
Strathfield Council

Planning Agreement Policy

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Planning Agreement Policy

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1 Introduction

1.1 Purpose

The purpose of this Policy is to guide, and assist, in the negotiation, preparation and entry into by the Council of planning agreements under the *Environmental Planning and Assessment Act 1979* (NSW).

The objectives of this Policy are to:

- (a) Establish a fair, transparent and accountable framework governing the use of planning agreements by the Council in a manner consistent with, and according to, law.
- (b) Support innovative and flexible approaches to the delivery of infrastructure and other public benefits consistent with the Council's strategic and infrastructure plans.
- (c) Provide guidance to applicants on making a public benefit offer and entering into a planning agreement with the Council.

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

1.2 Statutory Framework

Planning Agreements are governed by

- (a) Division 7.1 of the Act.
- (b) Division 1 of Part 9 of the Regulation.
- (c) The Practice Note (<https://www.planning.nsw.gov.au/Planning-agreements>).

1.3 Scope

The Policy applies to the use of Planning Agreements to which the Council is a party.

The Council is not obliged to enter a Planning Agreement consequent upon receiving an offer to enter a Planning Agreement. The Council has an absolute discretion about whether to enter a Planning Agreement.

1.4 Overview of planning agreements

Planning Agreements are voluntary agreements that provide for delivery to the Council of Development Contributions (such as the dedication of land, public infrastructure, community facilities, affordable housing, monetary contributions or any other material public benefit) for a Public Purpose.

Planning Agreements form a part of a system under which Development Contributions are provided to the Council. The system for Development Contributions includes contributions under plans formulated by the Council under sections 7.11 and 7.12 of the Act.

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Planning Agreements provide the Council with improved flexibility for the delivery of Public Benefits to manage the impacts of development.

Planning Agreements provide an efficient means of developing community infrastructure in conjunction with redevelopment in an urban renewal context.

1.5 Definitions

Unless the context otherwise requires, in this Policy:

Term	Meaning
Act	<i>Environmental Planning and Assessment Act 1979</i> (NSW).
Council	Strathfield Municipal Council.
Developer	An owner of land or a developer engaged by an owner of land to develop the land on behalf of the owner either through a Planning Proposal or a Development Application.
Development Application	Has the same meaning as in the Act (and for the purposes of this Policy includes an application to modify a Development Application that has been determined.
Development Contribution	A contribution provided by the Developer under a planning agreement being a monetary contribution, the dedication of land free of cost to Council, any other material public benefit or any combination of them.
Explanatory Note	Has the meaning given to that term in section 205 of the Regulation.
Instrument Change	A change to an environmental planning instrument whether it be for the making, amendment or repeal of that instrument.
Landowner	The registered owner of the land to which a Planning Proposal, Development Application or Planning Agreement applies or relates.
Local Environmental Plan	Has the meaning given to that term in the Act.
Planning Agreement	Has the meaning given to that term in section 7.4 of the Act.
Planning Obligation	An obligation imposed by a Planning Agreement on a Developer requiring the developer to make a Development Contribution.

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Term	Meaning
Planning Proposal	A proposal to change an environmental planning instrument to facilitate a development the subject of a Planning Agreement.
Policy	This document and includes all schedules and annexures to it.
Practice Note	The Planning Agreements Practice Note February 2021 published by the NSW Department of Planning Industry and Environment (February 2021).
Public	The community as a whole or, where context requires, a section of the community.
Public Benefit	The benefit enjoyed by the public because of a Development Contribution and may take the form set out in Schedule 1.
Public Facilities	Public infrastructure, facilities, amenities and services.
Public Purpose	Includes (without limitation) any of the following: <ul style="list-style-type: none">(a) The provision of (or the recoupment of the cost of providing) public amenities or public services;(b) The provision of (or the recoupment of the cost of providing) affordable housing;(c) The provision of (or the recoupment of the cost of providing) transport or other infrastructure relating to land;(d) The funding of recurrent expenditure relating to the provision of public amenities or public services, affordable housing or other infrastructure;(e) The monitoring of the planning impacts of a development;(f) The conservation and enhancement of the natural environment.
Regulation	<i>Environment Planning and Assessment Regulation 2021 (NSW).</i>

2 Governance

2.1 Principles

Planning Agreements will be governed by the following principles:

- (a) Planning decisions cannot be bought or sold through Planning Agreements.

