



# PLANNING AGREEMENT POLICY P5.0243.2

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# PLANNING AGREEMENT POLICY

**DIVISION:** GROWTH AND FINANCE

**BRANCH:** CONTRIBUTIONS PLANNING

**CATEGORY:** 2

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## PART 1 - INTRODUCTION

### 1. BACKGROUND

- 1.1. The Planning Agreements Policy (the Policy) has been prepared to provide a framework for the preparation and execution of Planning Agreements pursuant to the provisions of Part 7 of the EP&A Act.
- 1.2. The Policy sets out the purpose, scope and objectives for the preparation of Planning Agreements and also includes a set of guidelines to assist in the application of the policy to planning and development within the local government area.
- 1.3. The Policy forms part of Council's local planning framework including the Community Strategic Plan, Local Strategic Planning Statement, Local Environmental Plan and Contribution Policy and Plans.
- 1.4. At the time of writing this Policy, the NSW Department of Planning, Industry and Environment (the Department) was in the process of reviewing the Planning Agreements Policy Framework however, which included publishing for public consultation draft Planning Agreements Practice Note ('2020 Practice Note'), and a draft Ministerial Direction on Planning Agreements ('2020 Ministerial Direction'). However, a decision on the proposed changes had not been made at the time of this review.
- 1.5. Until such time as any legislative amendments are put in place, it is considered relevant to have a policy framework in place to address any Planning Agreement offers that might arise. In setting that framework, it is considered relevant to identify some of the key outcomes expected by the State Government of the current review. These were:
  - Public Benefit from the Planning Agreement must relate to the development;
  - Identification of a fair, reasonable and transparent Planning Agreement negotiation process;
  - Identification of appropriate infrastructure through an assessment of local community needs;
  - Establishing a preferred pathway to secure affordable housing through an affordable housing contribution scheme;
  - Setting out new principles under the acceptability test for Planning Agreements;
  - Consideration of thresholds for the use of Planning Agreements;
  - New emphasis on strategic infrastructure planning;
  
  - Timing of exhibition; and

- Improved transparency and reporting of contributions received via Planning Agreements.
- 1.6. Council reserves the right to amend and/or update this policy document at the conclusion of the work by the NSW Productivity Commission and any subsequent amendment of the statutory policy framework (i.e. amendments to the EP&A Act; EP&A Regulation; Planning Circulars; Guidelines etc).and/or adoption of the 2020 Practice Note and 2020 Ministerial Direction etc).

## 2. OBJECTIVES

2.1 The objectives of the Camden Planning Agreements Policy are to:

- Establish a fair, transparent and accountable framework governing the use of Planning Agreements by Council;
- Promote the timely delivery of infrastructure in the Camden LGA;
- Adopt innovative and flexible approaches to the provision of infrastructure and other Material Public Benefits in a manner that is consistent with Council's strategic and infrastructure plans; and
- Ensure that Planning Agreements do not compromise the full suite of infrastructure delivery required to support growing communities.

## 3. SCOPE

3.1 This Policy applies to all land covered in the Camden LGA subject to the EP&A Act.

3.2 This Policy applies when Council is negotiating and entering into a Planning Agreement within the meaning of s7.4 of the EP&A Act with a Developer to provide Material Public Benefit in the Camden LGA.

## 4. DEFINITIONS

The following are terms used in this policy.

Attributable cost	Means the estimated cost for each item in the works schedules of the relevant Contributions Plan, which may differ from the final actual cost of the item. It will be the value used in determining the amount of any offset of monetary contributions as a result of any executed Planning Agreement, where relevant.
CDC	Means a Complying Development Certificate issued under the <i>State Environmental Planning Policy (Exempt and Complying Development Codes) 2008.Assessment Act, 1979</i>
Consent / Conditions of Consent	Means a development consent issued for a Development Application. A Condition of Consent describes the conditions under which a consent is granted. This may include the payment of Development Contributions.
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.
Council	Means Camden Council.

Defects Liability Period (DLP)	Means the period agreed to in relation to the Works where Council may give the Developer a rectification notice stating the works to be rectified at the Developers cost to meet the terms of the Planning Agreement. This is specified as follows: <ul style="list-style-type: none"> <li>• All open space - 12 months</li> <li>• Civil works (roads, paths, truck drainage) - 12 months</li> <li>• Natural or riparian areas – 60 months.</li> </ul>
Developer	Means 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 Development Application. Includes an unincorporated group of persons or a person authorised to represent that group.
Development Application	Means an application for consent under Part 4 of the <i>Environmental Planning and Assessment Act, 1979</i> (EP&A Act) to carry out development (but does not include an application for a complying development certificate - see separate definition under CDC).
Development Consent / Conditions of consent	Means consent under Part 4 of the EP&A Act to carry out development and includes, unless expressly excluded, a complying development certificate. A Condition of Consent describes the conditions under which a consent is granted. This may include the execution of a Planning Agreement.
Development Contribution	Means a monetary contribution, the dedication of land free of cost, the carrying out of work, or the provision of any other Material Public Benefit, or any combination of them, to be used for, or applied towards a Public Purpose.
DCMC	Means Council's Development Contributions Planning Committee.
EP&A Act	Means the <i>Environmental Planning and Assessment Act 1979</i> .
EPA Regulation	Means the <i>Environmental Planning and Assessment Regulation 2000</i> .
Hand-Over Date	Means the date no later than the date specified in a Planning Agreement in which the Developer will hand over the works to Council.
Indexing	Refers to a method used in Contributions Plans for the contribution to be escalated using a recognised number or ratio (a value on a scale of measurement) derived from a series of observed facts that can reveal relative changes as a function of time.
IPR	Means Council's Integrated Planning and Reporting framework
Land Contribution	Means the area of land to be dedicated to Council..
LGA	Means Local Government Area.
LVI	Means the Land Value Index published annually by the Council on its website or in its Management Plan, or both.
Maintenance Period	Means the period agreed to in relation to specific works (or facility) where Council expects the Developer to be responsible for day- to- day maintenance of the work (or facility) at the Developer's cost to meet the terms of the Planning Agreement. <ul style="list-style-type: none"> <li>• All open space -12 months maintenance</li> <li>• Embellishment riparian/transmission easement land 5 years maintenance as per Dedication of Constrained Lands Policy.</li> </ul>

Material Public Benefit (MPB)	Means a benefit that is generally not a monetary contribution or the dedication of land but is for a public purpose and provides a specific and measurable Public Benefit. A Material Public Benefit does not need to be a physical work. Material Public Benefits may comprise social, economic, environmental and/or cultural benefits. Their “notional value” should be expressed in monetary terms.
Nexus	Means the relationship between the expected types of development in the area and the demand for additional infrastructure and public facilities to meet that demand.
Planning Agreement	Has the same meaning as in section 7.4 of the EP&A Act:  <i>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)—</i> <ul style="list-style-type: none"> <li><i>(a) who has sought a change to an environmental planning instrument, or</i></li> <li><i>(b) who has made, or proposes to make, a Development Application or application for a complying development certificate, or</i></li> <li><i>(c) who has entered into an agreement with, or is otherwise associated with, a person to whom paragraph (a) or (b) applies,</i></li> </ul> <i>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.</i>
Planning Authority	A Planning Authority has the same meaning as in Division 7.1 of Part 7 of the EP&A Act, and means: <ul style="list-style-type: none"> <li>• a council, or</li> <li>• the Minister for Planning, or</li> <li>• the Planning Ministerial Corporation, or</li> <li>• a development corporation (within the meaning of the <i>Growth Centres (Development Corporations) Act 1974</i>), or</li> <li>• a public authority (such as Transport for NSW).</li> </ul>
Planning Proposal	A proposal to change an environmental planning instrument to facilitate a development which may be the subject of a Planning Agreement.
Planning Purpose	Planning Purposes are outcomes that can be identified in the statutory planning controls and other adopted strategic planning and policies applying to development.
Practice Note	The Practice Notes (current and draft) on Planning Agreements published by the Department of Planning and Environment.
Proponent	Applicant of an application (i.e. Development Application, complying development certificate or Planning Proposal).
Public	The community as a whole or, where context requires, a section of the community.
Public Benefit	Is the benefit enjoyed by the public as a consequence of a Development Contribution or Planning Agreement.

