

## Planning Agreements Guideline

<b>Policy Owner: Group Manager City Planning</b>	
<b>Date Last Adopted/Amended: 16 November 2021</b>	<b>Review Date: 16 November 2024</b>

**Written guidelines provide broad advice in following a procedure or process instead of providing a set of precise requirements or standards.**

### 1. Introduction

Council’s Planning Agreements Policy has been prepared to set out Council’s requirements for the preparation of planning agreements with Council. This Guideline underpins and supports that Policy by providing further guidance for applicants on the preparation of planning agreements.

Council expects that this Guideline should be followed to the fullest extent possible.

#### Key Points

- This Guideline applies to all situations where an applicant wishes to apply to enter into a planning agreement with Council.

### 2. Definitions

Act	the Environmental Planning and Assessment Act 1979
Construction Certificate	has the same meaning as in the EP&A Act.
Contributions Plan	is a document that has been publicly exhibited and adopted by the Council pursuant to Section 7.18 of the EP&A Act that authorises the imposition of a condition under Section 7.11 of that Act;
Contribution Value	(a) in relation to an Infrastructure Item that is identified in the Contributions Plan, the estimated cost for the Infrastructure Item, as specified in the Contributions Plan, which may differ from the final actual cost of construction of the item,  (b) in relation to any other Infrastructure Item approved by the Council, the agreed value of that Infrastructure Item.

Council	Shellharbour City Council
Defects Liability Period	the period stipulated in a planning agreement during which Council may give the Developer a rectification notice stating the works to be rectified at the Developers cost.
Developer	is a person who has sought a change to an environmental planning instrument (which includes the making, amendment or revocation of an instrument (s7.4(11)) 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 Consent	has the same meaning as in the Act;
Development Contribution	a monetary contribution required by a condition of Development Consent imposed under Section 7.11 of the Act.
ELT	Council's Executive Leadership Team
Explanatory Note	a written statement that provides details of the objectives, nature, effect and merits of a planning agreement or an amendment or revocation of a planning agreement as required under clause 25E of the Regulation;
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 a change to an environmental planning instrument to facilitate a development that is or may be the subject of a planning agreement
Planning proposal	has the meaning given in section 3.33 of the Act
Practice Note	the Planning Agreements Practice Note published by the Department of Planning Industry and Environment (February 2021) and as may be amended from time to time
Planning agreement contribution	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 or applied towards a public purpose
Policy	Shellharbour City Council Planning Agreements Policy

Public benefit	is the benefit enjoyed by the public as a consequence of a planning agreement contribution
Public purpose	has the meaning given in Section 7.4 of the Act
Regulation	the Environmental Planning and Assessment Regulation 2000
Surplus Value	the amount by which the Contributions value of the works exceeds the required monetary contribution

### 3. Variation and Review

Council reserves the right to review, vary or revoke these Guidelines.

#### Review History -

Date Guideline (Procedure) first adopted – version 1	16 November 2021
Date amendment adopted – version 2	

### 4. Guidelines

#### 4.1 What is a Planning Agreement

4.1.1 **The Act** empowers Council to require developers to make contributions of money, works or land in relation to a development. These contributions (also known as Sec 7.11 or Sec 7.12 contributions) are used to help pay for services and infrastructure that need to be provided as a consequence of the development;

4.1.2 As an alternative to collecting these contributions, the Act also enables the Council and developers to negotiate planning agreements. A planning agreement is a voluntary agreement between a planning authority and a developer who has sought a change to an environmental planning instrument, or who has made or proposes to make a development application or application for a complying development certificate, under which the developer is required to:

- dedicate land free of cost;
- pay a monetary contribution;
- provide any other material benefit, or
- provide any combination of the above

to be used or applied towards a public purpose.