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- (b) The Council will assess the Public Benefit of any Development Contribution against the Council's strategic land use and infrastructure planning when deciding whether to proceed with a Planning Agreement. Public benefits may be social, economic, environmental and/or cultural.
- (c) The Council will not allow a Planning Agreement to improperly restrict the exercise of its functions under the Act, the Regulation or any other act of law.
- (d) The Council will not use a Planning Agreement for any purpose other than a proper planning purpose.
- (e) The Council will not use a Planning Agreement as a means of general revenue raising or to overcome revenue shortfalls.
- (f) Development that is unacceptable on planning grounds will not be supported even where Public Benefits offered mitigate the impacts of development.
- (g) When considering a Development Application or a Planning Proposal, the Council will not give undue weight to a Planning Agreement.
- (h) The Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a Planning Agreement.
- (i) The Council will act consistently, fairly and impartially in negotiating planning agreements with developers; and
- (j) The Council will ensure that it manages any conflict of interest it has between its role as planning authority and its financial interest in the development, being the subject of a Planning Agreement.

2.2 Council may enter a planning agreement

The Council may enter into a Planning Agreement with a Landowner or a Developer (or both) in connection with any Development Application or a Proposal relating to land in the Council's local government area.

2.3 Acceptability test

The Council will consider the following questions to assess the acceptability of a proposed Planning Agreement:

- (a) Is the proposed Planning Agreement directed towards a proper and legitimate planning purpose having regard to the statutory planning controls and other adopted planning policies and infrastructure strategies and the circumstances of the development?
- (b) Does the proposed Planning Agreement provide for a reasonable means of achieving the relevant planning purpose and securing the relevant Public Benefit?
- (c) Will the proposed Planning Agreement produce outcomes that benefit or protect the public interest against poor planning outcomes?
- (d) Does the proposed Planning Agreement promote the Council's aim in relation to the use of agreements as set out in this Policy?

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- (e) Are there any relevant circumstances that may preclude the Council from entering into the proposed Planning Agreement?
- (f) Will the proposed Planning Agreement provide benefits that bear a relationship to the development or the wider community?
- (g) Is the Public Benefit proposed appropriate, having regard to the nature of the development?

The above questions are not a code or an exclusive list. The Council may consider such other questions or considerations that are relevant to its deliberations concerning the acceptability of a proposed Planning Agreement.

2.4 Relationship to Development Applications or Planning Proposals

When exercising its functions under the Act in relation to a Development Application or a Planning Proposal, the Council will consider:

- (a) whether the proposed Planning Agreement is relevant to an application or proposal; and
- (b) whether it should be considered in connection with the application or proposal.

If so, the proper planning consideration is to be given to the proposed Planning Agreement.

2.5 Relationship to contribution plans

Normally Public Benefits provided under a Planning Agreements are additional to contributions required under plans formulated by the Council under sections 7.11 and 7.12 of the Act.

Planning Agreement may partly or fully exclude contributions required under plans formulated by the Council under sections 7.11 and 7.12 of the Act to development, the subject of a planning agreement. This exclusion may be in the form of land dedication or works in kind being provided instead.

The ability in a planning agreement to partly or fully exclude contributions required under plans formulated by the Council under sections 7.11 and 7.12 of the Act gives the Council a degree of flexibility to redistribute the financial, social and environmental costs and benefits of development. This flexibility provides the opportunity to address issues that may not have been anticipated or may not be able to be appropriately addressed with the more rigid requirements of sections 7.11 and 7.12 of the Act.

Where a planning agreement partly or fully excludes contributions required under plans formulated by the Council under sections 7.11 and 7.12 of the Act, the Act prevents the Council from imposing a condition of development consent requiring the payment of those contributions except to the extent that requires the payment of the balance of those contributions where the Planning Agreement only partly excludes them.

