

Policy title:	PLANNING AGREEMENTS POLICY
Policy number:	5.3.2
Objective:	Clarify the processes council will follow in relation to planning agreements.
Link to community vision/service:	Type text here
Program Area:	Planning Services
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1. Introduction

1.1. This Policy sets out Lismore City Council's policy and procedures relating to planning agreements under s93F of the Environmental Planning and Assessment Act 1979.

1.2. This Policy was adopted by resolution of Council on 12 August, 2008.

1.3. In this Policy, the following terminology is used:

- Act means the Environmental Planning and Assessment Act 1979,
- development application has the same meaning as in the Act,
- development contribution means the kind of provision made by a developer under a planning agreement, being a monetary contribution, the dedication of land free of cost or the provision of a material public benefit,
- instrument change means a change to an environmental planning instrument to enable a development application to be made to carry out development the subject of a planning agreement,
- planning benefit means 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,
- public facilities means public infrastructure, facilities, amenities and services,
- planning obligation means an obligation imposed by a planning agreement on a developer requiring the developer to make a development contribution,
- Practice Note means the Practice Note on Planning Agreements published by the Department of Infrastructure Planning and Natural Resources (July 2005)
- public includes a section of the public,
- public benefit is the benefit enjoyed by the public as a consequence of a development contribution,
- Regulation means the Environmental Planning and Assessment Regulation 2000,
- surplus value means the value of the developer's provision under a planning agreement less the sum of the value of public works required to be carried out by the developer under a condition imposed under s80A(1) of the Act and the value of development contributions that are or could have been required to be made under s94 or s94A of the Act in respect of the development the subject of the agreement.

1.4. The purposes of this Policy are:

- a) to establish a framework governing the use of planning agreements by the Council
- b) to ensure that the framework so established is efficient, fair, transparent and accountable,
- c) to enhance planning flexibility in the Council's area through the use of planning agreements,
- d) to enhance the range and extent of development contributions made by development towards public facilities in the Council's area,
- e) to set out the Council's specific policies on the use of planning agreements,
- f) to set out procedures relating to the use of planning agreements within the Council's area.

2. Policy on the Use of Planning Agreements

Council's strategic objectives for the use of planning agreements

2.1. The Council's strategic objectives with respect to the use of planning agreements include:

- a) to provide an enhanced and more flexible development contributions system for the Council,
- b) more particularly, to supplement or replace, as appropriate, the application of s94 and s94A of the Act to development,
- c) to give all stakeholders in development greater involvement in determining the type, standard and location of public facilities and other public benefits, and
- d) to allow the community, through the public participation process under the Act, to agree to the redistribution of the costs and benefits of development in order to realise community preferences for the provision of public benefits.
- e) to adopt innovative and flexible approaches to the provision of infrastructure in a manner that is consistent with the Council's adopted management plan,
- f) to provide or upgrade infrastructure to appropriate levels that reflect and balance environmental standards, community expectations and funding priorities, and
- g) to provide certainty for the community, developers and Council in respect to infrastructure and development outcomes.
- h) To provide or upgrade infrastructure that may be required to service new release areas identified in Council's residential land release strategies.

Fundamental principles governing the use of planning agreements

2.2. The Council's use of planning agreements will be governed by the following principles:

- a) planning decisions may not be bought or sold through planning agreements,
- b) development that is unacceptable on planning grounds will not be permitted because of planning benefits offered by developers that do not make the development acceptable in planning terms,
- c) the Council will not allow planning agreements to improperly fetter the exercise of its functions under the Act, Regulation or any other Act or law,
- d) the Council will not use planning agreements for any purpose other than a proper planning purpose,
- e) the Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed planning agreement,
- f) the Council will not improperly rely on its statutory position in order to extract unreasonable public benefits from developers under planning agreements,
- g) if the Council has a commercial stake in development the subject of a agreements, it will take appropriate steps to ensure that it avoids a conflict of interest between its role as a planning authority and its interest in the development.

Circumstances in which Council will consider negotiating a planning agreement

2.3 The Council, in its complete discretion, may negotiate a planning agreement with a developer in connection with any application by the developer for an instrument change or for development consent relating to any land in the Council's area.

Specific purposes of planning agreements

- 2.4 The Council may consider negotiating a planning agreement with a developer to:
- compensate for the loss of, or damage to, a public amenity, service, resource or asset caused by the development through its replacement, substitution, repair or regeneration,
 - meet the demands created by the development for new public infrastructure, amenities and services,
 - address a deficiency in the existing provision of public facilities in the Council's area,
 - achieve recurrent funding in respect of public facilities,
 - prescribe inclusions in the development that meet specific planning objectives of the Council,
 - monitor the planning impacts of development,
 - secure planning benefits for the wider community

Acceptability test to be applied to all planning agreements

- 2.5 The Council will apply the following test in order to assess the desirability of a proposed planning agreement:
- is the proposed planning agreement directed towards a proper or legitimate planning purpose having regard to its statutory planning controls and other adopted planning policies and the circumstances of the case?
 - does the proposed planning agreement provide for a reasonable means of achieving the relevant purpose?
 - can the proposed planning agreement be taken into consideration in the assessment of the relevant rezoning application or development application?
 - will the planning agreement produce outcomes that meet the general values and expectations of the community and protect the overall public interest?
 - does the proposed planning agreement promote the Council's strategic objectives in relation to the use of planning agreements?
 - does the proposed planning agreement conform to the fundamental principles governing the Council's use of planning agreements?
 - are there any relevant circumstances that may operate to preclude the Council from entering into the proposed planning agreement?

