

**Ku-ring-gai Council**  
**Planning Agreement Policy 2008**

**Adopted: 15 July 2008**

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## EXECUTIVE SUMMARY

Planning agreements are a mechanism for planning authorities and developers to negotiate outcomes in respect of applications to modify an environmental planning instrument (such as a Local Environmental Plan) or applications for development consent – especially development consents which give rise to development contributions. Planning agreements may specify how development contributions are to be implemented by a developer. Planning agreements may also authorise development contributions for a variety of public purposes which may go beyond contributions that would be possible under a Section 94 Development Contributions Plan. They must be publicly advertised and submissions from the public may be made and must be considered.

Importantly, planning agreements must be voluntary. No party can be compelled to enter into a planning agreement.

Planning agreements are one mechanism Ku-ring-gai Council intends to use to implement the public domain works and community infrastructure associated with the *Ku-ring-gai Town Centres Development Control Plan*, to implement the *Ku-ring-gai Town Centres Development Contributions Plan* and to assist in the orderly development of Council owned land.

By way of example, a planning agreement would be appropriate where the *Ku-ring-gai Town Centres Development Control Plan* identifies a new road to be located on or through a development site, where that site has been purchased or optioned by a developer and is expected to be the subject of a formal development application in the foreseeable future. In such circumstances, the planning agreement would make provision for the negotiated value of the land (valued by a registered valuer taking into account the unique characteristics of the land) to be off set against the monetary contributions attributable to that development. The planning agreement may also make provision for the developer to construct the road and any associated intersection works or it may make provision for the council to complete the road at such time as further land comes into Council's ownership. If the planning agreement makes provision for the road construction to be undertaken by the developer then the planning agreement would include Council's specifications, reference to detailed designs, Council's requirements for formal inspections during the course of the work, defects liability periods, security by bond or bank guarantee and the like.

This document provides an overview of the legislative requirements for negotiating planning agreements<sup>1</sup> and the procedures which Council intends to follow in the negotiation of a planning agreement.

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<sup>1</sup> Nothing in this policy is to be taken as superseding or obviating any legislative requirement whether made prior or subsequent to the adoption of this policy; the legislation shall always prevail to the extent of any discrepancy.

# 1 INTRODUCTION

## 1.1 Name of this Policy

This Policy is called the 'Ku-ring-gai Council Planning Agreement Policy 2008.'

It details Ku-ring-gai Council's policy and procedures relating to the preparation of planning agreements under s93F of the *Environmental Planning and Assessment Act 1979*.

## 1.2 Commencement Date

This policy was adopted by Council on 15 July 2008. The adoption was advertised on 25 July 2008.

## 1.3 Purpose

The purpose of this policy is:

- 1) to guide the preparation and negotiation of planning agreements for the provision of public benefits as part of applications for development and/or rezoning in Ku-ring-gai;
- 2) to facilitate the achievement of public benefits such as public domain improvements and community facilities identified in Development Control Plans, Development Contributions Plans and other plans and policies of the Council as part of the development process in the Ku-ring-gai Local Government Area; and/or
- 3) to facilitate improvements to the street vitality, amenity and economic viability of commercial centres within the Ku-ring-gai Local Government Area.

## 1.4 Objectives

The objectives of this Policy are:

- a) the timely instigation of negotiations between a developer or prospective developer, Ku-ring-gai Council and, if required, any other relevant party;
- b) to ensure transparency in the process of negotiating a planning agreement;
- c) to safeguard the public interest with respect to the provision of public benefits; and
- d) the effective and efficient achievement of quality public benefits associated with development.

## 1.5 Circumstances in which this Policy applies

This Policy applies within the Ku-ring-gai Local Government Area:

- a) in circumstances where a developer proposes to provide a public benefit as part of the development process whether or not that benefit will be on public or private land and whether or not that benefit is valued by a Contributions Plan;

- b) in circumstances where council owned land is proposed to be incorporated as part of any development site other than the direct sale of a parcel of land in its entirety; and
- c) any other circumstances where Council considers it desirable to have a planning agreement.

## 1.6 Legislation

The following legislation applies to the negotiation of a planning agreement:

- *Environmental Planning and Assessment Act 1979* – Part 4 Development Assessment Division 6 Development Contributions Subdivision 2 Planning Agreements – Sections 93F-93L
- *Environmental Planning and Assessment Regulation 2000* – Division 1A Planning Agreements – Clauses 25B-25H
- *Local Government Act 1993*

## 1.7 Relationship to other Plans and Policies

The following documents also apply to the negotiation of a planning agreement:

- *Ku-ring-gai Section 94 Contributions Plan 2004-2009 (as amended)*
- *Ku-ring-gai Development Contributions Plan for the Town Centres*
- *Ku-ring-gai Town Centres Development Control Plan*
- Any other plans and policies as determined in the circumstances of the request.

## 1.8 Development Contributions Practice Notes

This policy has been prepared having regard to the Development Contributions Practice Notes issued by the Department of Planning (then known as the Department of Infrastructure, Planning and Natural Resources).

## 1.9 Variations to the Policy

Variations to the recommendations of this Policy may be permissible if, in the opinion of the Council, the objectives of the Policy have been met. A written statement and any other supporting information that details how this has been achieved must be provided to Council.

## 2 DEFINITIONS

**Act** means the *Environmental Planning and Assessment Act 1979*.

**Affordable Housing** has the same meaning as in the Act.

**Consent Authority** means Ku-ring-gai Council, its heirs or successors, or any public body or panel which may be authorised to exercise the particular local government functions in respect of the land on which the planning agreement is proposed to be made.

**Developer** means a person who has sought a change to an environmental planning instrument or who has made, or proposes to make, an application for development consent.