A Planning Agreement may exclude the Public Benefits (provided under such an agreement) from being considered in the assessment of contributions required under plans formulated by the Council under sections 7.11 and 7.12 of the Act. In such cases, the Act precludes the application of those sections which would otherwise require the consideration of any land, money or material public benefit when assessing contributions.

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2.6 Types and forms of Public Benefits

Public Benefits provided under a Planning Agreements must be directed towards appropriate and legitimate planning purposes. The Council will consider the following when assessing the appropriateness and legitimacy of the proposed Public Benefits:

- (a) Whether the proposed Public Benefits mitigate or compensate for the impact of the relevant development.
- (b) Whether the proposed Public Benefits meet the Council's planning policy objectives including those set out in adopted strategic plans and plans formulated by the Council under sections 7.11 and 7.12 of the Act.
- (c) Whether the proposed Public Benefits meet the requirements for new public infrastructure identified in the Council's public works program.
- (d) Whether the proposed Public Benefits meet the objectives or needs of other relevant draft or adopted Council policies, strategies, plans, technical standards and specifications.

The above criteria are not a code or an exclusive list. The Council may consider such other criteria that are relevant to its deliberations concerning the appropriateness and legitimacy of the proposed Public Benefits.

The type and form of Public Benefit to be provided under a proposed Planning Agreement will be determined by the circumstances and content of the relevant Development Application or Planning Proposal to which the Planning Agreement relates.

2.7 Matters for consideration

The matters that the Council will consider in the preparation of a Planning Agreement include whether:

- (a) The demands created by the development for new public infrastructure, amenities or services are addressed.
- (b) The facilities and/or services to be provided meet the planning and strategic objectives of the Council.
- (c) Mitigation of the impact of development is addressed.
- (d) Recurrent funding of public facilities is required.
- (e) Improving or augmenting past deficiencies in infrastructure provision are addressed.
- (f) Monitoring the planning impacts of development is required.
- (g) The Public Benefits provide an opportunity for innovation or technology not anticipated in plans formulated by the Council under sections 7.11 and 7.12 of the Act.
- (h) The timing of the development aligns with the delivery of the Public Benefit;

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- (i) Public Benefits for the wider community accrue from the Planning Agreement.
- (j) There are any initial or ongoing costs for the Council as a result of the Planning Agreement.

The above matters are not a code or an exclusive list. The Council may consider such other matter that are relevant to its deliberations concerning the proposed Planning Agreement.

2.8 Contributions

The Council may seek to standardise Development Contributions to streamline negotiations and provide fairness, predictability and certainty for Developers. The value attributed to works-in-kind or land will be considered on their merits using the processes outlined in this Policy.

The Council may request Development Contributions towards recurrent costs of public facilities through a Planning Agreement. Generally, the Planning Agreement will 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, or for a time agreed between the parties.

Where a proposed Planning Agreement provides for a monetary contribution, the Council may seek to include a provision permitting the monetary contribution to be pooled with money paid under other Planning Agreements or plans formulated by the Council under sections 7.11 and 7.12 of the Act. This will be 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 Benefits to be provided in a fair and equitable way, particularly essential infrastructure anywhere in Council's local government area.

2.9 Probity

To manage the potential for conflict of interest and ensure transparency and good governance, the Council will ensure the definition and separation of roles and responsibilities between the negotiation of a Planning Agreement and the assessment of a Development Application or Planning Proposal. This will be supported by good record keeping of decision making and monitoring of the end-to-end process.

Staff involved with the negotiation, decision making and reporting of Planning Agreements sign conflict of interest declarations prior to the commencement of negotiations for each development.

3 Planning Agreements - Negotiation and Operation

3.1 Offer

The process for the Council to negotiate a Planning Agreement commences with the submission of an initial Public Benefit offer by the Landowner or a Developer or both, generally at the same time as a request for a Planning Proposal or lodgement of a Development Application.

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The offer must:

- (a) be in writing;
- (b) be addressed to the planning authority to whom it is made;
- (c) be signed by or on behalf of the Landowner and any other parties to the proposed Planning Agreement other than the Council;
- (d) describe the proposed Public Benefit;
- (e) cite the land and development to which it applies;
- (f) propose the timing of the delivery of the Public Benefits;
- (g) state whether the applicant is seeking an offset or reduction of contribution required under sections 7.11, 7.12 or 7.24 Act by the delivery of the Public Benefits; and
- (h) include the key terms it proposes to include in the Planning Agreement.

