

Fairfield City Council

Voluntary Planning Agreements Policy

Adopted:
14 August 2018
Effective:
5 September 2018

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1. Legislative Framework

This document establishes a framework for Fairfield City Council to guide the preparation of Voluntary Planning Agreements (VPA). The VPA policy has been prepared in accordance with Subdivision 2 of Division 7.1 of Part 7 of the Environmental Planning and Assessment Act 1979 and the relevant sections of the Environmental Planning and Assessment Regulation 2000.

This Policy is not legally binding. However, it is intended that Council and all persons dealing with Council in relation to VPA will follow this Policy to the fullest extent possible.

1.1 Commencement of this policy

This Policy was adopted by resolution of Council on 14 August 2018 and became effective on 5 September 2018.

Action	Date
Date Adopted	14 August 2018
Effective Date	29 August 2018
Responsible Division	Strategic Land Use Planning

The following dates are relevant to the making of this policy:

Action	Date
Review by internal stakeholders	23 May 2018
Review by Council's Solicitors	9 October 2017
Review by Development Contributions Steering Committee	1 February 2018
Reported to Council recommending exhibition	10 April 2018
Public Exhibition	25 April 2018 - 23 May 2018
Reported to Council recommending adoption	14 August 2018
Adoption Date	14 August 2018
Commencement of Policy	5 September 2018

1.2 Why use a voluntary planning agreement (VPA)?

A VPA may be used for a variety of reasons in order to achieve public benefits which are not ordinarily available through the planning and development system or are available in a restricted manner. Voluntary planning agreements –

- provide a means for allowing the local community to share in the financial benefit obtained by a developer due to a change in planning controls or a consent to a development application;
- provide a way for the local community to secure public benefits in addition to measures which are required to address the impact of development on private and public lands;
- allow for a flexible means for achieving good development outcomes and targeted public benefit;
- provide opportunities for the local community to participate in the quality and delivery of public benefits; and
- allow developers to have an input to the type, quality, timing and location of public benefits.

A VPA can assist developers and builders in the following ways:

- by allowing greater flexibility in the provision of public infrastructure;
- developers, builders, other stakeholders and public in the provision of public infrastructure and the charging of development contributions;
- it provides the flexibility required to respond to the particular public infrastructure needs of the proposed development and /or proposed change to an environmental planning instrument;
- it can provide more immediate outcomes in the provision of public benefits;
- it is an alternative approach to the charging of development contributions and the many rigid requirements in charging section 94 contributions; and
- it is a mechanism for providing a win-win outcome in that the timely provision of public infrastructure can assist by providing a more attractive environment for development or for a change to an environmental planning instrument.

Discussion of the potential for a VPA is encouraged at the pre-lodgement stage of Development Applications, Planning Proposals and State Significant Developments.

1.3 What is a voluntary planning agreement?

VPAs offer a highly flexible tool for the provision of public infrastructure. VPAs allow agreement for the provision of public infrastructure in a way that can meet the particular needs arising from a specific development proposal or change to an environmental planning instrument (including amending or repealing an environmental planning instrument) and the greater public interest.

Where a development proposal or change to an environmental planning instrument would require the provision of different (in terms of quantum, type, timing, etc.) public infrastructure than provided under Council's existing infrastructure works programs, then a VPA may be the most appropriate development contributions approach. The different infrastructure provided by way of VPA may be for example, land dedication, public car parking, vehicle or pedestrian access, affordable housing, conservation or enhancement of the natural environment or other public infrastructure required as a result of the development.

A VPA may be appropriate in any number of circumstances; this includes State Significant Developments and Designated Developments dealt with by the State Government and Planning Panels. Accordingly, a VPA may be appropriate in a wide range of development situations.

A VPA is defined in section 7.4 (1) of the EP & A Act as:

A planning agreement is a voluntary agreement or other arrangement under this Division between a planning authority (or 2 or more planning authorities) and a person (the **developer**):

- (a) who has sought a change to an environmental planning instrument, or
- (b) who has made, or proposes to make, a development application or application for a complying development certificate, or
- (c) who has entered into an agreement with, or is otherwise associated with, a person to whom paragraph (a) or (b) applies, under which the developer

is required to dedicate land free of cost, pay a monetary contribution, or provide any other material public benefit, or any combination of them, to be used for or applied towards a public purpose.

