



DRAFT Policy

Planning Agreements

2021

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Further Document Information and Relationships

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| Related Legislation | Part 7 Division 7.1 Subdivision 2 of the Environmental Planning and Assessment Act 1979 Part 4 Division 1A of the Environmental Planning and Assessment Regulation 2000 |
| Related Policies | |
| Related Standards, Procedures, Statements, documents | Planning Agreement Procedure #770771 Planning Agreement Template #869401 Department of Planning - Planning Agreements Practice Note Exhibition Draft April 2020 |

Note: Any reference to Legislation will be updated in the Policy as required. See website <http://www.legislation.nsw.gov.au/> for current Acts, Regulations and Environmental Planning Instruments.



CONTENTS

| | |
|---|----------|
| 1. Objectives | 1 |
| 2. Definitions..... | 1 |
| 3. Statement..... | 2 |
| 4. Policy provisions..... | 3 |
| 4.1 Circumstances in which Council may consider entering or not entering into a planning agreement | 3 |
| 4.2 Considerations for planning agreements | 5 |
| 4.3 Application of Sections 7.11 and 7.12 to a development to which a planning agreement relates | 5 |
| 4.4 Time when a developer's obligations arise under a planning agreement..... | 6 |
| 4.5 Timing of Specific Contributions..... | 6 |
| 4.6 Ownership of in-kind contributions | 6 |
| 4.7 Standard charges..... | 7 |
| 4.8 Recurrent costs and maintenance payments | 7 |
| 4.9 Pooling of monetary contributions..... | 7 |
| 4.10 Method for valuing a public purpose under a planning agreement..... | 7 |
| 4.11 Implementation agreements..... | 8 |
| 4.12 Monitoring and review of a planning agreement | 8 |
| 4.13 Modification or discharge of the developer's obligations under a planning agreement..... | 9 |
| 4.14 Provision of security under a planning agreement | 10 |
| 4.15 Preparation, form and documentation of the planning agreement | 10 |
| 4.16 Payment of costs incurred in the negotiation, preparation, execution, monitoring, administration and enforcement of agreements | 10 |
| 4.17 GST considerations | 11 |
| 4.18 Refunds..... | 11 |
| 4.19 Notations on planning certificates | 11 |
| 4.20 Registration of planning agreements with the Registrar-General..... | 11 |
| 4.21 Public use of privately-owned facilities..... | 11 |
| 4.22 Administering contributions | 11 |



1. Objectives

This policy provides guidance on matters relating to planning agreements. It sets out the statutory framework for planning agreements and deals with issues such as the fundamental principles governing their use. Planning agreements must be governed by a set of policy principles that ensure transparency, fairness and flexibility of planning decisions. Policy objectives include:

- To establish a framework governing the use of planning agreements by Council
- To ensure that the framework so established is efficient, fair, transparent and consistently applied, and allows for a high standard of public accountability
- To enhance flexibility in Byron Shire through the use of planning agreements
- To identify the circumstances in which Council will and will not consider entering a planning agreements, and the scope of development contributions acceptable to Council.
- To enhance the range and extent of development contributions made by developers towards public infrastructure or another public purpose in Byron Shire
- To set out Council's specific policies on the development and implementation of planning agreements
- To facilitate public participation and to allow the community to better understand the benefits of appropriate planning agreements for the provision of public purposes

If there is any inconsistency between the Acts, Regulations and Guidelines with this Policy, then those documents prevail.

2. Definitions

Words in this policy have the same meaning as in the relevant Acts and Regulations.

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| Act | Means the <i>Environmental Planning and Assessment Act 1979</i> |
| Development application | Has the same meaning as in the Act |
| Development consent | Has the same meaning as in the Act |
| Development contribution | Means the provision made by a developer pursuant to section 7.11 of the Act or under a planning agreement pursuant to section 7.4 of the Act, 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 |
| [Developer Contributions Plan | Means an adopted plan of Council made in accordance with 7.18 of the Act |
| LEP Amendment | Means a change to a local environmental planning instrument to enable a development application to be made to carry out development (rezoning) |



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| 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. Benefit to the community greater than the steps taken to mitigate the impact of the development |
| Planning Agreement | Has the same meaning as in section 7.4(1) of the Act, being a planning agreement is a voluntary agreement or other arrangement under this Division 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. |
| Planning obligation | Means an obligation imposed by a planning agreement on a developer requiring the developer to make a development contribution |
| Planning proposal | Has the same meaning as in the Act |
| Practice note | Means the Practice Note on planning agreements published by the Department of Planning, Industry and Environment (Exhibition Draft April 2020). |
| Public | Includes sections of the public |
| Public benefit | Is the benefit enjoyed by the public as a consequence of a development contribution |
| Public purpose | Includes but is not limited to those items listed in section 7.4 (2) of the Act. |
| Regulation | Means the <i>Environmental Planning and Assessment Regulation 2000</i> |

3. Statement

This policy is made in accordance with the *Environmental Planning and Assessment Act 1979*, which introduced a statutory framework through which developers can voluntarily offer to enter a contract with Council (a 'Planning Agreement'). Under a planning



agreement, a developer may be 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 towards a public purpose under section 7.4(2) of the Act.