**Development Application** has the same meaning as in the Act.

**Development Contribution** means the payment of a monetary contribution, the dedication of land, the carrying out of a work-in-kind, the provision of a material public benefit or any combination of the above in part or full satisfaction of a requirement occasioned by an application to develop land.

**Explanatory Note** means a written statement associated with a draft planning agreement in accordance with clause 35E of the Regulation.

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

**Material Public Benefit** means a work not identified in or valued by a Development Contributions Plan and proposed to be offset against any development contributions required as a consequence of the development of a site.

**Planning Authority** means Ku-ring-gai Council, its heirs or successors, or any public body which may be authorised to exercise the particular local government functions in respect of the land on which the planning agreement is proposed to be made.

**Planning Agreement** means an agreement negotiated and made in accordance with the *Environmental Planning and Assessment Act 1979* (Part 4 Development Assessment Division 6 Development Contributions Subdivision 2 Planning Agreements) and the *Environmental Planning and Assessment Regulation 2000* (Part 4 Development Contributions Division 1A Planning Agreements).

**Planning benefit** means a development contribution that confers a nett public benefit being a benefit that exceeds anything required to be done to address the impacts of a particular development on surrounding land or the wider community.

**Public** includes a section of the public.

**Public benefit** means a facility or work which provides a direct benefit to the public beyond the inhabitants of the proposed development.

**Public facilities** mean public infrastructure, facilities, amenities or services.

**Public domain** means any area outside the private domain.

**Public purpose** means the provision of, or recoupment of the cost of providing, public amenities and public services, affordable housing, transport or other infrastructure and may include recurrent expenditure, the costs of monitoring impacts of a development, the conservation or enhancement of the natural environment and any like purpose.

**Regulations** mean the *Environmental Planning and Assessment Regulation 2000*.

**Works in Kind** means a work identified in and valued by a Development Contributions Plan and proposed to be offset against monetary contributions.

## 3 WHAT MUST A PLANNING AGREEMENT CONTAIN?

### 3.1 Mandatory inclusions

A planning agreement must be in writing and signed by all of the parties to the agreement. A planning agreement is not entered into until it is signed. Ku-ring-gai Council must comply with Section 93F of the *Environmental Planning and Assessment Act* which requires planning agreements to include provisions specifying:

- a) a description of the land to which the agreement applies;
- b) a description of the change to the environmental planning agreement, or the development, to which the agreement applies;
- c) the nature and extent of the development contributions to be made by the developer under the agreement, and when and how the contributions are to be made;
- d) whether the agreement excludes (wholly or partly) the application of s94 or s94A to the subject development;
- e) if the development does not exclude the application of s94 to a development, whether benefits under the agreement may or may not be considered by the consent authority in determining a contribution in relation to that development under s94;
- f) a dispute resolution mechanism; and
- g) the enforcement of the agreement by a suitable means, such as the provision of a bond or bank guarantee, in the event of a breach by the developer.

Before a draft planning agreement may be exhibited, it must be accompanied by an Explanatory Note agreed upon by all the parties to the draft planning agreement.

### 3.2 General Inclusions

Ku-ring-gai Council may require a planning agreement to include additional clauses such as:

- the date or circumstances at which time a planning agreement may come into effect.<sup>2</sup>
- the application of the goods and services tax to the agreement;
- whether money contributed under a planning agreement may be pooled with other money from planning agreements and/or monetary development contributions and paid progressively towards for the purposes for which the money has been levied;
- the circumstances in which a developer's obligations may be modified which may include material changes to the planning controls applying to the land, material changes to the development consent applying to the land, the lapsing of a development consent, the revocation or modification of a relevant development consent by the Minister, or other material changes affecting the operation of the planning agreement;
- the circumstances in which a developer's obligations shall be considered to be discharged;
- the procedure for modifying a planning agreement;

<sup>2</sup> Clause 25C(2) permits a planning agreement to specify that the planning agreement does not come into effect until the happening of certain particular events.

- clauses related to the specific nature of the land dedication, monetary contributions, recurrent funding, material public benefits or works of the types listed in Part 6 of this Policy; and
- any other clauses as may be required in the circumstances of the negotiation.

### **3.3 Other inclusions**

The *Environmental Planning and Assessment Act* does not preclude a planning agreement from including other provisions that may be necessary or desirable in the circumstances of the cases with the exception of the specified exclusions cited in 3.4 and 3.5 below. Planning agreements have the potential to be used in a wide variety of planning circumstances and achieve a variety of planning outcomes. Accordingly, it is not appropriate for Ku-ring-gai Council to seek to limit the potential scope of a planning agreement in this context.

More detail on the types of considerations which would be incorporated in planning agreements for different purposes are listed in Part 6 of this Policy. A generic planning agreement template can be found at Attachment A.

### **3.4 Exclusions – No Fetter**

Section 93F(9) precludes a planning agreement from imposing an obligation on a planning authority to grant development consent or to exercise a function under the *Environmental Planning and Assessment Act* in relation to a change to an environmental planning instrument.

### **3.5 Exclusions – Breach of the Act**

Section 93F(10) provides that a planning agreement is void to the extent, if any, to which it authorises anything to be done in breach of the Act or any environmental planning instrument or development consent applying to the land to which the agreement applies.

## **4 PLANNING AGREEMENTS AND OTHER PLANNING PROCESSES**

### **4.1 Public Notice of Planning Agreements**

Section 93G(1) of the Act precludes a planning agreement from being entered into, amended or revoked unless public notice is given of the proposed agreement, amendment or revocation. The accompanying exhibition must include the draft planning agreement and an explanatory note.

Clause 25D of the *Environmental Planning and Assessment Regulation* makes provision for public notice to be given of a proposal to enter into an agreement, amend or revoke a planning agreement. The practical application of this clause means that a draft planning agreement should be negotiated prior to the submission of a development application to allow for concurrent exhibition of the draft planning agreement and the development application.

