

VOLUNTARY PLANNING AGREEMENT POLICY

QUALITY CONTROL			
TRIM REFERENCES	12/114 – D19/46113		
RESPONSIBLE POSITION	Director Infrastructure and Environment		
APPROVED BY	Council		
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1. INTRODUCTION

This Policy applies to the use of Planning Agreements to which the Council is a party. The public benefits negotiated through the Planning Agreement process will be administered by Council in the context of delivering the key outcome areas of the City of Broken Hill:

Key Direction 1: Our Community
Key Direction 2: Our Economy
Key Direction 3: Our Environment
Key Direction 4: Our Leadership

2. POLICY OBJECTIVE

This policy establishes a framework to guide the preparation of Planning Agreements under the *Environmental Planning and Assessment Act 1979 (EP&A Act)*. The policy objectives are to:

- Establish a fair, transparent and accountable framework governing the use of Planning Agreements by the Council of Broken Hill (Council);
- Give stakeholders in development greater involvement in the type, standard and location of public facilities and other public benefits; and
- Adopt innovative and flexible approaches to the provision of infrastructure and other public benefits in a manner that is consistent with Council's strategic and infrastructure plans.

This policy is not legally binding; however it is intended that the Council and all persons dealing with Council in relation to Planning Agreements will follow this Policy to the fullest extent possible. The acceptance of an offer to enter into a Planning Agreement is at the absolute discretion of Council.

3. POLICY SCOPE

Planning Agreements are voluntary agreements that allow Development Contributions such as the dedication of land at no cost to Council, monetary contributions, any other material public benefit or any combination of these for a public purpose.

Planning Agreements form one part of Council's developer contribution system. This developer contribution system includes Council's Section 7.12 Developer Contributions Plan (formerly known as 94A contribution) that have been adopted in accordance with the relevant provisions of the Act.

Any offer to enter into a Planning Agreement with Council is to be initialised in writing to the Council by the Developer. The written offer is to contain adequate information for Council to properly consider whether or not to accept the offer. In this regard, the offer should include as much information as possible including but not limited to the following matters:

- a) The Land to which the Planning Agreement relates, including its legal description;
- b) The Development Application or Planning Proposal that relates to the Planning Agreement;
- c) The Developer's details;
- d) If the Developer is not the owner of the subject land, then the landowner's details and whether the land owner intends to enter into the Planning Agreement as well (if so, a written offer will also be required from the relevant land owner(s));
- e) The Public Benefits being offered under the terms of the Planning Agreement; and
- f) The nature of the security to be provided for the Public Benefits; Planning Agreements are separate from but complement Council's Section 7.12 contribution plans. Planning Agreements provide an efficient means of increasing and broadening the range of community infrastructure in conjunction with redevelopment. Planning Agreements may arise through either a Development Application or a request for an Instrument Change.

The acceptance of an offer to enter into a Planning Agreement is at the absolute discretion of Council.

Council will not accept any component of a public benefit under the terms of a Planning Agreement if that component is already required to be provided by virtue of a condition of a development consent with the exception where the Planning Agreement proposes any off sets to contributions under Section 7.11 or 7.12 (as the case may be) of the Act.

In determining whether to accept an offer to enter into a Planning Agreement, the Council is required to take into consideration a number of matters including the nature and value of the public benefit being offered in proportion to the nature and value of the exceedance of the planning controls sought by the Applicant in the case of a Development Application or any Instrument Change.

4. POLICY ON THE USE OF PLANNING AGREEMENTS

4.1 Principles governing the use of Planning Agreements

Planning Agreements will be governed by the following principles:

- Council will assess the public benefit of the Development Contribution when deciding whether to proceed with the Planning Agreement;
- Council will not allow Planning Agreements to improperly restrict the exercise of its functions under the Act, Regulation or any other act of law;
- Council will not use Planning Agreements for any purpose other than a proper planning purpose;

- Development that is unacceptable on planning grounds will not be supported because of planning benefits offered by developers that do not mitigate the impacts of development;
- When considering a Development Application or planning proposal, Council will not give undue weight to a Planning Agreement;
- Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a Planning Agreement;
- Council will not improperly rely on its statutory position, or otherwise act improperly, in order to extract unreasonable public benefits from developers under Planning Agreements, and will ensure that all parties involved in the Planning Agreement process are dealt with fairly; and
- If Council is subject to a financial interest from a development, being the subject of a Planning Agreement, it will take appropriate steps to ensure that it manages any conflict of interest it has between its role as planning authority and its interest in the development.