1.4 Types of contributions

Types of development contributions authorised by a VPA can be:

- (a) monetary contributions,
- (b) the dedication of land free of cost,
- (c) any other material public benefit including, but not limited to, affordable housing, provision of community facilities and conservation and enhancement of the natural environment,
- (d) any combination of (a), (b), and (c).

Development contributions will be used for or applied towards a public purpose.

1.5 In this policy the following terminology is used:

Act means the Environmental Planning and Assessment Act 1979,

Dealing in relation to the land means, without limitations, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with land,

Council means Fairfield City Council,

Contributions plan means a contributions plan approved under section 7.11 of the Act

Developer is a person who has:

- (a) sought an instrument change, or
- (b) made or proposes to make a development application, or
- (c) entered into an agreement with or is otherwise associated with, a person to whom paragraph (a) or (b) applies,

Development application has the same meaning as in the Act,

Development contribution means the kind of provision made by a developer under a VPA, being a monetary contribution, the dedication of land free of cost or the provision of a material public benefit,

Explanatory note means a written statement made by a planning authority in accordance with clause 25E of the Regulation,

Instrument change means a change to an environmental planning instrument whether it be for the making, amendment or repeal of that instrument.

Material public benefit means a benefit that is not a monetary contribution or the dedication of land, but is for a public purpose. A material public benefit does not need to

be a physical work.

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,

Planning obligation means an obligation imposed by a VPA on a developer requiring the developer to make a development contribution,

Practice note means the Practice Note on VPA published by the Department of Planning and Environment (November 2016) or the current Practice Note released by the Department of Planning and Environment.

Public includes a section of the public,

Public benefit is the benefit enjoyed by the public as a consequence of a development contribution,

Public facilities means public infrastructure, facilities, amenities and services,

Regulation means the Environmental Planning and Assessment Regulation 2000,

Surplus value means the value of the developer's provision under a VPA less the sum of the value of public works required to be carried out by the developer under a condition imposed under s4.17 (1) of the Act and the value of development contributions that are or could have been required to be made under s7.11 or s7.12 of the Act in respect of the subject of the agreement.

2. About this Policy

2.1 The objectives of this policy are:

- a) to establish a fair, transparent and accountable framework governing the use of VPAs by Council;
- b) to set out Council's specific policies and procedures relating to the use of VPAs within Council's LGA;
- c) to establish a probity framework for the negotiation, preparation and implementation of VPAs; and
- d) to provide an enhanced and more flexible development contributions system for Council.

2.2 When may Council consider entering into a voluntary planning agreement?

Council may consider entering into a VPA where there will be an opportunity or likely requirement for a development contribution;

(a) when a developer:

- i. proposes to, or has made a request for a planning proposal seeking a change to Fairfield Local Environmental Plan 2013 to facilitate the carrying out of development or State Significant Development; or
- ii. proposes to, or has made, a development application under Part 4 of the EP&A Act; or
- iii. an application under s 4.55 of the EP& A Act to modify a development consent; or
- iv. has entered into an agreement with, or is otherwise associated with, a person to whom (i), (ii) or (iii) applies; or

(b) in the circumstances of an offer by a developer as set out in section

7.7(3) of the Act, [s 7.7 (3) states in part: a consent authority can require a planning agreement to be entered into as a condition of a development consent, but only if it requires a planning agreement that is in the terms of an offer made by the developer in connection with:(a) the development application or application for a complying development certificate, or
(b) a change to an environmental planning instrument sought by the developer for the purposes of making the development application or application for a complying development certificate, or that is in the terms of a commitment made by the proponent in a statement of commitments made under Part 3A.

Notwithstanding the above, Council is not obliged to enter into a voluntary planning agreement with a developer.

2.3 Cross boundary voluntary planning agreements

In the case where a development has been proposed in an area close to the boundary of the LGA, and the VPA offer benefits the adjoining Council. Then that adjoining Council may be liaised with to collectively agree to enter into the agreement to contribute towards a community benefit.

2.4 When will this policy be used?

This policy will be used by Council while considering, negotiating, and entering into planning agreements as defined under the Act.

2.5 Land to which the policy applies:

This Policy applies to land within the Local Government Area of Fairfield City.

2.6 Periodic review of Policy:

It is intended that this Policy will be periodically reviewed and, depending on the outcome of any review, may be updated from time to time. The updates may cover additional matters to those covered in this policy or provide more detailed information or guidance on specific matters covered in this Policy.

3. Principles and Framework on the use of Voluntary Planning Agreements

This section sets out the principles and framework regarding the use of VPA.