Planning agreements will operate in addition to Section 7.11 contributions, though such an Agreement may be taken into account in the calculation of a Section 7.11 contribution. Any reduction or replacement of Section 94 contributions ordinarily payable will be entirely at Council's discretion. Any contribution under a planning agreement will be in addition to contributions required under the Water Management Act 2000.

Council's planning agreement framework consists of the following:

- a) The provisions of Part 7 Division 7.1 Subdivision 2 of the Act;
- b) The provisions of Part 4 Division 1A of the Regulation; and
- c) This Policy

This Policy sets out Council's preferred position in relation to the development and implementation of planning agreements as to ensure an efficient, fair, transparent and accountable process. Although the Policy is not legally binding, it is intended that all persons dealing with Council in relation to planning agreements will follow this Policy to the fullest extent.

This Policy will be periodically reviewed and/or updated as appropriate. Any updates may cover additional matters to those covered in this Policy or provide more detailed information or guidance on specific matters covered in this Policy.

4. Policy provisions

4.1 Circumstances in which Council may consider entering or not entering into a planning agreement

Planning agreements may be used in a wide variety of planning circumstances to achieve many different planning outcomes. Planning agreements may be proposed in connection with applications for changes to environmental planning instruments or for consent to carry out development (development applications). However, in accordance with the legislation, Council has complete discretion whether to enter into a planning agreement.

Council may consider negotiating a planning agreement with a developer to secure a contribution toward public infrastructure or another public purpose. This includes but is not limited to any of the following:

- a) the provision of (or the recoupment of the cost of providing) public amenities or public services (as defined in Clause 4.3 below), affordable housing, and transport or other infrastructure relating to land, and
- b) the funding of recurrent expenditure (refer to 4.7) relating to the provision of public amenities or public services, affordable housing or transport or other infrastructure, and
- c) the monitoring of the planning impacts of development,
- d) the conservation or enhancement of the natural environment.



Council will consider contributions toward the following:

- a) Compensation for the loss of, or damage to, a public amenity, service (as defined in Clause 4.3 below), resource or asset that will or is likely to result from the carrying out of the development through its replacement, substitution, restoration or regeneration;
- b) Meeting the demands created by the development for new public infrastructure, amenities and services;
- c) Achieving recurrent funding in respect of infrastructure, facilities and services;
- d) Prescribing inclusions in the development that meet specific planning objectives of Council;
- e) Securing planning benefits for the wider community;
- f) Funding the recurrent costs of habitat protection where development will trigger the Biodiversity Offsets Scheme under the Biodiversity Conservation Act 2016.

Whilst a wide range of public purposes will be considered, Byron Shire Council would be most likely to consider planning agreements that include the following benefits:

- a) Infrastructure in addition to those listed in the Works Programs of Council's adopted Development Contributions Plan, provided there are no resulting adverse impacts on Council's adopted Development Contributions Plan or its implementation;
- b) Affordable housing; and
- c) Environmental repair and enhancement.

Planning agreements may be used in a wide range of circumstances, however, it is important to identify situations that may prohibit Council from considering entering a Planning Agreement and/or make a proposed planning agreement undesirable.

A contribution under a planning agreement will be in addition to contributions required under Division 5 of the Water Management Act 2000.

Council will not consider entering a planning agreement in the following circumstances:

- a) Where the suspicion may arise that an LEP amendment or development consent can be bought by the highest bidder via a planning agreement;
- b) When the planning agreement incorporates or suggests an obligation for Council to grant consent to the application relating to the planning agreement;
- c) Where a breach of the EP&A Act or any other Act may result from the provisions of a planning agreement;
- d) Where the proposal is a public private partnership as defined in Part 6 of the Local Government Act 1993;
- e) When a development is unacceptable on planning grounds, that is, the contribution toward the public purpose offered by the developer in a planning agreement will not make an unacceptable development acceptable;
- f) When in Council's assessment the interests of individuals or interest groups outweigh the public interest;



- g) When it could be considered that Council is improperly relying on its statutory position to extract unreasonable public benefits from a developer via a planning agreement;
- h) When a proposed planning agreement will prejudice the timing or manner of the provision of any particular facility or service identified in Council's adopted Developer Contributions Plan;
- i) When a proposed public benefit would be a matter which would be required pursuant to a condition imposed under s4.17 of the Act in any event.

