

## Planning Agreements Policy 2021

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

### 1. Policy Statement/Objective(s)

Shellharbour City Council is committed to ensuring a fair, transparent and accountable framework for the negotiation, preparation implementation and management of planning agreements. This Policy provides that framework.

The specific objectives of this policy (and Council's strategic objectives in relation to planning agreements) are to:

- a) establish a framework governing the use of planning agreements by Council;
- b) ensure that the use of planning agreements by Council is efficient, fair, transparent and accountable;
- c) ensure the highest level of probity in the preparation, negotiation and implementation of planning agreements
- d) enhance flexibility in the provision of infrastructure and services for the community through the use of planning agreements;
- e) enhance the range and extent of development contributions made by development towards public facilities in the Council's area;
- f) set out the Council's specific expectations on the use of planning agreements;
- g) provide certainty for developers when negotiating and preparing planning agreements
- h) to provide for an appropriate level of public participation into the preparation and consideration of planning agreements and of the public benefits arising from planning agreements

This Policy should be read in conjunction with the accompanying "*Planning Agreement Policy – Guideline Document*", which supplements this Policy, and provides further information for applicants seeking to enter into a planning agreement with Council.

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

## 2. Scope

This policy sets out Council's rules and expectations relating to the negotiation and preparation of planning agreements.

It applies in all circumstances where an applicant seeks to enter into a planning agreement with Council in connection with a Development Application or a Planning Proposal applying to land in the Shellharbour LGA.

The Policy does not limit or fetter Council's duty or discretion to properly determine development applications or planning proposals under the Environmental Planning and Assessment Act, 1979

Transitional Arrangements: This policy applies to all planning agreements prepared in connection with a Development Application or a Planning Proposal applying to land in the Shellharbour LGA, other than those which have commenced their exhibition period before the date that this Policy comes into effect

## 3. References

- Shellharbour City Council Section 7.11 Local Infrastructure Contributions Plan (as updated)
- Shellharbour City Council Works in Kind Policy and Guideline Document (as amended)
- Environmental Planning and Assessment Act NSW 1979
- Environmental Planning and Assessment Regulation NSW 2000
- Local Government Act 1993
- Local Government (General) Regulation 2005
- Planning Agreements Practice Note – NSW Department of Planning industry and Environment (February 2021)
- Tendering Guidelines for NSW Local Government

## 4. Definitions

Act	means 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 of development consent under Section 7.11 of that Act;
Contribution Value means:	(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	means Shellharbour City Council.

Defects Liability Period	means 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	means a monetary contribution required by a condition of Development Consent imposed under Section 7.11 of the Act.
ELT	means Council's Executive Leadership Team
Explanatory Note	means 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	means the Planning Agreements Practice Note published by the Department of Planning, Industry and Natural Resources in February 2021 and as may be amended from time to time
Planning agreement contribution	means the provision made by a developer under a planning agreement being a monetary contribution, the dedication of land free of cost or the provision of a material public benefit to be used or applied towards a public purpose
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 means the Environmental Planning and Assessment Regulation 2000

## 5. Variation and Review

Council reserves the right to review, vary or revoke this policy, in consultation with its employees.

### Review History

Date Policy first adopted – version 1	16 November 2021
Date amendment adopted – version 2	

## 6. Policy

### 6.1 Council Discretion to Negotiate a Planning Agreement

The Council has the complete discretion to negotiate a planning agreement with an applicant in connection with any application by the applicant for an **instrument change** or for **development consent** relating to any land in the Council's area, or in conjunction with the relevant Council of any land adjoining the Council's area.

#### 6.1.1 Purposes for which a Planning Agreement may be negotiated

Council may consider negotiating a planning agreement with a developer to:

- a) compensate for the loss of, or damage to, a public amenity, service, resource or asset caused by the development through its replacement, substitution, repair or regeneration
- b) meet the demands created by the development for new public infrastructure, and services that may be outside those of the current Contributions Plan
- c) address a particular deficiency or deficiencies in the existing provision of public facilities
- d) achieve recurrent funding with respect of public facilities
- e) prescribe inclusions in the development that meet specific planning objectives relating to the development
- f) monitor or mitigate the planning impacts of development
- g) secure planning benefits for the wider community.

### 6.2 Fundamental principles governing the use of planning agreements

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

- a) Council will always consider a development or rezoning proposal on its merits, not on the basis of a planning agreement. In particular, Council will ensure that:
  - planning decisions shall not be bought or sold through planning agreements, and
  - development that is unacceptable on planning grounds will not be permitted because of **public benefits** offered by planning agreements that do not make the development acceptable in planning terms,
- b) Council will not allow planning agreements to improperly fetter the exercise of its functions under the **Act**, the **Regulation** or any other Act or law,
- d) Council will not use planning agreements for any purpose other than a proper **public purpose**

- e) Council will not actively seek benefits under a planning agreement that are wholly unrelated to the development the subject of that planning agreement, but may consider offers made by a developer,
- f) Council will use planning agreements to provide local infrastructure in a way that complements its contribution and infrastructure delivery systems, particularly its Local Infrastructure Contributions Plan prepared under Sec 7.11 of the Act. One way in which this might occur is that Council may seek to use planning agreements to provide local infrastructure in association with development applications or rezoning proposals on land that had not been considered for development when its Sec 7.11 Contributions Plan had been prepared or amended;
- g) Council will prefer that the public benefits under a planning agreement have some direct relationship to the development or instrument change with which it is associated. However Council will consider other public benefits where these are consistent with other Council strategic documents, existing development contributions plans or infrastructure delivery plans or other schedules adopted by Council
- h) Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed planning agreement,
- i) Council will not improperly rely on its statutory position in order to extract unreasonable public benefits from developers under planning agreements, and will not refuse to grant consent to a development on the grounds that a planning agreement has not been entered into in relation to the proposed development, or that the developer has not offered to enter into such an agreement;
- j) if the Council has a commercial stake in development the subject of a proposed planning agreement, it will take appropriate steps to ensure that it avoids a conflict of interest between its role as a planning authority and its interest in the development, and
- k) planning agreements should not be used to justify a dispensation with applicable development standards under clause 4.6 of the Shellharbour Local Environmental Plan 2013, or with the development standards included in Shellharbour LEP 2000 and Shellharbour LEP 2004.