4.1.3 Planning agreements allow for a wider range of **public benefits** to be obtained in comparison to benefits collected under Section 7.11 or Section 7.12 of the Act. They also provide for greater flexibility in the timing of the delivery of local infrastructure, and the locations where it can occur;

4.1.4 With the anticipated growth of Shellharbour, it likely that more developers will seek to enter into planning agreements with the Council. A sound policy for the preparation of planning agreements, supported by this Guideline will help facilitate the preparation of planning agreements by providing advice to applicants about what should be included in a planning agreement, explaining the steps in preparing such an agreement, and advising how Council will ensure that probity considerations are addressed in a planning agreement;

- 4.1.5 This Guideline provides developers with information about how to enter into a planning agreement with Council, and includes Council's expectations in relation to the content of a planning agreement.

Council expects that this Guideline will be complied with to the fullest extent possible.

## **4.2 General Guidance on Negotiating and Preparing a Planning Agreement:**

- 4.2.1 The Council's negotiation of planning agreements will be based on principles of efficiency, fairness, transparency and accountability
- 4.2.2 Council prefers that the negotiation of planning agreements occurs simultaneously with the associated application for an instrument change or development application.
- 4.2.3 In some cases, Council may agree to entering into a planning agreement after development consent has been granted. In such cases however a condition of consent must include provision on for a planning agreement to be prepared in accordance with a Letter of Offer submitted by the applicant or developer and approved by Council.

## **4.3 Process for Entering into a Planning Agreement with Council**

The process that should be followed by an applicant seeking to enter into a planning agreement is explained in detail in Council's [Promapp process](#) which can be accessed through the hyperlink.

The details of each stage of the process are available through the hyperlink above, and are not repeated here. However, for clarity it is advised that if the applicant, following an initial meeting with Council decides to submit a formal letter to enter into a planning agreement, the letter should include the following information:

- 1) details of the development application or instrument change with which the agreement is associated;
- 2) details of the benefits to be provided under the agreement (whether works, land , a monetary contribution;
- 3) if works are being provided whether the work is an item that is included in Councils Local Infrastructure Contributions Plan (Sec 7.11 Plan), and if so the Contribution Value for the works
- 4) if works are being provided, whether any Council approval is required before the works can be constructed
- 5) details of the proposed commencement time of the Agreement
- 6) details of the proposed timing of the delivery of the benefits;
- 7) details of the security to be provided under the planning agreement;
- 8) advice as to whether any offset of benefits payable under Council's Sec 7.11 Plan are being sought;
- 9) whether any maintenance contribution is included in the benefits being provided (to help offset maintenance costs of either land or a facility being provided under the Agreement;
- 10) agreement to pay Council's reasonable costs in the preparation of the planning agreement
- 11) an outline of any other relevant matters included in this Guideline and an undertaking to comply with these matters in the preparation of the Agreement.

The letter including this information should preferably be submitted at the same time that the development application or planning proposal is lodged.

#### **4.4. Mandatory Requirements under the Act for Inclusion in a Planning Agreement**

It is essential that a planning agreement comply with Section 7.4 of the Act, including the mandatory content requirements for planning agreements (Sec 7.4 (3)).

These matters are as follows:

- a) a description of the land to which the agreement applies,
- b) a description of:
  - i. the change to the environmental planning instrument to which the agreement applies, or
  - ii. the development application to which the agreement applies,
- c) the nature and extent of the provision to be made by the developer 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,
- d) in the case of development, whether the agreement excludes (wholly or in part) or does not exclude the application of section 7.11, 7.12 or 7.24 to the development,
- e) if the agreement does not exclude the application of sections 7.11 to the development, whether the benefits under the agreement are, or are not, to be taken into consideration in determining a development contribution under these sections of the Act,
- f) a mechanism for the resolution of disputes under the agreement;
- g) 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 developer.

As the mandatory requirements under the Act may change from time to time each planning agreement should be checked against the most current version of the Act and Regulation at the time it is being prepared.

#### **4.5 Advice on Matters to be included in a Planning Agreement**

This section of the Guideline provides advice as to Council's policy position, or "rules" on how some of the mandatory requirements should be addressed in a planning agreement, as well as on other matters that may be included in the agreement.