4.2 Considerations for planning agreements

4.2.1 Acceptability test to be applied to all planning agreements

Council will apply the following test to all proposed planning agreements in order to assess the acceptability of a given Agreement:

- a) Does the proposed planning agreement provide for a reasonable means of achieving the desired outcomes and securing the benefits?
- b) Does the planning agreement provide for infrastructure or public benefits that are not wholly unrelated to development?
- c) Will the planning agreement produce outcomes that meet the general values and expectations of the community and protect the overall public interest?
- d) Does the proposed planning agreement promote Council's strategic objectives as identified in the Community Strategic Plan, Delivery Plan, Operational Plan and other strategic documents?
- e) Are there any relevant circumstances that may operate to preclude the Council from entering the proposed planning agreement?
- f) Does the proposed planning agreement promote sustainability in terms of all key elements being ecology, society, economy, governance and human habitat?
- g) It is proposed that the planning agreement be registered pursuant to section 7.6 of the Act [cl 24 of the Regulation] and is it able to be registered?
- h) Does the planning agreement protect the community against adverse planning decisions?

4.3 Application of Sections 7.11 and 7.12 to a development to which a planning agreement relates

Council's adopted Development Contribution Plan is an important tool of Council to fund vital infrastructure in response to development. Established over a number of years, it identifies the infrastructure funding priorities in Byron Shire. Contributions made by developers under the Plan are used to fund Council infrastructure and facilities including the following:

- a) Road infrastructure;
- b) Community facilities;
- c) Open Space;
- d) Cycleways.



Planning agreements can offer flexibility in the nature and timing of the contributions a developer can make, and include contributions toward public infrastructure and other public purposes not normally required as section 7.11 contributions, e.g. affordable housing; recurrent funding related to public infrastructure or other public purposes. Planning agreements thus act in addition to contributions requirements under Council's Developer Contributions Plan and not as a replacement. In particular, they will be used to augment Council's adopted Developer Contributions Plan as appropriate, and/or operate in relation to developments not included under Council's adopted Contributions Plan (e.g. in the case of larger rezonings).

As such, Council's section 7.11 program will continue to operate in the usual way. However, Byron Shire Council may agree to take into account the provision of a planning agreement in determining development contributions under section 7.11. Whether, and the extent to which, this occurs will be at the discretion of Council.

However, it is noted that the base position of Council in relation to developer contributions is set out in its Developer Contributions Plan, and it will not normally negotiate a planning agreement that replaces or reduces the contributions required under this Plan unless there is significant public benefit. Planning agreements would normally provide for contributions to public infrastructure that are **in addition to** the contribution required under Council's Developer Contributions Plan. In cases where Council is willing to negotiate replacement of a contribution ordinarily required under its Contributions Plan, equivalency of the contribution proposed under the planning agreement will be required, and its value assessed by Council using an appropriate method of valuation as set out in the planning agreement template.

4.4 Time when a developer's obligations arise under a planning agreement

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 the development that is the subject of the agreement. However, where the public infrastructure or other public benefit provided under a Planning Agreement is for a limited time, Council may require the planning agreement to operate from the first day on which the public benefit arises.

4.5 Timing of specific contributions

Where the development involves the subdivision of land the developer contribution under a planning agreement should be made prior to the release of a subdivision certificate. Where development involves the erection of a building then developer contribution under a planning agreement should be made prior to the release of a construction certificate.

Dedication of dwellings units in the case of Affordable Housing Payment will be dedicated to Council prior to the issue of an occupation certificate.

4.6 Ownership of in-kind contributions

Where specified by this Policy or otherwise negotiated, title to land, dwellings or other material benefits dedicated will generally be vested in Council in perpetuity, for example, in the case of affordable housing.



Before accepting title to in-kind contributions, Council will ensure that it is of a standard and quality acceptable to Council including any requirements or standards set out in the Planning Agreement between the two parties.

4.7 Standard charges

Wherever possible, Byron Shire Council will seek to standardise development contributions offered under planning agreements in order to streamline negotiations and provide fairness, transparency and certainty for developers, and a high standard of accountability to the public. This does not however prevent public infrastructure and other public purposes contributions from being negotiated on a case-by-case basis, particularly where planning benefits are involved.

