

Report of Planning and Economy to the Ordinary Meeting of Council held on Monday 19 October 2015

**PE3 – Planning Agreements Policy**

PE3

**Planning Agreements Policy**

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**EXECUTIVE SUMMARY**

- The purpose of this report is to seek a resolution from the Council to adopt the attached Planning Agreements Policy (Policy) as its guiding framework for preparing and considering planning agreements.
- It is recommended that the Council:
  - Note the changes that have been made to the Policy after its exhibition as a Draft Policy, as shown in Attachment 1
  - Resolve to adopt the Planning Agreements Policy included at Attachment 2
  - Resolve, pursuant to s55(3)(i) of the Local Government Act 1993 not to invite tenders in respect of any planning agreement because of the unavailability in every case of competitive tenders, meaning that a satisfactory result cannot and would not be achieved by inviting tenders.

**REPORT**

At the Ordinary Meeting of 18 May 2015, Council considered a report on a Draft Planning Agreements Policy that had been prepared. This report explained why a Planning Agreements Policy was considered necessary, and also explained the main features of the Draft Policy.

In summary a Policy to provide a management framework around the preparation and consideration of Planning Agreements is considered good practice for the following reasons:

- Entering a Planning Agreement often involves setting aside Council's adopted Plan on developer contributions (e.g. Section 94 and Section 94A Plans). A Policy will provide guidance as to when it is appropriate to do this.
- A Planning Agreements Policy will provide certainty to developers regarding what Council's "rules" are for planning requirements and so it should help streamline the negotiation process for preparing Planning Agreements.

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**EXHIBITION OF THE DRAFT POLICY**

Exhibition of the Draft Policy occurred from 3 June 2015 until 4 July 2015 at Council's Administration Centre, Wollondilly Library and on the Council website. Two submissions were received during the exhibition period, and are reviewed below:

- Submission No 1 - queried the implications of the Draft Policy for the Draft Planning Agreement that has been exhibited for Macquariedale Rd South Appin. The submission did not object to the Draft Policy and no changes have been made to it as a result of this submission.
- Submission No 2 - this submission raised concerns that the exhibited Draft Policy attempted to limit what could be provided as benefits by a developer under the agreement, by restricting the purposes for which Section 94 offsets would be given. Some changes were made to the relevant clauses in the Draft Policy. These changes have provided more clarity regarding Council's position regarding when Section 94 offsets will be allowed through a Planning Agreement, and are explained in more detail below.

**CHANGES TO THE EXHIBITED VERSION OF THE DRAFT POLICY**

Some changes have been made to the exhibited version of the Draft Policy. Changes have been included following discussion with Council's legal advisors, further internal review of the draft Policy and a consideration of the matters raised in the submissions.

Attachment 1 to the Policy shows all the changes made to the exhibited version of the Draft Policy, with text that has been added and text that has been deleted. It is considered that these changes are minor and they do not require the re-exhibition of the Draft Policy.

Amendments have been made to the clauses that outline when offsets of Section 94 Contributions are permitted under a Planning Agreement (Clauses 4.7.2(a) and (b) and clauses 4.7.10 and 4.7.11). The revised clauses provide for a consistent approach towards Section 94 offsets for all works that are offered under a planning agreement.

Briefly, the revised clauses provide that Section 94 offsets will be considered when a work offered under a Planning Agreement is already included in Council's Contributions Plan. Where a work being offered under a Planning Agreement is not included in the Contributions Plan, Council will generally not offer a Section 94 offset, unless Council considers that a wider community benefit likely to result.

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As a result of these changes clauses 4.7.2(a) and (b) (that related specifically to offsets for roads) have been deleted, and the provisions of these clauses have been included in the revised clauses 4.7.10 and 4.7.11, which set out the circumstances when offsets (or credits) will be considered.

**PLANNING AGREEMENTS AND THE TENDER REQUIREMENTS UNDER THE LOCAL GOVERNMENT ACT**

Part 3 of the recommendation contained in this report suggests that Council:

*"Resolve, pursuant to s55(3)(i) of the Local Government Act 1993 not to invite tenders in respect of any planning agreement because of the unavailability in every case of competitive tenders, meaning that a satisfactory result cannot and would not be achieved by inviting tenders"*

This recommendation has been included as a result of legal advice to ensure that Council is compliant with the tendering procedures included in Section 55(1) of the Local Government Act 1993, and which requires Council to invite tenders for carrying out works that have a value in excess of \$150,000.

Planning agreements frequently require works to be carried out in excess of this value, and as the planning agreement acts as a commercial contract between Council and the developer (as provider of the works) there is a risk that Council may be in breach of the Act by contracting the developer to undertake the works through the planning agreement without having gone through a tender process before entering into the agreement.

However Section 55(3) of the Act provides a number of exceptions to a Council being required to enter the tender process, including:

*(i) a contract where, because of extenuating circumstances, remoteness of locality or the unavailability of competitive or reliable tenderers, a council decides by resolution (which states the reasons for the decision) that a satisfactory result would not be achieved by inviting tenders.*

This exemption from the tender process is relevant to works to be carried out under a planning agreement because the only party that would ever decide to enter the planning agreement (ie the works contract) would be the developer as he/she would be the only party that would receive the benefits under the agreement, such as Section 94 offsets, obtaining the development consent or rezoning. Furthermore, the works are often undertaken on, or in conjunction with works on the developers site, which no other developer would have access to.

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As a result, the circumstances envisaged by Section 55(3)(i) regarding extenuating circumstances and/or the unavailability of competitive tenderers would always apply to works provided under a planning agreement and as a result, Council can except itself from the tendering requirements of the Act.

Section 55(3)(i) requires a resolution from Council to except itself from the tendering requirements, and the resolution provided below has been included to satisfy this requirement. This resolution will apply to all future planning agreements and that a specific resolution is not required each time a planning agreement is entered into. Clause 2.6 of the Policy has been included to confirm that Council has passed the required resolution and hence is compliant with the tender requirements in respect of works to be provided under any and all Planning Agreements.

**CONSULTATION**

Public consultation regarding the Draft Policy has occurred through the public exhibition process as described above. As noted, two (2) submissions were received during the exhibition period.

Consultation has also occurred with Council's Audit Committee and Council's legal advisors in finalising the policy.

Consultation was also undertaken with Lindsay Taylor Lawyers.

**FINANCIAL IMPLICATIONS**

This matter has no financial impact on Council's adopted budget or forward estimates.

However the preparation of planning agreements in accordance with a Planning Agreements Policy may result in capital works undertaken by the developer in lieu of contributions paid under Council's Section 94 and Section 94A Plans.

**ATTACHMENTS**

1. Summary of changes made to the Draft Policy since exhibition.
2. Planning Agreements Policy submitted for adoption by Council.

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**RECOMMENDATION**

1. That Council note the changes that have been made to the Draft Policy following its exhibition, and which are shown at Attachments 1.
2. That Council resolve to adopt the Planning Agreements Policy included at Attachment 2, to be used as Council's guiding framework for preparing and assessing planning agreements.
3. That Council resolve, pursuant to s55(3)(i) of the Local Government Act 1993 not to invite tenders in respect of any planning agreement because of the unavailability in every case of competitive tenders, meaning that a satisfactory result cannot and would not be achieved by inviting tenders.