**Council expects that all planning agreements will be prepared to be consistent with the provisions included in this section of the Guideline.**

##### **4.5.1 Security**

As required by the Act. Council will ensure that planning agreements include adequate security arrangements to protect against a breach of the agreement by the developer. Such arrangements may include the following, depending upon the circumstances of the planning agreement and the public benefits being provided:

- a) where the agreement provides for benefits to be paid in the form of a monetary contribution that the contribution be made prior to the issue of a construction certificate or a subdivision certificate. Unless unavoidable, a planning

agreement should not include a provision that such contributions be made prior to an occupation certificate as this does not provide Council with a sufficient level of security;

- b) where the agreement provides for works to be carried out, a bond or bank guarantee from an Australian bank in favour of the Council should be provided for 120% of the value of the works, and on terms otherwise acceptable to Council (refer also to subclause 'f' below). This should be provided whether or not the works are to be completed before the issue of a construction or subdivision certificate as security against the developer defaulting on the planning agreement, and in which case Council may need to step in and complete the works. The agreement may also need to include "Step - in rights" in favour of Council to provide further security against this eventuality;
- c) where a planning agreement provides for the dedication of land to Council, the Agreement must include a provision that enables the Council to compulsorily acquire the land for A\$1.00 in the event of a breach of the agreement by the developer;
- d) Council will also require the planning agreement to be registered on the title of the land;
- e) Council may also in appropriate circumstances require the planning agreement to create a charge on the land, and to provide that Council can lodge a caveat on the title of the land to protect its interests;
- f) Council will also require any financial security that is provided to be indexed according to the same index as the contributions to which it relates.
- g) Council will usually require that any security required for works or for the dedication of land to be in place prior to the issue of a subdivision certificate or a construction certificate.

#### **4.5.2 Type of development contributions under a planning agreement**

- a) Council has no preference for a particular type of contribution and will consider, on a case by case basis contributions including money, the dedication of land free of cost, the construction of works, including a combination of these;
- b) Where a planning agreement proposes the dedication of land to Council, or the dedication of works (for example, stormwater infrastructure, Council will consider whether there may be a requirement for a contribution for the ongoing maintenance of the land or the works proposed to be dedicated and may seek to include this in the planning agreement
- c) Where a planning agreement proposes to undertake works, the provisions of clause 4.5.2 ( c) will also apply

#### **4.5.3 Acceptance of Works**

Acceptance by Council of any works to be constructed under a planning agreement shall be subject to the following:

- a. the developer obtaining all necessary approvals (including development consent or complying development certificate) necessary to undertake the works;

- b. the provision by the developer of a certificate confirming that the work has been carried out and completed in accordance with the agreement and with any development consent that applies and with any relevant Australian Standards; and
- c. the Council will also require the planning agreement to provide a defects liability period during which any defects must be rectified at the developer's expense. The Defects Liability Period and Maintenance Periods will commence from the hand over date or as set out in the planning agreement.
- d. Where a work is proposed as a benefit under a planning agreement and a monetary value is assigned to that work and is included in the planning agreement for the purpose of valuing the work, Council will expect that the planning agreement will provide for the work to be delivered whether or not it exceeds the value of that work included in the planning agreement;
- e. Prior to completion of the works an inspection will be carried out and Council will assess the acceptability of the works. If incomplete or defective works are identified during the inspection, the Developer will be required to remedy these at its own cost to Council's satisfaction. The works will be taken to be completed to the Council's satisfaction when the Council gives written notification to the Developer to that effect. This will be provided for in the planning agreement.
- f. Where the works are located on land not owned by the Council the Council will generally require the land to be dedicated to it free of cost. Pursuant to s7.11 (5) (b) of the Act, the value of the land cannot be accepted to satisfy a requirement for a monetary contribution imposed under s7.11 (1) of the Act.
- g. In circumstances where the works are provided on land which will not be dedicated to Council, appropriate notations and/or restrictions must be placed on the title to the satisfaction of the Council to ensure that the land will be used for its intended purpose under the planning agreement. Arrangements on title must also be made to provide for future and ongoing maintenance of the land and works either by Council or by another party as provided for by the planning agreement.