4.8 Recurrent costs and maintenance payments

Council may request developers, through a planning agreement, to make development contributions towards the recurrent costs of public facilities that primarily serve the development to which the planning agreement applies or neighbouring development in perpetuity. However, where the facilities are intended to serve the wider community, planning agreements should only require the developer to make contributions towards the recurrent costs of the facility until a public revenue stream is established to support the on-going costs of the facility.

Wherever possible, the contributions will be calculated as a fixed payment to provide certainty as to the total cost of such a contribution, and to ensure there is an end point to the contribution. Upfront payment will be preferred, though in certain cases periodic payment may be negotiated at Council's discretion.

4.9 Pooling of monetary contributions

Council should disclose to developers, and planning agreements should specifically provide, that monetary contributions paid under different planning agreements are to be pooled and progressively applied towards the provision of public benefits that relate to the various agreements. Pooling may be appropriate to allow public benefits, particularly essential infrastructure, to be provided in a fair and equitable way.

However, pooling may not be practicable or necessarily appropriate where few planning agreements are enacted, particularly if these are not geographically proximate. The pooling of contributions in a planning agreement will be at the discretion of Council.

While planning agreements allow for pooling of funds, if significant pooling is required the planning authority should consider if a section 7.11 infrastructure contributions plan would be appropriate.

4.10 Method for valuing a public purpose under a planning agreement

Contributions toward a public purpose will be negotiated for inclusion in a planning agreement on a case-by-case basis, however there is value in standardised development contributions so as to provide equity, transparency and certainty for developers and a high standard of public accountability. Each circumstance is however unique and standardised contributions may not suit all developments.



Unless otherwise agreed, where the nominated public purpose under a planning agreement is the provision of land, the Council will value the benefit on the basis of a valuation provided by a registered valuer. Where Council and the developer cannot reach agreement on the valuation, an independent third party valuation will be sought by Council at the developer's cost.

Unless otherwise agreed, where the nominated public purpose under a planning agreement is a material public benefit such as the carrying out of works, the work will be valued by a qualified quantity surveyor. Where Council and the developer cannot reach agreement on the valuation, an independent third party valuation will be sought by council at the developer's cost.

Where the benefit under a planning agreement is the provision of a material public benefit in the form of affordable housing dwellings, refer to Council's Affordable Housing Policy.

In cases where the public purpose proposed is provided in lieu of to augment a particular public facility that would ordinarily be provided under Council's section 7.11 program and/or is nominated in its adopted Contributions Plan, and the value of the contribution proposed under a planning agreement is of a lesser value than the contribution ordinarily payable under Council's Development Contribution Plan, the applicant will generally be required to pay the difference between the contributions.

As noted, any variation to developer contributions ordinarily payable will be at Council's discretion.

In addition, if the proposed benefit does not address all of the 'heads of developer contributions' identified in Council's adopted Contribution Plan, contributions will remain payable for the other 'heads of developer contributions'.

4.11 Implementation agreements

Where appropriate, Council will require the planning agreement to include provision that before the development that is the subject of the planning agreement is commenced, the parties are to enter an implementation agreement. The implementation agreement must provide for matters such as:

- The times at which and if relevant, the period during which, the developer is to make provision under the planning agreement,
- The design, technical specification and standard of any work required by the planning agreement to be undertaken by the developer,
- The manner in which a work is to be handed over to Council,
- If the planning agreement requires the developer to manage or maintain land that has been dedicated to Council or works that have been handed over to Council, the manner in which this will take place, and
- The manner in which a material public benefit is to be made available for its public purpose in accordance with the planning agreement.

4.12 Monitoring and review of a planning agreement

Where required Council may monitor the implementation and performance of the developer's obligations under a planning agreement in a systematic and transparent way.



Monitoring systems should enable information about the implementation of planning agreements to be made readily available to public agencies, developers and the community.

Council may, where relevant, 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. This may require a review of the developer's performance of the agreement.

4.13 Modification or discharge of the developer's obligations under a planning agreement

Planning agreements should not impose obligations on developers indefinitely. Fulfilment of the developer's obligations will generally bring about the conclusion of the planning agreement; however this may not always be possible. Planning agreements should set out the circumstances in which the parties agree to modify or discharge the developer's obligations under the agreement.

The circumstances that may require a modification or discharge of a planning agreement may include:

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

Planning agreements should set out the circumstances in which the parties agree to modify the developer's obligations under the planning agreements, and any modifications will ultimately be at Council's discretion. 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:

- a) A development consent to which the planning agreement relates has been voluntarily surrendered and that voluntary surrender has been accepted by Council pursuant to s104A of the Act and Clause 97 of the Regulations (note a voluntary surrender will not be effective if the surrender will have adverse impacts on third parties, including the Council or the community, or on the locality of the development); or
- b) The performance of the planning agreement has been frustrated by an event beyond the control of the parties.