The statutory exhibition period for a draft planning agreement is 28 days.

## **4.2 Planning Agreements and Development Assessment**

Section 79C(1)(a) of the Act requires a consent authority to take into consideration any planning agreement entered into, or draft planning agreement proposed to be entered into, by a developer together with any submissions made in response to the exhibition of the planning agreement or draft planning agreement.

Section 93I(2) of the Act precludes a consent authority from refusing to grant consent on the grounds that a planning agreement has not been entered into in relation to the proposed development or that the developer has not offered to enter into a planning agreement.

## **4.3 Planning Agreements and Consent conditions**

Section 93I(3) of the Act authorises a consent authority to require a planning agreement to be entered into as a condition of a development consent. However, a consent condition can only require a planning agreement if it is in the terms of an offer made by the developer as part of making the development application.

The practical import of this requirement means that the draft planning agreement must be exhibited concurrently with the public notification of the development application. The draft planning agreement must be ready for execution at the time of development consent in order to enable a condition of consent referring to the draft planning agreement to be part of that development consent.

The importance of incorporating the planning agreement within the development consent arises from the need to address potential GST liability otherwise attached to the planning agreement. In view of the complexity of the legislation, specific GST issues will be considered afresh with each and every planning agreement proposed to be negotiated.

## **4.4 Planning Agreements and Contributions Plans**

Following the execution of a planning agreement, that planning agreement will then take precedence over any reference in a Contributions Plan, including a subsequent Contributions Plan, adopted by Ku-ring-gai Council, its heirs or successors.

# **5 ADMINISTRATION**

## **5.1 Registration of Planning Agreements (Caveats)**

Section 93H of the Act permits a planning agreement (or any amendment or revocation of a planning agreement) to be registered on the title of the land to which the planning agreement relates if each person with an interest in the land agrees to its registration. If a planning agreement has been so registered, it is binding on, and enforceable against, the owner of the land as if that owner had entered into the planning agreement.

It is the policy of Ku-ring-gai Council to have all planning agreements registered on the title of the land until the responsibilities listed therein have been discharged. The cost of the registration shall be borne by the developer.

Council may also make notation under s149(5) of the Act about a planning agreement on any certificate issued under s149(2) of the Act relating to the land which is the subject of a planning agreement whether or not the planning agreement has been registered on the title of the land.

## **5.2 Land and Environment Court**

Section 93J(1) of the Act expressly precludes a person from appealing to the Land and Environment Court against the terms of a planning agreement or against the failure of a planning authority to enter into an agreement. There is a core principle is that a planning agreement must be made voluntarily on both sides therefore, once voluntarily entered into, there are no appeal rights. This does not affect the jurisdiction of the Land and Environment Court under section 123 of the Act to remedy or restrain a breach of the Act.

## **5.3 Amendment and Revocation of Planning Agreements**

Clause 25C(3) of the *Environmental Planning and Assessment Regulation* provides that a planning agreement can be amended or revoked by a further agreement or, with the agreement of all parties, by the advertising of an intent to revoke and the execution of a revocation.

## **5.4 Planning Agreement Register**

Council is required to keep a register of planning agreements applying to land within the local government area, whether or not the Council is a party to the agreement. The register must record the date an agreement was entered into and a short description of the agreement, including any subsequent amendments.

Ku-ring-gai Council will make available for public inspection during ordinary office hours:

- the planning agreement register;
- copies of all planning agreements (and any amendments) that apply within the Ku-ring-gai Local Government Area; and
- copies of explanatory notes relating to those agreements (including any amendments).

# **6 PLANNING AGREEMENTS**

## **6.1 Ku-ring-gai Council's Objectives for Planning Agreements**

Ku-ring-gai Council's objectives with respect to the role of planning agreements include:

- a) to provide an innovative and flexible approach to the provision of infrastructure in compliance with the legislation in an open and transparent manner;
- b) to facilitate the payment of contributions in kind;
- c) to provide clarity in the process and delivery of works in kind or material public benefits;
- d) to give all stakeholders in the development involvement in determining the nature, standard and location of public facilities and public benefits;
- e) to allow the community, through the public exhibition process, to gain an understanding of the process of negotiating the provision of public benefits in kind; and

- f) to provide certainty for the community, developers and the council in respect to the provision of infrastructure and development outcomes.

## 6.2 Fundamental principles of Planning Agreements

Planning agreements provide a means for planning authorities and developers to negotiate the provision of public benefits in connection with a development application or application for a rezoning. There are fundamental principles relating to probity and best practice in the negotiation of planning agreements. These include, but are not limited to:

- the underlying principle that the public interest is paramount in the negotiation of a planning agreement;
- planning agreements must be voluntary on both sides;
- planning decisions cannot be bought or sold and therefore there can be no fetter on a local government authority in the exercise of their planning functions;
- for the reasons cited above, benefits that have no relationship to the development are not encouraged;
- the type of benefits that generally could be included in a planning agreement are works of the type that appear in the works schedules of Council's adopted Contributions Plans, public domain works in the Town Centres Development Control Plan, affordable housing, recurrent funding for a public purpose and bushland regeneration;
- that benefits offered by a developer will not render an otherwise unacceptable development in planning terms, anything other than unacceptable unless the purpose of the benefits is to directly mitigate an unacceptable impact e.g. traffic generation, emissions, etc;
- the recognition of the need for transparency including the opportunity for public comment on a draft planning agreement;
- planning authorities should not use planning agreements to engage in revenue raising or overcome particular spending limitations;
- planning authorities should not allow the interests of individuals or an interest group to outweigh the public interest when considering planning agreements;
- planning authorities should not improperly rely on their statutory position to exact unreasonable public benefits; and
- where Council has a commercial stake in land or the development the subject of an agreement, it will take all reasonable steps to ensure that it avoids a conflict of interest between its role as a planning authority and its interests in the development or land. In this respect Council shall have regard to its *Statement of Business Ethics* and the publication from the Independent Commission Against Corruption (ICAC) entitled: *Direct Negotiations – Guidelines for managing risks in direct negotiations*.