The above matters are not a code or an exclusive list. The offer may include such other information and terms as considered relevant to the offer.

3.2 Valuation

The Public Benefits proposed under a Planning Agreement must be attributed a value in the agreement. The Council and the counterparty(s) to the Planning Agreement must as part of the negotiation reach agreement on the value attributed to the proposed Public Benefits. The Council must ensure that the value attributed to the Public Benefits is undependably verified by a suitably qualified expert (whose identity will be guided by the form the Public Benefit and will most likely be a quantity surveyor or a valuer).

If the Public Benefit under a Planning Agreement is in the form of works-in-kind, then the Council will generally attribute a value to those works based on a cost estimate prepared by a suitably qualified quantity surveyor or other expert. The Council may require the cost estimate to be peer reviewed by a suitably qualified quantity surveyor or other expert (at no cost to Council).

Where the Public Benefit under a Planning Agreement is in the form of a land transfer or dedication, the Council may seek the services of an appropriately qualified land valuer to attribute a value to the land being transferred or dedicated.

Any works and services that would normally be provided or undertaken to satisfy a condition of development consent will be deemed to have no value under a Planning Agreement.

3.3 Parties

Normally, the parties to the Planning Agreement will be the Council and the Landowner.

The circumstances of a Planning agreement may require other counterparty(s) including the Developer or the consent authority for the Development Application or a Planning Proposal. This will be determined on a case-by-case basis.

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3.4 Provision of security and acquisition rights

The Council will require a Planning Agreement to make provision for security in respect of the performance by the counterparty(s) obligations under the Planning Agreement.

The security may be in the form of a monetary bond, a bank guarantee, a guarantee by a third party or any combination of them.

The security must be in favour of the Council.

The security amount should be for an amount not less than the to the full attributed value of the Public Benefits provided under the Planning Agreement.

Where the Public Benefit under a Planning Agreement includes the transfer or dedication of land, the Council may require a Planning Agreement to contain a right for the Council to acquire the land (at no cost) if the counterparty(s) fails or is unable to meet its transfer or dedication obligations under the Planning Agreement.

3.5 Template planning agreement

Council has prepared a template for Planning Agreements it may enter. The template is available on the Council's website.

Depending on the nature of the proposed Planning Agreement offer, some of the clauses in the template may not apply or may require amendments. Some provisions are standard for every planning agreement to comply with the Act and Regulations.

Council will prepare each draft planning agreement.

3.6 Public notification

Under the Act, a proposed Planning Agreements and an Explanatory Note must be publicly notified (for a minimum of 28 days).

If the Planning Agreement is in connection with a Planning Proposal, the notification of the draft Planning Agreement and Explanatory Note must occur, if practicable, with the public notification of, and community consultation, for the Planning Proposal. This is so that the Council can ensure that the public can consider all elements of the Planning Proposal.

If the Planning Agreement is in connection with a Development Application, the public notification must occur as soon as possible after a draft Planning Agreement has been prepared and considered by the Council and the counterparty(s) to be ready for public notification.

Amendments to the draft Planning Agreement may be required because of public submissions received during public notification or for other reasons. Where amendments are required to a draft Planning Agreement that materially affect the nature, scope or timing of the Public Benefits or the key terms of the Planning Agreement, the amended draft Planning Agreement and Explanatory Note must be publicly notified again.

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3.7 Modification and re-notification

Planning Agreements can be modified by agreement between the parties. Either party can request a modification. Modification will generally occur through a deed of variation to the Planning Agreement.

The public notification obligations set out above apply to any modification.

3.8 Registration on title

Planning Agreements must be registered on the property title of the subject land. Where the Developer is not the Landowner, the Planning Agreement must include a provision requiring the Landowner and the Developer to register the Planning Agreement.

Signature of the Planning Agreement confers on the Council an interest in the subject land that will support a caveat. Pending registration, the Council may lodge a caveat against the title to the subject land.