3.1 Initial written offer to enter into a voluntary planning agreement

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, Planning Proposal or State Significant Development 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 land owner'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;

3.2 Entering into a voluntary planning agreement

Council, in its complete discretion, may negotiate a VPA with a developer in connection with any proposed application by the developer for an instrument change or for development consent or proposed development applications relating to any land in Fairfield LGA.

The VPA should be negotiated between developers, Council officers and other planning authorities as part of the submission of application, so that copies of draft agreement or VPA offer letter may accompany the exhibition of the application.

Any offer to enter into a VPA with Council is to be initiated in writing to Council by the developer.

Although the process for negotiating a VPA will vary depending on the individual circumstances, the typical process involved in negotiating a VPA is outlined in Appendix 'B'.

3.3 Acceptability test

Council will apply the following principles in order to assess the acceptability of the proposed VPA:

- (a) whether the proposed VPA is directed towards a proper or legitimate planning purpose ordinarily ascertainable from the statutory planning controls and other adopted planning policies applying to development and the circumstances of the case;
- (b) whether the proposed VPA provide for public benefits that bear a relationship to development that is not wholly unrelated to development;
- (c) whether VPA produce outcomes that meet the general values and expectations of the public and protect the overall public interest and environment from adverse impact;
- (d) whether the proposed VPA provide for a reasonable means of achieving the relevant purposes and outcomes and securing the benefits;
- (e) whether there are any relevant circumstances that may operate to preclude Council from entering into the proposed VPA; and
- (f) Whether the quantum of the public benefit proposed through the VPA commensurate with the value of the Development Contribution.

3.3.1 Acceptability Test – land dedication

Acceptability of land to be dedicated in deciding whether land to be dedicated is acceptable, Council will consider, where relevant, matters including:

- (a) the monetary value of the land;
- (b) the dimensions, location and topography of the land
- (c) the current use and improvements on the land;
- (d) factors affecting the usability of the land, including soil condition; accessibility, solar access and relationship with existing public facilities,
- (e) ongoing costs to Council; and
- (f) works proposed to be undertaken by the applicant.

3.3.2 Acceptability Test- material public benefits

Acceptability of a material public benefit in deciding whether a material public benefit is acceptable, Council will consider, where relevant, matters including:

- (a) the monetary value of the benefit;
- (b) what needs of the community would be satisfied;
- (c) the financial implications for Council;
- (d) the timing of completion of works or the delivery of the benefit; and
- (e) future recurrent costs associated with the benefit.

3.4 Consideration of voluntary planning agreements in relation to instrument changes and development applications

When exercising its functions under the Act in relation to an application by a developer for an instrument change or a development consent to which a proposed VPA relates, Council will consider to the fullest extent permitted by law:

- (a) whether the proposed VPA is relevant to the application and hence may be considered in connection with the application; and
- (b) if so, the proper planning weight will be given to the proposed VPA.

3.5 Implementation of a material public benefit

A VPA may include provision for Council and a developer to enter into a separate contractual arrangement relating to the delivery of a material public benefit in the form of:

- public amenities and public services;
- affordable housing;
- transport or other infrastructure;
- conservation or enhancement of the natural environment;
- monitoring of the planning impacts of development; and
- any other material community benefit.

Council and the developer will maintain the confidentiality of such an arrangement where sensitive commercial information is involved.

3.6 Relationship between voluntary planning agreements and Development Contributions

Normally public benefits provided by way of voluntary planning agreement will be in addition to contributions required under Council's Development Contributions Plans.

However, a VPA may seek to wholly or partly exclude the application of development contributions relating to the development that is the subject of the agreement.

This is a matter to be negotiated between Council and a developer having regard to the circumstances of the specific case.

Any offset of Section 7.11 Development Contributions related to a VPA will only be considered for contributions related to additional floor space above that already provided for in Fairfield Local Environmental Plan 2013.

However, where the application of Section 7.11 of the Act to development is not excluded by a VPA, Council will not agree to a provision allowing benefits under the agreement to be taken into consideration in determining a development contribution under S7.11.

3.7 Relationship between voluntary planning agreements and clause 4.6 of the LEP

Any variation to development standards under clause 4.6 of the LEP, as part of a development application sought in connection with a VPA, will not be permitted by Council unless Council is of the opinion that the dispensation sought under clause 4.6 meets the relevant test on its own planning merits.

4. Contents of Voluntary Planning Agreement

4.1 Form of development contributions under a voluntary planning agreement

The form of development contributions to be made under a proposed VPA will be determined by the particulars of the instrument change or development application to which the proposed VPA relates.