4.2 Circumstances where Council may enter into a Planning Agreement

Council may negotiate a Planning Agreement offered by a developer in connection with any Development Application or proposal for an Instrument Change relating to any land in the Council's local government area.

4.3 Acceptability test to be applied to all Planning Agreements

Council will consider the following questions in order to assess the desirability 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 case?
- 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 protect the public interest?
- d) Are there any relevant circumstances that may operate to preclude Council from entering into the proposed Planning Agreement?
- e) Will the proposed Planning Agreement provide benefits that bear a relationship to the delivery of services and infrastructures within the LGA?
- f) Is the quantum of the Public Benefit commensurate with the value of the Development Contribution?

4.4 Consideration of Planning Agreements in relation to planning proposals and Development Applications

When exercising its functions under the Act in relation to a Development Application or a proposal for an Instrument Change to which Planning Agreement relates, Council will consider:

- a) whether the proposed Planning Agreement is relevant to the Development Application or Instrument Change and whether it may be subsequently considered in connection with the Development Application or Instrument Change; and
- b) if so, the proper planning weight to be given to the proposed Planning Agreement.

4.5 Types and forms of contributions

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

- a) mitigate or compensate for the impact of the relevant development;
- b) meet Council's planning policy objectives including those set out in section 7.12 contributions plans;
- c) meet the requirements of Council's public infrastructure works program; and
- d) meet the objectives of other relevant draft or adopted Council policies, strategies or plans

The form of a Development Contribution to be made under a proposed Planning Agreement will be determined by the particulars of the Development Application or planning proposal to which the Planning Agreement relates.

4.6 Relationship to Section 7.12 contributions plan

Normally public benefits in Planning Agreements are additional to required contributions. By exception, a Planning Agreement may partly or fully exclude the application of section 7.12 contributions in relation to developments, the subject of a Planning Agreement.

The ability in a Planning Agreement to partly or wholly exclude the application of section 7.12 contributions gives Council a degree of flexibility to redistribute the financial, social and environmental costs and benefits of a 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 section 7.12 contributions.

Where a Planning Agreement partly or fully excludes the application of section 7.12 contributions, the Act prevents Council from imposing a condition of development consent requiring the payment of those contributions except to the extent that it requires the payment of the balance of those contributions where the Planning Agreement only partly excludes them.

A Planning Agreement may also exclude the benefits provided under such agreement being considered in the assessment of section 7.12 contributions. In such cases, the Act precludes the application of section 7.11(6) which would otherwise require the consideration of any land, money or material public benefit contributed to the consent authority when assessing section 7.12 contributions.

4.7 Public notification of Planning Agreements

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 Planning Agreement is in connection with a Development Application, the public notice shall be given, if practicable, as part of and contemporaneously with, and in the same manner as, any notice of the Development Application.

If the Planning Agreement is in connection with a proposal for an Instrument Change, the public notice shall be given, if practicable, as part of and contemporaneously with, and in the same manner as, any public notice of the relevant planning proposal that is required under the Act.

Where it is not practicable to give public notice at such times, the Regulation requires that it be given as soon as possible after as determined by Council.

Amendments may be required as a result of public submissions or for other reasons. Where amendments are required to a draft Planning Agreement, the amended draft Planning Agreement and explanatory note may be re-exhibited. Where Council has entered into a Planning Agreement

and the agreement is in force, it must include certain particulars relating to the Planning Agreement in its annual report for that year.

4.8 Amendment to Planning Agreement

Where Council has entered into a Planning Agreement and the parties to the agreement have agreed to vary the Planning Agreement, then a new letter of offer and a deed of variation will be required to be entered into to formally record the changes to the terms of the Planning Agreement.

The deed of variation will need to be publicly notified for 28 days prior to the parties executing the document. The deed may also be required to be registered on the title of the subject land.