The provision in the planning agreement relating to modification or revocation of the planning agreement must be in accordance with the Act and the Regulation.



4.14 Provision of security under a planning agreement

Council may require the developer to execute an appropriate Deed of Guarantee, securing the developer's obligations under the planning agreement, including the development contribution and any ancillary warranties made by the developer. The type of security preferred by Council is the unconditional bank guarantee from an Australian Bank in favour of Byron Shire Council. The bank guarantee must be equivalent to the full value of the developer obligation under the planning agreement and on terms that are acceptable to Council.

4.15 Preparation, form and documentation of the planning agreement

The parties to a planning agreement should agree on which party is to draft the agreement to avoid duplication of resources and costs.

Council's General Manager, and Director Sustainable Environment and Economy and the Director Infrastructure Services are responsible for negotiating any agreement in relation to this clause. Negotiated agreements will be entered into in accordance with the delegated authority issued to the General Manager.

Council will require the planning agreement to be in accordance with Council's planning agreement template.

Councils are required to keep and make available a register of planning agreements. The register should be made available online.

4.16 Payment of costs incurred in the negotiation, preparation, execution, monitoring, administration and enforcement of agreements

Council will require the planning agreement to make provision for payment by the developer of all of Council's costs of:

- Negotiating, preparing, executing, registering, and monitoring the agreement; and
- Enforcing and otherwise administering the agreement.

There is no comprehensive policy on the extent to which Council may recover costs due to the unique circumstances associated with each planning agreement. However as a general rule, Council considers that the following approach is fair and reasonable:

- If the planning agreement relates to an application by a developer for an instrument change, the developer will pay the whole of Council's costs;
- If the planning agreement relates to a development application, then the developer will pay the whole of Council's costs; and
- In certain circumstances, Council may require the planning agreement to make provision for a development contribution by the developer towards the on-going administration of the agreement.

Costs should be based on reasonable charges. The reasonableness of charges may be established by the use of published Council charges, industry standard charges, independent third party quotations or other means. Costs will include all staff resources



expended on negotiating, preparing, entering and enforcing any agreement as well as all costs incurred by the Council, for example but not limited to legal costs, surveying costs, legal fees, consultants fees, registration fees, agents fees, production fees, advertising costs, photocopy fees, and GST liability.

4.17 GST considerations

A planning agreement potentially involves taxable supplies from Council and/or the developer. Consequently both parties may have a potential GST liability. Council and the developer should obtain legal/financial advice in every case as to whether a potential GST liability attaches to a particular agreement.

4.18 Refunds

Planning agreements may provide that refunds of monetary development contributions made under the agreement are available if public benefits are not provided in accordance with the agreement.

4.19 Notations on planning certificates

Council may make a notation under Section 10.7(5) of the Act about planning agreements where the developers obligations have not yet been fulfilled, relating to the land the subject of the agreement. The planning agreement must contain an acknowledgment by the developer of the potential for such a notation.

4.20 Registration of planning agreements with the Registrar-General

A planning agreement may be registered under Section 7.6 of the Act unless Council agrees to it not being so registered. If a planning agreement has been registered with the Registrar-General under this section, the agreement is binding on, and is enforceable against, the owner of the land from time to time as if each owner for the time being had entered into the agreement.

4.21 Public use of privately-owned facilities

If the planning agreement provides for the developer to make a privately-owned facility available for public use, Council will generally require the parties to enter into an implementation agreement. The agreement may, subject to Council's agreement, provide for payment to the developer of a reasonable fee by a member of the public who desires to use the relevant facility.

4.22 Administering contributions

In accordance with sections 7.3(1) and (4) of the Act, Council will hold any monetary contribution paid in accordance with a planning agreement, together with any additional amount earned from its investment, for the purpose for which the payment was required and apply it towards that purpose within a reasonable time. Contributions in-kind will also be used for the purpose to which they are dedicated in accordance with a planning agreement, and in compliance with section 7.3(3) of the Act.

Cash, land or material public benefits contributed under section 7.4(1) will be separately accounted for by Council, and will be the subject of annual public reporting as to the status of all contributions received by Council under planning agreements. Similar, to Council's



section 7.11 program, Council will develop a rolling plan for the use of contributions made to its Section 4.50 Public Purpose Fund, reviewed annually, which will identify priorities for the development identified public purposes and ensure that contributions collected are applied against these public purposes within a reasonable time. Again, the status of works and regular review of this Plan will be the subject of annual public reporting by Council.