



Bayside Council

Serving Our Community

Bayside Council Planning Agreement Policy



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Bayside Council Planning Agreement Policy 2022

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1. Preliminary

1.1 About this policy

This document contains Bayside Council's (Council) Planning Agreement Policy. Planning agreements are legally established under the *Environmental Planning and Assessment Act 1979* (Act) and the *Environmental Planning and Assessment Regulation 2021* (Regulation).

1.2 Name of this policy

This policy is the Bayside Council Planning Agreement Policy

1.3 Objectives of this policy

The objectives of this policy are:

- (a) To establish Council's policy on the use of planning agreements,
- (b) To provide a clear and transparent framework for the Council's use of planning agreements,
- (c) To ensure that the negotiation, preparation, and implementation of planning agreements occurs in an open, fair, consistent, and accountable manner,
- (d) To establish a probity framework for the negotiation, preparation, and implementation of planning agreements,
- (e) To facilitate flexibility in the provision of required infrastructure for Bayside's growing and changing community.

1.4 Land to which this policy applies

This policy applies to all land within the Bayside Council Local Government Area (LGA) and to land outside of Council's LGA in the case of a joint planning agreement with another Council.

1.5 When will this policy be used?

This policy will be used in association with planning agreements to which the Council is a party, within their meaning under the Act and the Regulation.

1.6 What is a planning agreement?

Part 7, Subdivision 2, 7.4(1) of the Act defines a planning agreement as:

(1) 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.

1.7 Why use planning agreements?

Planning agreements may be used to achieve public purpose outcomes that ordinarily would not be available through the planning and development system or are available, but in a constrained manner.

Planning agreements:

- a) provide a means for allowing the local host community to share in the benefit obtained by a developer due to a usually unanticipated change in planning controls or a consent to a development application;
- b) provide a way for the local community to secure public benefit outcomes that address the impact of development on private and public land;
- c) provide a flexible means for achieving good development outcomes in conjunction with public purpose outcomes, especially when development deviates from what may have been anticipated;
- d) allow opportunities for more innovative and efficient provision of public purpose outcomes than might be realised by other means; and
- e) provide opportunities for the local community to participate in the quality and delivery of public purpose outcomes provided along with development.

1.8 When Council may consider a planning agreement?

The Council may consider entering into a planning agreement when a developer:

- a) proposes to, or has made, a request for a planning proposal seeking a change to the Bayside Local Environmental Plan 2021; or
- b) proposes to, or has made, a development application, or an application under section 4.55 of the Act to modify a development consent, or made a Complying Development application; or
- c) proposes to undertake development on land included in the Bayside Local Environmental Plan 2021 - Land Reservation Acquisition Map; or
- d) proposes development for the purpose of signage to which Chapter 3 of State Environmental Planning Policy (Industry and Employment) 2021 applies.

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

1.9 Contributions authorised by a planning agreement

Planning agreement contributions may comprise:

- (a) monetary contributions; or
- (b) the dedication of land free of cost; or
- (c) any other material public benefit, or
- (d) any combination of the above.

Planning agreement contributions must be used or applied towards a public purpose. A planning agreement may replace or be in addition to infrastructure contributions otherwise payable in a particular circumstance under s.711 and/or s.7.12 of the Act. Any applicable Special Infrastructure Contribution (SIC) must be paid in addition to a planning agreement.

1.10 Principles for using a planning agreement

The Council's involvement in planning agreements is bound by the following principles:

- (a) Foremost, planning outcomes will not be bought or sold through planning agreements. Public purpose outcomes offered by developers do not make unacceptable development acceptable.
- (b) The Council will not allow planning agreements to fetter the exercise of its statutory planning functions.
- (c) When considering a written request from an applicant for a variation under clause 4.6 of the Bayside Local Environmental Plan 2021 seeking the variation of a development standard, the Council will not give weight to a planning agreement, be it executed, in draft or under offer. Public benefits provided under a planning agreement must not be exchanged for a variation from a development standard under any circumstances. Variations to development standards under Clause 4.6 must be justified on planning grounds, and the benefit under a planning agreement should preferably contribute to achieving the planning objective of the development standard.
- (d) The Council will only use planning agreements for a proper planning purpose.
- (e) Planning agreements should not include public purpose outcomes wholly unrelated to a particular development. Council, at its sole discretion, may apply a monetary contribution made under a planning agreement towards a public purpose other than the purpose specified if Council considers that the public interest would be better served.
- (f) The Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering planning agreements.
- (g) The Council will not improperly rely on its statutory position in order to extract unreasonable public purpose outcomes from a developer under a planning agreement.
- (h) Value capture should not be the primary purpose of a planning agreement.

2. Policy Context

2.1 Legislative framework

This policy and the preparation, content and implementation of planning agreements have regard to and are governed by:

- a) Part 7, Division 7.1, Subdivision 2 of the Act,
- b) Part 9, Division 1 of the Regulation,

With Consideration of:

- c) Any relevant practice note; current version issued by the NSW Department of Planning, Industry and Environment (DPIE) on 12 February 2021.

The practice note is legally binding in so far as:

Clause 203(7) of the Regulation operates to require Council to consider the practice note when negotiating or entering into planning agreements: *(7) A council that is negotiating or entering into a planning agreement must consider any relevant practice notes.*

All planning authorities are required under clause 205(2) of the Regulation, to consider the practice note when preparing the explanatory note. *(2) In preparing the explanatory note, the planning authority must consider any relevant practice notes issued by the Planning Secretary under section 203(6).*

If there are any inconsistencies between this policy and the practice note, the practice note prevails.

3. Preparing a planning agreement

3.1 Probity

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

- a) Roles and responsibilities within the processes for a planning agreement, a planning proposal and a development application will be managed to ensure transparency, impartiality and accountability and to avoid conflicts of interest. This will generally include separation of roles and responsibilities.
- b) Commercial and financial information will be treated as confidential material.

Depending on the type of planning agreement and the Council's involvement, the Council may engage a probity expert for advice and assistance with the agreement.

When Council owns land in association with a planning agreement, a probity plan may be created to ensure best practice.

Probity costs may be shared between Council and other parties associated with the planning agreement depending on a case by case basis.

3.2 Negotiating a planning agreement

3.2.1 Who will negotiate?

In any planning agreement the Council acts as a regulatory and planning authority and, in most cases, as a stakeholder and asset manager. This policy acknowledges those roles and seeks to separate them in order to ensure probity. Therefore, in negotiating a planning agreement the following arrangements regarding negotiation will be practiced:

- a) A Council staff member will be responsible for negotiating or co-ordinating the negotiation of a planning agreement with a developer or their representative. This will not be the staff member responsible for the assessment of the related planning proposal or development application.
- b) Councillors will not participate in negotiations with a developer or their representatives but will have a role in:
 - i. endorsing a draft planning agreement for exhibition,
 - ii. endorsing an offer to enter into a planning agreement,
 - iii. approving a planning agreement.
- c) Where negotiations occur in regard to land that is not owned by the developer, the written approval of the land owner authorising the developer to act on their behalf must be provided to the Council prior to commencement of negotiations. This requirement applies to land that is the subject of the development application or planning proposal and other land which may be part of negotiations.
- d) The developer is required to disclose all third party interests in the land or lands that are the subject of negotiations. The written consent of those parties must be provided prior to the commencement of negotiations.

3.2.2 When should negotiations commence?

The Council prefers that negotiations for a planning agreement commence before the lodgement of a development application or a request for a planning proposal is made. Negotiations may commence after a formal pre-development application or pre-planning proposal meeting has been undertaken.

3.2.3 Reporting and decision making

Throughout the planning agreement process, reports will be provided to the relevant committees of the Council and recommendations from those committees will be considered by the Council.