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**SUMMARY OF CHANGES – PLANNING AGREEMENTS POLICY FOR WOLLONDILLY COUNCIL**

Location	Previous Wording	New Wording	Reasoning
4.4 (c)	(c) the Council will not allow planning agreements to improperly fetter the exercise of its functions under the Act, or any other Act or law,	(c) the Council will not allow planning agreements to improperly fetter the exercise of its functions under the Act, the <b>Environmental Planning and Assessment Regulation 2000 (Regulation)</b> or any other Act or law,	Change made to comply with legal advice
4.4 (i)	i) planning agreements should not be used to justify a dispensation with applicable development standards under clause 4.6 of the Wollondilly Local Environmental Plan 2011.	i) planning agreements should not be used to justify a dispensation with applicable development standards under clause 4.6 of the Wollondilly Local Environmental Plan 2011 <b>(Wollondilly LEP)</b> .	To comply with legal advice
4.6.3	4.6.3 This Policy includes references to a document entitled "Planning Agreements Procedures Guideline" (Procedures Guideline) which provides information about the procedural aspects of preparing planning agreement, prepared for use by	4.6.3 This Policy includes references to a document entitled "Planning Agreements Procedures Guideline" (Procedures Guideline) which provides information about the procedural aspects of preparing planning agreement, <b>and which has been</b>	To comply with legal advice and to clarify that the Procedures Guideline has been prepared for use by Council staff involved in preparing Planning Agreements

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	Council staff involved in preparing planning agreements, though it may also be of interest to other parties involved in preparing planning agreements.	prepared for use by Council staff involved in preparing planning agreements,	
4.7.1 (b)	b) where the agreement provides for works to be carried out, a bond or bank guarantee from an Australian bank in favour of the Council should be provided for the full value of the works, and on terms otherwise acceptable to Council (refer also to 'f below);	b) where the agreement provides for works to be carried out, a bond or bank guarantee from an Australian bank in favour of the Council should be provided for the full value of the works, and on terms otherwise acceptable to Council (refer also to subclause 'f below);	Minor change to text to comply with legal advice
Page 6, 4.7.1 d)	d) as noted in Clause 4.16, Council will also require the planning agreement to be registered on the title of the land;	d) as noted in Clause 4.7.16, Council will also require the planning agreement to be registered on the title of the land;	Correct a typo in the clause numbering
4.7.1 e)	e) Council may also in appropriate circumstances require the planning agreement to create a charge on the land, and to provide that council can lodge a caveat on the title of the land to protect its interests;	e) Council may also in appropriate circumstances require the planning agreement to create a charge on the land, and to provide that Council can lodge a caveat on the title of the land to protect its interests;	Correct a typo
4.7.2, 2 <sup>nd</sup> paragraph	Where a planning agreement proposes the dedication of land to Council, Council will consider this in relation to Council's adopted "Dedication of Land Policy" (PLA0036).	Where a planning agreement proposes the dedication of land to Council, Council will consider this in relation to Council's adopted "Dedication of Land Policy" (PLA0036). Applicants proposing	Additional wording added to clarify the relevance of the "Dedication of Land" Policy to some planning agreements.

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		<p>to dedicate land to council under a planning agreement should familiarize themselves with this policy, particularly the requirement for a contribution for the maintenance of "environmental land" where this is proposed to be dedicated to Council</p>	
<p>4.7.2</p>	<p>In relation to the inclusion of roadworks in a Planning Agreement, the Council will be guided by the following principles:</p> <p>a) Roads Included in the Contributions Plan:</p> <p>If a road which is listed in Council's Contributions Plan is proposed for upgrading (or for any road or traffic related works) as part of a Planning Proposal or a Development Application, the works can be included in a Planning Agreement and offsets given against Section 94 payments. Offsets will generally be allowed only up to the amount that would otherwise be paid as a Section 94 payment for the roads component of that development. However, in limited</p>	<p>Deleted</p>	<p>These clauses have been deleted following consideration of legal advice which had identified the need for more consistency in Council's approach to allowing Sec 94 offsets for roadworks vis a vis other works that might be provided through a planning agreement. The revised approach is set out in clauses 4.7.10 and 11 as explained in the council report.</p>



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	<p>circumstances (depending upon the offer made by the developer) the Council may consider allowing offsets against other categories of works included in the Contributions Plan, up to the full cost of the roadworks as specified in the Contributions Plan. Should the cost of carrying out the roadworks exceed the cost that is included in the Contributions Plan against those works, Council will consider allowing the developer credits against Section 94 contributions payable for future developments in the Wollondilly Shire, up to an amount of 50% of the difference between the cost of the works as carried out by the developer, and the cost of the works included in the Contributions Plan.</p> <p>b) Roads not included in the Contributions Plan:</p> <p>i. If a road which is not listed in Council's Contributions Plan will require upgrading (or any other road or traffic related works) as part</p>		
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	<p>of a Planning Proposal or a Development Application, the works can be included in a Planning Agreement as “direct works” to provide certainty that they will be delivered. Council will expect that the cost of these works will be borne by the developer, and in most cases no offset will be given against Section 94 contributions, particularly where the works are required to service a proposed development. Council will however consider a Section 94 offset up to a maximum of 50% of the amount that would otherwise be paid as a Section 94 payment for the roads component of that development in cases where Council considers that there will be a material public benefit as a result of the works.</p> <p>ii. As an alternative to this approach, and in cases where a significant public benefit will result from the works, Council may agree to consider recoupment mechanisms for the developer where the developer agrees to forward fund such</p>		
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	<p>works. Such mechanisms could include the identification of the road in Councils Developer Contributions Plan and allowing the developer to recoup a percentage of the cost of the works from contributions paid as a result of future development. In other cases Council may include the road in its Contributions Plan where it can be shown that future development in the area will incur a significant benefit from the completion of these works (blue text to be deleted).</p>		
<p>4.7.10, 4.7.11</p>	<p>4.7.10 Methodology for valuing Public Benefits under a Planning Agreement                      a) Offsets                      Council will consider whether the value of any land or works provided under a planning agreement (determined in accordance with the remainder of this clause 4.7.10) should offset contributions payable under s94 of the Act.                       b) Dedication of Land                      Where the benefit under a planning agreement is the provision of land for a</p>	<p>4.7.10 Methodology for valuing Public Benefits under a Planning Agreement                      a) Offsets                      Council will consider whether the value of any land or works provided under a planning agreement (determined in accordance with the remainder of this clause 4.7.10) should offset contributions payable under s94 of the Act. Any offsets allowed shall be determined in accordance with clause 4.7.11 below</p>	<p>Following legal advice and review by staff, these clauses have been amended to reflect a more consistent approach to Council's consideration of allowing Section 94 offsets for works provided through a Planning Agreement.</p>