4.2 Standard contributions

Wherever possible, Council will seek to standardise development contributions sought under a VPA in order to streamline negotiations and provide fairness, predictability and certainty for developers. This, however, does not prevent public benefits being negotiated on a case by case basis, particularly where planning benefits are also involved.

4.3 Recurrent charges

Council may request developers, through a VPA, to make development contributions towards the recurrent costs of public facilities. Where the public facility primarily serves the development to which the VPA 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 VPA 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 ongoing costs of the facility.

4.4 Pooling of monetary 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.

4.5 Credits and refunds

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.

4.6 When developer's obligations arise under a voluntary planning agreement

Council will require a VPA to provide that the developer's obligations under the agreement take effect when the first development consent operates in respect of development that is the subject of the agreement.

4.7 Preparation and Documentation of the voluntary planning agreement

Council's Solicitor will ordinarily prepare a VPA relating to a particular application for amendment to instrument change or development consent.

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

Council may agree to a provision in a VPA 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 his/her interest under the agreement in accordance with its terms and the assignee has become bound to Council to perform the developer's obligations under the agreement;
- (c) the development consent to which the agreement relates has lapsed;
- (d) there has been a material modification to the development consent to which the agreement relates;
- (e) the performance of the VPA has been frustrated by an event beyond the control of the parties;
- (f) Council and the developer otherwise agree to the modification or discharge of the agreement;
- (g) material changes have been made to the planning controls applying to the land to which the agreement applies; and
- (h) the revocation or modification by the Minister for Planning of a development consent to which an agreement relates.

Such a provision will require the modification or discharge of the VPA in accordance with the Act and Regulation.

4.9 Costs of entering into a voluntary planning agreement

The costs for preparing, executing, stamping and registering the VPA are to be met by the developer.

Council's costs in negotiating, assessing, reviewing, advertising, engaging consultants where necessary, administering and enforcing the VPA will be met in part or full by the developer depending on the circumstances.

4.10 Method for valuing the public benefits under a voluntary planning agreement

Reasonable public benefit for the community is guided through the planning frameworks such as:

- Local and State planning strategies; and
- Council's strategic plans and policies including the 'City Plan'.

Where the benefit under a VPA is the carrying out of works for a public purpose, Council will seek to value the benefit on the basis of the estimated value of the completed works determined by a suitably qualified quantity surveyor appointed by Council.

Where the benefit includes dedication of land and the value of the land has to be taken into account, Council may seek the services of an appropriately qualified land valuer as appointed by Council.

Where the VPA proposes benefits that would normally be provided as a condition of development consent then those works will be deemed to have no value towards the VPA.

4.11 Implementation agreements

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

- (a) Issues of commercial sensitivity;
- (b) the times at which and, if relevant, the period during which, the developer is to make provision under the VPA;
- (c) the design, technical specification and standard of any work required by the VPA to be undertaken by the developer;
- (d) the manner in which work is to be handed over to Council; and
- (e) the manner in which material public benefit is to be made available for its public purpose in accordance with the VPA.

4.12 Assignment and dealings by the developer

A VPA will include a provision requiring Council's prior consent to:

- (a) the sale and transfer of the land which is subject of the agreement;
- (b) the assignment of the developer's rights and obligations under the agreement to a third party, or;
- (c) any novation of the agreement

4.13 Standard Form for voluntary planning agreements

A VPA will be in writing and will be based on Council's template (see Appendix C). The final content of the agreement will be subject to the outcome of negotiations between the responsible Council officer and the developer and any decision of Council.

5. Negotiation Procedures

This section outlines the broad procedures for the negotiation of VPAs.

5.1 Who will negotiate a voluntary planning agreement on behalf of Council?

A senior Council officer, who is not involved with the regulatory / assessment process, will lead the negotiation of VPAs on behalf of Council.

Councils Executive Leadership Team (ELT) will review the VPA and may set up a negotiation team. Where there is a negotiation team it will include officers with appropriate technical expertise. The officers involved in assessment and negotiation of the VPA will not be involved in the processing of the particular development application, planning proposal or State Significant Development which has resulted in the requirement for a VPA.

Councillors will not participate in negotiations with a developer or their representatives but will have a role in:

- (a) endorsing a draft VPA for exhibition purposes;
- (b) endorsing an offer to enter into a VPA; and
- (c) approval of a VPA.

