



POLICY STATEMENT

PLANNING AGREEMENT

POLICY ADOPTED: **18 March 2014**

Policy Objective:

The objectives of this Policy are:

- (a) To establish a framework governing the use of Planning Agreements by Council;
- (b) To ensure that the framework so established is efficient, fair, transparent and accountable;
- (c) To enhance planning flexibility in Council's area through the use of Planning Agreements;
- (d) To enhance the range and extent of development contributions made by development towards Public facilities in Council's area;
- (e) To set out Council's specific policies on the use of Planning Agreements; and

Council's objectives with respect to the use of Planning Agreements include:

- (a) To provide an enhanced and more flexible development contributions system for Council, which achieves net Planning benefits from Development;
- (b) To supplement or replace, as appropriate, the application of Section 94 and Section 94A of the Act to Development;
- (c) To give all stakeholders in Development greater involvement in determining the type, standard and location of Public facilities and other Public benefits;
- (d) To allow the community, through the public participation process under the Act, to gain an understanding as to the redistribution of the costs and benefits of Development in order to realise community preferences for the provision of Public benefits;
- (e) To adopt innovative and flexible approaches to the provision of Public facilities in a manner that is consistent with relevant controls, policies and circumstances legally recognised as relevant under Section 79C of the Act;
- (f) To provide or upgrade Public facilities to appropriate levels that reflect and balance environmental standards (including, without limitation, the principles of ecologically sustainable development), community expectations and funding priorities;
- (g) To ensure that Developers make appropriate contributions towards the cost of the provision and management of Public facilities within Council's area;
- (h) To provide certainty for the community, Developers and Council in respect to Public facilities and development outcomes; and

Policy Statement:

This Policy sets out Bland Shire Council's policy, principles relating to the use of Planning Agreements under the *Environmental Planning and Assessment Act 1979*.

This Policy was adopted by resolution of Council on 2 February 2011 and became effective on 2 February 2011

Council's use of Planning Agreements will be governed by the following principles:

- (a) Planning decisions may not be bought or sold through Planning Agreements;
- (b) Development that is unacceptable on planning grounds (including, without limitation, environmental, sustainability or financial grounds) will not be permitted because of Planning benefits offered by Developers that do not make the Development acceptable in planning terms;
- (c) Council will not allow Planning Agreements to improperly fetter the exercise of its functions under the Act, Regulation or any other Act or Law.
- (d) Council will not use Planning Agreements for any purpose other than a proper planning purpose.
- (e) Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed Planning Agreement;
- (f) Council will not improperly rely on its statutory position, or otherwise act improperly, in order to extract unreasonable Public benefits from Developers under Planning Agreements, and will ensure that all Parties involved in the Planning Agreement process are dealt with fairly; and
- (g) If Council has a commercial stake in Development the subject of 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 interest in the Development.

Definitions:

Act means the Environmental Planning and Assessment Act 1979.

Contributions Plan means a contributions plan approved under Section 94EA of the Act for the purpose of requiring contributions under Section 94 or 94A of the Act.

Council means Bland Shire Council.

Developer, Developers has the same meaning given in Section 93F(1) of the Act.

Development has the same meaning given in Section 4 of Part 1 of the Act.

Development Contribution means the kind of provision made by a developer under a Planning Agreement, being a monetary contribution, the dedication of land free of cost or the provision of a material Public benefit.

Instrument change means a change to an environmental planning instrument to enable a development application to be made to carry out development the subject of a Planning Agreement.

Net public benefit 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.

Parties mean Council and a Developer or Developers.

Planning Agreement means a voluntary agreement or other arrangement between Council and a Developer authorised by Subdivision 2 of Division 6 of Part 4 of the Act and includes an agreement to amend or revoke a Planning Agreement.

Planning benefit means a Development Contribution that confers a Net public benefit.

Public includes a section of the public.

Public benefit is the benefit enjoyed by the public as a consequence of a development contribution.

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

Public purpose means any purpose that benefits the public, including but not limited to a purpose specified in Section 93F (2) of the Act.

Regulation means the Environmental Planning and Assessment Regulation 2000.

Surplus value means the value of the Developer's provision under a Planning Agreement less the sum of the value of public works required to be carried out by the Developer under a condition imposed under Section 80A (1) of the Act and the value of development contributions that are or could have been required to be made under Section 94 or Section 94A of the Act in respect of the development the subject of the agreement.

Responsibilities:

This Policy is not legally binding. However, it is intended that Council and all persons dealing with Council in relation to Planning Agreements will follow this Policy to the fullest extent possible.