3.3 Who will prepare a planning agreement?

Unless otherwise determined between the parties:

- the developer will be responsible for drafting the offer to enter into a planning agreement.
- Council solicitors will draft the first-round version of a draft planning agreement and the explanatory note which must be exhibited with the planning agreement.
- The first-round draft planning agreement is then further revised through the Parties solicitors until an in-principle agreement in writing is achieved between the parties.

3.4 Acceptability Test

The Council will consider the following matters when determining the acceptability of a planning agreement by applying an Acceptability Test as outlined below.

A planning agreement must:

1. Provide development contributions that can be used for or applied towards a public purpose that would not form part of development consent obligations as part of the development in the absence of a planning agreement.
2. Be directed towards legitimate planning purposes, which can be identified in the statutory planning controls and other adopted planning strategies and policies applying to development.
3. Provide for the delivery of infrastructure or public benefits not wholly unrelated to the development.
4. Produce outcomes that meet the general values and expectations of the public and protect the overall public interest.
5. Provide for a reasonable means of achieving the desired outcomes and securing the benefits.
6. Protect the community against adverse planning decisions.
7. Satisfy the statutory requirements for planning agreements contained in the Act and the Regulation.
8. Satisfy the principles for using a planning agreement contained in this policy,
9. Not be in conflict with another planning agreement applying to the relevant land.

3.5 Acceptability of land to be dedicated The Council

In deciding whether land to be dedicated is acceptable, the 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 and renewal costs to Council, and
- f) works proposed to be undertaken by the applicant.

3.6 Acceptability of a material public benefit

In deciding whether a material public benefit is acceptable, the Council will consider, where relevant, matters including:

- a) the monetary value of the benefit,

- b) what needs of the community could be satisfied,
- c) the financial implications for the Council,
- d) the timing of completion of works or the delivery of the benefit, and
- e) future recurrent costs associated with the benefit.

3.7 Valuation of development contribution or offer

The monetary value of a development contribution or an offer by a developer comprising land to be dedicated or a material public benefit is to be determined prior to a draft planning agreement being agreed in-principle.

In most cases, a land valuation is to be determined by a qualified land valuer and a qualified quantity surveyor in the case of a material public benefit.

3.8 Costs

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

The Council's costs in negotiating, assessing, reviewing, administering and enforcing the planning agreement will be met in part or full by the developer depending on the circumstances. The Council's costs may be related to matters and actions including the use of independent consultants, legal advice, notification and advertising, and Council staff preparation and administration time.

The planning agreement will include provision for the payment of costs by the developer and the Council. The developer may be required to pay a security deposit for meeting the Council's costs.

4. Form and content of a planning agreement

4.1 Statutory requirements

The Act and Regulation set out the statutory requirements governing the form and content of a planning agreement and the mandatory process in its preparation, including steps for public notification and the requirement for explanatory notes. Details contained in the Act and Regulation are supplemented by the Practice Note. This policy adopts the requirements and processes contained in the Act, the Regulation and the Practice Note.

4.2 Timing the delivery of development contributions

A planning agreement will specify the time at which a development contribution must be paid or provided.

Where the planning agreement is associated with a development application, a monetary contribution should be provided prior to an occupation certificate being issued.

In other cases, the timing for the payment of a monetary contribution will be negotiated. A planning agreement may contain a provision allowing the deferral, periodic payment or staging of a development contribution. In such cases, a provision allowing the adjustment of the contribution value may be included in the agreement.

4.3 Indexation - adjustment of development contributions

A planning agreement that includes a monetary development contribution payment to Council is to be indexed on the date of payment using the following indexes released by the Australian Bureau of Statistics and will be selected, at the sole discretion of Council, depending on the nature and type of development contribution to be indexed:

- 1) All groups CPI; Sydney

Series ID: A2325806K, 640101

- 2) Producer Price Index; 3101 Road and bridge construction NSW

Series ID A2333685A, 6427017

Late monetary contributions payments will attract a penalty interest rate payable in accordance with Rule 36.7 of the Uniform Civil Procedure Rules 2005.