The landowner must consent to, and procure the consent of any other prior registered interests to, the registration of the Planning Agreement.

The Council may require a Planning Agreement to contain an acknowledgement that the Council will make a notation about a Planning Agreement on any certificate issued under section 10.7(5) of the Act relating to the subject land.

Upon the Public Benefits under the Planning Agreement being provided, the Council will do all things reasonably required to cause removal of the Planning Agreement from the title to the subject land.

3.9 Costs

The Landowner or the Developer (or both) is responsible for all costs incurred by the Council in connection with the negotiation, prepared and enforcement of a Planning Agreement. This includes costs incurred by the Council in relation to engagement of experts and consultants.

The Landowner or the Developer (or both) is responsible for all costs incurred by the Council in connection with public notification.

3.10 Enforcement

The Council may use a range of enforcement methods to ensure delivery of the Public Benefits provided under a Planning Agreement.

The type or types of enforcement methods depend on the nature of the Public Benefit being provided. Types of enforcement include, but are not limited to:

- (a) Provision of a bank guarantee or insurance bond to secure the delivery of works and maintenance in any defects liability period
- (b) Rights to compulsorily acquire land from the Developer or the Landowner (as the case may be).

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- (c) Rights for the Council to step in and complete works at the Developer's cost if the Developer fails to undertake the works.
- (d) Warranties to ensure the ongoing operation of Public Benefits after delivery.
- (e) Linking construction certificates or occupation certificates to delivery of Public Benefits.

The Council's objective in imposing these enforcement methods is to ensure the delivery of the Public Benefit without the Council incurring additional costs.

3.11 Discharge of obligations

The Developer must ensure that the Public Benefits are provided by the date or milestone stated in the Planning Agreement. For works in kind, the Council will inspect and provide confirmation in writing that the works have reached completion.

The Council may terminate a Planning Agreement when:

- (a) for agreements relating to a Planning Proposal, the local environmental plan is:
 - (i) subsequently amended by an environmental planning instrument made after the Planning Proposal in a way that prevents the development from proceeding; or
 - (ii) declared to be invalid by a Court of competent jurisdiction.
- (b) for agreements relating to a Development Application, the development consent lapses or is surrendered.

3.12 Planning agreements register

The Council maintains a register of all Planning Agreements.

The register is available for inspection by the public.

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Schedule 1 - Public Benefits

Infrastructure

- Accessibility improvements - accessible parking, kerb ramps, modifications to public buildings or areas
- Roads - design and construction
- Open space - parks, public places, embellishment
- Drainage and storm water controls
- Traffic measures
- Transport outcomes
- Pedestrian and cycleways linkages and footpaths Telecommunication networks
- Power, water, gas
- Communications and information technology such as WIFI public space
- Bridges (vehicular and pedestrian)

Facilities

- Accessible, key worker and affordable housing
- Community services - e.g. meeting rooms, halls, libraries
- Child care and family health care centres
- Public toilets
- Youth spaces
- Public leisure facilities
- Performance spaces
- Civic spaces
- Public car parking areas and commuter parking
- Bus shelters
- Family care facilities
- Sport, recreation and activity centres
- Business, research and creative industries incubator space and ancillary uses

Public domain improvements

- Paving - paths, streets and open space areas
- Plantings - streets and open space areas
- Furniture - seats, bins
- Banners
- Public art in streets, open space and other public domain space
- Kerbs and gutters
- Treatment and/or features in public places
- Facilities such as kiosk in parks and open spaces
- Turf
- Public leisure, sport and recreation facilities

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- Environmental management improvements such as water and energy minimization devices
- Water quality devices
- Water bubblers, lockers and other amenities
- Signage including suburb identification, way finding, parking, interpretation and information signs for pedestrians, cyclists and users of other vehicles.

Other

- Cash contributions
- Key worker housing
- Land dedicated for use as parks, facilities, pedestrian connectivity and new roads
- Contributions for the development of community facilities plans and cultural facilities plans
- Aboriginal site protection
- Other benefits in line with Council plans and strategies -including plans of management, flood plan management plans, traffic and transport plans, master-plans, development control plans and local environmental plans