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	<p>public purpose, the Council will generally seek to value the benefit on the basis of the estimated amount of compensation to which the Developer would be entitled under the Land Acquisition (Just Terms Compensation) Act 1991 upon the compulsory acquisition of the land.</p> <p>Council will normally require the developer to obtain a valuation of the land at his or her cost. Council may also seek to confirm this value by arranging for a separate valuation at its own cost.</p> <p>If land is dedicated to Council under a Planning Agreement, it will not be considered to be dedicated at "no cost" to Council if an offset of the Section 94 payment that would otherwise be required is given.</p> <p>c) Carrying Out of Works Where the benefit under a planning agreement is the carrying out of works for a public purpose, the Council</p>	<p>b) Dedication of Land Where the benefit under a planning agreement is the provision of land for a public purpose, the Council will generally seek to value the benefit on the basis of the estimated amount of compensation to which the Developer would be entitled under the Land Acquisition (Just Terms Compensation) Act 1991 upon the compulsory acquisition of the land.</p> <p>Council will normally require the developer to obtain a valuation of the land at his or her cost. Council may also seek to confirm this value by arranging for a separate valuation at its own cost.</p> <p>If land is dedicated to Council under a Planning Agreement, it will not be considered to be dedicated at "no cost" to Council if an offset of the Section 94 payment that would otherwise be required is given.</p> <p>b) Carrying Out of Works</p>	
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	<p>will generally seek to value the benefit on the basis of the estimated value of the completed works determined using the method that would be ordinarily adopted by an independent quantity surveyor.</p> <p>Where such works are already included in Council's Contributions Plan, the value of any offset that may be given for such works through the planning agreement will generally not exceed the value of the work that is included in the Contributions Plan.</p> <p>Where an offset is considered appropriate Council will only allow the value of the works to be offset against s94 contributions which would otherwise be payable in respect of the same type of work, and the value of the offset will not exceed the s94 contributions otherwise payable in respect of that type of work. (This clause may be varied by Clause 4.7.2 in relation to roadworks in limited circumstances if</p>	<p>Where the benefit under a planning agreement is the carrying out of works for a public purpose, the Council will generally seek to value the benefit on the basis of the estimated value of the completed works determined using the method that would be ordinarily adopted by an independent quantity surveyor.</p> <p>Council will normally require the developer to obtain a valuation of the works being provided through a planning agreement land at his or her cost. Council may also seek to confirm this value by arranging for a separate valuation at its own cost.</p> <p>Council will also have regard to other relevant mechanisms for valuing the benefits proposed to be provided under a planning agreement, and in particular may refer to the "Local Infrastructure Benchmark Costs (IPART, Final Report April 2014)."</p> <p>Council may require that the value of contributions of land and works made</p>	
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	<p>determined to be appropriate).</p> <p>Council will normally require the developer to obtain a valuation of the works being provided through a planning agreement land at his or her cost. Council may also seek to confirm this value by arranging for a separate valuation at its own cost.</p> <p>Council will also have regard to other relevant mechanisms for valuing the benefits proposed to be provided under a planning agreement, and in particular may refer to the “Local Infrastructure Benchmark Costs (IPART, Final Report April 2014).”</p> <p>Council may require that the value of contributions of land and works made under a planning agreement should be indexed using an appropriate index (refer cl 4.7.7).</p> <p>4.7.11 Credits and refunds a) Credits Except as provided for in the following</p>	<p>under a planning agreement should be indexed using an appropriate index (refer cl 4.7.7).</p> <p>4.7.11 Offsets and Credits for the Payment of Developer Contributions</p> <p>Where a developer proposes to provide infrastructure (such as works or land) to Council as a benefit under a planning agreement, Council may allow the provision of this infrastructure to offset contributions payable under s94 of the Act, and/or to allow a credit against future Section 94 contributions.</p> <p>Council’s consideration as to whether to allow an offset or credit will be based on the following principles:</p> <p>a) Offsets and Credits for infrastructure included in Council’s Contributions Plan i) Where the infrastructure that is to be provided as a benefit under a Planning Agreement is listed in Council’s Contributions Plan, the maximum value of any offset (or credit) that may be given through the</p>	
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	<p>paragraph, Council will generally not grant a credit for the value of contributions made under a planning agreement against any development contributions required in relation to development other than the development to which the planning agreement relates.</p> <p>Where a developer has provided infrastructure under a planning agreement which exceeds the value of the s94 contributions otherwise payable in respect of the development to which the planning agreement relates, Council may allow that surplus value to be offset against s94 contributions payable in respect of other development carried out by the developer, to the extent that Council has been able to recoup the cost of that infrastructure from other developers.</p> <p>b) Refunds The Council will generally not give refunds of any contributions that are made under a planning agreement.</p>	<p>Planning Agreement will generally not exceed the value for that infrastructure that is included in the Contributions Plan</p> <p>ii) Where an offset is considered appropriate Council will generally only allow an offset up to the amount of the s94 contributions otherwise payable in respect of the same category of infrastructure included in the Section 94 Plan</p> <p>iii) Where the cost of the works or the land value exceeds the amount of any offset allowed by way of sub clause (ii) above (the surplus value), Council will generally not allow any refund of the surplus value to the developer.</p> <p>iv) In cases where a piece of infrastructure benefits other development in the area (carried out by other developers), or where Council wishes for the delivery of that infrastructure to be brought forward, Council will consider entering into recoupment processes with other developers and any money so recouped up to the "Surplus</p>	
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	<p>The Council will generally not agree to refund any amount by which a contribution made under a planning agreement exceed the contributions which the developer would otherwise have been required to make under the Act.</p>	<p>value” will be allowed as a credit to the first developer against future Section 94 contributions for other development in the Wollondilly local government area;</p> <p>b) Offsets and Credits for infrastructure items not included in Council’s Contributions Plan</p> <p>i) Subject to subclause (ii) below, Council will generally not allow offsets or credits for infrastructure to be provided as a benefit under a Planning Agreement that are not included in Councils Section 94 or Section 94A Plan. This applies particularly when the proposed infrastructure is considered as “direct works” (ie that is directly attributable to the proposed development - such as road upgrades resulting directly from a proposed development). Council will however support the inclusion of “ direct works” in a planning agreement to help provide certainty that they will be delivered.</p> <p>ii) For all infrastructure items</p>	
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		<p>provided for by a Planning Agreement that are not included in Council's Contributions Plan, a Section 94 offset or credit against future contributions may be allowed where Council believes that a wider community benefit will result. The suitability of any offset, and the amount will be determined at Council's discretion, and will be considered against the following principles:</p> <ul style="list-style-type: none"> <li>• Allowing an offset up to the maximum of the amount otherwise payable through the Section 94 contribution for the corresponding category included in the Section 94 Plan;</li> <li>• Allowing credits to the developer on developer contributions payable on future development when Council has recouped money from other developers benefitting from the infrastructure, (for example, by including the item in a Section 94 Plan, or by the negotiation of planning agreements with other developers). The amount of credit allowed will be the</li> </ul>	
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		<p>amount of money actually received through the recoupment process, up to a maximum of the “surplus value”</p> <ul style="list-style-type: none"> <li>• Allowing offsets on other categories of the Section 94 contribution that is payable.</li> <li>• Including the item in a Section 94 Plan in cases where Council considers that the works will result in a significant benefit to the wider community;</li> </ul> <p>In considering whether to allow offsets or credits for these developments, Council will consider the likely impacts of the offset or the credit on delivering the works program included in the Contributions Plan;</p> <p>c) Credits and Refunds</p> <p>Council will generally not grant a credit for the value of any contributions made under a Planning Agreement other than in accordance with this paragraph</p> <p>Council will generally not give refunds of any contributions that are made under a Planning Agreement</p> <p>The Council will</p>	
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		generally not agree to refund any amount by which a contribution made under a Planning Agreement exceeds the contributions which the developer would otherwise have been required to make under the Act	
4.7.13 b)		b) Council is satisfied that the person to whom the land or rights are transferred is able to perform the obligations under the agreement, based on evidence to be provided to Council when Council's consent to the transfer is sought (previous subclauses 'b' and 'c' merged to create one subclause);	Remove an incorrect line space in the document to merge (previous) subclauses 'b' and 'c' to create a new subclause 'b'.
4.7.14	The Council will continuously monitor the performance of the developer's obligations under a planning agreement being complied with.	The Council will continuously monitor the performance of the developer's obligations under a planning agreement. In this regard, Council may require a planning agreement to require the developer to submit reports to show how the requirements of the planning agreement are being complied with.	Change made following internal review of draft document. Revised clause gives Council more powers to ensure compliance with the requirements of the Planning Agreement.
4.7.16	The Council will, subject to the requirements of Sec 93H of the Act require planning agreements to be	The Council will, subject to the requirements of Sec 93H of the Act require planning agreements to be	Comply with legal advice and correct a minor typo