Public Purpose	Has the same meaning as in Section 7.4 of the EP&A Act:  <i>A public purpose includes (without limitation) any of the following:</i> <ul style="list-style-type: none"> <li><i>a) the provision of (or the recoupment of the cost of providing) public amenities or public services,</i></li> <li><i>b) the provision of (or the recoupment of the cost of providing) affordable housing,</i></li> <li><i>c) the provision of (or the recoupment of the cost of providing) transport or other infrastructure relating to land,</i></li> <li><i>d) the funding of recurrent expenditure relating to the provision of public amenities or public services, affordable housing or transport or other infrastructure,</i></li> <li><i>e) the monitoring of the planning impacts of development,</i></li> <li><i>f) the conservation or enhancement of the natural environment.</i></li> </ul>
Public Facilities Recurrent Costs	Means public infrastructure, facilities, services and amenities. Means any cost which is of a repeated nature that is required for the operation or maintenance of a public facility.
Surplus Value	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 4.17 (1) of the EP&A Act and the value of Development Contributions that are or could have been required to be made under Section 7.11 or Section 7.12 of the EP&A Act in respect of the development the subject of the Planning Agreement.
Value Capture	Means Council capturing, for the community benefit, some of the land value increase accruing to a parcel of land from a change to a planning instrument (such as a rezoning or increase in FSR), which increases the development potential of the land and hence its value.  Planning Agreements should not be used explicitly for value capture in connection with the making of planning decisions. For example, they should not be used to capture land value uplift resulting from rezoning or variations to planning controls. Such agreements often express value capture as a monetary contribution per square metre of increased floor area or as a percentage of the increased value of the land. Usually, the Planning Agreement would only commence operation as a result of the rezoning proposal or increased development potential being applied.
Works-in-Kind (WIK)	Means the undertaking of a work or provision of a facility by an applicant, which is already nominated in the works schedule of a Contributions Plan.
Works schedule	Means the schedule of the specific public amenities and public services for which a contribution may be required as set out in a Contributions Plan's technical document.

## **PART 2 - POLICY STATEMENT**

This Policy shall be referred to when negotiating and entering into an agreement with a Developer, landowner, or similar entity to provide Material Public Benefit in the Camden Local Government Area (LGA). The acceptance of an offer to enter into a Planning Agreement is at the absolute discretion of Council.

This Policy shall not limit or fetter Council's statutory discretion or duty in determining Development Applications under the EP&A Act.

### **5. INTRODUCTION**

#### **5.1. Purpose of this Policy**

This Policy sets out the statutory framework for Planning Agreements and provides key guiding principles governing their use.

The Policy provides a framework for the preparation and execution of Planning Agreements related to the provisions of Part 7, Division 7.1 Subdivision 2 of the EP&A Act.

The Policy sets out the purpose, scope and objectives for the preparation of Planning Agreements and includes guidelines that set out how the policy will be used in planning and development within the Camden LGA.

The Policy applies to Planning Agreements that the Council might enter into with a landowner or Developer who requests changes to a Local Environmental Plan either through a Planning Proposal request or a Development Application for land within the Camden LGA.

#### **5.2. Related Council Policies**

This Policy should be read in conjunction with the following Council Policies and Documents:

- Contributions Planning Policy; and
- Works-in-Kind Policy.

#### **5.3. Application**

This Policy applies when Council is negotiating and entering into a Planning Agreement with a Developer or landowner to provide Material Public Benefit in the Camden LGA.

#### **5.4. What is a Planning Agreement?**

Planning Agreements, often referred to as a Planning Agreement or Voluntary Planning Agreement (VPA), are used widely in the planning system as a tool for delivering innovative or complex infrastructure and Public Benefit outcomes in connection with Planning Proposals, Development Applications and Complying Development Certificates.

They provide a way for Council and Developers to negotiate flexible outcomes in respect of development and infrastructure contributions and enables the NSW planning system to deliver sustainable development achieving key economic, social and environmental objectives.

Planning Agreements authorise Development Contributions for a variety of public purposes, some of which extend beyond the scope of section 7.11 and 7.12 (local infrastructure contributions), or section 7.24 (special infrastructure contributions or SICs) of the EP&A Act. Executed under the agreement, a Developer can agree to provide or fund:

- Public amenities and public services
- Affordable housing
- Transport or other infrastructure
- Protection and enhancement of the natural environment, and
- Recurrent expenditure relating to any of the above provisions.

Contributions under a Planning Agreement can be made through:

- The dedication of land (free of cost)
- Monetary contributions
- Construction of infrastructure
- Material Public Benefits; and
- Combination of the above.

Planning Agreements form part of Council's planning framework. This framework includes Council's section 7.11 contribution plans and the Contributions Planning Policy, which provides the overarching foundations and guiding principles for the contributions framework.

### **5.5. Objectives of Planning Agreements**

Planning Agreements may be directed towards achieving the following broad objectives:

- Meeting the demands created by development for new public infrastructure, amenities and services.
- Prescribing the nature of development to achieve specific planning objectives.
- Securing planning benefits for the wider community so that development delivers a Material Public Benefit.
- Compensating for the loss of or damage to a public amenity, service, resource or asset by development through replacement, substitution, repair or regeneration.

### **5.6. Benefits of a Planning Agreement**

Planning Agreements may be used for a variety of reasons in order to achieve Public Benefits that are not ordinarily available through the planning system, the existing Contributions Plan or may only be available in a restricted manner. Their use will be dictated by the circumstances of individual cases.

## Planning Agreements:

- Provide a flexible means of achieving tailored development outcomes and focused Public Benefits.
- Can provide enhanced and more flexible infrastructure funding opportunities and better planning implementation.
- Allow for the flexible delivery of infrastructure for a development proposal which may have good planning merit but is out of sequence with broader strategic planning processes.
- Allow opportunities for more innovative and efficient provision of Public Benefits than might be realised by other means.
- Provide opportunities for the local community to participate in the quality and delivery of infrastructure or Material Public Benefits.
- Allow Developers to have an input to the type, quality, timing and location of Material Public Benefits.
- Allow infrastructure or other Public Benefits to be secured earlier in the planning process, if executed as part of a Planning Proposal.
- Provide a flexible framework under which councils and other Planning Authorities can share responsibility for the provision of infrastructure in new greenfield release areas.
- Offers Developers a degree of control and certainty they would not otherwise have.
- Can be prepared to specifically target the needs of the development and community.

### 5.7. **When can Planning Agreements be used**

Planning Agreements have the potential to be used in a wide variety of circumstances and to achieve many different planning outcomes. These circumstances are provided in the following sub-sections.

### 5.8. **Compensation for loss or damage caused by development**

Planning Agreements can provide for Development Contributions that compensate for increased demand on the use of a public amenity, service, resource or asset that will or is likely to result from the carrying out the development.

For example, development may result in the loss of or increased impact on the provision of public open space, public car parking, public access, water and air quality, bushland, wildlife habitat or other natural areas.

A Planning Agreement can impose planning obligations directed towards replacing, substituting or restoring the public amenity, service, resource or asset to an equivalent standard or serviceability to that existing before the development is carried out, together with any further provision or embellishment required as a result of the demand generated by the development itself. In this way, Planning Agreements can offset development impacts that may otherwise be unacceptable.

### **5.9. Meeting demand created by development**

Planning Agreements can provide for Development Contributions that meet the demand for new public infrastructure, amenities and services created by development. For example, development may create a demand for public transport services, drainage services, public roads, public open space, streetscape and/or other public domain improvements, community and recreational facilities.

The Public Benefit provided under the agreement could be the provision, extension or improvement of public infrastructure, amenities and services to meet the additional demand created by the development.