## 6.3 When is a planning agreement required?

The circumstances in which Ku-ring-gai Council would consider negotiating a planning agreement with a developer include:

- a) meeting the demands created by the development for new public infrastructure, amenities and services;

- b) compensating for the loss of or change to a public facility, amenity or service, resource or asset;
- c) securing planning benefits for the wider community so that the development delivers a nett benefit to the community;
- d) achieving benefits of a type that cannot be sought through formal contributions plans such as recurrent funding, affordable housing, or regeneration or rehabilitation of bushland or the like;
- e) achieving works which were excluded from contributions plans for the purpose of achieving a reasonable contribution rate;
- f) clarifying the relationship between development contributions under an adopted contributions plan and the works to be provided on any given development site; and
- g) specifying the standards to be met in the provision of works in kind or the provision of a material public benefit;

**Note:** Ku-ring-gai Council intends to request a developer to commence negotiation of a planning agreement where there is any proposal to dedicate land and/or carry out works-in-kind included in a Development Contributions Plan and/or provide a material public benefit whether or not it is of the kind identified in a Development Control Plan.

Clause 25D(1) of the *Regulations* requires a draft Planning Agreement to be exhibited concurrent with a Development Application or an application to modify an Environmental Planning Instrument. In order to satisfy these criteria, a prospective applicant needs to notify the Council of their intent to negotiate a planning agreement prior to the lodgement of any Development Application or concurrent with any application to modify an Environmental Planning Instrument.

## 6.4 Land Dedication and Planning Agreements

A planning agreement may make provision for the dedication of land. In the case of land identified within a Contributions Plan, the estimated value of land that is identified in that Contributions Plan will be given due consideration. This consideration is essential as the initial estimated value contributed to determining the contribution rates. However, there are other matters that may impact on the agreed value of land.

In all cases, the agreed value of the particular parcel of land will be negotiated as part of the planning agreement. Council will employ a registered valuer and will instruct that person to take into account the unique characteristics of the property and the circumstances of the dedication which may include:

- the extent, if any, to which any development potential attaching to that part of the land to be dedicated can be incorporated elsewhere within the development;
- whether the land proposed to be dedicated has been identified by Ku-ring-gai Council in any Development Control Plan, Development Contributions Plan or other policy of the Council;
- the location, configuration, size, accessibility, topography and existing use of the land proposed to be dedicated;
- whether the land is located in or adjacent to a riparian corridor or bushfire prone land;
- whether the land adjoins an existing area of open space and can be consolidated into that area;

- whether the land will create or improve accessibility within the area whether by pedestrians, cyclists, private vehicles, public transport or any combination of these;
- whether the land supports the habitat of threatened or endangered species of fauna or endangered ecological communities of flora;
- any factors which may affect the usability of the land such soil condition, flood liability, potential site contamination, public accessibility and safety, proximity to existing uses, the current use of the land, the cost of embellishment or construction of any proposed facility on the land;
- the potential to carry out works within a reasonable time and, as a consequence, any measures required to secure or maintain the land in the event that works cannot be carried out for some time;
- in the case of a material public benefit not anticipated by a Contributions Plan and proposed to be offset against monetary contributions, the impact on the achievement of works identified within any adopted Contributions Plan of the Council;
- the on-going costs to the Council of care, control and management both prior to and after any improvement works are carried out on the land; and
- any other relevant matter in the circumstances of the case.

Where a planning agreement relates to the acquisition, transfer or disposal of land valued in accordance with the criteria above, the planning agreement will include:

- particulars to identify the land to be dedicated or a plan of subdivision;
- the dimensions, location and characteristics of the land to be dedicated;
- either the agreed value of the dedication or the conditions and/or requirements that will be deemed to be satisfied by the dedication; and
- the date at which the transfer of ownership will take place or the threshold which will trigger the requirement to transfer ownership of the land.

Following execution of a Planning Agreement the agreed value will be as per the planning agreement regardless of any subsequent change in land value including a change in value between the execution of the planning agreement and the transfer of land ownership. If a planning agreement provides that a specified land dedication satisfies a required contribution or consent condition without specifying a land value that agreement will stand regardless of whether relative changes in land value or contribution rates alter the value of that agreement to either party unless the planning agreement is formally amended by mutual agreement.

## **6.5 Capital Works and Planning Agreements**

A planning agreement may make provision for a developer to carry out work on land to be dedicated and/or in the public domain. Council will instruct a qualified quantity surveyor to verify all cost estimates submitted by the developer as part of the negotiation process. The planning agreement will specify the particulars of the work and the procedure for satisfying any requirements in carrying out of the work taking into account the unique characteristics of the property and the circumstances of the work which may include:

- requirements and specifications for detailed design plans for future approval or specific references to endorsed plans;
- public liability insurance during construction and during the defects liability period;

- requirements for inspections by council prior to and during the course of construction including the notice to be given in order to arrange such an inspection;
- requirements for the commencement of handover proceedings;
- details of the defects liability period;
- security such as bonds or bank guarantees to be held during the course of construction and during the defects liability period;
- access for council officers during the course of construction to ascertain progress or to assess asset value; and
- any other matter relevant to the securing the public interest in the achievement of a quality public benefit.