#### **4.5.4 Time when developer's obligations arise under a planning agreement**

- a) The Council will generally require a planning agreement to provide that the developer's obligations under the agreement take effect when the first development consent operates in respect of development that is the subject of the agreement.
- b) Contributions will usually be required to be made prior to the issuing of a construction certificate or subdivision certificate in respect of the development;
- c) For planning agreements prepared in connection with instrument changes, the development contributions may be required before any development consent is granted.

#### **4.5.5 Application of s7.11 and S 7.12**

Planning agreements can exclude the application of s7.11 and s 7.12 of the Act in whole or in part, so that a developer may not need to pay some or all of these contributions, in addition to the contributions proposed under the planning agreement.

- a) Council has no general policy on whether a planning agreement should exclude

the application of sec 7.11 or 7.12 to development to which the agreement relates. This is a matter for negotiation between the Council and a developer, depending upon the circumstances of the agreement. Some further advice about this matter is included in Clauses 4.6.10 and 4.6.11.

- b) Where the application of sec 7.11 or sec 7.12 of the Act is not excluded by a planning agreement, the Council will consider on a case by case basis whether to include a provision allowing benefits under the planning agreement to be taken into account when determining a development contribution under sec 7.11 or sec 7.12.

#### 4.5.6 Dispute resolution

A planning agreement must provide a mechanism for the resolution of disputes arising under a planning agreement. The Council will generally require a planning agreement to provide for mediation of disputes between the parties to the agreement before the parties may exercise any other legal rights in relation to the dispute.

#### 4.5.7 Indexing of Costs and GST

- (a) In general, Council will expect that monetary contributions paid under a planning agreement are indexed to account for changes in the consumer price index, with the final payment to be indexed to the relevant cpi that is current at the time that the payment is made;

When indexing the contribution required under the planning agreement, the following formula will be applied:

$$C_I = \frac{C_B \times \frac{CP_P}{CP_C}}{X}$$

Where:

$C_I$  contribution rate at date of payment

$C_B$  base contribution rate as specified in the planning agreement

$CP_P$  Latest published 'June quarter' index rate at the date of payment

$CP_C$  Latest published 'June quarter' index rate at date of execution of planning agreement.

When indexing the contributions to be paid, Council will generally use the All Groups Consumer Price, Sydney published by the Australian Bureau of Statistics (ABS Series Code 6401.1).

However, Council reserves the right base its indexation of contributions on other indices where this is considered appropriate and relevant to the use to which the contribution will be applied.

- (b) Council may also seek to standardise development contributions sought under a planning agreement by basing them on the current Development Contributions Plan. This should streamline negotiations and provide fairness, predictability and certainty for developers.

#### 4.5.8 GST and Planning Agreements

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

Monetary contributions provided under a planning agreement are exclusive of GST. If GST is or becomes payable on any contribution under a planning agreement, the developer will be required to pay the GST or to pay an amount to Council equivalent to the GST. The template planning agreement includes a provision to this effect

#### 4.5.9 Recurrent Costs

The planning agreement may seek to include a monetary contribution for recurrent costs (such as ongoing maintenance) associated with the provision of a facility such as a building, or the dedication of land that is provided through the planning agreement

Where the public facility or land primarily serves the development to which the planning agreement relates or neighbouring development, the developer may be required to fund the ongoing costs of the facility in perpetuity.

However, where the public facility or public benefit is intended to serve the wider community, the planning agreement may only require the developer to make contributions towards the recurrent costs of the facility or land until a sufficient revenue stream is established to support the on-going costs of the facility or land.

#### 4.5.10 Pooling of Development Contributions

Where a proposed planning agreement provides for a monetary contribution by the developer, the Council may seek to include a provision permitting money paid under the agreement to be pooled with other money obtained by the Council under other planning agreements, and under conditions imposed on development consents pursuant to s7.11 or s 7.12 of the Act, so that those funds can be applied progressively for the different purposes identified under those agreements and conditions.