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	<p>registered on the title of the property being developed or that is subject to the instrument change.</p> <p>To facilitate this process, Council will require the developer to provide all relevant documents for the purposes of registration within 10 days after execution of the agreement. Council will then attend to the registration.</p>	<p>registered on the title of the property being developed or that is subject to the instrument change.</p> <p>To facilitate this process, Council will require the developer to provide all relevant documents for the purposes of registration within <b>(ten)</b> 10 days after execution of the agreement. Council will then attend to the registration.</p>	
4.8, f)	<p>In this regard, Council (or Council's Executive) may require a Probity Plan to be prepared for some planning agreements, or recommend the appointment of a third party Probity Advisor to manage probity concerns. This may be appropriate for planning agreements that relate to a major development application or instrument change, where Council has a significant commercial stake in a development that is subject to a planning agreement, or where there may be a potential conflict of interest. Where such a Plan (or third party appointment) is made, Council will expect that the</p>	<p><b>f)</b> in this regard, Council (or Council's Executive) may require a Probity Plan to be prepared for some planning agreements, or recommend the appointment of a third party Probity Advisor to manage probity concerns. This may be appropriate for planning agreements that relate to a major development application or instrument change, where Council has a significant commercial stake in a development that is subject to a planning agreement, or where there may be a potential conflict of interest. Where such a Plan (or third party appointment) is made, Council will expect that the</p>	<p>Clause revised to clarify that council expects the developer to pay all of its costs for preparing a Probity Plan or engaging a third party Probity Advisor.</p>

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	developer should pay the entire cost of preparing;	developer should pay the entire cost of preparing the Plan, or engaging the third party Probity Advisor;	
4.8, h)	h) prior to the exhibition of any planning agreement, the endorsement of Council's Executive be sought. In considering the Agreement, the Executive will consider it against the checklist included in Schedule 1 of this Policy. A resolution from the Council will also be sought prior to exhibiting a draft planning agreement if determined appropriate by the Executive;	h) prior to the exhibition of any planning agreement, the endorsement of Council's Executive will be sought. In considering the Agreement, the Executive will consider it against the checklist included in Schedule 1 of this Policy. A resolution from the Council will also be sought prior to exhibiting a draft planning agreement if determined appropriate by the Executive;	Amendment made requiring Council's Executive to consider all Planning Agreements against the checklist included in Schedule 1.  This was made on legal advice to ensure that all planning agreements are considered against consistent criteria
4.8, j), k)	j) A planning agreement will be re-exhibited if any change is made to it after exhibition, other than a minor change which does not affect the operation of the agreement, or the contributions provided under the agreement (subject to legal advice in any particular case if considered necessary).  However, re-exhibition will not be needed if minor changes are proposed to the scope of works for a benefit provided under an Agreement,	j) A planning agreement will be re-exhibited if any change is made to it after exhibition, other than a minor change which does not affect the operation of the agreement, or the contributions provided under the agreement (subject to legal advice in any particular case if considered necessary).  (Second pgh deleted)	The amended text complies with legal advice stating that the retained paragraph provides sufficient flexibility for Council not to have to re-exhibit a planning agreement in the case of minor changes that do not affect the operation of the agreement or the contributions received.

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	<p>or if there are changes to the designs or specifications of the Agreement. In such cases the changes will be agreed to in writing between the parties and will be fully documented.</p>		
	<p>k) In spite of any delegations that might apply, The decision to enter into a planning agreement will always be made by the elected body of Council after considering a report on the matter. The report should advise Council of the details of the agreement, its compliance with Policy, and the outcome of the exhibition process. will ensure transparency in the decision making process for planning agreements. Should the planning agreement provide for the dedication of land to Council, a specific resolution will be sought from Council to accept the dedication of the land.</p>	<p>k) The decision to enter into a planning agreement will always be made by the elected body of Council after considering a report on the matter. The report should advise Council of the details of the agreement, its compliance with <b>this</b> Policy, and the outcome of the exhibition process. <b>This</b> will help ensure transparency in the decision making process for planning agreements. Should the planning agreement provide for the dedication of land to Council, a specific resolution will be sought from Council to accept the dedication of the land.</p>	<p>Relatively minor changes made to comply with legal advice</p>

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**1. POLICY OBJECTIVES**

- 1.1 The objectives of this policy are to:
- a) establish a framework governing the use of planning agreements by Council;
  - b) ensure that the use of planning agreements by Council is efficient, fair, transparent and accountable;
  - c) enhance flexibility in the provision of infrastructure and services for the community through the use of planning agreements;
  - d) enhance the range and extent of development contributions made by development towards public facilities in the Council's area;
  - e) set out the Council's specific policies on the use of planning agreements;
  - f) help to achieve objectives CO1, C02, G02, G05, G06, EN2, EC1, EC3, EC4, EC5 IN1, IN2, IN3 of the *Wollondilly Community Strategic Plan 2033*

**2. BACKGROUND**

- 2.1 The Environmental Planning and Assessment Act 1979 (**the Act**) empowers Council to require developers to make contributions of money, works or land in relation to a development. These contributions are used to help pay for services and infrastructure that need to be provided as a consequence of the development;
- 2.2 As an alternative to collecting these contributions, (known as Section 94 Contributions) the Act also enables the Council and developers to negotiate planning agreements under which the developer offers to provide services and infrastructure for the community, or contributions of money or land for such services and infrastructure;
- 2.3 Planning agreements allow for a wider range of public benefits to be obtained in comparison to benefits collected under Section 94 of the Act;
- 2.4 With the anticipated growth of Wollondilly it is likely that more developers will seek to enter into planning agreements with the Council. A policy on planning agreements will help facilitate the preparation of planning agreements in the future and will demonstrate good governance by Council;
- 2.5 This Policy sets out Council's overall policy framework for preparing and negotiating planning agreements and for assessing their suitability;
- 2.6 Council has resolved pursuant to s55(3)(i) of the Local Government Act 1993 not to invite tenders in respect of any planning agreement because of the unavailability in every case of competitive tenders meaning that a satisfactory result cannot and would not be achieved by inviting tenders

**3. ELIGIBILITY**

- 3.1 All land within the Shire of Wollondilly;
- 3.2 This policy also applies to planning agreements proposed in respect of land in Wollondilly Shire, and which will also apply to land in adjoining local government areas;

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- 3.3 All planning agreements prepared for land in the Wollondilly Shire should seek to follow this policy to the fullest extent possible;
- 3.4 The Policy will apply to all planning agreements that have not been exhibited at the time this Policy has been adopted.

**4. GUIDELINES**

**4.1 Council discretion to negotiate Planning Agreements**

The Council has the complete discretion to negotiate a planning agreement with a developer in connection with any application by the developer for a change to an environmental planning instrument or for development consent relating to any land in the Council's area, or in conjunction with the relevant Council of any land adjoining the Council's area.

**4.2 Council's Strategic Objectives for Planning Agreements**

In deciding whether to negotiate a Planning Agreement the Council will consider whether the agreement is consistent with the following strategic objectives:

- a) to generally advance Council's Mission for the Local Government Area as stated in the Wollondilly Community Strategic Plan 2033: *"(to) create opportunities in partnership with the Community to enhance the quality of life and the environment, by managing growth and providing sustainable services and facilities"*.
- b) to demonstrate consistency with at least one of the specific objectives of the Wollondilly Strategic Plan that were referred to in clause 1.1(g) of this Policy;
- c) to provide an enhanced and more flexible development contributions system for the Council,
- d) to supplement or replace, as appropriate, the application of s94 or s94A of the Act to development (refer also to Cls 4.5(d) and 4.5(j)).
- e) to give all stakeholders in development greater involvement in determining the type, standard and location of public facilities and other public benefits,
- f) 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,
- g) to provide or upgrade services and infrastructure to appropriate levels that reflect and balance environmental standards, community expectations and funding priorities, and
- h) to provide certainty for the community, developers and Council in respect to infrastructure, services and development outcomes.