## **6.6 Monetary Contributions and Planning Agreements**

A planning agreement may make provision for monetary contributions other than contributions required under an adopted and in force Section 94 or Sections 94A Development Contributions Plan. In such circumstances the planning agreement will include:

- the amount of the monetary contribution;
- the purpose and extent of the monetary contribution;
- when such contributions are to be paid;
- in the case of staged payments, the nature of the staging or the dates or thresholds at which times payments are to be made;
- any mechanisms for the inflation of the monetary contribution over time;
- details of any security that is to be provided in lieu of the monetary contribution until such time as it becomes due and payable;
- circumstances in which contribution would be renegotiated or revoked;
- the obligations of council to expend the monetary contributions;
- in the case of contributions that require additional funding from council and/or other sources in order to achieve the ultimate objective, the process for managing and accounting for the contributions until such time as they can be expended including the investment of the contributions and the treatment of interest; and
- any other matter relevant to the securing the public interest in the management and expenditure of additional monetary contributions.

Monetary contributions required by a standard condition of consent in accordance with an adopted contributions plan will not normally be specifically referenced in a planning agreement except to the extent that the planning agreement must clarify the relationship of the planning agreement to any contributions which may be required as a consequence of granting a consent on land to which a planning agreement will apply.

## **6.7 Recurrent Costs and Planning Agreements**

A planning agreement may make provision for the funding of recurrent costs associated with a public benefit. In such circumstances the planning agreement will include:

- the specific purpose of the recurrent funding;
- the nature and extent of the recurrent funding;
- the time period over which the funding shall be provided;
- any mechanisms for the inflation of the recurrent funding;
- the heads of consideration for any endowment fund or trust that may be required to be established to manage the recurrent funding;
- circumstances in which funding would be renegotiated or revoked; and
- any other matter relevant to the securing the public interest in the achievement of an on-going public benefit.

## **6.8 Affordable Housing and Planning Agreements**

A planning agreement may make provision for the development and future management of affordable housing. In such circumstances the planning agreement will include:

- a definition of affordable housing for the purposes of the planning agreement;
- if not in perpetuity or the life of the construction then the time period over which such housing is to meet the definition of affordable housing;
- provisions for the future management of the affordable housing; and
- criteria for assessment of future tenants or reference to another policy of the Council which specifies such criteria;
- the mechanism for ensuring the housing remains available as affordable housing;
- any other matter relevant to the securing the public interest in the achievement of affordable housing.

## **6.9 Other Matters for Planning Agreements – Bushland**

A planning agreement may make provision the rehabilitation, restoration, regeneration and/or conservation of any natural area. In such circumstances the planning agreement will include:

- a description of the site including location, configuration, size, accessibility, topography and existing land use;
- the nature and extent of the works to be carried out;
- a map of the site identifying the area where the works are to be carried out;
- an assessment of the ecological value of the site in the context of the proposed works;

- reference to a plan of management for the proposed works (initial and on-going);
- reference to a Species Impact Statement if necessary in the circumstances of the matter;
- the mechanism by which the land will be protected in the future; and
- any other matter relevant to the securing the public interest in the achievement of natural area management.

## 6.10 Costs

A Planning Agreement will make provision for the legal and administrative costs of preparing that Planning Agreement. In the event of particularly complex matters requiring Council to employ external experts, Council may require formal agreement concerning the distributions of costs prior to the commencement of negotiations.

A planning agreement will specify that other costs related to the core purposes of the planning agreement such as detailed landscape and architectural designs will be borne by the developer. A planning agreement may make provision in respect of any other costs. A planning agreement may also make provision for Council's cost for the monitoring and enforcing of the planning agreement to be borne by the developer.

## 6.11 Goods and Services Tax (GST)

In view of the complexity of the legislation, specific GST issues will be considered afresh with each and every planning agreement proposed to be negotiated.

# 7 PROCEDURES

## 7.1 Process for Planning Agreements

In the case of a development application, a developer must approach Ku-ring-gai Council *before* lodging a development application. Council and the developer must consider whether there are other parties that should be involved. Such parties would normally include the owner of the land if the developer is not the owner. The planning agreement is then negotiated in accordance with the matters for consideration in this Policy.

The draft planning agreement will be documented and the parties will agree on the terms of the accompanying explanatory note required by the *Environmental Planning and Assessment Regulation*. The developer will then lodge an application with the council or other relevant authority accompanied by the draft planning agreement and explanatory note. The application must clearly record the offer to enter into a planning agreement. Assessment will follow the standard procedures of council including consultation with other public authorities.

The draft planning agreement and explanatory note will be advertised concurrent with the application in accordance with the Act and Regulation. Any person may make submissions and Council is bound to consider them.

The application will be determined and, as far as relevant, the draft planning agreement and any submissions in respect of the draft planning agreement will be given consideration during that process. If the application is a development consent, a condition may be included requiring the planning agreement to be entered into but only in the terms of the offer by the developer in the draft planning agreement. The Council, or other planning authority, would resolve to execute the planning agreement at the time approval of the application is also resolved.

The executed planning agreement would then be registered on the title of the land the subject of the planning agreement binding all heirs and successors until the discharge of the developer's obligations under the planning agreement. Note that the planning agreement may contain a clause indicating specific circumstances in which it would become active.

## 7.2 Negotiation Procedures

Ku-ring-gai Council will delegate the appropriate authority to a council officer, or group of officers, to negotiate a planning agreement on behalf of the Council. Councillors will not be involved in the negotiation of a planning agreement.

If Council has a commercial interest in the subject matter or site of a planning agreement as a landowner, developer or financier, the Council will ensure that the Council officer who assesses the application to which the planning agreement relates is not the same person, or a subordinate of the person, who negotiated the planning agreement on behalf of Council.

Council may, at its absolute discretion, involve an independent third party to facilitate or participate in the negotiations particularly in the following circumstances:

- where council has a commercial interest in the property the subject of a planning agreement;
- where the size or complexity of the project or the number of stakeholders is such that the negotiation would benefit from the presence of an independent facilitator;
- where sensitive financial or confidential information must be verified or established in the course of negotiations;
- for probity reasons; or
- as part of a dispute resolution;

A planning agreement may make provision for the costs of the independent party to be borne by the developer.