4.4 Pooling of development contributions

Any residual monetary amounts remaining in planning agreement reserves, may be pooled and used by Council towards a public purpose outcome at the sole discretion of Council.

Monetary developer contributions arising from planning agreements can be pooled, at the sole discretion of Council with funds obtained from other planning agreements, contribution plans, grants and any other funding sources to be used for public purposes identified in those agreements and plans or as per this policy.

4.5 Security/enforcement of a planning agreement

A planning agreement will include a provision relating to the enforcement of obligations set out in the agreement. An appropriate type of security will be negotiated as part of the planning agreement and will be aligned with the type of contribution such as a monetary contribution, land dedication or a work in kind.

The type of security will also be aligned with different circumstances that might apply with the delivery of the particular contribution and the existing and future tenure of land. Types of acceptable security to Council include bonds and bank guarantees and a pre-acquisition agreement in the case of land dedication.

Insurance Bonds or Investment Bonds will not be accepted by Council.

4.6 Dispute resolution

A planning agreement will include a provision for the mediation of disputes. Should it be necessary to enter into dispute resolution, each party will bear their own costs. If the dispute has arisen due to a failure of the developer in meeting an obligation, Council will pursue costs.

4.7 Assignment and dealings by the developer

A planning agreement will include a provision requiring the Council's prior consent to:

- a) the sale or transfer of the land which is the 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.

4.8 Registration of a planning agreement

A planning agreement will include a provision requiring the registration of the agreement on the title of the land to which the agreement applies at the developer's cost.

4.9 Reporting

Council will report on planning agreements in its Annual Report and maintain a register as required by the Act and Regulations.

5. Administrative

5.1 Definitions

In this policy the following definitions apply.

Annual report means the report prepared by the Council under section 428 of the Local Government Act 1993.

Contribution plan means a contribution plan approved under section 7.18 of the Act.

Council means Bayside Council.

Developer means an entity or entities carrying out Development as referred to in section 1.5 of the Act.

Development has the same meaning referred to in section 1.5 of the Act.

Development application has the same meaning referred to in section 1.4 of the Act.

Development Consent has the same meaning referred to in section 1.4 of the Act.

Explanatory note has the same meaning referred to in section 205 of the Regulations.

Local infrastructure contributions has the same meaning referred to in section 7.11 (cf previous s 94) and section 7.12 (cf previous s 94A) of the Act.

Minister means the Minister for Planning.

Planning agreement has the same meaning referred to in section 7.4 of the Act.

Planning agreement contribution means a contribution 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, or a combination thereof, to be used for, or applied towards a public purpose.

Planning authority has the same meaning referred to in section 7.1 of the Act.

Practice note means the document titled "Planning agreements" issued by the NSW Department of Planning, Industry and Environment (DPIE) on 12 February 2021.

Planning proposal means a document and supporting information that explains the intended effect and justification of a proposed Local Environmental Plan (LEP) or amendment to a Local Environmental Plan (LEP).

Public purpose as defined under section 7.4(2) of the Act, includes (without limitation) any of the following:

- (a) the provision of (or the recoupment of the cost of providing) public amenities or public services,*
- (b) the provision of (or the recoupment of the cost of providing) affordable housing,*
- (c) the provision of (or the recoupment of the cost of providing) transport or other infrastructure relating to land,*
- (d) the funding of recurrent expenditure relating to the provision of public amenities or public services, affordable housing or transport or other infrastructure,*
- (e) the monitoring of the planning impacts of development,*
- (f) the conservation or enhancement of the natural environment.*

the Act means the Environmental Planning and Assessment Act 1979.

the Regulation means the Environmental Planning and Assessment Regulation 2021.

Value capture means a Planning authority capturing a proportion of the land value increase accruing from planning activities that increase the development potential of the land.

5.2 Approval and commencement

This policy was approved by Council on 23 March 2023 and commenced on 23 March 2023.

5.3 Monitoring, reviewing and reporting

The operation of this policy will be monitored, reviewed and reported to the Council periodically.