### **5.10. Providing planning benefits to the wider community**

Planning Agreements can be used to secure the provision of broader planning benefits for the wider community.

The provision of planning benefits through Planning Agreements involves an agreement between a Developer and Council to allow the wider community to share in part of the development uplift to achieve specified Public Benefits.

The planning benefit may be provided in conjunction with planning obligations or other measures that address the impacts of particular development on surrounding land or the wider community.

Planning benefits may take the form of additional or improved quality of public facilities than is required for a particular development. Alternatively, planning benefits may involve the provision of public facilities that, although not strictly required to make the development acceptable in planning terms, are not wholly unrelated to the development. An example of this might be Development Contributions towards the provision or retention of offsite affordable housing.

### **5.11. Recurrent funding**

Planning Agreements may provide for Public Benefits that take the form of Development Contributions towards the Recurrent Costs of infrastructure, facilities and services.

Such benefits may relate to the Recurrent Costs of items that primarily serve the development to which the Planning Agreement applies or neighbouring development. In such cases, the Planning Agreement may establish an endowment fund, managed by a trust, to pay for the Recurrent Costs of the relevant item. In addition, it may bind future owners in a development to make periodic payments to the fund for the Recurrent Costs of the item.

For example, a Planning Agreement may fund the Recurrent Costs of habitat protection where development will have a demonstrated impact on nearby sensitive habitat.

Planning benefits may also take the form of interim funding of the Recurrent Costs of infrastructure, facilities and services that will ultimately serve the wider community. The Planning Agreement would only require the Developer to make such contributions until a public revenue stream is established to support the ongoing cost of the maintenance or management of the infrastructure, facilities or services.

## 5.12. Planning Agreement Principles

The overarching Planning Agreement principles of this Policy provide a framework for negotiating, entering into and administering Planning Agreements.

The principles are:

- 1 The proper planning consideration is to be given to the proposed Planning Agreement.
- 2 Council will assess the Material Public Benefit offer and the public interest when deciding whether to proceed with the Planning Agreement.
- 3 The negotiation and preparation of Planning Agreements must be informed by Council's Strategic Planning Framework and the outcomes of Planning Agreements should align with the relevant strategies, plans and studies of Council. Where they do not align with the Strategic Planning Framework, or were not envisaged in strategic plans, there must be clear justification based on clear planning principles.
- 4 Development Applications, Planning Proposals or Complying Development Certificates will be assessed on their own merits without undue weight being given to associated or proposed Planning Agreements.
- 5 Council will act consistently, fairly and impartially in negotiating Planning Agreements with Developers and landowners.
- 6 Council must evaluate the most appropriate contributions method according to the circumstances of the development to minimise risk to Council and deliver the appropriate level of infrastructure.
- 7 The preparation of Planning Agreements is to be in accordance with the relevant provisions of the EP&A Act, the EP&A Regulations, *Local Government Act 1993* and any other applicable legislation or State Planning Policy requirements.
- 8 The exclusion of section 7.11 contributions or section 7.12 levies through a Planning Agreement will be a matter of negotiation between the Council and the Developer, on a case-by-case basis.
- 9 Council must be satisfied that entering into a Planning Agreement will not compromise the delivery of infrastructure outlined in an adopted or draft Contributions Plan.
- 10 Planning Agreements that include land or works that are not included in the Contributions Plan should be specified as not being subject to credit from the relevant plan unless it is assessed by Council as providing an equal (or better) outcome for the community and which will replace land or works in a Contributions Plan.
- 11 Benefits provided under a Planning Agreement must not be exchanged for a variation from a development standard under clause 4.6 of the EP&A Act, under any circumstances. Variations to development standards must be justified on planning grounds and the benefit under a Planning Agreement should contribute to achieving the planning objectives of the development standard.
- 12 When exercising its functions under the EP&A Act in relation to a proposal, Council will consider and take into account:
  - Whether the proposed Planning Agreement is relevant to and should be considered in connection with a proposal
  - Whether demand for new public infrastructure or services that is created by the proposal.

- 13 In the situation of competing proposals, Council may apply discretion and approve the proposal that offers the greatest planning benefit, so long as it is made known to the relevant parties beforehand.
- 14 Council will not agree to a Planning Agreement providing for any alleged surplus value under a Planning Agreement being refunded to the Developer or offset against 7.11 or 7.12 Development Contributions required to be made by the Developer in respect of other development in the LGA.

## 6. POLICY CONTEXT

This section outlines the legislative, strategic and local planning framework underpinning this Policy and key policy considerations when entering into and administering Planning Agreements.

### 6.1. Legislative framework

- EP&A Act – Provides the legislative framework for Planning Agreements.
- EP&A Regulation – outlines the procedural requirements for the use of Planning Agreements as well as the making, amending and revocation of Planning Agreements and the public notice of Planning Agreements.
- *Practice Notes* – provide advice on matters surrounding Planning Agreements and provide an overview of current trends and best practices. The practice notes are made for the purposes of clause 25B(2) and clause 26(1) of the EP&A Regulation. While the practice notes in themselves are not legally binding without an accompanying Ministerial direction, in some cases they may advocate greater restrictions on the content and use of Planning Agreements than is provided for in the EP&A Act and EP&A Regulation. The practice notes also set out a template designed to standardise the form of Planning Agreements. If there is any inconsistency between this Policy and the Practice Notes, this Policy prevails.

As at the date of this Policy, the key Practice Notes relating to Planning Agreements include:

- Practice Note on Planning Agreements, dated July 2005
  - Exhibition Draft Practice Note – Planning Agreements, dated April 2020; and
  - Draft Practice Note – Planning Agreements, dated November 2016.
- Ministerial Directions - under section 9.1 of the EP&A Act, Ministerial Directions require consideration for plan making covering issues such as employment, environment and heritage, housing, infrastructure and urban development. This includes infrastructure contributions, of which Planning Agreements are a form of.

### 6.2. EP&A Act

- *Ministerial Directions* - under section 7.9 of the EP&A Act, the Minister may make directions as to the procedures to be followed in negotiating a Planning Agreement, the publication of those procedures, the method of determining the extent of provision of the Public Benefit to be made by the Developer under a Planning Agreement and other standard requirements with respect to Planning Agreements. Under Section 7.17 of the EP&A Act, the Minister may also make directions as to various matters relating to Development Contributions under s7.11 and s7.12 of the EP&A Act.

As at the date of the Policy, the key Ministerial Direction relating to Planning Agreements is *Environmental Planning And Assessment (Planning Agreements) Direction 2019* which requires all councils to consider a series of matters when negotiating a Planning Agreement with a Developer for the purposes of affordable housing in connection with a development.

### 6.3. Environmental Planning and Assessment Act 1979

Part 7, Division 7.1, Subdivision 2 of the EP&A Act sets out, amongst other matters:

Provision	Section of the EP&A Act
The definition of a Planning Agreement	7.4(1)
The definition of a public purpose	7.4(2)
The mandatory, minimum requirements for a Planning Agreement	7.4(3)
The relationship of a Planning Agreement to the application of section 7.11 and section 7.12 of the Act	7.4(2), 3A, 5,6
The ability of the Council to enter into a joint Planning Agreement with another council of other public authority	7.4(8)
Limitations on the content of a Planning Agreement	7.4(9)

### 6.4. Environmental Planning and Assessment Regulation 2000

Part 4, Division 1A of the EP&A Regulation sets out, amongst other matters:

Provision	Clause of the EP&A Regulation
The form and subject matter of Planning Agreements	25B
The signing and commencement of a Planning Agreement	25C
Amendment and revocation of a Planning Agreement	25C
Public notice requirements, including the timing of that notice in regard to a Development Application and a Planning Proposal	25D
Requirements for an explanatory note and the content of that note	25E
Requirements for the public inspection of Planning Agreements	25F, 25G and 25H

#### Principle:

- The preparation of Planning Agreements is to be in accordance with the relevant provisions of the EP&A Act, the EP&A Regulations, *Local Government Act 1993* and any other applicable legislation or State Planning Policy requirements.