5.3 Separation of Council's negotiation and planning assessment roles

If Council has a commercial interest (such as Council owned land or Council projects) in the subject matter of a VPA as a landowner, developer or financier, Council will ensure that there is a probity plan that maintains a separation between Council's negotiation and planning assessment roles.

5.4 Involvement of independent third parties in the negotiation process

Council will encourage the appointment of an independent person to facilitate or participate in the negotiations or aspects of it, particularly where:

- (a) an independent assessment of a proposed change to an environmental planning instrument or development application is considered to be necessary or desirable;
- (b) factual information requires validation in the course of negotiations;
- (c) sensitive financial or other confidential information must be verified or established in the course of negotiations;
- (d) facilitation of complex negotiations are required in relation to large projects or where numerous parties or stakeholders are involved; and
- (e) dispute resolution is required under a VPA.

The costs of the independent person will be borne by the developer

5.5 Negotiation process – third parties

Before the lodgement of the relevant application by the developer, Council and the developer will decide whether to negotiate a VPA. The parties should consider whether other planning authorities and other persons associated with the developer should be

additional parties to the agreement. If the developer is not the owner of the relevant land, the landowner should be an additional party to the agreement.

After the parties have decided to negotiate a VPA, the negotiation of that agreement will involve the following key steps:

- (a) the parties will then appoint a person to represent them in the negotiations (Council staff with appropriate delegations to negotiate a VPA);
- (b) the parties will decide whether to appoint an independent person to facilitate or otherwise participate in the negotiations or aspects of it;
- (c) the parties will also agree on a timetable for negotiations and the protocols and work practices governing their negotiations;
- (d) the parties will then identify the key issues for negotiation and undertake the negotiations;
- (e) if agreement is reached, the proposed VPA will be prepared and a copy will be provided to the developer. This will include an explanatory note, as required by the Regulation, which is in the form set out in Appendix C;
- (f) the parties will undertake further negotiation on the specific terms of the proposed VPA and explanatory note;
- (g) once agreement is reached on the terms of the proposed VPA, the developer will be required to finalise the draft agreement in preparation for lodgement;
- (h) the developer may then make the relevant application to Council accompanied by a copy of the agreement and explanatory note (refer to Appendix 'C' & 'D'). The application must clearly record that the developers offer is made on the basis that the VPA will apply if application is approved; and
- (i) the parties may be required to undertake further negotiations and, hence, a number of the above steps, as a result of the public notification and inspection of the VPA or its formal consideration by Council in connection with the relevant application, may need to be repeated including publicly re-notifying the agreement.

5.6 Amending or revoking a voluntary planning agreement

Council and the developer may negotiate the amendment or revocation of a VPA. A VPA may be amended or revoked by a further agreement in writing signed by representatives of Council and the developer. An amendment of a VPA may be needed to be negotiated where a development application linked to the agreement is modified under s7.11 of the Act and the modification has a bearing on development contributions. Amendment or revocation of a VPA must follow the statutory requirements contained in the Act and the Regulation.

6. Public Notification & Exhibition of Voluntary Planning Agreements

6.1 Public notification of voluntary planning agreements

A VPA cannot be entered into, amended or revoked unless publicly exhibited for a period of 28 days.

A VPA relating to a Development Application or Planning Proposal shall be publicly notified / exhibited in accordance with the Environmental Planning & Assessment Act and Regulation. If practicable, the VPA will be exhibited concurrently with the Development Application or Planning Proposal.

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

Where amendments to a draft VPA are required as a result of public submission or other reasons, the amended draft VPA and explanatory notes may be required to be re-exhibited.

6.2 Amendment to voluntary planning agreement

Where Council has entered into a VPA and the parties to the VPA have agreed to vary the 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 VPA.

The deed of variation will be publicly exhibited for a minimum period of 28 days prior to the parties executing the document. The deed will also be registered on the title of the subject land.

6.3 Consideration of a voluntary planning agreement

A proposed VPA and public submissions made in relation to that agreement will be considered in the determination of the relevant application for an instrument change or for development consent, so far as relevant to the application.

The weight given to the proposed VPA and public submissions made in relation to that agreement is a matter for the consent authority to evaluate.

7. Implementation and Conditions of Voluntary Planning Agreements

7.1 Entering into a voluntary planning agreement

A VPA is entered into when it is signed by all of the parties. A VPA can be entered into at any time after the agreement is publicly notified in accordance with the Act and Regulation.