## 7.3 Probity Test

Ku-ring-gai Council will apply the following probity tests to all planning agreements:

Is the proposed planning agreement directed towards a proper or legitimate planning purpose ordinarily ascertainable from the statutory planning controls and other adopted planning policy applying to development and the circumstances of the case?

Does the proposed planning agreement provide for public benefits that bear a relationship with the development?

Will the proposed planning agreement produce outcomes that meet the general values and expectation of the public and protect the overall public interest?

Does the proposed planning agreement conform to the fundamental principles governing Council's use of planning agreements as expressed in this policy?

Are there any relevant circumstances that may operate to preclude the Council from entering into the proposed planning agreement?

If Council has a commercial interest in the land the subject of a planning agreement, was the process of negotiating the planning agreement undertaken in a separate Department to the Department responsible for the assessment of the development application or the amendment to the relevant environmental planning instrument?

## **8 GENERAL MATTERS**

### **8.1 Council Contact**

Persons making enquires regarding this Policy are advised to contact Ku-ring-gai Council's Customer Service Centre on 9424 0000.

## **APPENDICES**

**Appendix A: Sample Draft Planning Agreement Template**

**Appendix B: Sample Explanatory Note**

## **Appendix A: Sample Draft Planning Agreement Template**

# **Planning Agreement**

## **Parties to the Agreement**

1. **KU-RING-GAI COUNCIL** of 818 Pacific Highway, Gordon, New South Wales, 2072 **(Council)**; and
2. **[INSERT THE NAME AND THE ADDRESS OF THE DEVELOPER] (Developer)**
3. **[INSERT NAME AND ADDRESS OF ANY THIRD PARTY TO THE AGREEMENT E.G. THE MINISTER OR DELETE AS APPLICABLE] (Identify a short title for use in this agreement)**

## **Background**

### **[DEVELOPMENT APPLICATIONS/DELETE FOR A CHANGE TO AN EPI]**

- A. On [INSERT DATE] the Developer [MADE/AUTHORISED TO BE LODGED] a Development Application [TO/WITH] the Council to carry out the Development on the Land.
- B. That Development Application was accompanied by an offer by the Developer to enter into this Agreement to make Development Contributions towards the Public Facilities identified in this agreement if that Development Consent was granted.
- C. The Developer is the owner of the Land / has entered into a Contract for Sale of Land dated [INSERT DATE] for the purchase of the land / has an option to purchase the land the subject of this agreement dated [INSERT DATE]. [DELETE AS APPLICABLE]

### **[CHANGES TO AN ENVIRONMENTAL PLANNING INSTRUMENT/DELETE FOR A DA]**

- A. On [INSERT DATE] the Developer made an application to the Council for the Instrument Change specified in this Agreement for the purposes of making a Development Application to the Council for Development Consent to carry out the Development on the Land.
- B. That Instrument Change application was accompanied by an offer by the Developer to enter into this Agreement to make Development Contributions towards the Public Facilities identified in this agreement if that Development Consent was granted.
- C. The Instrument Change was published in the NSW Government Gazette No. [INSERT NUMBER] on [INSERT DATE] and took effect on [INSERT DATE].

- D. On [INSERT DATE] the Developer [MADE/AUTHORISED TO BE LODGED] a Development Application [TO/WITH] the Council to carry out the Development on the Land.
- E. The Developer is the owner of the Land / has entered into a Contract for Sale of Land dated [INSERT DATE] for the purchase of the land / has an option to purchase the land the subject of this agreement dated [INSERT DATE]. [DELETE AS APPLICABLE]

## Operative Provisions

### 1 Planning Agreement Under The Act

The parties agree that this Agreement is a Planning Agreement governed by subdivision 2 of Division 6 of Part 4 of the Act.

### 2 Application of this Agreement

This Agreement binds the parties and applies to the Land [SPECIFY THE LAND TO WHICH THE PLANNING AGREEMENT RELATES] and [SPECIFY THE DEVELOPMENT TO WHICH THE PLANNING AGREEMENT RELATES].

### 3 Operation of this Agreement

This Agreement takes effect ON EXECUTION OF THIS AGREEMENT / ON THE OCCURRING OF A SPECIFIC EVENT [TO BE SPECIFIED EG THE GRANTING OF CONSENT]

### 4 Definitions and Interpretation

#### 4.1 Definitions

In this Agreement, the following definitions apply:

**Act** means the *Environmental Planning and Assessment Act 1979* (NSW) (as amended).

**Completion** means the stage in the construction of the works the subject of this agreement when, in the opinion of Council, the works are substantially complete except for minor omissions and minor defects which do not preclude the works from being reasonably capable of being used for their intended purpose(s).

**Construction Certificate** has the same meaning as in the Act.

**Construction Costs** means the construction cost of the works the subject of this Planning Agreement determined by the Council.

**Dealing**, in relation to the Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the Land.

**Dedicated Land** means the land specified this Planning Agreement [INSERT REFERENCE] to be dedicated to the Council free of cost in accordance with this Agreement.

**Defects Liability Period** means the period 12 months from the date on which the works the subject of this agreement reach Completion.

**Development** means [SPECIFY THE NATURE OF THE DEVELOPMENT ASSOCIATED WITH THIS PLANNING AGREEMENT]

**Development Application** means the development application identified in this Planning Agreement including all modifications made under section 96 of the Act and includes all plans, reports, models, and other supplementary information submitted to the consent authority and pertaining to the determination of that Development Application.

**Development Consent** means the consent granted by the Council to the Development Application for the Development identified in this Planning Agreement including all modifications made under section 96 of the Act.

**Development Contribution** means the sum of the Monetary Contribution, Dedicated Land or other Public Benefits (including, without limitation, the works the subject of this Agreement) including any combination of the above.