### 6.5. Strategic Planning Framework

The negotiation and preparation of Planning Agreements must be informed by Council's Strategic Planning Framework. This ensures legitimacy to the overall direction of the Planning Agreement and provides an overarching strategic foundation. Relevant strategic plans and related documents include, but are not limited to:

- Western City District Plan
- Local Strategic Planning Statement
- Local Housing Strategy
- Economic Development Strategy
- Rural Lands Strategy
- Recreation and Leisure Strategy
- Sustainability Strategy
- Integrated Transport Strategy
- Library Strategic Plan
- Sportsfield and other recreation strategies
- Precinct Plans
- Local infrastructure studies
- Associated 'hard' infrastructure studies (road and transport studies, engineering assessments for watercycle management)
- Infrastructure demand studies (open space and recreation and other social infrastructure.)

To ensure Public Benefits align with Council's technical requirements (i.e. in the case of land dedication and works in kind), Planning Agreements should also give reference to:

- Open Space Design Manual
- Buildings Design Manual
- Engineering and Street Design Standards
- Relevant Australian Standards

Some of the key strategies are discussed in more detail in the following sub-sections.

Principle:

- The negotiation and preparation of Planning Agreements must be informed by Council's Strategic Planning Framework and agreements should align with the relevant strategies, plans and studies of Council. Exceptions may be where the particular project was not envisaged by the strategic planning and conforms to robust planning principles.

## 6.6. Western City District Plan

Planning Agreements can assist with the delivery of the directions and planning priorities outlined in the Western City District Plan (District Plan), which are set out under the overarching themes from the Greater Sydney Region Plan – A Metropolis of Three Cities. These include:

1. Infrastructure and collaboration;
2. Liveability;
3. Productivity; and
4. Sustainability.

Liveability is a particularly important theme because it influences the quality of life that people experience. The creation and renewal of places, neighbourhoods and business centres are central objectives to improving liveability. Improvements to liveability can occur through a variety of actions including providing:

- Local infrastructure.
- More and improved public spaces including better use of and access to those spaces.
- Well-connected places.
- People-friendly, workable and safer streets, lanes and pathways that are accessible by people of all ages and abilities.

Sustainability objectives can also benefit from Planning Agreements particularly in terms of:

- Protecting and enhancing biodiversity.
- Achieving energy, water and climate change mitigation strategies.

#### **6.7. Local Strategic Planning Statement**

Planning Agreements should also be used to implement the relevant priorities contained in Council's Local Strategic Planning Statement (LSPS), such as:

- Local Priority I1 - Aligning infrastructure delivery with growth
- Local Priority L1 - Providing housing choice and affordability for Camden's growing and changing population
- Local Priority L3 - Providing services and facilities to foster a healthy and socially connected community
- Local Priority S4 - Protecting and restoring environmentally sensitive land and enhancing biodiversity.

#### **6.8. Integrated Planning and Reporting framework**

When negotiating Planning Agreements and establishing the type of public facilities to be included in the agreement, all parties must take into consideration the Council's integrated planning and reporting (IPR) framework and proposed projects, actions and services which may be identified in the plans and strategies. This ensures that Planning Agreements align with Council's broader corporate strategic planning and land use planning policies, goals, and strategies. These include:

- The Community Strategic Plan.
- The combined Delivery Program and Operational Plan.
- Resourcing Strategy.

#### **6.9. The Development Contributions Management Committee**

A whole-of-Council approach is an integral component of Council's financial management. A contributions system must have regard to the IPR Framework as well as other relevant adopted plans, strategies and policies to ensure that contributions are integrated within the overall management framework.

Given that Planning Agreements are one of several mechanisms for funding public infrastructure, such agreements form part of the Development Contributions system. Therefore, Planning Agreements will integrate with relevant financial management plans prepared by Council for budgeting and expenditure purposes.

The implications arising from entering into a Planning Agreement must be appreciated in the context of Council's overall service delivery function. The Development Contributions system affects all sections/departments of Council including:

- Planning and environmental services – in forecasting and facilitating development, preparing and reviewing Contributions Plans and providing advice on Planning Agreements as well as the issue and enforcement of development consents.
- Engineering, community and recreation services – in providing and managing public facilities administrative.
- Corporate services – in managing the administrative, legal and financial accounting processes.

It is therefore critical that the preparation and ongoing administration of the Development Contributions system involve all relevant departments of Council.

The DCMC is an internal Council committee comprised of management and specialist staff representing strategic planning, finance and capital works sections. This is considered good practice.

The DCMC meets monthly to manage the Development Contributions system. DCMC meetings are closed to the public and decisions are made by consensus. DCMC meeting minutes, decisions and recommendations in relation to Planning Agreements are communicated directly to the applicant who makes a written application to enter a Planning Agreement.

Decision-making is guided by the Development Contributions Management Committee Terms of Reference 2019 as amended from time to time.

## **7. SCOPE OF PLANNING AGREEMENTS**

This part provides guidance and key principles in relation to the scope of Planning Agreements, including relationship of Planning Agreements with local Contributions Plans, Development Applications and Planning Proposals.

### **7.1. Relationship of a Planning Agreement to Contribution Plans**

This Policy forms part of Council's Development Contributions framework, which includes the Contributions Planning Policy and Contributions Plan Template.

Council may impose a condition of consent to a Development Application, or a complying Development Application, requiring a Development Contribution under section 7.11 or the payment of a levy under section 7.12 of the EP&A Act (if consistent with the relevant Contributions Plan).

A Planning Agreement may partly or fully exclude the application of section 7.11 or section 7.12 contributions to development the subject of a Planning Agreement. Sections 7.4 and 7.11 of the EP&A Act set out the way a Planning Agreement can influence contributions and levies imposed as conditions of development consent. This includes the ability of a Planning Agreement to wholly or partly exclude the application of section 7.11 or section 7.12 in respect of a development.

Planning Agreements can be used to formalise arrangements for Developers delivering infrastructure that is out-of-sequence compared to the priorities in the Contributions Plan. In this circumstance, where the delivery of infrastructure is aligned, this generally should wholly or partly exclude the application of sections 7.11 or 7.12. Planning Agreements should clearly specify any land or works that are within the Contributions Plan, the cost outlined in the Schedule of Works and the indexing method. It should reference the infrastructure priorities section of the Contributions Plan to indicate when the Developer should receive credit for the infrastructure they deliver.

In other circumstances, the intent of a Contributions Plan must not be undermined by Planning Agreements delivering infrastructure which does not align with established infrastructure priorities. Infrastructure not identified in a relevant Contributions Plan or a strategic plan, but which otherwise achieves a justifiable Material Public Benefit, will be considered on a case-by-case basis.

Planning Agreements that include land or works that are not included in the Contributions Plan should be specified as not being subject to credit from the relevant plan. Planning Agreements that include land or works that are included in the Contributions Plan should be specified as being subject to credit from the relevant plan.

#### Principles:

- The exclusion of section 7.11 contributions or section 7.12 levies through a Planning Agreement will be a matter of negotiation between the Council and the Developer, on a case-by-case basis.
- When a Local Contributions Plan is being prepared or in draft form, this should reflect any relevant Planning Agreement already in place.
- Infrastructure works identified in an adopted Local Contributions Plan will be prioritised and infrastructure not identified in such a plan, but which achieves a Material Public Benefit, will be considered.
- Planning Agreements that include land or works that are not included in the Contributions Plan should be specified as not being subject to credit from the relevant plan.

## **7.2. Planning Agreements and Development Applications**

When determining a Development Application, Council is required by section 4.15 (previously section 79C) of the EP&A Act, to take into consideration any relevant Planning Agreement that has been entered into or a draft agreement a Developer has offered to enter into. Council is also required to take into consideration any public submissions made in respect of the Development Application, which may include submissions relating to a Planning Agreement.

Section 7.7 prevents Council refusing a DA on the grounds that a Planning Agreement has not been entered into in relation to the proposed development.