**4.3 Specific Purposes of Planning Agreements**

The Council may consider negotiating a planning agreement with a developer to:

- a) 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,
- b) meet the demands created by the development for new public infrastructure, and services that may be outside those of the current Development Contributions Plan,
- c) address a particular deficiency or deficiencies in the existing provision of public facilities in the Council's area,
- d) achieve recurrent funding in respect of public facilities,



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- e) prescribe inclusions in the development that meet specific planning objectives of the Council relating to the development,
- f) monitor and/or mitigate the planning impacts of development, and
- g) secure planning benefits for the wider community (eg affordable housing, skills training).

**4.4 Fundamental principles governing the use of planning agreements**

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

- a) planning decisions shall not be bought or sold through planning agreements,
- b) development that is unacceptable on planning grounds will not be permitted because of benefits offered by planning agreements 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, the Environmental Planning and Assessment Regulation 2000 (**Regulation**) or any other Act or law,
- d) the Council will not use planning agreements for any purpose other than a proper public purpose (*note: a public purpose is defined in Sec 93F2 of the Act*),
- e) the Council will not actively seek benefits under a planning agreement that are wholly unrelated to the development the subject of that planning agreement, but may consider offers made by a developer,
- f) the Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed planning agreement,
- g) the Council will not improperly rely on its statutory position in order to extract unreasonable public benefits from developers under planning agreements,
- h) if the Council has a commercial stake in development the subject of a proposed planning agreement, 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, and
- i) planning agreements should not be used to justify a dispensation with applicable development standards under clause 4.6 of the Wollondilly Local Environmental Plan 2011(**Wollondilly LEP**) .

**4.5 Acceptability test to be applied to all planning agreements**

The Council will consider all planning agreements against the following "Acceptability Test":

- a) is the proposed planning agreement directed towards a proper or legitimate planning purpose having regard to the statutory planning controls and other adopted planning policies and the circumstances of the case?
- b) does the proposed planning agreement provide a reasonable means of achieving the relevant purpose?
- c) can the proposed planning agreement be taken into consideration in the assessment of the relevant application for an instrument change or development application?
- d) will the planning agreement produce outcomes that meet the general values and expectations of the community and protect the overall public interest? This should be considered (inter alia) particularly with the public interest and impact on community values associated with varying Council's relevant Developer Contributions Plan as per

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clause 4.2(d) that may apply in order to accept the benefits proposed under the Planning Agreement (refer also Clause 4.5 (j) below)

- e) does the agreement provide public benefits that are not wholly unrelated to the development?
- f) does the proposed planning agreement promote the Council’s strategic objectives in relation to the use of planning agreements?
- g) does the proposed planning agreement conform to the fundamental principles governing the Council’s use of planning agreements?
- h) are there any relevant circumstances that may operate to preclude the Council from entering into the proposed planning agreement?
- i) is the Agreement consistent with other relevant Council Policies (eg the Dedication of Land Policy) and with the Wollondilly Community Strategic Plan 2033?
- j) is it appropriate to forego the benefits that would otherwise be paid under Council’s Developer Contributions Plan in exchange for the benefits proposed under the planning agreement? (this applies to those agreements which seek to offset contributions made under Council’s relevant Developer Contributions Plan).

**4.6 General Guidance on Negotiating and Preparing a Planning Agreement:**

- 4.6.1 The Council’s negotiation of planning agreements will be based on principles of efficiency, fairness, transparency and accountability
- 4.6.2 Council prefers that the negotiation of planning agreements occurs simultaneously with the associated application for an instrument change or development application.
- 4.6.3 This Policy includes references to a document entitled “*Planning Agreements Procedures Guideline*” (*Procedures Guideline*) which provides information about the procedural aspects of preparing planning agreement, and which has been prepared for use by Council staff involved in preparing planning agreements.
- 4.6.4 **It is essential that a planning agreement comply with Section 93F of the Act, including the mandatory content requirements for planning agreements.** These matters are included in the Procedures Guideline mentioned above and are not repeated in this Policy.
- 4.6.5 However, clause 4.7 of this Policy provides advice as to Council’s policy position, or “rules” on how some of the mandatory requirements should be addressed in a planning agreement, as well as on other matters that may be included in the agreement.
- 4.6.6 As required by the legislation, an Explanatory Note must be prepared to accompany a planning agreement and must include the matters included in Clause 25E of the Regulation. The Procedures Guideline referred to above provides more information on matters to be included in the Explanatory Note.
- 4.6.7 The diagram overleaf outlines the general process to be followed in preparing a planning agreement. The Guideline document referred to in Clause 4.6.3 above provides more advice on the procedural stages included in this diagram, and Schedule 1 to this Policy includes the checklist that Council’s Executive will consider against planning agreements when considering whether to endorse them for exhibition.

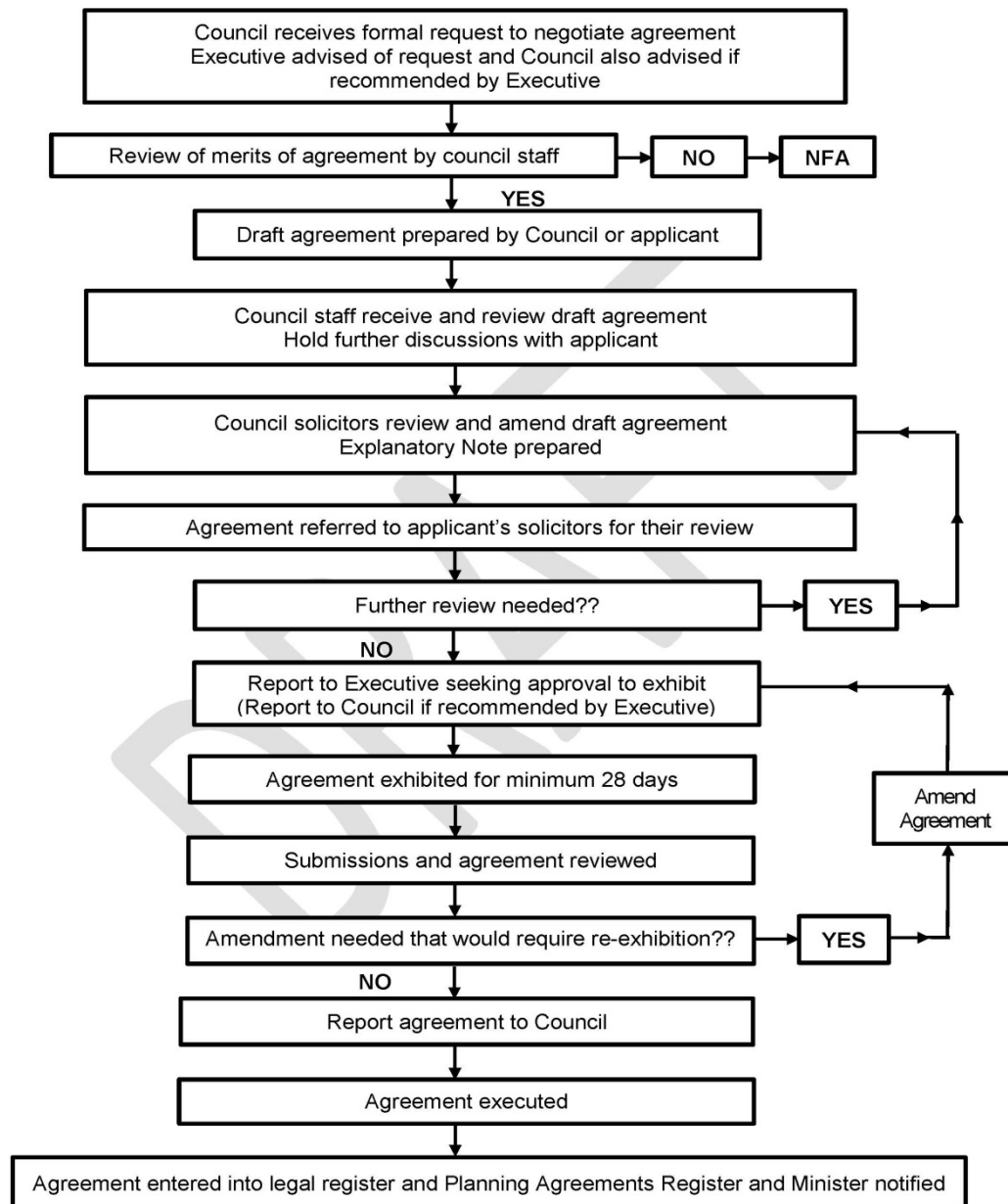
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**4.7 Council's Policy on some specific matters relating to planning agreements**