Recommended Practices:

Circumstances in which Council will consider Negotiating a Planning Agreement

Council, in its complete discretion, may negotiate a Planning Agreement with a Developer in connection with any application by the Developer for an Instrument change or for development consent relating to any Development of land in Council's area.

Specific Purposes of Planning Agreements

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 facilities;
- (c) Achieve the provision of affordable housing;
- (d) Address a deficiency in the existing provision of Public facilities in Council's area;
- (e) Achieve recurrent funding in respect of Public facilities;

- (f) Prescribe inclusions in the Development that meet specific planning objectives of Council;
- (g) Monitor the implementation of Development;
- (h) Secure Planning benefits for the public; and
- (i) Allow the payment of monetary contributions at various stages of Development which may differ to that specified in an adopted Contributions Plan, pending careful consideration of Public facility delivery and associated financial implications.

Acceptability Test to be Applied to All Planning Agreements

Council will apply the following test in order to assess the acceptability of a proposed Planning Agreement:

- (a) Is the proposed Planning Agreement directed towards a proper or legitimate planning purpose having regard to its statutory planning controls and other adopted planning policies and strategies and the circumstances of the case?
- (b) Does the proposed Planning Agreement provide for a reasonable means of achieving the relevant purpose and outcomes and securing the benefits?
- (c) Can the proposed Planning Agreement be taken into consideration in the assessment of the relevant Instrument change or application for Development?
- (d) Will the proposed Planning Agreement produce outcomes that meet the general values and expectations of the public and protect the overall public interest against planning harm?
- (e) Does the proposed Planning Agreement promote Council's objectives in relation to the use of Planning Agreements as set out in this Policy?
- (f) Does the proposed Planning Agreement conform to the principles governing Council's use of Planning Agreements as set out in this Policy?
- (g) Are there any relevant circumstances that may operate to preclude Council from entering into the proposed Planning Agreement?

Consideration of Planning Agreements in relation to Instrument Changes and Applications for Development

When exercising its functions under the Act in relation to an application by a Developer for an Instrument change or a development consent to which a proposed Planning Agreement relates, Council will consider to the fullest extent permitted by law:

- (a) Whether the proposed Planning Agreement is relevant to the application and hence may be considered in connection with the application; and
- (b) If so, the proper planning weight to be given to the proposed Planning Agreement.

Application of Section 94 and Section 94A to Development to which a Planning Agreement Relates

A Planning Agreement may wholly or partly exclude the application of Section 94 or Section 94A of the Act to Development to which the agreement relates. This is a matter for negotiation between Council and a Developer having regard to the particular circumstances of the case, including, but not limited to, negotiation and agreement relating to works in kind.

Where the application of Section 94 or Section 94A of the Act to Development is not excluded by a Planning Agreement and where there are no works in kind involved, Council will generally not agree to a provision allowing benefits under the agreement to be taken into consideration in determining Development Contributions under Section 94 or Section 94A of the Act.

Form of Development Contributions under a Planning Agreement

The form of a Development Contribution to be made under a proposed Planning Agreement will be determined by the particulars of the Instrument change or application for Development to which the proposed Planning Agreement relates. Without limitation, Development Contributions by a Developer under a proposed Planning Agreement may include:

- (a) The dedication of land to Council or another relevant Public authority;
- (b) The provision of particular Public facilities;
- (c) The making of a monetary contribution towards the cost of the provision of Public facilities; or
- (d) The provision of, or payment towards, recurrent services in respect of Public facilities.

Recurrent Charges

Council may request Developers, through a Planning Agreement, to make Development Contributions towards the recurrent costs of Public facilities. Where the Public facility primarily serves the Development to which the Planning Agreement relates or neighbouring Development, the arrangement for recurrent funding may be in perpetuity.

However, where the Public facility or Public benefit is intended to serve the wider community, the Planning Agreement will only require the Developer to make contributions towards the recurrent costs of the Public facility until a public revenue stream is established to support the ongoing costs of the facility.

Pooling of Monetary Contributions

Where a proposed Planning Agreement provides for a monetary contribution by the Developer, Council may seek to include a provision permitting money paid under the agreement to be pooled with money paid under other Planning Agreements or Contributions Plans and applied progressively for the different purposes under those agreements or plans, subject to the specific requirements of the relevant agreements or plans. Pooling may be appropriate to allow Public facilities that provide Public benefit, to be provided in a fair and equitable way.