Section 7.7 also authorises Council to require a Planning Agreement to be entered into as a condition of development consent, but only if it requires an agreement that is in the terms of an offer made by the Developer in connection with the Development Application or a Planning Proposal.

Council and Developers must make a judgement in each case about whether the use of a Planning Agreement is beneficial and otherwise appropriate. However, Planning Agreements should never be used to require compliance with, or re-state obligations imposed by conditions of development consent as it may create unnecessary and inappropriate duplication.

Principles:

- A Planning Agreement should not be given undue weight when the merits of an application are assessed.
- The approval of a Development Application should never be contingent on the proponent entering into a Planning Agreement.
- Planning Agreements should never be used to require compliance with, or re-state obligations imposed by, conditions of development consent.
- Demand for new public infrastructure or services that is created by a Planning Proposal and/or Development Application is to be considered and taken into account.

**7.3. Relationship between Planning Agreements and varying development standards (Clause 4.6)**

The Land and Environment Court has handed down decisions limiting the ability of consent authorities and Developers to rely on Planning Agreements to justify variations to development standards contained in local environmental plans proposed by Development Applications. Relevant case law includes;

- *Jubilee Properties v Warringah Council* [2015] NSWLEC 1042
- *Mecone Pty Limited v Waverley Council* [2015] NSWLEC 1312.

The Land and Environment Court decisions reinforce the principle that the benefits provided under a Planning Agreement should not be used to justify a variation from a development standard unless the benefit is directed towards achieving the planning objectives of the relevant development standard.

Principle:

- Benefits provided under a Planning Agreement must not be exchanged for a variation from a development standard under clause 4.6 of the EP&A Act under any circumstances. Variations to development standards must be justified on planning grounds and the benefit under a Planning Agreement should contribute to achieving the planning objectives of the development standard.

**7.4. Planning Agreements and Planning Proposals**

Planning Agreements can be entered into in connection with a proposal to change the land use zoning and/or make changes to development controls in an LEP in relation to a site. Planning Agreements negotiated in this context will generally seek to offset any associated uplift afforded by an LEP amendment by way of providing infrastructure provision or other related Material Public Benefits to support the development and wider community.

The EP&A Act requires a planning authority to state the objectives and outcomes of a Planning Proposal, and to describe and justify the process by which they will be achieved. The role of a Planning Agreement in facilitating these objectives or outcomes should be clearly set out in the Planning Proposal documentation.

Council is to consider all applications for Planning Proposals on their merits. The unwillingness of a Developer to offer to enter into a Planning Agreement related to land value increase should not be a reason why a Planning Proposal is refused. Equally, a Planning Proposal that may have negative planning outcomes cannot be justified solely on the basis of an opportunity to enter into a Planning Agreement.

Council will not prioritise site-specific Planning Proposals on the basis they provide for opportunity to capture windfall gain or LGA-wide strategic planning initiatives. For instance, infrastructure and Public Benefit, including affordable housing, are likely to be planned and delivered in a more comprehensive way if linked to broad strategic planning exercises, rather than if planning impacts and potential Public Benefits are determined on a site-by-site basis.

Other contributions mechanisms can also provide for a more efficient and reasonable distribution of the costs of infrastructure associated with growth, rather than focusing on individual large developments. These considerations are not inconsistent with the role of a council to assess site specific Planning Proposals on their planning merits.

#### Principles:

When exercising its functions under the EP& A Act in relation to a Planning Proposal, Council will consider:

- Whether the proposed Planning Agreement is relevant to a proposal and whether it should be considered in connection with the proposal.
- Demand for new public infrastructure or services that is created by the proposal.

### **7.5. Competing proposals to provide planning benefits**

Situations may arise where Council is faced with competing applications, each accompanied by offers to enter into Planning Agreements providing Material Public Benefits. In such cases, provided the planning benefits offered are not wholly unrelated to development, they may be considered in connection with the applications and it may be perfectly rational for Council to approve the proposal which offers the greatest Material Public Benefit, all things being equal.

#### Principle:

- In the situation of competing proposals, Council may apply discretion and approve the proposal which offers the greatest Material Public Benefit.

### **7.6. Planning Agreement or other contributions mechanism?**

Planning Agreements should complement other contribution mechanisms, including section 7.11 contributions and section 7.12 levies for local infrastructure. They can be used to deliver infrastructure outcomes specified in these mechanisms, strategic planning documentation, or additional Public Benefit.

A Planning Agreement provides flexibility in terms of delivery and timing. The funds or works are not required to have a direct nexus with the proposal but should be related. A Planning Agreement should be considered where Council is satisfied that there is a direct benefit over and above the existing Contributions Plans in place. Council must be satisfied that entering into a Planning Agreement will not compromise the delivery of infrastructure outlined in a Contributions Plan.

A Planning Agreement also allows for Recurrent Costs, whereas a Contributions Plan does not (under current legislation). Therefore, a Planning Agreement may be particularly valuable where there is ongoing maintenance and or operational costs associated with infrastructure, such as watercycle management.

A Planning Agreement may also include the delivery of Material Public Benefit in the form of affordable housing (providing the Council complies with the *Environmental Planning and Assessment (Planning Agreements) Direction 2019*) and other related planning issues, which are not identified in a Contributions Plan.

However, Planning Agreements generally should not be used as *de facto* substitutes for Contributions Plans. There is a clear legislative, regulatory and policy framework supporting Contributions Plans which does not (presently) apply to Planning Agreements. Where there is a need for public infrastructure across a development area with a range of landowners, a Contributions Plan is more appropriate because it simplifies transactions and has clearer underpinning strategic planning.

The table below identifies some factors in development outcomes and infrastructure needs that may be considered when identifying an appropriate contribution mechanism:

<b>Contribution Mechanism</b>	<b>Application</b>
Section 7.11 Development Contributions	<ol style="list-style-type: none"> <li>1 In urban release areas and major urban renewal precincts</li> <li>2 In areas where growth is faster and higher levels of contributions can offset the considerable administration costs, financial risks and inefficiencies of managing money amongst and within the funds</li> <li>3 In areas with multiple owners who are unable to coordinate offering dedications or provision of a Material Public Benefit</li> <li>4 Where Council can access supplementary funds to meet the non-development demand for the infrastructure included in the Contributions Plan</li> <li>5 Areas where the overall rate of growth is uncertain but different landholders are likely to proceed with development at rates different to other landholders</li> </ol>
Section 7.12 levies	<ol style="list-style-type: none"> <li>1 In established urban areas where supplementary funding of infrastructure to meet nondevelopment demands is uncertain</li> <li>2 In high growth urban centres where infrastructure needs are mixed and where a high number of developments can contribute to shared costs In areas where both the rate and the infrastructure impacts of future development are relatively low, difficult to predict, or spread over time</li> </ol>

	<ol style="list-style-type: none"> <li>3 Where the provision of the infrastructure benefits a dispersed set of contributors and nexus is difficult to identify</li> <li>4 Where resources to manage the development, contributions are limited</li> <li>5 In areas with multiple ownership with little scope for land dedications or provision of a Material Public Benefit as alternatives to paying a monetary contribution</li> <li>6 Where the costs of needed infrastructure are relatively low and spread over time</li> </ol>
Planning Agreements	<ol style="list-style-type: none"> <li>1 In relation to a major development site or precinct that is owned by a single Developer/land owner or a consortium of Developers/land owners</li> <li>2 Where the proponent has an incentive to be directly involved in the delivery of community infrastructure, such as quicker timeframes for delivery of infrastructure are important for the Developer to bring the product to market</li> <li>3 Where a proposed development is unanticipated by Council and thus works and facilities to cater for this development have not been identified.</li> <li>4 Where the proponent agrees to be involved in the provision of public infrastructure rather than just community infrastructure</li> <li>5 Where the owners want to provide community infrastructure additional to, or at a higher standard than, what has been specified under the Contributions Plan</li> <li>6 Where Council and the proponent can, by negotiation, achieve different and better or more innovative outcomes than can be achieved through imposing direct or indirect contributions</li> </ol>
Works in Kind Agreements (WIK) <b>NOTE:</b> This refers to an agreement entered into under s7.11(5)(b) of the EP&A Act	<ol style="list-style-type: none"> <li>1 Provides more flexibility in terms of delivery and timing</li> <li>2 Can enable the delivery of infrastructure much earlier than otherwise would be provided by Council</li> <li>3 More successful where major growth or development occurs in a distinct area</li> <li>4 Need to ensure the valuation process and scope of work are clearly defined in the WIK agreement</li> </ol>

See also Section 7.2 of the Contributions Planning Policy for detailed discussion of funding mechanisms.