**A planning agreement must above all else, address the mandatory content requirements included in Sec 93F of the Act.**

This section of the policy outlines Council's policy position on some of these mandatory requirements, and on other matters that may be included in a planning agreement. **Council expects that all planning agreements will be prepared to be consistent with the provisions included in this section of the Policy.**

**4.7.1 Security**

As required by Section 93F of the Act. Council will ensure that planning agreements include adequate security arrangements to protect against a breach of the agreement by the developer. Such arrangements may include the following, depending upon the circumstances of the planning agreement and the benefits being provided:

- a) where the agreement provides for benefits to be paid in the form of a monetary contribution, that the contribution be made prior to the issue of a construction certificate or a subdivision certificate. Unless unavoidable, a planning agreement should not include a provision that such contributions be made prior to an occupation certificate as this does not provide Council with a sufficient level of security;
- b) where the agreement provides for works to be carried out, a bond or bank guarantee from an Australian bank in favour of the Council should be provided for the full value of the works, and on terms otherwise acceptable to Council (refer also to subclause 'f' below);
- c) where a planning agreement provides for the dedication of land to Council, a Planning Agreement must include a provision that enables the Council to compulsorily acquire the land for A\$1.00 in the event of a breach of the agreement by the developer;
- d) as noted in Clause 4.7.16, Council will also require the planning agreement to be registered on the title of the land;
- e) Council may also in appropriate circumstances require the planning agreement to create a charge on the land, and to provide that Council can lodge a caveat on the title of the land to protect its interests;
- f) Council will also require any financial security that is provided to be indexed according to the same index as the contributions to which it relates.

**4.7.2 Nature of development contributions under a planning agreement**

Council has no preference for a particular type of contribution and will consider, on a case by case basis contributions including money, land, or construction of works, including a combination of these;

Where a planning agreement proposes the dedication of land to Council, Council will consider this in relation to Council's adopted "Dedication of Land Policy" (PLA0036). Applicants proposing to dedicate land to council under a planning agreement should familiarize themselves with this policy, particularly the requirement for a contribution for the maintenance of "environmental land" where this is proposed to be dedicated to Council

Where a Planning Agreement proposes to undertake works, the provisions of clause 4.7.3 will apply.

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**4.7.3 Acceptance of Works**

Acceptance by Council of any works to be constructed under a planning agreement shall be subject to the following:

- a) the developer obtaining all necessary approvals (including development consent or complying development certificate) necessary to undertake the works;
- b) the provision by the developer of a certificate confirming that the work has been carried out and completed in accordance with the agreement and with any development consent that applies and with any relevant Australian Standards; and
- c) the Council will also require the agreement to provide a defects liability period during which any defects must be rectified at the developers expense.
- d) Where a work is proposed as a benefit under a planning agreement and a monetary value is assigned to that work and is included in the Agreement for the purpose of valuing the work, Council will expect that the Agreement will provide for the work to be delivered whether or not it exceeds the value of that work included in the Agreement;

**4.7.4 Time when developer's obligations arise under a planning agreement**

The Council will generally require a planning agreement 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.

Contributions will usually be required to be made prior to the issuing of a construction certificate or subdivision certificate in respect of the development;

For planning agreements prepared in connection with instrument changes, the development contributions may be required before any development consent is granted.

**4.7.5 Application of s94 and s94A**

Planning agreements can exclude the application of s94 and s94A of the Act in whole or in part, so that a developer may not need to pay some or all of these contributions, in addition to the contributions proposed under the planning agreement.

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 a developer, depending upon the circumstances of the agreement. Some further advice about this matter is included in Clause 4.7.10.

Where the application of s94 of the Act to development is not excluded by a planning agreement, the Council will consider on a case by case basis whether to include a provision allowing benefits under the planning agreement to be taken into account when determining a development contribution under s94.

A planning agreement may only exclude the application of s94EF of the Act (relating to State Infrastructure Contributions) if the Minister for Planning is a party to the agreement. The exclusion of s94EF is a matter for negotiation between the developer and the Minister.

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**4.7.6 Dispute resolution**

A planning agreement must provide a mechanism for the resolution of disputes arising under a planning agreement. The Council will generally require a planning agreement to provide for mediation of disputes between the parties to the agreement before the parties may exercise any other legal rights in relation to the dispute.

**4.7.7 Indexing of Costs and GST**

In general, Council will expect that monetary contributions paid under a planning agreement are indexed to account for changes in the consumer price index, with the final payment to be indexed to the cpi current at the time that the payment is made;

In indexing the contributions to be paid, Council will use the "All Groups" cpi as published by the Australian Bureau of Statistics as its default index. However Council reserves the right to base its indexation of contributions on other indexes where this is considered appropriate and relevant to the use to which the contribution will be applied.

Contributions made under a planning agreement are generally exempt from GST.

Council may also seek to standardise development contributions sought under a planning agreement by basing them on the current Development Contributions Plan. This should streamline negotiations and provide fairness, predictability and certainty for developers.

**4.7.8 Recurrent Costs**

Planning Agreements may also be used to recover recurrent costs of public facilities. Where the public facility primarily serves the development to which the planning agreement relates or neighbouring development, the developer may be required to fund the ongoing costs of the facility in perpetuity.

However, where the public facility or public benefit is intended to serve the wider community, the planning agreement will usually only require the developer to make contributions towards the recurrent costs of the facility until a sufficient public revenue stream is established to support the on-going costs of the facility.

**4.7.9 Pooling of Development Contributions**

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 other money obtained by the Council under other planning agreements, and under conditions imposed on development consents pursuant to s94 or s94A of the Act, so that those funds can be applied progressively for the different purposes identified under those agreements and conditions.

Pooling may assist in allowing public benefits, particularly essential infrastructure and services to be provided in a fair and equitable way.

**4.7.10 Methodology for valuing Public Benefits under a Planning Agreement**

a) Offsets

Council will consider whether the value of any land or works provided under a planning agreement (determined in accordance with the remainder of this clause 4.7.10) should offset contributions payable under s94 of the Act. Any offsets allowed shall be determined in accordance with clause 4.7.11 below

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- b) *Dedication of Land*  
Where the benefit under a planning agreement is the provision of land for a public purpose, the Council will generally seek to value the benefit on the basis of the estimated amount of compensation to which the Developer would be entitled under the *Land Acquisition (Just Terms Compensation) Act 1991* upon the compulsory acquisition of the land.

Council will normally require the developer to obtain a valuation of the land at his or her cost. Council may also seek to confirm this value by arranging for a separate valuation at its own cost.

If land is dedicated to Council under a Planning Agreement, it will not be considered to be dedicated at "no cost" to Council if an offset of the Section 94 payment that would otherwise be required is given.

- a) *Carrying Out of Works*

Where the benefit under a planning agreement is the carrying out of works for a public purpose, the Council will generally seek to value the benefit on the basis of the estimated value of the completed works determined using the method that would be ordinarily adopted by an independent quantity surveyor.