Application of s94 and s94A to development to which a planning agreement relates

- 2.6 The Council has no general policy on whether a planning agreement should exclude the application of s94 or s94A of the Act to development to which the agreement relates. This is a matter for negotiation between the Council and developers on a case by case basis.
- 2.7 However, where the application of s94 of the Act to development is not excluded by a planning agreement, the Council will generally decide on a case by case basis whether the benefits under the agreement are to be taken into consideration in determining a development contribution under section 94.

Form of development contributions under a planning agreement

- 2.8 The form of a development contribution to be made under a proposed planning agreement will be determined by the particulars of the instrument change or development application to which the proposed planning agreement relates.

Recurrent charges

- 2.9 The Council may request developers, through a planning agreement, to make development contributions towards the recurrent costs of public facilities. Where the public facility primarily serves the development to which the planning agreement relates or neighbouring development, the arrangement for recurrent funding may be in perpetuity. However, where the public facility or public benefit is intended to serve the wider community, the planning agreement will only require the developer to make contributions towards the recurrent costs of the facility until a public revenue stream is established to support the on-going costs of the facility.

Pooling of development contributions

- 2.10 Where a proposed planning agreement provides for a monetary contribution by the developer, the Council may seek to include a provision permitting money paid under the agreement to be pooled with money paid under other planning agreements and applied progressively for the different purposes under those agreements, subject to the specific requirements of the relevant agreements. Pooling may be appropriate to allow public benefits, particularly essential infrastructure, to be provided in a fair and equitable way.

Monitoring and review of a planning agreement

- 2.11 The Council will continuously monitor the performance of the developer's obligations under a planning agreement.
- 2.12 The Council will require the planning agreement to contain a provision establishing a mechanism under which the planning agreement is periodically reviewed with the involvement of all parties. This will include a review of the developer's performance of the agreement.
- 2.13 The Council will require the planning agreement to contain a provision requiring the parties to use their best endeavours to agree on a modification to the agreement having regard to the outcomes of the review.

Modification or discharge of the developer's obligations under a planning agreement

- 2.14 The Council will generally only agree to a provision in a planning agreement permitting the Developer's obligations under the agreement to be modified or discharged where the modification or discharge is linked to the following circumstances:
- a) the developer's obligations have been fully carried in accordance with the agreement,
 - b) the developer has assigned the developer's interest under the agreement in accordance with its terms and the assignee has become bound to the Council to perform the developer's obligations under the agreement,
 - c) the development consent to which the agreement relates has lapsed,
 - d) the performance of the planning agreement has been frustrated by an event beyond the control of the parties,
 - e) the Council and the developer otherwise agree to the modification or discharge of the agreement.
- 2.15 Such a provision will require the modification or revocation of the planning agreement in accordance with the Act and Regulation.

Notations on Certificates under s149(5) of the Act

- 2.16 Where an application is received for a Certificate under s149(2) of the Act and a planning agreement applies to the land for which the certificate is being sought, Council will issue a s149(5) Certificate at no additional cost to the applicant which identifies that a planning agreement is applicable to the land and which outlines the principal matters addressed in the planning agreement.

Provision of security under a planning agreement

- 2.17 The Council will require a planning agreement to make provision for security by the developer of the developer's obligations under the agreement. The security is to be lodged with Council prior to Council executing the agreement under its common seal and prior to Council forwarding the LEP Amendment to the Minister when an instrument change is sought.
- 2.18 The form of security will generally be the unconditional bank guarantee from an Australian Bank in favour of the Council to the full value of the Developer's provision under the Agreement and on terms otherwise acceptable to the Council.

3. Procedures Relating to the Use of Planning Agreements

Council's negotiation system

- 3.1. The Council's negotiation system for planning agreements aims to be efficient, predictable, transparent and accountable.
- 3.2. The system seeks to ensure that the negotiation of planning agreements runs in parallel with applications for instrument changes or development applications.
- 3.3. The system is based on principles of fairness, co-operation, full disclosure, early warning, and agreed working practices and timetables.

When should a planning agreement be negotiated?

- 3.4. The Council is required to ensure that a planning agreement is publicly notified as part of and in the same manner as and contemporaneously with the application for the instrument change or the development application to which it relates.
- 3.5. The planning agreement must therefore be negotiated and documented before it is publicly notified as required by the Act and Regulation.
- 3.6. The Council prefers that a planning agreement is negotiated before lodgement of the relevant application and that it accompanies the application on lodgement.

Who will negotiate a planning agreement on behalf of the Council?

- 3.7. A Council officer with appropriate delegated authority will negotiate a planning agreement on behalf of the Council.
- 3.8. The Councillors will not be involved in the face to face negotiation of the agreement.

Separation of the Council's commercial and planning assessment roles

- 3.9. If the Council has a commercial interest in the subject matter of a planning agreement as a landowner, developer or financier, the preparation and assessment of the planning agreement will be in accordance with Council's corporate procedure for the preparation and assessment of development applications where Council is the proponent.

Public notification of planning agreements

- 3.10. Where Council decides to re-exhibit a draft LEP Amendment in accordance with s68(3B) of the EP&A Act, and the draft LEP Amendment is accompanied by a draft planning agreement, then the draft planning agreement will be re-exhibited concurrently with the draft LEP Amendment whether or not the planning agreement has been amended.
- 3.11. Where Council gives notice, pursuant to section 93G(1) of the Environmental Planning and Assessment Act, of a proposal to amend or revoke an existing planning agreement, Council will notify in writing all persons who made submissions to the original planning agreement or to the draft LEP Amendment or development application to which the planning agreement applied.