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

In deciding whether to enter into a Planning Agreement, Council will consider all planning agreements against the following "Acceptability Test".

- a) is the proposed planning agreement directed towards a proper or legitimate planning purpose having regard to the statutory planning controls and other adopted planning policies and the circumstances of the case?
- b) does the proposed planning agreement provide a reasonable means of achieving the relevant purpose?
- c) can the proposed planning agreement be taken into consideration in the assessment of the relevant application for an instrument change or development application?
- d) will the planning agreement produce outcomes that meet the general values and expectations of the community and protect the overall public interest? This should be considered (inter alia) particularly with the public interest and impact on community values associated with varying Council's relevant Developer Contributions Plan that may apply in order to accept the benefits proposed under the Planning Agreement (refer also Clause 4.5 (k) and (l) below)
- e) does the agreement provide public benefits that are not wholly unrelated to the development?
- f) does the proposed planning agreement promote the Council's strategic objectives in relation to the use of planning agreements? (that is Clause 1 of this Policy)

g) does the proposed planning agreement conform to the fundamental principles governing the Council's use of planning agreements?

h) are there any relevant circumstances that may operate to preclude the Council from entering into the proposed planning agreement?

i) is the planning agreement consistent with other relevant Council Policies and strategic documents, particularly including this Policy and associated Guideline, and other documents relating to its strategic goals for land use planning and infrastructure delivery, such as the Shellharbour Local Strategic Planning Statement;

j) Does the planning agreement align with any relevant district and regional strategic plans and policies;

k) is it appropriate to forego the benefits that would otherwise be paid under Council's Developer Contributions Plan in exchange for the public benefits proposed under the planning agreement? (this applies to those agreements which seek to offset contributions made under Council's relevant Developer Contributions Plan).

l) Will there be a nett community benefit associated with entering into the proposed Planning Agreement. In this context Council would in most cases expect to see the value of the benefits to be provided under the planning agreement exceed those that would otherwise be provided in accordance with Council's Local Infrastructure Contributions Plan. This is particularly the case when the planning agreement proposes to provide works that are not identified in Council's **Contributions Plan**.

The planning agreement will be considered against these criteria when the initial offer is being considered and again before the agreement is executed,

#### **6.4 Planning Agreements and the Public Tender Process.**

Council has resolved pursuant to s55(3)(i) of the Local Government Act 1993 not to invite tenders in respect of any planning agreement because of the unavailability in every case of competitive tenders meaning that a satisfactory result cannot and would not be achieved by inviting tenders

#### **6.5 The Content of a Planning Agreement**

a) A planning agreement must above all else, address the mandatory content requirements included in Sec 7.4 (especially Sec 7.4(3) of the Act.

b) the accompanying Guideline outlines Council's policy on some of these mandatory requirements, and on other matters that are usually included in a planning agreement. Council expects that this Policy and the associated Guideline will be complied with to the fullest extent possible

#### **6.6 Ensuring Probity in Preparing Planning Agreements**

Ensuring probity in the preparation of planning agreements is of the utmost importance to Shellharbour Council.

The accompanying Guideline document explains the steps that Council will take to ensure probity in the preparation of Planning Agreements.

## 6.7 Endorsement and Execution of Planning Agreements

The endorsement and execution of planning agreements will occur as follows:

- a) When a draft planning agreement is considered appropriate for exhibition, a report shall be prepared for Council seeking a resolution to exhibit it;
- b) Following completion of the exhibition period, the planning agreement will be considered to be adopted by Council unless any of the following circumstances apply, and in which case a further report will be submitted to Council:
  - One or more submissions of objection are received to the exhibition of the draft planning agreement;
  - A change is made to the draft planning agreement following exhibition that changes either the operation of the exhibited draft planning agreement, or the nature, quantity or timing of the benefits to be received;
- c) Where appropriate, and subject to receiving delegation from the Council, the Chief Executive Officer will be responsible for executing a planning agreement on behalf of the Council;
- d) A planning agreement has been executed when it has been signed and dated by both parties.

## 6.8 Administration of Council's Planning Agreement System

Council's administration of its planning agreements will be based on principles of transparency and public accessibility. This will be achieved by:

- a) complying with relevant statutory requirements, including:
  - maintaining a Planning Agreements Register;
  - forwarding a copy of all planning agreements to the Minister;
  - reporting on planning agreements in Council's Annual Report,
- b) providing for planning agreements to be accessible to the public both electronically and (upon request) in hard copy.

The accompanying Guideline provides more information about these matters.

## 7. Related Forms

Nil

## 8. Attachments:

Nil

## Policy Authorised by:

Name: Council Resolution No. 214

Date: 16 November 2021

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Date of Adoption: 16 November 2021

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