Pooling may assist in allowing public benefits, particularly essential infrastructure and services to be provided in a fair and equitable way.

#### 4.5.11 Offsets and Credits for the Payment of Developer Contributions

Where a developer proposes to provide infrastructure (such as works or land) to Council as a benefit under a planning agreement, Council may allow the provision of this infrastructure to offset contributions payable under sec 7.11 or sec 7.12 of the Act, and/or to allow a credit against future contributions. Council's consideration as to whether to allow an offset or credit will be based on the following principles:

- (a) **Offsets for works or land required to enable the development**  
Council will generally not agree to offsets of Sec 7.11 contributions for works that are included in a planning agreement and which are considered as "direct works" (i.e. works that are directly attributable to the proposed development - such as road upgrades resulting directly from a proposed development). Council may however agree to the inclusion of "direct works" in a planning agreement to help provide certainty that they will be delivered,

and in some cases to provide for a maintenance contribution for these works.

**(b) Offsets and Credits for Infrastructure included in Council's Contributions Plan**

- i. In most cases, a Works in Kind Agreement is the appropriate type of agreement for a developer to deliver a work that is identified in Council's Local Infrastructure Plan, and developers are referred to Council's Works in Kind Policy and associated Works in Kind Guideline for advice about preparing works in kind agreements to deliver such items of infrastructure.

However, where an item that is included in Council's Local Infrastructure Plan is included as a public benefit under a planning agreement (perhaps because it is one of several other items being delivered), the maximum value of any offset (or credit) that may be given through the planning agreement for this item will generally not exceed the value for that infrastructure that is included in the Contributions Plan

- ii. However, in most cases where an offset is considered appropriate Council will only allow an offset up to the amount of the sec 7.11 or sec 7.12 contribution payable in respect of the same category of infrastructure included in the Section 7.11 or sec 7.12 Plan.
- iii. Council may allow additional offsets but only up to the maximum value of the Sec 7.11 contribution that would be payable. Council will generally not agree to refund any amount by which a contribution made under a planning agreement exceeds the contributions which the developer would otherwise have been required to make under the Act
- iv. Where the cost of the works or the land value exceeds the amount of any offset allowed by way of sub clause (ii) above (the surplus value), Council will generally not allow any refund of the surplus value to the developer.
- v. In cases where a piece of infrastructure benefits other development in the area (carried out by other developers), or where Council wishes for the delivery of that infrastructure to be brought forward, Council will consider entering into recoupment processes with other developers and any money so recouped up to the "Surplus value" will be allowed as a credit or refund to the first developer against future Sec 7.11 or Sec 7.12 contributions for other development in the Shellharbour local government area;

**c) Offsets and Credits for infrastructure items not included in Council's Contributions Plan**

- (i) For all infrastructure items provided for by a planning agreement that are not included in Council's Contributions Plan, a Sec 7.11 offset or credit against future contributions may be allowed where Council believes that a wider community benefit will result from the provision of the public benefits under the planning agreement. The suitability of any offset, and the amount will be determined at Council's discretion, and will be considered against the following principles:
  - Allowing an offset up to the maximum of the amount otherwise payable through the Section 7.11 or 7.12 contribution for the corresponding category of works;
  - Allowing credits to the developer on developer contributions payable on future development when Council has recouped money from other developers benefitting from the infrastructure, (for example, by including

the item in a Section 94 Plan, or by the negotiation of planning agreements with other developers). The amount of credit allowed will be the amount of money actually received through the recoupment process, up to a maximum of the “surplus value”

- Allowing offsets on other categories of the Section 7.11 contribution that is payable up to the maximum amount of contribution required to be paid.
- Including the item in a Sec 7.11 Plan in cases where Council considers that the works will result in a significant benefit to the wider community;

(ii) In considering whether to allow offsets or credits for these developments, Council will consider the likely impacts of the offset or the credit on delivering the works program included in the Contributions Plan;

(iii) **Credits and Refunds**

Council will generally not grant a credit for the value of any contributions made under a planning agreement other than in accordance with this clause

Council will not refund contributions made under a planning agreement unless the development consent is surrendered and the contributions paid have not been spent or allocated to a project budget. Contributions toward recurrent costs will not be refunded.