If the application is for an instrument change, and that application is approved, the VPA may be entered into immediately upon approval. Alternatively, it can be entered into if consent is subsequently granted to a development application relating to the instrument change.

If the application is for development consent, Council will require the VPA to be entered into as a condition of granting development consent to the development to which the agreement relates. In such a case, a condition of consent may be imposed which is in the form set out in **Appendix E**, but only in terms of the developer's offer made in connection with the application.

If the application for development consent is approved on terms different to the developer's offer, the VPA cannot be entered into.

7.2 Registration of voluntary planning agreements

Section 7.6 of the Act permits a VPA (including where an agreement is amended) to be registered on the title to land if each person with an estate or interest in the land agrees to its registration.

Section 7.6(3) provides that a VPA that has been registered on the title to land under s7.6 is binding on, and enforceable against, the owner of the land from time to time as if each owner for the time being had entered into the agreement.

Council will require a VPA to contain a provision requiring the developer to agree to registration of the agreement pursuant to s7.6 of the Act if the requirements of that section are satisfied.

7.3 Monitoring and review of a voluntary planning agreement

Council will continuously monitor the performance of the developer's obligations under a VPA.

Council requires the VPA to contain a provision establishing a mechanism under which the VPA is periodically reviewed with the involvement of all parties. This will include a review of the developer's performance of the agreement.

Council requires the VPA 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.

7.4 Council's annual report and register

The EP&A Act requires that where Council has entered into a VPA, while the VPA is in force that Council must include in its annual report of that year, particulars of compliance with and the effect of the VPA.

Council is to keep a register of any VPA that applies to land within Fairfield Local Government Area, whether or not Council is a party to a VPA. Council will record in the register the date the agreement was entered into and a short description of the agreement (including any amendment).

Council will make the following available for public inspection (free of charge) during ordinary office hours:

- (a) the VPA register kept by Council;
- (b) copies of all VPA (including amendments) that apply to the LGA of Council; and
- (c) copies of the explanatory notes relating to those agreements or amendments.

7.5 Provision of security under a voluntary planning agreement

Council will require a VPA to make provision for security by the developer of the developer's obligations under the agreement.

The form of security should be an unconditional and irrevocable bank guarantee from an Australian Bank in favour of Council to the full value of the developer's provision under the agreement and on terms otherwise acceptable to Council.

7.6 Dispute resolution

The VPA will include a clause to provide for mediation of disputes between the parties to the agreement before the parties may exercise any other legal right in relation to the dispute.

Should it be necessary to enter into dispute resolution, each party will bear their own costs.

7.7 Hand-over of works

Council will only accept the hand-over of a public work carried out under a VPA, once the developer furnishes to Council a certificate to the effect that the work has been carried out and completed in accordance with the agreement and any applicable development consent.

The VPA will include provisions for a defects liability period during which any defects must be rectified at the developer's expense.

7.8 Management of land or works after hand-over

If the VPA includes that costs relating to management or maintenance of land that has been dedicated to Council or works that have been handed-over to Council will be borne by the developer; Council will require the parties to enter into a separate implementation agreement in that regard .

The failure of the parties to reach agreement in relation to management and maintenance of the land or works may be dealt with under the dispute resolution provisions of the VPA.

7.9 Public use of privately – owned facilities

If a VPA provides for the developer to make a privately-owned facility available for public use, Council will require the parties to enter into a separate implementation agreement in that regard

Such an agreement may, subject to Council's agreement, provide for payment to the developer of a reasonable fee by a member of the public who desires to use the relevant facility.

The failure of the parties to reach agreement in relation to management and maintenance of the land or works may be dealt with under the dispute resolution provisions of the VPA.

7.10 Notations on certificates under Section 10.7 of the Act

Council will require a VPA to contain an acknowledgement by the developer that Council may, in its absolute discretion, make a notation under s10.7 (5) of the Act about a VPA on any certificate issued under s10.7 (2) relating to the land the subject of the agreement or any other land.