**GST** has the same meaning as in the GST Law.

**GST Law** has the meaning given to that term in *A New Tax System (Goods and Services Tax) Act 1999* and any other Act or regulation relating to the imposition or administration of the GST.

**Guarantee** means an unconditional bank guarantee, unlimited in time, issued by a bank licensed to carry on business in Australia that:

- (a) is in favour of the Council;
- (b) for the Guarantee Amount; and
- (c) on such other terms and conditions the Council may approve from time to time.

**Guarantee Amount** means the amount specified in this Planning Agreement as varied from time to time in accordance with this Agreement.

**Instrument Change** means [INSERT REFERENCE TO THE SPECIFIC CHANGE WHICH RELATES TO THIS PLANNING AGREEMENT]

**Land** means the land identified in this Planning Agreement by reference to Lot and DP, given address and any other identifying particulars being the land the subject of this Planning Agreement.

**Monetary Contribution** means the amount set out in this Planning Agreement [INSERT REFERENCE] (indexed in accordance with [INSERT REFERENCE TO THE CLAUSE IN THIS AGREEMENT]) to be paid by the Developer to the Council in accordance with this Agreement.

**Occupation Certificate** has the same meaning as in the Act.

**Party** means a party to this agreement, and includes their successors and assigns.

**Public Benefits** means the public benefits identified in this Planning Agreement [INSERT REFERENCE] which are to be provided as a result of this Planning Agreement.

**Quantity Surveyor** means a duly qualified quantity surveyor of at least five (5) year's experience in the assessment of building material and construction costs.

**Quantity Surveyor Assessment** means an assessment by an independent Quantity Surveyor of the Construction Cost to the reasonable satisfaction of the Council.

**Regulation** means the *Environmental Planning and Assessment Regulation, 2000* (as amended).

**Works** means the works identified in the sections 8, 9 and 10 of this agreement and any attachments referred to therein.

## 4.2 Interpretation

In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:

- (a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
- (b) A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- (c) If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.
- (d) A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
- (e) A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- (f) A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- (g) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.

- (h) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (i) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- (j) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other gender.
- (k) References to the word 'include' or 'including' are to be construed without limitation.
- (l) A reference to this Agreement includes the agreement recorded in this Agreement.
- (m) A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.
- (n) Any schedules and attachments form part of this Agreement.
- (o) Unless otherwise specified in this Planning Agreement, a word defined in the Act has the same meaning in this Agreement.

## **5 Development Contributions to be made under this Agreement**

### **5.1 Payment of Monetary Development Contributions**

- (a) The Developer agrees to pay to the Council [SPECIFY PAYMENT OPTIONS E.G. CASH, BANK CHEQUE] the monetary contribution under specified IN THIS AGREEMENT / THE CONSENT CONDITION SPECIFIED IN THE DEVELOPMENT CONSENT [DELETE AS APPLICABLE] prior to release of the first Construction Certificate issued in respect of the Development Consent.
- (b) The amount payable is to be indexed in accordance with the methodology stated IN THIS AGREEMENT / THE CONSENT CONDITION SPECIFIED IN THE DEVELOPMENT CONSENT [DELETE AS APPLICABLE].

## **6 Application of Development Contributions**

### **6.1 Application of Development Contributions under Section 94 of the Act**

The contributions are to be applied to the works specified in the relevant Development Contributions Plan(s) consistent with the priorities and estimated staging stated in that Development Contributions Plan(s).

### **6.2 Applications of Development Contributions under this agreement**

[SPECIFY HOW AND WHEN MONETARY CONTRIBUTIONS ARISING AS A RESULT OF THIS AGREEMENT WILL BE EXPENDED BY THE COUNCIL]

## **7 Application of s94 and s94A of the Act to Development**

7.1 [SPECIFY THE RELATIONSHIP BETWEEN THIS AGREEMENT AND SECTION 94 CONTRIBUTIONS DUE AND PAYABLE UNDER THIS CONSENT. I.E. IS THERE AN OFFSET? AGAINST HOW MANY CATEGORIES? OR DOES SECTION 94 APPLY UNCHANGED?]

## **8 Dedication of Land [DELETE IF NOT APPLICABLE]**

8.1 [INSERT CLAUSES RELATING TO THE DEDICATION OF LAND GENERALLY GUIDED BY THE HEADS OF CONSIDERATION DOCUMENTED IN SECTION 6.4 OF THE PLANNING AGREEMENT POLICY]

## **9 Capital Works [DELETE IF NOT APPLICABLE]**

9.1 [INSERT CLAUSES RELATING TO THE CARRYING OUT OF CAPITAL WORKS GENERALLY GUIDED BY THE HEADS OF CONSIDERATION DOCUMENTED IN SECTION 6.5 OF THE PLANNING AGREEMENT POLICY]

## **10 Other Contributions [DELETE IF NOT APPLICABLE]**

10.1 [INSERT CLAUSES RELATING TO OTHER TYPES OF CONTRIBUTIONS GENERALLY GUIDED BY THE HEADS OF CONSIDERATION DOCUMENTED IN SECTIONS 6.6-69 OF THE PLANNING AGREEMENT POLICY]

## **11 Registration of this Agreement**

11.1 [SPECIFY THAT THE AGREEMENT IS TO BE REGISTERED ON THE TITLE OF THE LAND]

## **12 Review of this Agreement**

12.1 [SPECIFY WHETHER AND IN WHAT CIRCUMSTANCES THE AGREEMENT CAN OR WILL BE REVIEWED AND THE PROCESS AND IMPLEMENTATION OF THE REVIEW THAT IS TO OCCUR]

## **13 Dispute Resolution**

13.1 [SPECIFY AN APPROPRIATE DISPUTE RESOLUTION PROCESS]

## **14 Enforcement**

14.1 [SPECIFY THE MEANS OF ENFORCING THE AGREEMENT E.G. BANK GUARANTEE POLICY]

## **15 Notices**

**15.1** Any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:

- a) delivered or posted to that Party at its address set out below;
- b) faxed to that Party at its fax number set out below;
- c) sent by document exchange to the DX number set out below;
- d) e-mailed to that Party at its email address set out below.