Principles:

- Council must evaluate the most appropriate contributions method according to the circumstances of the development to minimise risk to Council and deliver the appropriate level of infrastructure.
- Council must be satisfied that entering into a Planning Agreement will not compromise the delivery of infrastructure outlined in a Contributions Plan.

## **8. GUIDELINES & PRINCIPLES FOR NEGOTIATING & PREPARING PLANNING AGREEMENTS**

This section outlines guidelines, procedures and key principles when entering into and preparing Planning Agreements. It also discusses the public interest and probity considerations in connection with the use of Planning Agreements.

### **8.1. Circumstances where Council may enter into a Planning Agreement**

Where possible, a Planning Agreement should be negotiated between Council and the proponent before an application is made or a Planning Proposal is submitted so that applications may be accompanied by a draft agreement and considered/assessed concurrently.

Council may negotiate a Planning Agreement with a proponent (and/or associates) in connection with any Development Application (including a modification of a Development Application), complying development certificate or Planning Proposal to change a Local Environmental Plan relating to any land in the Council's area.

When considering a 'bonus scheme', planning authorities should carry out public consultation, consider the apportionment of funding, look at the feasibility impact and determine the need for the infrastructure. Such a scheme should also satisfy the fundamental principles and considerations for acceptability set out in **Section 8.4 - Acceptability test to be applied to Planning Agreements**.

If an agreement is negotiated, it is documented as a draft Planning Agreement and the parties agree on the terms of the accompanying explanatory note required by the EP&A Regulation. The parties also agree on the content of the application to which the draft agreement relates.

#### Principles:

- A Planning Agreement cannot impose an obligation on Council to grant consent to a Development Application or support a Planning Proposal.

### **8.2. When should negotiations commence?**

Negotiation of Planning Agreements should run in parallel with applications to change environmental planning instruments or Development Applications.

It is preferable that negotiations for a Planning Agreement commence before the lodgement of a Development Application or a request for a Planning Proposal is made. Negotiations can commence as part of a formal pre-Development Application or pre-Planning Proposal meeting.

### **8.3. Who will prepare a Planning Agreement?**

Unless otherwise determined between the parties, Council will be responsible for drafting the Planning Agreement at the Developer's cost. This will be confirmed at the outset of negotiations.

The process for Council to negotiate a Planning Agreement commences with the submission of a written Public Benefit offer by the Developer. The offer must adequately describe the Public Benefit and must be signed by the proponent.

Once drafted, the agreement will be submitted to the Developer for review.

The explanatory note, which must be exhibited with a Planning Agreement, is to be prepared jointly by Council and the Developer. The offer must:

- Be in writing
- Be addressed to Council
- Be executed by or on behalf of all parties to the Planning Agreement, other than Council to whom the offer is made
- Outline in enough detail, to allow proper consideration by Council, the matters required to be included in a Planning Agreement as specified in section 7.4(3) of the EP&A Act
- Address in enough detail, to allow proper consideration by the planning authority, any relevant matters
- Outline in enough detail, to allow proper consideration by the planning authority, all other key terms, and
- Conditions proposed to be contained in the Planning Agreement.

All new Planning Agreements will be subject to legal review to ensure they can be properly administered.

#### **8.4. Acceptability test to be applied to Planning Agreements**

Council will consider the following criteria in order to evaluate the Material Public Benefit associated with a proposed Planning Agreement:

- 1 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?
- 2 Does the proposed Planning Agreement provide for a reasonable means of achieving the relevant planning purpose and securing the relevant Material Public Benefit?
- 3 Will the proposed Planning Agreement produce outcomes that benefit or protect the public interest against poor planning outcomes?
- 4 Does the proposed Planning Agreement promote Council's principles in relation to the use of agreements as set out in this Policy?
- 5 Are there any relevant circumstances that preclude Council from entering into the proposed Planning Agreement?
- 6 Will the proposed Planning Agreement provide benefits that have a relationship to the development or the wider community?
- 7 Is the Public Benefit proposed appropriate having regard to the nature of the development?
- 8 Will there be any initial or ongoing costs for Council as a result of the Planning Agreement?
- 9 Will it undermine the intent of any adopted Contributions Plan that applies to the land?

#### **8.5. The public interest**

The Acceptability Test requires that Planning Agreements are in the public interest. The public interest is directed towards securing Public Benefit for the community.

In some cases, the public interest may be measured in terms of the need to mitigate any adverse impacts of development or the desirability of providing a planning benefit to the wider community.

The negotiating framework for Planning Agreements raises the fundamental issue of what is an appropriate Planning Agreement. The process involves the exercise of discretion for both Council and the Developer, giving both parties room to accommodate subjective values and varying concepts of the public interest, private interests and other standards.

The ability for a Planning Agreement to wholly or partly exclude the application of local infrastructure contributions to development gives Council scope for trade-offs under an agreement. This means that the financial, social and environmental costs and benefits of development can be redistributed through a Planning Agreement.

#### Principles:

- A key consideration in whether to enter into a Planning Agreement is whether the agreement is in the public interest.
- Individuals or groups do not outweigh the public interest when considering Planning Agreements.

### **8.6. Planning purpose**

The Acceptability Test requires that Planning Agreements are directed towards legitimate planning purposes, that can be identified in the statutory planning controls and other adopted planning policies applying to development.

The provision of planning benefits for the wider community through Planning Agreements involves capturing part of the uplift in underlying land value as a result of the Development Application or Planning Proposal. The value of planning benefits could consider a reasonable share of that uplift value to ensure commercial feasibility of the development.

Furthermore, planning benefits, though primarily directed to the wider community, must never be wholly unrelated to development contributing the benefit.

To ensure that Development Contributions provided under Planning Agreements are directed towards appropriate and legitimate planning purposes, Council will consider whether the proposed Planning Agreement:

- 1 Mitigates or compensates for the impact of the relevant development
- 2 Addresses the demands created by the development for new public infrastructure, amenities or services
- 3 Aligns the timing of the development with the delivery of the Public Benefit
- 4 Meets Council's Policy objectives and principles.
- 5 Meets the requirements for new public infrastructure identified in Council's infrastructure delivery and resourcing plans
- 6 Meets the objectives of Local Environmental Plans, Development Control Plans, and other relevant planning strategies, studies and policies of future planning arrangements
- 7 Meets the objectives or needs of other relevant draft or adopted Council policies, strategies, plans, technical standards and specifications

- 8 Is in a form suited to the particulars of the application to which the Planning Agreement relates
- 9 Provides Public Benefits that provide innovation or technology not anticipated in Contributions Plans.

Principles:

- The proper planning consideration is to be given to the proposed Planning Agreement.
- Council will not use Planning Agreements for any purpose other than to provide a Material Public Benefit to the community.
- Provision of infrastructure should generally align with strategic planning documentation.

## **9. OTHER PROCEDURAL GUIDELINES**

### **9.1. Valuation of Material Public Benefits under a Planning Agreement**

The Public Benefit proposed under a Planning Agreement will be attributed a notional value in the agreement. This attributed value will be agreed between Council and the Developer as part of the negotiation and drafting process. The value should be identified in specific numerical (\$) terms, together with the relevant date (by financial year).