Appendix A

Practice Note on Voluntary Planning Agreements

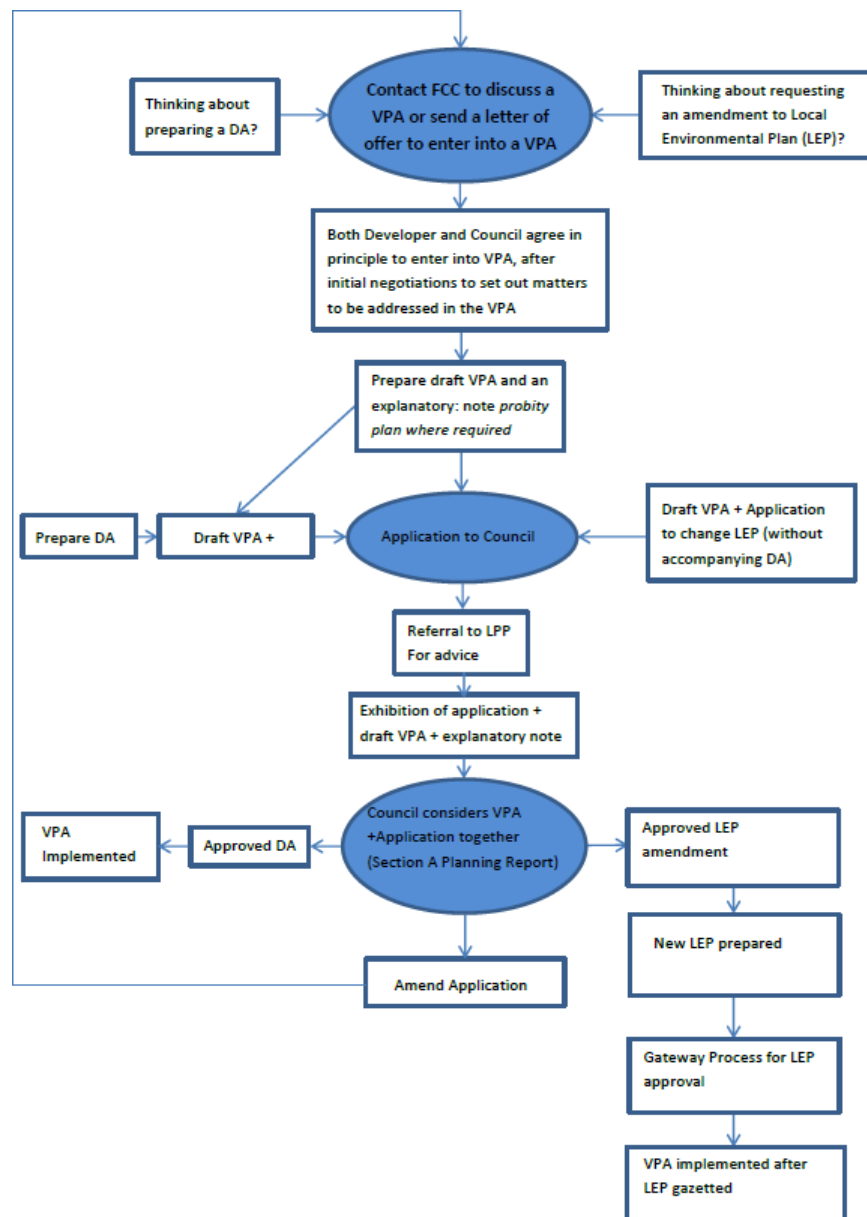
Department of Planning and Environment

Refer to the Department of Planning's website: <http://www.planning.nsw.gov.au>

Appendix B

Steps for Entering into a Voluntary Planning Agreement

Figure 1: Policy for entering into a VPA



Appendix C

Template Voluntary Planning Agreement

(between Council and Developer)

VOLUNTARY PLANNING AGREEMENT

Parties

of ###, New South Wales (**Council**)

and

of ##, New South Wales (**Developer**)

Background

(For Development Applications)

- A. On, ##, the Developer made a Development Application to Council for Development Consent 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 if that Development consent was granted.

(For Changes to Environmental Planning Instruments)

- A. On, ##, the Developer made an application to Council for the Instrument Change for the purpose of making a Development Application to Council for Development Consent to carry out the Development on the Land.
- B. The Instrument Change application was accompanied by an offer by the Developer to enter into this Agreement to make Development Contributions towards the Public Facilities that Development Consent was granted.
- C. The Instrument Change was published in NSW Government Gazette No. ## on ## and took effect on ##.
- D. On, ##, the Developer made a Development Application to Council for Development Consent to carry out the Development on the Land.

Operative provisions

1. Voluntary planning agreement under the Act

The Parties agree that this Agreement is a voluntary planning agreement governed by Subdivision 2 of Division 7.1 of Part 7 of the Act.