Methodology for Valuing Public Benefits under a Planning Agreement

Unless otherwise agreed in a particular case, where the benefit under a Planning Agreement is the provision of land for a Public purpose, the value of the benefit will be determined by an independent valuer with at least 10 years experience in valuing land in New South Wales (and who is acceptable to Council and the Developer), on the basis of a scope of work which is prepared by Council, in consultation with the Developer. All costs of the independent valuer in carrying out such a valuation will be borne by the Developer.

Unless otherwise agreed in a particular case, where the benefit under a Planning Agreement is the carrying out of works for a Public purpose, the value of the benefit will be determined by an independent quantity surveyor with at least 10 years experience (and who is acceptable to Council and the Developer), on the basis of the estimated value of the completed works determined using the method that would be ordinarily adopted by a quantity surveyor. Council will prepare the scope of work for this independent quantity surveyor in consultation with the Developer. All costs of the independent quantity surveyor in carrying out this work will be borne by the Developer.

Where the benefit under a Planning Agreement is the provision of a material Public benefit, Council and the Developer will negotiate the manner in which the benefit is to be valued for the purposes of the agreement.

Credits

Council will not allow the Surplus value under a Planning Agreement to be offset against Development Contributions required to be made by the Developer in respect of other Development outside of the area of the applicable Contributions Plan.

Unless otherwise agreed by the Parties in a particular case, The Surplus value will not be refunded to a Developer until the following criteria are met:

- (a) All of the Developer's land within the area serviced by a contributions plan covering that area has been developed and all relevant contributions have been offset against the Surplus value.
- (b) 75% of the areas benefiting from the Surplus value have contributed to the scheme.
- (c) Sufficient funds exist in the fund ensuring the refund will not impact on Council's ability to carry out works contained on its rolling works programme.

Time when 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 Development that is the subject of the agreement, and will operate progressively, in accordance with its terms, as the Development proceeds from the issue of the first Construction Certificate in respect of that Development until the grant of the final Occupation Certificate.

Implementation Agreements

In appropriate cases, Council may require a Planning Agreement to provide that before the Development the subject of the agreement is commenced, the Parties are to enter into an implementation agreement that provides for matters such as:

- (a) The times at which and, if relevant, the period during which, the Developer is to make provision 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 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;
- (e) The management or maintenance of land or works following hand over to Council.

Monitoring and Review of a Planning Agreement

Council will continuously monitor the performance of the Developer's obligations under a Planning Agreement. This may include Council requiring the Developer (at its cost) to report periodically to Council on its compliance with obligations under the Planning Agreement.

Council will require the Planning Agreement to contain a provision establishing a mechanism under which the Planning Agreement is periodically reviewed with the involvement of all Parties. This will include a review of the Developer's performance of the agreement.

Council will require the Planning Agreement to contain a provision requiring the Parties to use their best endeavours to agree on a modification to the agreement having regard to the outcomes of the review.

Modification or Discharge of the Developer's Obligations under a Planning Agreement

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) The Developer's obligations have been fully carried out in accordance with the agreement;
- (b) The Developer has assigned the Developer's interest under the agreement in accordance with its terms and the assignee has become bound to Council to perform the Developer's obligations under the agreement;
- (c) The development consent to which the agreement relates has lapsed;
- (d) There has been a material modification to the development consent to which the agreement relates;
- (e) Material changes have been made to the planning controls applying to the land to which the agreement applies;
- (f) The revocation or modification by the Minister for Planning of a development consent to which an agreement relates;
- (g) The performance of the Planning Agreement has been frustrated by an event beyond the control of the Parties; and
- (h) The Parties otherwise agree to the modification or discharge of the agreement.

Such a provision will require the modification or revocation of the Planning Agreement in accordance with the Act and Regulation.

Assignment and Dealings by the Developer

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

- (a) Council has given its consent to the proposed assignment or dealing;
- (b) The Developer has, at no cost to Council, first procured the execution by the person with whom it is dealing of all necessary documents in favour of Council by which that

person agrees to be bound by the agreement as if they were a party to the original agreement; and

(c) The Developer is not in breach of the Planning Agreement.

Provision of Security under a Planning Agreement

Council generally will require a Planning Agreement to make provision for security by the Developer of the Developer's obligations under the Planning Agreement.

Unless otherwise agreed by the Parties in a particular case, the form of security required by Council will be cash or an irrevocable Bankers Guarantee approved by the Manager of Finance in favour of Council to the full value of the Developer's provision (together with projected CPI) under the Planning Agreement.

Preparation and Form of the Planning Agreement

Unless otherwise agreed by the Parties in a particular case, a Planning Agreement will be prepared by Council.