4.9 Independent third parties

Independent third parties may, at the sole discretion of Council, be used wherever it is deemed appropriate by Council for various reasons including but not limited to, circumstances where it is considering whether the Planning Agreement delivers a net public benefit. The cost associated with the use of independent third parties will be borne by the developer.

4.10 Assessing proposed provisions under a Planning Agreement

The matters that Council may consider in any negotiations for 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 Council;
- c) mitigation of the impact of development is addressed;
- d) recurrent funding of public facilities is required;
- e) past deficiencies in infrastructure provision that would otherwise prevent a development from occurring are addressed;
- f) monitoring the planning impacts of development is required;
- g) planning benefits for the wider community accrue from the Planning Agreement; and
- h) any initial or ongoing costs are designated as Council's responsibility.

4.11 Negotiations team

The terms of a planning agreement will be negotiated by Council's VPA negotiations team. Council's negotiations team will be made up of the General Manager, Director Infrastructure and Environment, Manager Planning and Development and the Mayor or Mayor's appointed representative. All Council staff participating in the negotiations must have the appropriate delegations pursuant to section 7.4 of the *EP&A Act 1979*.

4.12 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. However, this does not prevent public benefits being negotiated on a case by case basis particularly where planning benefits are also involved.

For proposed development and planning proposals, Council's primary position is that satisfactory arrangements for the provision of community infrastructure will be taken to have been made when the value of the planning agreement contributions is equivalent to 50% of the land value uplift.

4.13 Recurrent Contributions

The Council may request developers to make 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.

4.14 Pooling of Development Contributions

Where a proposed Planning Agreement provides for a monetary contribution by the Developer, Council may seek to include provisions permitting money paid under the agreement to be pooled with money paid under other Planning Agreements. These monetary contributions will allow public benefits to be provided in a fair and equitable way, particularly for essential infrastructure anywhere in the Broken Hill LGA.

4.15 Valuing public benefits under a Planning Agreement

The value of a benefit proposed under a Planning Agreement will be determined prior to the agreement being publicly notified.

If a Development Contribution under a Planning Agreement is the carrying out of works for a public purpose, Council may value that Development Contribution on the basis of a cost estimate for the works. This may be prepared by a suitably qualified quantity surveyor or valuer (as the case may be) appointed by Council and paid by the Developer.

Where the Development Contribution under a Planning Agreement includes the dedication of land and the value of that land is to be taken into account, Council may seek the services of an appropriately qualified land valuer as appointed by Council and at the cost of the Developer in order to value the land being dedicated.

In the event that a Planning Agreement proposes works and services that would normally be provided as a condition of development consent, then those works and services will be deemed to have no value under the Planning Agreement.

4.16 Costs of entering into Planning Agreements

The costs of preparing, negotiating, executing, varying and monitoring compliance with the Planning Agreement, including any external or internal costs to Council together with the cost of employing independent consultants and/or independent third parties are all costs associated with entering into a Planning Agreement. Generally, Council will require that all reasonable costs are met by the Developer.

4.17 Credits and Off-sets

In the event that the costs of any works-in kind that are to be provided by a Developer exceed the costs of those works as agreed with Council in a Planning Agreement:

- a) Council will not agree to a Planning Agreement providing for those additional costs to be:
 - refunded to the developer; or
 - off-set against any Development Contributions required to be made by the developer; and
- b) The developer will not be able to make any further claim against Council for those additional costs.

4.18 Implementation agreements

In appropriate cases, Council may require a Planning Agreement to provide that before the commencement of development and subject to the agreement all relevant parties, the parties are to enter into an implementation or side agreement in addition to the VPA for matters such as:

- Issues of commercial sensitivity;
- The terms on which the developer will provide Council with early access to the land;
- The manner in which completed work is to be handed over to Council;
- The manner in which work to be completed by Council and the Developer separately are to interface.

These agreements may be publicly notified at the sole discretion of Council, having regard to their commercial sensitivity.

4.19 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.

At the discretion of Council, the form of security will be an unconditional performance bond or bank guarantee provided by an institution regulated by the Australian Prudential Regulation Authority (APRA).

The security must be in favour of the Council to the full value of the Developer's obligations under the Planning Agreement and on terms otherwise acceptable to Council.