**Ku-ring-gai Council**

Attention: [INSERT NAME OF CONTACT]

Address: 818 Pacific Highway, Gordon, NSW 2072

Locked Bag 1056, Pymble, NSW, 2073

Fax Number: 02 9424 0880

DX number: 8703, Gordon

Email: [\\_\\_\\_\\_\\_@kmc.nsw.gov.au](mailto:_____@kmc.nsw.gov.au) [COMPLETE EMAIL ADDRESS]

**Developer**

Attention: [INSERT DETAILS]

Address: [INSERT DETAILS]

Fax Number: [INSERT DETAILS]

DX number: [INSERT DETAILS]

Email: [INSERT DETAILS]

**15.2** If a Party gives the other Party three business days notice of a change of its address or other details, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.

**15.3** Any notice, consent, information, application or request is to be treated as given or made at the following time:

- a) If it is delivered, when it is left at the relevant address;
- b) If it is sent by post, two business days after it is posted;
- c) If it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number;

d) If it is sent by DX, one business day after it is dispatched.

15.4 If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

## **16 Approvals and consent**

16.1 Except as otherwise set out in this Agreement, and subject to any statutory obligations, a party may give or withhold an approval or consent to be given under this Agreement in that Party's absolute discretion and subject to any conditions determined by the Party. A Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

## **17 Assignment and Dealings**

17.1 [SPECIFY ANY RESTRICTIONS ON THE DEVELOPER'S DEALINGS IN THE LAND TO WHICH THE AGREEMENT APPLIES AND THE PERIOD DURING WHICH THOSE RESTRICTIONS APPLY]

## **18 Costs**

18.1 [SPECIFY HOW THE COSTS OF NEGOTIATING, PREPARING, EXECUTING, STAMPING AND REGISTERING THE AGREEMENT ARE TO BE BORNE BETWEEN THE PARTIES]

## **19 Entire agreement**

19.1 This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with. No Party can rely on an earlier document, or anything said or done by another Party, or by a director, officer, agent or employee of that Party, before this Agreement was executed, except as permitted by law.

## **20 Further acts**

20.1 Each Party must promptly execute all documents and do all things that another Party from time to time reasonably requests to affect, perfect or complete this Agreement and all transactions incidental to it.

## **21 Governing law and jurisdiction**

21.1 This Agreement is governed by the law of New South Wales. The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal. The parties will not object to the exercise of jurisdiction by those courts on any basis.

## **22 Joint and individual liability and benefits**

**22.1** Except as otherwise set out in this Agreement, any agreement, covenant, representation or warranty under this Agreement by two or more persons binds them jointly and each of them individually, and any benefit in favour of two or more persons is for the benefit of them jointly and each of them individually.

## **23 No fetter**

**23.1** Nothing in this Agreement will be construed as requiring Council to do anything that would cause it to be in breach of any of its obligations at law, and without limitation, nothing shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

## **24 Representations and warranties**

**24.1** The Parties represent and warrant that they have power to enter into this Agreement and comply with their obligations under the Agreement and that entry into this Agreement will not result in the breach of any law.

## **25 Severability**

**25.1** If a clause or part of a clause of this Agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Agreement, but the rest of this Agreement is not affected.

## **26 Modification**

**26.1** No modification of this Agreement will be of any force or effect unless it is in writing and signed by the parties to this Agreement.

## **27 Waiver**

**27.1** The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another Party. A waiver by a Party is only effective if it is in writing. A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

## **28 GST**

**28.1** If any part reasonably decides that it is liable to pay GST on a supply made to the other Party under this Agreement and the supply was not priced to include GST, then a recipient of the supply must pay an additional amount equal to the GST on that supply.

**EXECUTED** as an Agreement:

**PARTY**

**KU-RING-GAI COUNCIL** by [INSERT NAME] in the presence of [INSERT NAME]:

Delegate:

Witness:

**PARTY**

**[INSERT DEVELOPER & ACN]** in accordance with section 127 of Corporations Law:

**PARTY**

**[INSERT DETAILS OF ANY THIRD PARTY OR DELETE AS APPLICABLE]**

## **Appendix B: Sample Explanatory Note**

**Environmental Planning and Assessment Regulation 2000**  
(Clause 25E)

### **Explanatory Note**

#### **Draft Planning Agreement**

Under s93F of the Environmental Planning and Assessment Act 1979

#### **1. Parties**

## (Planning Authority)

## (Developer)

#### **2. Description of Subject Land**

#### **3. Description of Proposed Change to Environmental Planning Instrument / Development Application**

#### **4. Summary of Objectives, Nature and Effect of the Draft Planning Agreement**

#### **5. Assessment of the Merits of the Draft Planning Agreement**

The Planning Purposes Served by the Planning Agreement

How the Draft Planning Agreement Promotes the Objects of the Environmental Planning  
and Assessment Act 1979

How the Draft Planning Agreement Promotes the Public Interest

For Planning Authorities:

- (a) Development Corporations – How the Draft Planning Agreement promotes its  
Statutory Responsibilities
- (b) Other Public Authorities - How the Draft Planning Agreement promotes the Objects (if  
any) of the Act under Which it is Constituted
- (c) Councils – How the Draft Planning Agreement Promotes the Elements of the  
Council's Charter
- (d) All Planning Authorities – Whether the Draft Planning Agreement Conforms with the  
Authority's Capital Works Programme

The Impact of the Draft Planning Agreement on the Public or Any Section of the Public

Other Matters

#### **Signed and Dated by All Parties**