If a Development Contribution under a Planning Agreement is the carrying out of works for a public purpose, Council will attribute a value to that Development Contribution. In respect of work that is included in the Council's Contributions Plan, the value attributed to the work should be the value as specified in the Contributions Plan. In respect of work that is not included in the Council's Contributions Plan, the value will be based on a cost estimate for the works prepared by a suitably qualified quantity surveyor engaged by Council at the Developer's cost or by reference to Council's standard rates and costs where appropriate.

Where the Development Contribution under a Planning Agreement includes the transfer or dedication of land, Council may seek the services of an appropriately qualified land valuer, at the Developer's cost, in order to attribute a value to the land being transferred or dedicated, unless the land is included in the Council's Contributions Plan in which case the value attributed to the land should be as specified in the Contributions Plan.

If a Developer procures a valuation from a Quantity Surveyor or Land Valuer Council reserves the right to have their report peer-reviewed, at the Developer's cost, or provide its own independent assessment.

Any Developer's works and services that would normally be provided as a condition of development consent (i.e. a road or on-site detention required to service a proposed development) will be deemed to have no value under the Planning Agreement.

## 9.2. Surplus value and credits

In certain circumstances, applicants may, through previous Development Applications, have made more local contributions to Council than was required under a Contributions Plan. This would only likely have occurred when the applicant provided land or other Material Public Benefit through a Works-in-Kind or land dedication agreement and this extra provision is referred to as 'surplus value'.

It is at Council's discretion whether it will accept the provision of a Planning Agreement such as land dedication or Works-in-Kind or other Material Public Benefits, where the value exceeds the value of Development Contributions that would be applicable or required by conditions of consent or under a Contributions Plan.

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

If a person is seeking to settle a contribution obligation with the Council and would like Council to consider accrued surplus value relating to an earlier consent and agreement, they must submit a written request together with details of the earlier agreement. The earlier agreement should explicitly acknowledge that previous 'payments' exceeded contributions that were required at that time. In such circumstances, Council may offset the surplus value from an earlier agreement against a current application or more recent consent.

Where the value of the works undertaken is less than the contribution required as a condition of consent, the Developer will be required to pay the difference.

Refer to the Contributions Planning Policy (Section 8.5) for further detail in relation to provision of Material Public Benefits in excess of contribution requirements.

Refer also to the Camden Works-in-Kind Policy (Section 14) for further detail in relation to the treatment of Surplus Value specific to WIK agreements.

### Principle:

- Council will not agree to a Planning Agreement providing for any alleged surplus value under a Planning Agreement being refunded to the Developer or offset against 7.11 or 7.12 Development Contributions required to be made by the Developer in respect of other development in the LGA.
- Planning Agreements that include land or works that are not included in the Contributions Plan should be specified as not being subject to credit from the relevant plan.

### **9.3. Pooling of Development Contributions**

Council's ability to forward fund (internally borrow) infrastructure is limited. Consequently, infrastructure provision is largely contingent upon the availability of contributions funds. In some cases, enabling infrastructure is required where development cannot effectively occur without the infrastructure, such as a collector road. Pooling of funds is enabled under the provisions of s7.3(2) of the EP&A Act and clause 27(1)(i) of the EP&A Regulation, which allows borrowing between contribution accounts. This allows greater flexibility and timeliness in the way facilities can be provided.

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. This will be applied progressively for the different purposes under those agreements or plans.

Pooling may be appropriate to allow Public Benefits to be provided in a fair and equitable way, particularly enabling infrastructure. Pooling of funds should be directed to the highest priority infrastructure, as identified in the Contributions Plan and as prioritised in the Work Schedule.

This is in accordance with the Contributions Planning Policy, and provisions of the EP&A Act and EP&A Regulation.

Refer to Section 9.1 of the Contributions Planning Policy for further detail on the pooling of contribution funds.

### **9.4. Recurrent contributions**

An applicant may offer, and Council may request, Developers to make Development Contributions towards Recurrent Costs of infrastructure through a Planning Agreement. Generally, the Planning Agreement will only require the Developer to make contributions towards the Recurrent Costs until a public revenue stream is established to support the on-going costs of the facility, or for a time agreed between the parties.

There must be a clear determination of when that revenue stream will likely be enough for Council to consider the timing of cessation of recurrent Costs.

Any initial or ongoing costs for Council as a result of the Planning Agreement will be taken into consideration when assessing the acceptability of the offer.

### **9.5. Standard contributions**

Wherever possible, Council will seek to standardise Development Contributions sought under Planning Agreements in order to streamline negotiations and provide fairness, predictability and certainty for Developers. Although the value of Planning Agreements will be considered on their merits.

## 9.6. Parties to a Planning Agreement

The Council and the Developer are always parties to a Planning Agreement. It will be frequently necessary for the landowner to be an additional party. The circumstances where the landowner will be required to be a party include (but are not limited to) where the Planning Agreement will be registered on the land title, where the Planning Agreement requires land to be dedicated to the Council, where the Planning Agreement requires the creation of covenants, easements, rights or way and the like burdening land, where the Planning Agreement requires works to be carried out on private land that will be handed over to the Council on completion of the works, where the Planning Agreement provides for access to or across private land to enable the carrying out of works, where the security for performance provided under the Planning Agreement is a charge on land, and the like. The Council will make an assessment of whether the landowner or any other person in addition to the Council and the Developer should be a party to a Planning Agreement in each particular case.

## 9.7. Probity

Council is committed to fairness, equity and ethical behaviour in the care, control and management of the Camden LGA and in the administration of this Policy. To this end, the following practices will apply:

- a) Roles and responsibilities within the processes for a Planning Agreement, a Planning Proposal, Complying Development Certificate and a Development Application will be managed to ensure transparency, impartiality and accountability and to avoid conflicts of interest. This will generally include separation of roles and responsibilities.
- b) Commercial and financial information will be treated as confidential material.

Depending on the type of Planning Agreement and the Council's involvement, Council may engage a probity expert for advice and assistance with the agreement. Costs associated with this service will be shared between the Council and the other parties associated with the agreement.

Independent third parties could be used in a variety of situations involving Planning Agreements. The situations include:

- Where an independent assessment of a proposed change to an environmental planning instrument or Development Application is necessary or desirable.
- Where information requires validation.
- Where sensitive financial or other confidential information must be verified or established during negotiations.
- Where facilitation of complex negotiations are required for large projects or where numerous parties or stakeholders are involved.
- Where dispute resolution is required under a Planning Agreement.
- Where there may be an actual or perceived conflict of interest between Council and the Developer.

Furthermore, all actions associated with negotiating and administering Planning Agreements must comply with the requirements of Council's Corporate Operational Risk referenced as OR 147 – Fraud or Corruption.

Principle:

- Council will act consistently, fairly and impartially in negotiating Planning Agreements with Developers.

**9.8. Dispute resolution**

Different kinds of dispute resolution mechanisms may suit different kinds of matters and this should be reflected in a Planning Agreement. For example, mediation may be suitable to deal with most disputes while expert determination may be most suitable to resolve disputes of a technical nature. Similarly, arbitration may be suitable for resolving commercial disputes.

Council will 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 NSW current at the time the agreement is entered into.

**9.9. Past deficiencies in infrastructure provision**

Planning Agreements may be used to overcome past deficiencies in infrastructure provision that would otherwise prevent development from occurring. This may involve the conferring of a planning benefit under the agreement, but only where it is justified, material and in the public interest.

**9.10. Public Notification**

Planning Agreements must be publicly notified and made available for public inspection before they can be entered into. A Planning Agreement cannot be entered into, amended or revoked unless public notice is given and the Planning Agreement is first made publicly available for inspection for a minimum period of 28 days.

If the draft Planning Agreement is in connection with a Development Application, the public notice will be given, if practicable, as part of a contemporaneously with, and in the same manner as any notice of the Development Application, or if that is not practicable, as soon as possible and after a draft agreement has been prepared and agreed by the parties.