4.20 Notations on certificates under section 149(5) of the Act

Council will require a Planning Agreement to contain an acknowledgement by the Developer that Council will make a notation about a Planning Agreement on any certificate issued under section 10.7 of the Act relating to the land the subject of the agreement

4.21 Registration of Planning Agreements and caveat

Pursuant to Section 7.6 of the EP&A Act, Council will generally require a Planning Agreement to contain a provision requiring the Developer to agree to registration of the agreement on the title to the land to which the agreement applies.

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

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

The costs of registering the Planning Agreement and the caveat on the title of the land are to be borne by the Developer. The Developer is to provide Council with all the necessary documents required to facilitate the registration of the Planning Agreement and caveat on the title to the land, including the written consent of any parties with interests in the land.

The Council is to lodge the Planning Agreement and the caveat for registration on the title of the land.

4.22 Monitoring and review of a Planning Agreement

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

5. IMPLEMENTATION

5.1 Roles and Responsibilities

The following Council officers are responsible for the implementation and the adherence to this policy:

- General Manager
- Director Infrastructure and Environment
- Manager Planning and Development

5.2 Communication

This Policy will be communicated to the community and staff in accordance with Council's Policy, Procedure and Process Framework and Council's Business Paper process. Following adoption by Council the Policy will be made available on Council's website.

5.3 Associated Documents

The following documentation is to be read in conjunction with this policy.

- Broken Hill Section 7.12 Developer Contributions Plan
- NSW Planning and Environment – Draft Practice Note – Planning Agreements issued February 2021

6. REVIEW

Review of this policy will incorporate relevant legislation, documentation released from relevant state agencies and best practice guidelines.

The standard review period will be within each term of Council following the Local Government Elections, or as required to ensure that it meets legislation requirements and the needs of the community and Council. The responsible Council Officer will be notified of the review requirements three (3) months prior to the expiry of this policy.

The Director Infrastructure and Environment is responsible for the review of this policy.

7. LEGISLATIVE AND LEGAL FRAMEWORK

This policy is to be read in conjunction with the following:

- *Environmental Planning and Assessment Act 1979*
- *Environmental Planning and Assessment Regulation 2021*
- Practice Note on Planning Agreements – Department of Planning, Industry and Environment February 2021

Council employees shall refrain from personal activities that would conflict with proper execution and management of Council's Voluntary Planning Agreements Policy. Council's Code of Conduct provides guidance for recognising and disclosing any conflicts of interest.

8. DEFINITIONS

Term	Meaning
Act	<i>Environmental Planning and Assessment Act 1979 (EP&A Act)</i>
Council	Broken Hill City Council
Developer	A person who has sought a change to an environmental planning instrument that includes the making, amendment or repeal of an instrument, or who has made or proposes to make a Development Application, or who has entered into an agreement with or is otherwise associated with such a person
Development Application	Has the same meaning as in the Act
Development Contribution	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	A written statement that provides details of the objectives, nature, effect and merits of a Planning Agreement, or an amendment to or revocation of a Planning Agreement as required under the Regulation
Voluntary	Done, given, or acting of one's own free will.
Instrument Change	A change to an environmental planning instrument whether it be for the making, amendment or repeal of that instrument
Planning Agreement	A voluntary agreement between one or more planning authorities and a Developer: (a) who seeks to change an environmental planning instrument (which may be for rezoning or other purpose); or (b) who has made, or proposes to make a Development Application
Planning Benefit	A Development Contribution that confers a net public benefit, that is, a benefit that exceeds the benefit derived from measures that would address the impacts of particular development on surrounding land or the wider community

Planning Obligation	An obligation imposed by a Planning Agreement on a developer requiring the developer to make a Development Contribution
Public	The community as a whole or, where context requires, a section of the community
Public Benefit	The benefit enjoyed by the public as a consequence of a Development Contribution
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>Environmental Planning and Assessment Regulation 2021</i>

Note: This Policy adopts the terms used in the Practice Note on Planning Agreements published by the former Department of Planning, Industry and Environment (February 2021) and the definitions of the *Environmental Planning and Assessment Act 1979* and *Environmental Planning and Assessment Regulation 2021*.