Council will generally require the Planning Agreement to be in or to the effect of the standard form Planning Agreement.

Council's Costs of Negotiating, Entering into, Monitoring and Enforcing a Planning Agreement

Council will generally require a Planning Agreement to make provision for payment by the Developer of Council's costs of and incidental to:

- (a) Negotiating, preparing, advertising and entering into the agreement.
- (b) Registration of the agreement on the title of any relevant land.
- (c) Enforcing the agreement.

The amount to be paid by the Developer will be determined by negotiation in each case. However as a general rule, Council considers that when the Planning Agreement relates to an application by the Developer for an Instrument change, or relates to an application for Development, in each case it is fair and reasonable that the Developer will pay the whole of Council's costs.

In particular cases, Council may require the Planning Agreement to make provision for a contribution by the Developer towards the ongoing administration of the agreement.

Notations on Certificates under Section 149(5) of the Act

Council will generally require a Planning Agreement to contain an acknowledgement by the Developer that Council may, in its absolute discretion, make a notation under Section 149(5) of the Act about a Planning Agreement on any certificate issued under Section 149(2) of the Act relating to the land the subject of the agreement or any other land.

Registration of Planning Agreements

The Planning Agreement is to contain a provision requiring the Developer to agree to registration of the agreement pursuant to Section 93H of the Act if the requirements of that section are satisfied.

Dispute Resolution

Council will generally require a Planning Agreement to provide for mediation of disputes between the Parties, at their own cost, before the Parties may exercise any other legal rights in relation to the dispute. Unless the Parties agree otherwise, the Planning Agreement will provide that such mediation will be conducted pursuant to the Mediation Rules published by the Law Society of New South Wales current at the time the agreement is entered into.

Hand Over of Works

Council will generally not accept the handover of a Public facility carried out under a Planning Agreement unless the Developer furnishes to Council a certificate to the effect that the work has been carried out and completed in accordance with the agreement and any applicable development consent (which certificate may, at Council's discretion, be a final Occupation Certificate, Compliance Certificate or a Subdivision Certificate) and, following the issue of such a certificate to Council, the work is also certified as complete by a Council Building Surveyor or Engineer.

Council will also require the agreement to provide for a defects liability period during which any defects must be rectified at the Developer's expense.

Management of Land or Works after Hand Over

If a Planning Agreement provides for the Developer, at the Developer's cost, to manage or maintain land that has been dedicated to Council or Public facilities that have been handed over to Council, Council will generally require the Parties to enter into a separate implementation agreement in that regard.

The failure of the Parties to reach agreement in relation to management and maintenance of the land or facilities may be dealt with under the dispute resolution provisions of the Planning Agreement.

Public Use of Privately Owned Facilities

If a 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 a separate implementation agreement in that regard.

Such an 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.

Planning Agreements Entered into by Other Planning Authorities

The Act authorises other planning authorities to enter into Planning Agreements with Developers. These authorities include the Minister for Planning, growth centres development corporations and other public authorities designated in the Regulation. In particular, an agreement may be applied to major infrastructure and other projects approved by the Minister under Part 3A of the Act.

Such Planning Agreements may relate to proposed Developments or instrument changes applying to or affecting Council's area and Council needs to ensure that:

- (a) Any costs or impacts of the proposed Development or Instrument change will be adequately addressed by the agreement;
- (b) Any opportunities or requirements to provide Public facilities under the agreement are properly pursued; and

- (c) Any proposed benefits under the agreement are appropriately provided in the best interests of the local community.

To this end, where another planning authority proposes to enter into a Planning Agreement that:

- (a) Relates to a Development or Instrument change on land within Council's area; or
- (b) Relates to a Development or Instrument change that is likely to have a cost or impact on Council's area; or
- (c) Proposes to provide, or in the opinion of Council should provide, Public facilities within Council's area.

Council will, pursuant to Section 93F (7) of the Act, seek to become an additional party to the agreement and receive a benefit under the agreement on behalf of the State.

NOTE: THIS POLICY NEEDS TO BE READ INCONJUNCTION WITH THE PLANNING AGREEMENT PROCEDURE

References:

Environmental Planning and Assessment Act 1979.
 Environmental Planning and Assessment Regulations 2000

Appendices:

Nil

Authorisation:

Status	Committee	N/A	
	Manex	N/A	
Owner	Director Corporate, Community & Development Services		
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Superseded Policy			
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2 February 2011	0		2 February 2012
9 January 2014	1		
18 March 2014	2		March 2015

Related Council Policy / Procedure
PLANNING AGREEMENT PROCEDURE