Council will normally require the developer to obtain a valuation of the works being provided through a planning agreement land at his or her cost. Council may also seek to confirm this value by arranging for a separate valuation at its own cost.

Council will also have regard to other relevant mechanisms for valuing the benefits proposed to be provided under a planning agreement, and in particular may refer to the  
"Local Infrastructure Benchmark Costs (IPART, Final Report April 2014)."

Council may require that the value of contributions of land and works made under a planning agreement should be indexed using an appropriate index (refer cl 4.7.7).

**4.7.11 Offsets and Credits for the Payment of Developer Contributions**

Where a developer proposes to provide infrastructure (such as works or land) to Council as a benefit under a planning agreement, Council may allow the provision of this infrastructure to offset contributions payable under s94 of the Act, and/or to allow a credit against future Section 94 contributions. Council's consideration as to whether to allow an offset or credit will be based on the following principles:

- a) Offsets and Credits for infrastructure included in Council's Contributions Plan
  - i) Where the infrastructure that is to be provided as a benefit under a Planning Agreement is listed in Council's Contributions Plan, the maximum value of any offset (or credit) that may be given through the Planning Agreement will generally not exceed the value for that infrastructure that is included in the Contributions Plan
  - ii) Where an offset is considered appropriate Council will generally only allow an offset up to the amount of the s94 contributions otherwise payable in respect of the same category of infrastructure included in the Section 94 Plan

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- iii) Where the cost of the works or the land value exceeds the amount of any offset allowed by way of sub clause (ii) above (the surplus value), Council will generally not allow any refund of the surplus value to the developer.
  - iv) In cases where a piece of infrastructure benefits other development in the area (carried out by other developers), or where Council wishes for the delivery of that infrastructure to be brought forward, Council will consider entering into recoupment processes with other developers and any money so recouped up to the "Surplus value" will be allowed as a credit to the first developer against future Section 94 contributions for other development in the Wollondilly local government area;
- b) Offsets and Credits for infrastructure items not included in Council's Contributions Plan
- i) Subject to subclause (ii) below, Council will generally not allow offsets or credits for infrastructure to be provided as a benefit under a Planning Agreement that are not included in Council's Section 94 or Section 94A Plan. This applies particularly when the proposed infrastructure is considered as "direct works" (ie that is directly attributable to the proposed development - such as road upgrades resulting directly from a proposed development). Council will however support the inclusion of "direct works" in a planning agreement to help provide certainty that they will be delivered.
  - ii) For all infrastructure items provided for by a Planning Agreement that are not included in Council's Contributions Plan, a Section 94 offset or credit against future contributions may be allowed where Council believes that a wider community benefit will result. The suitability of any offset, and the amount will be determined at Council's discretion, and will be considered against the following principles:
    - Allowing an offset up to the maximum of the amount otherwise payable through the Section 94 contribution for the corresponding category included in the Section 94 Plan;
    - Allowing credits to the developer on developer contributions payable on future development when Council has recouped money from other developers benefitting from the infrastructure, (for example, by including the item in a Section 94 Plan, or by the negotiation of planning agreements with other developers). The amount of credit allowed will be the amount of money actually received through the recoupment process, up to a maximum of the "surplus value"
    - Allowing offsets on other categories of the Section 94 contribution that is payable.
    - Including the item in a Section 94 Plan in cases where Council considers that the works will result in a significant benefit to the wider community;

In considering whether to allow offsets or credits for these developments, Council will consider the likely impacts of the offset or the credit on delivering the works program included in the Contributions Plan;
- c) Credits and Refunds
- Council will generally not grant a credit for the value of any contributions made under a Planning Agreement other than in accordance with this paragraph



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Council will generally not give refunds of any contributions that are made under a Planning Agreement

The Council will generally not agree to refund any amount by which a contribution made under a Planning Agreement exceeds the contributions which the developer would otherwise have been required to make under the Act

**4.7.12 Council's costs of negotiating, entering into, monitoring and enforcing a Planning Agreement**

Council will generally require a developer to pay all of the Council's reasonable costs of negotiating, preparing and entering into the agreement, and enforcing its terms. This will include all costs associated with any third parties who may be engaged to facilitate a planning agreement, and will be Council's expectation whether or not the agreement is concluded.

In addition, Council may require the developer to make a contribution towards the Council's costs of the on-going administration of the agreement and/or administration of the current Development Contributions Plan. The amount to be paid by the developer will be determined by negotiation in each case.

**4.7.13 Assignment and dealings by the developer and landowner**

The Council will require every planning agreement to provide that the developer (and, if the developer is not the landowner, the landowner) may not transfer the land to any person or transfer its rights or obligations under the agreement unless:

- a) the person to whom the land or rights are transferred agrees to be bound by the planning agreement at no cost to Council,
- b) Council is satisfied that the person to whom the land or rights are transferred is able to perform the obligations under the agreement, based on evidence to be provided to Council when Council's consent to the transfer is sought (**previous subclauses 'b' and 'c' merged to create one subclause**);
- c) the developer is not in breach of the planning agreement, and
- d) the Council otherwise consents to the transfer.

**4.7.14 Monitoring and review of a Planning Agreement**

The Council will continuously monitor the performance of the developer's obligations under a planning agreement. In this regard, Council may require a planning agreement to require the developer to submit reports to show how the requirements of the planning agreement are being complied with.

The Council will also require regular reviews of the terms of the planning agreement and, if the parties consider that amendments to the agreement are required, the parties will use their best endeavours to agree on the amendments.

Amendments might be required if there is a change in circumstances relating to the development or a change in law which impacts upon the contributions which can be made.

Amendments may also be required as a result of the introduction of new planning legislation once this is introduced.

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

Council will only agree to changing the developer's obligations under a planning agreement, or discharging the developer from its obligations, if:

- a) the developer has fully performed its obligations under the agreement, including providing all contributions that are required;
- b) the developer has assigned its interest to another party who has agreed to perform the developer's obligations,
- c) the development consent to which the agreement relates has lapsed or has been surrendered,
- d) the performance of the planning agreement has been frustrated by an event beyond the control of the parties, or
- e) the Council and the developer otherwise agree to the modification or discharge of the agreement.

Should the parties agree to a modification of this Agreement, the proposed modification shall be publicly notified in accordance with the Council's current notification policy, and in accordance with the Procedures Guideline referred to previously.

**4.7.16 Registration of planning agreements**

The Council will, subject to the requirements of Sec 93H of the Act require planning agreements to be registered on the title of the property being developed or that is subject to the instrument change.

To facilitate this process, Council will require the developer to provide all relevant documents for the purposes of registration within (ten) 10 days after execution of the agreement. Council will then attend to the registration.

**4.7.17 Notations on certificates under s149(5) of the Act**

The Council may decide to make a notation on any planning certificate issued under s149 of the Act in relation to the land to which a planning agreement relates, about the planning agreement, and may include a provision in the planning agreement acknowledging this.

**4.7.18 Implementation agreements**

The Council may require an implementation agreement that provides for matters such as:

- a) the timetable for provision of planning obligations under the planning agreement.
- b) the design, technical specification and standard of any work required by the planning agreement to be undertaken by the developer.
- c) the manner in which a work is to be handed over to the council.
- d) the manner in which a material public benefit is to be made available for its public purpose in accordance with the planning agreement

**4.7.19 Council's consideration of planning agreements in the exercise of its Statutory Functions**

When exercising its functions under the Act in relation to an application for an instrument change or a development application to which a proposed planning agreement relates, the Council will consider whether the proposed planning agreement is relevant to the application and the proper weight to be given to the proposed planning agreement.

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**4.7.20 Consideration of applications under Clause 4.6 of Wollondilly LEP 2011**

Clause 4.6 of the Wollondilly Local Environmental Plan 2011 (Wollondilly LEP) allows a developer to object to the application of a development standard to a development.