2. Application of this Agreement

[Drafting Note 2: Specify the land to which the Agreement applies and the development to which it applies]

3. Operation of this Agreement

[Drafting Note 3: Specify when the Agreement takes effect and when the Parties must execute the Agreement]

4. Definitions and interpretation

4.1 In this Agreement the following definitions apply:

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

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

Development means ##

Development Application has the same meaning as in the Act.

Development Consent has the same meaning as in the Act.

Development Contributions means a monetary contribution, the dedication of land free of cost or the provision of a material public benefit.

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* (Cth) and any other Act or regulation relating to the imposition or administration of the GST.

Instrument Change means ## Local Environmental Plan ##.

Land means Lot ## DP ##, known as ##.

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

Public Facilities means ##.

Regulation means the *Environmental Planning and Assessment Regulation 2000*.

4.2 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 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 genders.
- (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.

5. Development Contributions to be made under this Agreement

[Drafting Note 5: Specify the development contributions to be made under the agreement, when they are to be made; and the manner in which they are to be made]

6. Application of the Development Contributions

- 6.1 [Specify the times at which, the manner in which and the public purposes for which development contributions are to be applied]

7. Application of s7.11 and s7.12 of the Act to the Development

[Drafting Note7: Specify whether and to what extent s7.11 and s7.12 apply to development the subject of this Agreement]

8. Registration of this Agreement

[Drafting Note 8: Specify whether the Agreement is to registered as provided for in s7.6 of the Act]

9. Review of this Agreement

[Draft Note 9: Specify whether, and in what circumstances, the Agreement can or will be reviewed and how the process and implementation of the review is to occur].

10. Dispute Resolution

[Drafting Note 10: Specify and appropriate dispute resolution process]

11. Enforcement

[Drafting Note 11: Specify the means of enforcing this Agreement]

12. Notices

12.1 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) Emailed to that Party at its email address set out below.

Council

Attention: ##
Address: ##
Fax number: ##
Email: ##

Developer

Attention: ##
Address: ##
Fax number: ##
Email: ##

12.2 If a party gives the other party 3 business days' notice of a change of its address or fax number, 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.

12.3 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, 2 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.

- 12.4 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.

13. Approval and consent

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.

14. Assignment and Dealings

[Drafting Note 14: Specify any restrictions on the Developer's dealings in the land to which the Agreement applies and the period during which those restrictions apply]

15. Costs

[Drafting Note 15: Specify how the costs of negotiating, preparing, executing, stamping and registering the Agreement are to be borne by the Parties]

16. Entire agreement

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.

17. Further acts

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.

18. Governing law and jurisdiction

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 from them. The Parties will not object to the exercise of jurisdiction by those courts on any basis.

19. Joint and individual liability and benefits

Except as otherwise set out in this Agreement, any agreement, covenant, representation or warranty under this Agreement by 2 or more persons binds them jointly and each of them individually, and any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.

20. No fetter

Nothing in this Agreement shall 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.

21. Representation and warranties

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.

22. Severability

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.

23. Modification

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.

24. Waiver

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

25. GST

If any Party 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 recipient of the supply must pay an additional amount equal to the GST on that supply.

Execution

Dated: _____

Executed as an Agreement: _____

Appendix D

Template explanatory note

Environmental Planning and Assessment Regulation 2000

(Clause 25E)

Explanatory Note

Draft Voluntary Planning Agreement

Under s7.4 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 Voluntary planning agreement

5. Assessment of the Merits of the Draft Voluntary planning agreement

The Planning Purposes Served by the Draft Voluntary planning agreement

How the Draft Voluntary planning agreement Promotes the objects of the Environmental Planning and Assessment Act 1979

How the Draft Voluntary planning agreement Promotes the public Interest

For Planning Authorities:

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

The Impact of the Draft Voluntary planning agreement on the Public or Any Section of the Public

Other Matters

Signed and Dated by All Parties

Appendix E

Template condition of development consent

(Where voluntary planning agreement accompanied a development application)

##. Pursuant to section 4.17 of the Environmental Planning and Assessment Act 1979, the voluntary planning agreement that relates to the development application the subject of this consent must be entered into before [*Insert Requirement*].

(Where voluntary planning agreement accompanied an application to change an environmental planning instrument)

##. Pursuant to section 4.17(1) of the *Environmental Planning and Assessment Act 1979*, the voluntary planning agreement that accompanied the application made by [*Insert Name of Developer*] to [*Insert Name of Planning Authority*] dated [*Insert Date*] relating to [*Specify Name of Environmental Planning Instrument*] for the purpose of the making of the development application the subject of this consent.