Any refund of contributions received under a planning agreement is at the full discretion of Council.

#### **4.5.12 Methodology for valuing Public Benefits under a Planning Agreement**

Where it is agreed that the value of any land or works provided under a planning agreement may offset contributions payable under s7.11 of the Act, the following principles shall be used to help determine the value of the offsets

I. *Dedication of Land*

Where the public benefit under a planning agreement is the provision of land for a public purpose, the Council will generally seek to value the benefit on the basis of the estimated amount of compensation to which the Developer would be entitled under the *Land Acquisition (Just Terms Compensation) Act 1991* upon the compulsory acquisition of the land.

Council will normally require the developer to obtain a valuation of the land at his or her cost. Council may also seek to confirm this value by arranging for a separate valuation at its own cost.

If the land is to be dedicated to Council under a planning agreement at “no cost”, it will only be considered to be dedicated at “no cost” if no offset of the Section 7.11 contribution is allowed.

All land that is to be transferred to Council under the provisions of a planning agreement, whether it is associated with the undertaking of works or not, must generally be dedicated or transferred at no cost to Council and free of encumbrances.

The developer will be responsible for preparing all documents and meeting all costs associated with the following:

- Removing any encumbrance on the title
- Creating an interest in land in the Council’s favour
- Subdividing any of the land

- Preparing and lodging documents for registration
- Obtaining the consent of any land owners to the registration
- Dealing with any requisition from Land and Property Information relating to any dealing lodged for registration.

Where the land is being dedicated in association with the undertaking of works, the land will not be transferred until the completion of works to Council's satisfaction, unless otherwise specified in the planning agreement.

## II. *Carrying Out of Works*

Where the benefit under a planning agreement is the carrying out of works for a public purpose, the Council will generally seek to value the benefit on the basis of the estimated value of the completed works determined using the method that would be ordinarily adopted by an independent quantity surveyor.

Council will normally require the developer to obtain a valuation of the works being provided through a planning agreement land at his or her cost. Council may also seek to confirm this value by arranging for a separate valuation at its own cost.

Council will also have regard to other relevant mechanisms for valuing the benefits proposed to be provided under a planning agreement, and may refer to the "*Local Infrastructure Benchmark Costs (IPART, Final Report April 2014)*."

Council may require that the value of contributions of land and works made under a planning agreement should be indexed using an appropriate index (refer cl 4.7.7).

### **4.5.13 Council's costs of negotiating, entering into, monitoring and enforcing a Planning Agreement**

Council will generally require a developer to pay all of the Council's reasonable costs of negotiating, preparing and entering into the agreement, and enforcing its terms. This will include all costs associated with any third parties who may be engaged to facilitate a planning agreement. This applies whether or not the planning agreement is ultimately executed.

In addition, Council may require the developer to make a contribution towards the Council's costs of the on-going administration of the agreement and/or administration of the current Development Contributions Plan. Council expects the amount to be approximately 5% of the total value of the benefits to be provided under the agreement.

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

The Council will require every planning agreement to provide that the developer (and, if the developer is not the landowner, the landowner) may not transfer the land to any person or transfer its rights or obligations under the agreement unless:

- a) the person to whom the land or rights are transferred agrees to be bound by the planning agreement at no cost to Council,
- b) Council is satisfied that the person to whom the land or rights are transferred is able to perform the obligations under the agreement, based on evidence to be provided to Council when Council's consent to the transfer is sought

- c) the developer is not in breach of the planning agreement, and
- d) the Council otherwise consents to the transfer.

#### **4.5.15 Monitoring and review of a Planning Agreement**

The Council will continuously monitor the performance of the developer's obligations under a planning agreement. To assist in this regard, Council may require a planning agreement to require the developer to submit reports to show how the requirements of the planning agreement are being complied with.