If the draft Planning Agreement is in connection with a Planning Proposal (i.e. proposal to change to the Camden Local Environmental Plan 2010), the public notice will be given, if practicable, as part of any public notice of the relevant Planning Proposal that is required under the EP&A Act. This is so that Council can ensure that the public can consider all elements of the change to the Local Environmental Plan at the same time.

Where it is not practicable to give public notice at such times, the EP&A Regulation requires that this be undertaken by Council as soon as practical.

Amendments may be required as a result of public submissions or for other reasons. Any material changes that are proposed to be made to a Planning Agreement after a public notice has been given should be subject to renotification if the changes would materially affect:

- How any of the matters specified in s7.4 of the EP&A Act are dealt with by the Planning Agreement.
- Other key terms and conditions of the Planning Agreement.
- The planning authority's interests or the public interest under the Planning Agreement.
- Whether a non-involved member of the community would have made a submission objecting to the change if it had been publicly notified.

An explanatory note is required to be prepared to accompany public notice of a draft Planning Agreement and this should be written in plain English. The explanatory note should help the community to understand what the Planning Agreement is proposing, how it delivers Public Benefit and why it is acceptable and in the public interest.

### 9.11. Planning Agreement Register

Section 25F (1) and (2) of the EP&A Regulation states that a Council must keep a Planning Agreement register. Council must keep a record of the following in its register:

1. A short description of any Planning Agreement (including any amendment) that applies to the area of the Council
2. The date the agreement was entered into
3. The names of the parties, and
4. The land to which it applies.

For reasons of transparency, the Planning Agreement register is available on Council's website, together with a copy of each Planning Agreement.

### 9.12. Planning Agreement deferrals and variations

Planning Agreements may contain clauses enabling a Developer to defer or vary obligations under a Planning Agreement.

- Deferral of Works is an option in a Planning Agreement available to a Developer that intends to defer or delay the delivery of works beyond the obligations specified in the Planning Agreement Schedule of Works.
- Variation of Works is an option in a Planning Agreement available to a Developer or council that intends to vary the design or specification of any work that is required to be carried out under a Planning Agreement.

Developers must apply to Council in writing if they wish to defer or vary their obligations under a Planning Agreement. The party proposing the modification must bear the other party's cost of the modification.

Any material changes that are proposed to be made to a Planning Agreement after a public notice has been given should be the subject of re-notification. This would be the case where proposed changes would materially affect:

- How any of the matters specified in section 7.4(3) of the EP&A Act are dealt with by the Planning Agreement;
- Other key terms and conditions of the Planning Agreement; or
- Council's interests or the public interest under the Planning Agreement

### 9.13. **Costs of entering into Planning Agreements**

Council requires a Planning Agreement to make provision for payment, by the Developer, of Council's costs for commercial negotiations of a Planning Agreement, together with the cost of employing independent consultants and third parties if necessary.

Generally, Council will require that all reasonable costs for the drafting, legal negotiations, exhibition, execution, registration and removal of registration of the agreement are met by the Developer.

Council will require the Planning Agreement to make provision for a contribution by the Developer towards the ongoing administration of the agreement.

This also applies to any amendment to a Planning Agreement instigated by the Developer.

### 9.14. **Provision of security under a Planning Agreement**

Council will require a Planning Agreement to make provision for security to cover the Developer's obligations under the agreement. This will include monetary contributions not paid at the time the agreement is executed by the parties.

The form of security will be a performance bond provided in accordance with Council's Development Infrastructure Bond Policy, as amended from time to time.

The security must be in favour of the Council to the full value of the Developer's obligations under the Planning Agreement or as otherwise agreed by Council.

Where the Development Contribution under a Planning Agreement includes the transfer or dedication of land, Council will generally require a Planning Agreement to contain a right for Council to acquire the land in the event that the Developer fails or is unable to meet its transfer or dedication obligations under the agreement and/or possibly step-in' rights to complete parks, open space and the like.

Council will require a Planning Agreement to contain a provision requiring the Developer to agree to registration of the agreement on the title to the Developer's land pursuant to section 7.6 of the EP& A Act.

### 9.15. **Registration of Planning Agreements and caveat**

As discussed in **Section 9.14** above, Council will require a Planning Agreement to contain a provision requiring the Developer to agree to registration of the agreement on the title to the Developer's land pursuant to section 7.6 of the EP&A Act.

On execution of the Planning Agreement and until it is registered on title, the Developer may be required to consent to Council lodging a caveat on the title of the relevant land.

Council will require the relevant registered landowner to consent to and procure the consent of any other prior registered interests to the registration of the Planning Agreement and the caveat.

Provision should ordinarily be made in a registered Planning Agreement about when the notation of the Planning Agreement on the title to land can be removed. This may, for example, occur when:

- The Developer has complied with all obligations under the Planning Agreement relating to the land and is discharged from the Planning Agreement;
- The Developer has complied with all relevant obligations under the Planning Agreement relating to a stage of development and the notation about that stage in the Planning Agreement on the title to the land is removed
- Land the subject of the Planning Agreement is subdivided and titles for new lots are created and the Developer has complied with all relevant Planning Agreement obligations relating to the subdivision, or
- Additional valuable security for performance of the Planning Agreement acceptable to the planning authority is provided by the Developer in exchange for removal of the notation of the Planning Agreement from the title to land.

#### **9.16. Implementation of agreements**

Before the lodgement of a Development Application or prior to issue of a Construction Certificate (prior to works commencing) on land subject to a Planning Agreement, Council will require the Developer to issue for approval:

- Concept and detailed designs, technical specification and standard of any work required by the Planning Agreement to be undertaken by the Developer, and/or
- The terms on which the Developer will provide Council with access to the land (or vice versa), and/or
- The way completed work is to be inspected and handed over to Council.

To ensure Public Benefits align with Council's technical requirements (i.e. in the case of land dedication and works), Planning Agreements should give reference to:

- Open Space Design Manual
- Buildings Design Manual; and
- Engineering Standards.

#### **9.17. Monitoring and review of a Planning Agreement**

Council will monitor and enforce the performance of the Developer's obligations under a Planning Agreement.

Monitoring systems will enable information about the implementation of Planning Agreements be made readily available to public agencies, Developers and the community. Planning Agreements will contain a mechanism for their periodic review that involves the participation of all parties.

All draft Planning Agreements will be subject to legal review to ensure they can be properly administered.

#### **9.18. Modification and discharge of Developer's obligations**

Planning Agreements must set out the circumstances in which the parties agree to modify or discharge the Developer's obligations under the agreement. The modification or discharge (or closure) should be affected by an amendment to the agreement.

The circumstances that may require Planning Agreements to be modified or discharged may include the following:

- The Developer's obligations have been fully carried out in accordance with the Planning Agreement; or
- The development consent to which the Planning Agreement relates has lapsed, or
- The instrument change to which the Planning Agreement relates did not proceed, or
- The development consent to which the agreement relates has been modified to such an extent that the planning obligations may not be appropriate, or
- The performance of the Planning Agreement has been frustrated by an event or events beyond the reasonable control of the parties, or
- The Developer has fully and completely assigned the Developer's interest under the Planning Agreement in accordance with its terms, or
- Other material changes affecting the operation of the Planning Agreement have occurred, or
- Council and the Developer otherwise agree to the modification or discharge of the agreement.

□ \* \* \*

**RELEVANT LEGISLATIVE INSTRUMENTS:** *Environmental Planning and Assessment Act 1979*  
*Environmental Planning and Assessment Regulation 2000*

**RELATED POLICIES, PLANS AND PROCEDURES:** Contributions Planning Policy  
Works In Kind Policy  
Contributions Plan Template  
Development Performance Bond Policy

**RESPONSIBLE DIRECTOR:** Growth and Finance

**APPROVAL:** Council

**HISTORY:**

<b>Version</b>	<b>Approved by</b>	<b>Changes made</b>	<b>Date</b>	<b>EDMS Number</b>
1	ELG	New	15/10/2020	20/353342
2	Council	Changed from a Category 3 – Operational Policy to a Category 2 – Strategic Policy, updating references to State Gov reforms	20/10/2023	20/353342