agreement; or
- The Minister has determined in writing to the parties not to support the planning proposal.

10.5 Assignment and dealings by the proponent

The Council will require every planning agreement to provide that the proponent may not assign its rights or obligations under the agreement nor have any dealing in relation to the land the subject of the agreement unless, in addition to any other requirements of the agreement:

- the proponent has, at no cost to the Council, first procured the execution by the person with whom it is dealing of all necessary documents in favour of the Council by which that person agrees to be bound by the agreement as if they were a party to the original agreement; and
- the proponent is not in breach of this Agreement.

10.6 Notations on Certificates under section 10.7(5) of the Act

The Council will generally require a planning agreement to contain an acknowledgement by the proponent that the Council may, in its absolute discretion, make a notation under s 10.7(5) of the Act about a planning agreement on any certificate issued under s10.7 of the Act relating to the land the subject of the agreement or any other land.

10.7 Registration of planning agreements

The Council will require a planning agreement to contain provisions for registration of the planning agreement on the title of the land pursuant to section 7.6 of the Act. The proponent will undertake the registration at no cost to Council and provide evidence of registration.

10.8 Dispute resolution

The 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.

10.9 Credits and refunds

The Council will determine on a case by case basis generally whether to agree to a planning agreement providing for the surplus value under a planning agreement being refunded to the proponent or offset against development contributions required to be made by the proponent in respect of other development in the Council's area.

10.10 Administration Matters

Three original copies of the planning agreement are required for execution:

1. For the proponent
2. For Council
3. For the Land Titles Office.

The third copy will not be required if the planning agreement is not required to be registered on the title of the land.

Council will provide the proponent with the required paper copies for signature.

The Council will sign and date the required paper copies only after the proponent has signed. Council will then retain one original copy in accordance with the State Records Act 1998. Council will provide the remaining copy / copies to the proponent.

Relevant Legislation

- Environmental Planning and Assessment Act, 1979
- Environmental Planning and Assessment Regulation 2000
- Blayney Local Environmental Plan 2012

Related Policy

- Practice Note: Development Contributions published by the Department of Planning, Infrastructure and Natural Resources 19 July 2005
- Planning Circular PS 11-007: Voluntary Planning Agreements and Development Control Plans – NSW Planning 18 February 2011
- Revised Local Development Contributions Practice Note - Department of Planning and Infrastructure 2014
- Draft Practice Note on Planning Agreements - NSW Planning and Environment published November 2016

Other references

- NSW Mining and Energy Council Roads Calculator and the negotiation framework Schematic

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