The Council will also require regular reviews of the terms of the planning agreement and, if the parties consider that amendments to the agreement are required, the parties will use their best endeavours to agree on the amendments.

Amendments might be required if there is a change in circumstances relating to the development or a change in law which impacts upon the contributions which can be made.

#### **4.5.16 Modification or discharge of the developer's obligations under a planning agreement**

Council will only agree to changing the developer's obligations under a planning agreement, or discharging the developer from its obligations, if:

- a) the developer has fully performed its obligations under the agreement, including providing all contributions that are required;
- b) the developer has assigned its interest to another party who has agreed to perform the developer's obligations,
- c) the development consent to which the agreement relates has lapsed or has been surrendered,
- d) the performance of the planning agreement has been frustrated by an event beyond the control of the parties, or
- e) the Council and the developer otherwise agree to the modification or discharge of the agreement.

Should the parties agree to a modification of this planning agreement, the proposed modification shall be publicly notified in accordance with the Council's current notification policy, and in accordance with the requirements of the Act and Regulation.

#### **4.5.17 Registration of planning agreements**

The Council will, subject to the requirements of Sec 7.6 of the Act require planning agreements to be registered on the title of the property being developed or that is subject to the instrument change.

To facilitate this process, Council will require the developer to provide all relevant documents for the purposes of registration within (ten) 10 days after execution of the agreement. Council will then attend to the registration.

However, if the planning agreement is not registered prior to the granting of development consent, Council will require the registration of the planning agreement as a condition of development consent.

The registration of the planning agreement against the title can be removed once all of the planning obligations under the agreement have been satisfied.

#### **4.5.18 Notations on certificates under s10.7 of the Act**

The Council may decide to make a notation on any planning certificate issued under section 10.7 (previously sec 149) of the Act in relation to the land to which a planning agreement relates, about the planning agreement, and may include a provision in the planning agreement acknowledging this.

#### **4.5.19 Implementation agreements**

The Council may require an implementation agreement that provides for matters such as:

- a) the timetable for provision of planning obligations under the planning agreement.
- b) the design, technical specification and standard of any work required by the planning agreement to be undertaken by the developer.
- c) the manner in which a work is to be handed over to the council.
- d) the manner in which a material public benefit is to be made available for its public purpose in accordance with the planning agreement

#### **4.5.20 Council's consideration of planning agreements in the exercise of its Statutory Functions**

When exercising its functions under the Act in relation to an application for an instrument change or a development application to which a proposed planning agreement relates, the Council will consider whether the proposed planning agreement is relevant to the application and the proper weight to be given to the proposed planning agreement.

#### **4.5.21 Consideration of applications under Clause 4.6 of Shellharbour LEP 2011**

Clause 4.6 of the Shellharbour Local Environmental Plan 2011 (Shellharbour LEP) allows a developer to object to the application of a development standard to a development.

Council will not uphold an objection made under this clause merely because the developer has offered to enter into a planning agreement and provide additional development contributions under that agreement.

Council will assess such an objection under the provisions of clause 4.6 of the Shellharbour LEP. In this regard, the provisions of the planning agreement may be relevant to the extent that any contributions to be provided under the agreement offset any impact of the development which is relevant to the development standard in question.

#### **4.5.22 The Explanatory Note**

The Regulation requires that an Explanatory Note must be prepared and exhibited with the draft planning agreement. The Explanatory Note should help the community to understand the planning agreement, including the public benefits being proposed, how the benefits are being delivered and why they are

in the public interest. The Explanatory Note must;

- Summarise the objectives, nature and effect of the proposed agreement;
- Include an assessment of the merits of the planning agreement, including the impact on the public;
- Identify how the planning agreement promotes the public interest;
- Identify whether the planning agreement conforms with Council's capital works program;
- State whether the planning agreement specifies that any of its requirements must be complied with before a construction certificate, occupation certificate or a subdivision certificate is issued;

## **5 Probity Considerations**

The preparation of planning agreements has been identified as a potential source of corruption by the NSW Independent Commission Against Corruption (ICAC). Council will ensure that the following steps are taken to ensure that planning agreements are negotiated and prepared with appropriate levels of probity and with good governance:

- a) ensure that all planning agreements are prepared in accordance with the relevant statutory requirements, the Policy, this Guideline and relevant Guidelines from the Department of Planning;
- b) where possible, ensure a separation between Council staff with a direct role in planning agreements and those assessing development applications or preparing planning proposals associated with a planning agreement. Where this is not possible, consideration should be given to relevant staff entering into a Probity Plan (refer pgh 'i' below) to help manage any potential conflicts of interest;
- c) ensure that Councillors do not have a direct role in negotiating planning agreements.
- d) ensure that Councillors and council staff understand the circumstances in which planning agreements are appropriate and understand their roles and responsibilities in relation to planning agreements, particularly where there may be a conflict of interest.
- e) inform all applicants about Council's values and advise them that the negotiations will be carried out in accordance with Council's Statement of business ethics.
- f) ensure that in any negotiations with developers about a planning agreement that at least two Council staff are present and that notes of the meeting are taken
- g) all formal offers to negotiate a planning agreement will be referred to Executive Leadership Team (ELT). Where ELT considers the proposed planning agreement relates to a significant development application or instrument change, then if the offer is supported by the Executive, a report to the Council shall be provided outlining the key terms of the agreement and seeking Council approval to negotiate it.
- h) where the Council has a commercial interest in a development or instrument change that is subject to 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 commercial role in the development;
- i) in this regard, Council (or Council's ELT) may require a Probity Plan to be prepared for some planning agreements, or recommend the appointment of a third party Probity Advisor to manage probity concerns. This may be appropriate

for planning agreements that relate to a major development application or instrument change, where Council has a significant commercial interest in a development that is subject to a planning agreement, or where there may be a potential conflict of interest. Where such a Plan (or third party appointment) is made, Council will expect that the developer should pay the entire cost of preparing the Plan, or engaging the third party Probity Advisor;

- j) the Council may also appoint an independent party to facilitate or otherwise participate in the negotiation of a planning agreement, where it considers that this may lead to a better planning outcome. Where it is decided to involve a third party in the preparation of a planning agreement, Council will expect that the developer should pay the entire cost associated with the appointment of the third party.
- k) prior to the exhibition of any draft planning agreement, it will be reported to Council, seeking endorsement to exhibit it. The report to Council will consider the draft planning agreement against this Guideline and the associated planning agreements Policy, particularly clauses 7.2 and 7.3
- l) the Council has the complete discretion to agree (or disagree) to the preparation of the planning agreement process and to the execution of the planning agreement following the completion of the procedural stages. Furthermore, a decision by Council or ELT to agree to the commencement of the planning agreement process does not imply that Council supports the planning agreement and imposes no obligation on Council to execute the planning agreement following the completion of the procedural stages.
- m) Council will ensure a full and transparent public exhibition process for planning agreements. Besides complying with any statutory requirements for the exhibition of planning agreements, this will include providing a level of supporting information sufficient to ensure that the public is aware of what is being proposed under a planning agreement.
- n) A planning agreement will be re-exhibited if any change is made to it after exhibition, other than a minor change which does not affect the operation of the agreement, or the contributions provided under the agreement (subject to legal advice in any particular case if considered necessary).

## **6 Administration**

Council is required to ensure transparency in managing its planning agreements. As a result, Councils process for managing its planning agreements will adhere to the following principles:

- a) Complying with all relevant statutory requirements. These include:
  - Maintaining a Planning Agreements Register;
  - Sending a copy of all planning agreements to the Minister;
  - Reporting on planning agreements in Council's Annual Reports
- b) Providing for planning agreements to be accessible to the public both electronically via Council's web site, and in hard copy upon request.

**5. Related Forms/Documents**

Nil

**6. Related Policy:**

This Guideline relates to Council’s Planning Agreements Policy

**Guideline Authorised by:**

Name: Geoff Hoynes – Group Manager, City Planning

Date: 16 November 2021 (date of adoption by Council)