Council will not uphold an objection made under this clause merely because the developer has offered to enter into a planning agreement and provide additional development contributions under that agreement.

Council will assess such an objection under the provisions of clause 4.6 of the Wollondilly LEP. In this regard, the provisions of the planning agreement may be relevant to the extent that any contributions to be provided under the agreement offset any impact of the development which is relevant to the development standard in question.

**4.8 Ensuring Probity in Preparing Planning Agreements**

Ensuring probity in the preparation of planning agreements is of the utmost importance to Wollondilly Council. Some steps that the Council will undertake to ensure probity in the planning agreement process are:

- a) ensure that all planning agreements are prepared in accordance with the relevant statutory requirements, this Policy, the Procedures Guideline and relevant Guidelines from the Department of Planning;
- b) where possible, ensure a separation between Council staff with a direct role in planning agreements and those assessing development applications or preparing planning proposals associated with a planning agreement;
- c) ensure that Councillors do not have a direct role in negotiating planning agreements.
- d) all formal offers to negotiate a planning agreement will be referred to Council's Executive and where Council's Executive considers the proposed planning agreement to relate to a significant development application or instrument change, then if the offer is supported by the Executive, a report to the Council shall be provided outlining the key terms of the agreement and seeking Council approval to negotiate it.
- e) where the Council has a commercial stake in a development or instrument change that is subject to a planning agreement, it will take appropriate steps to ensure that it avoids a conflict of interest between its role as a planning authority and its commercial role in the development;
- f) in this regard, Council (or Council's Executive) may require a Probity Plan to be prepared for some planning agreements, or recommend the appointment of a third party Probity Advisor to manage probity concerns. This may be appropriate for planning agreements that relate to a major development application or instrument change, where Council has a significant commercial stake in a development that is subject to a planning agreement, or where there may be a potential conflict of interest. Where such a Plan (or third party appointment) is made, Council will expect that the developer should pay the entire cost of preparing the Plan, or engaging the third party Probity Advisor;
- g) the Council may also appoint an independent party to facilitate or otherwise participate in the negotiation of a planning agreement, where it considers that this may lead to a better planning outcome. Where it is decided to involve a third party in the preparation of a planning agreement, Council will expect that the developer should pay the entire cost associated with the appointment of the third party.

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- h) prior to the exhibition of any planning agreement, the endorsement of Council's Executive will be sought. In considering the Agreement, the Executive will consider it against the checklist included in Schedule 1 of this Policy. A resolution from the Council will also be sought prior to exhibiting a draft planning agreement if determined appropriate by the Executive;
- i) ensuring a full and transparent public exhibition process for planning agreements. Besides complying with any statutory requirements for the exhibition of planning agreements, this will include providing a level of supporting information sufficient to ensure that the public is aware of what is being proposed under a planning agreement.
- j) A planning agreement will be re-exhibited if any change is made to it after exhibition, other than a minor change which does not affect the operation of the agreement, or the contributions provided under the agreement (subject to legal advice in any particular case if considered necessary).
- k) The decision to enter into a planning agreement will always be made by the elected body of Council after considering a report on the matter. The report should advise Council of the details of the agreement, its compliance with this Policy, and the outcome of the exhibition process. This will help ensure transparency in the decision making process for planning agreements. Should the planning agreement provide for the dedication of land to Council, a specific resolution will be sought from Council to accept the dedication of the land.

**4.9 Endorsement and Execution of Planning Agreements**

The endorsement and execution of planning agreements will occur as follows:

- a) as noted above, all planning agreements will be reported to Council to seek a formal resolution that Council supports the planning agreement being entered into;
- b) following endorsement by Council the planning agreement will be prepared for execution;
  - a planning agreement has been executed when it has been signed and dated by both parties.
  - the General Manager will be responsible for executing a planning agreement on behalf of the Council;

**4.10 Administration of Council's Planning Agreement System**

Council is required to ensure transparency and accessibility for the public in managing its planning agreements. As a result, the administration of Council's Planning Agreement system will be based on the following principles;

- a) complying with relevant statutory requirements. These include:
  - maintaining a Planning Agreements Register;
  - forwarding a copy of all planning agreements to the Minister;
  - reporting on planning agreements in Council's Annual Report,
- b) providing for planning agreements to be accessible to the public both electronically and in hard copy.

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The Procedures Guideline referred to previously provides more information about these matters.

**5. RESPONSIBILITY/ACCOUNTABILITY**

- 5.1 Executive
- 5.2 Growth Management
- 5.3 Planning
- 5.4 Property
- 5.5 Finance
- 5.6 Environment
- 5.7 Infrastructure Planning
- 5.8 Governance
- 5.9 Community
- 5.10 Council's Land and Property Panel

**6. RELATED POLICIES**

- 6.1 Development Contributions Plan
- 6.2 Local Environmental Plan
- 6.3 Community Strategic Plan
- 6.4 Asset Management Plan
- 6.5 Environmental Zones Policy
- 6.6 Dedication of Land Policy
- 6.7 Probity – Dealing With Council Owned Land Policy
- 6.8 Open Space Recreation and Community Facilities Strategy
- 6.9 Biodiversity Strategy

**7. RELATED PROCEDURES**

- 7.1 As mentioned in this Policy, a document entitled "*Planning Agreements Procedures Guideline*" (Procedures Guideline) has been prepared to provide additional information on the procedures associated with preparing planning agreements. It has been prepared for internal use by Council staff.

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**8. RELATED LEGISLATION**

- 8.1 Environmental Planning and Assessment Act, 1979
- 8.2 Environmental Planning and Assessment Regulation, 2000

**9. ATTACHMENTS**

- 9.1 Schedule 1 – Matters for Consideration by Council's Executive

**10. RESOURCES**

- 10.1 Planning Agreement Practice Note (Department of Infrastructure, Planning and Natural Resources, 19 July 2005)

**11. IMPLEMENTATION STATEMENT**

- 11.1 To ensure this policy is implemented effectively, Council will employ a variety of strategies involving awareness, education and training. These strategies will be aimed at Councillors, staff and council representatives and will involve:
  - a) a regular review of the legislation and Guidelines from the Department of Planning to ensure that any relevant changes that affect planning agreements are incorporated into this Policy. This will be particularly important should new planning legislation be introduced;
  - b) regular emphasis on relevant sections of the Policy when planning agreements are reported to the Council;
  - c) a review of this policy every 3 years. This will include a consideration of the impact of this policy on the preparation of planning agreements, review of similar policies prepared by other Councils, and obtaining legal advice where appropriate.

**12. POLICY HISTORY**

- 12.1 Date Adopted as Draft 18 May 2015
- 12.2 Date Adopted as Most Recent Adoption
- 12.3 Next Review Date
- 12.4 Responsible Officer                      Manager Planning

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Planning & Economy

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**Schedule 1: Matters for Consideration by the Executive**

The following checklist has been prepared which provides for a consideration of the draft agreement against relevant matters included in Council's policy, and which the Executive could use in deciding whether to approve the exhibition of a draft planning agreement.

**Checklist of Matters for Consideration to Exhibit Draft Planning Agreement**

Matter for Consideration	Comment
What benefits are proposed under the Agreement (any land to be dedicated should be identified)?	
Does the agreement accompany a DA or Planning proposal?	
Does the agreement exclude Council's Sec 94/94A Plan?	
Is there likely to be significant community interest in the agreement or associated application?	
Are any special probity considerations required (eg Probity Plan or Probity Advisor)	
Does the agreement comply with the mandatory content requirements (s93f of Act)?	
Does it comply with Council's strategic objectives for VPAs (cl 4.2)?	
Is the agreement for a legitimate planning purpose? (cl 4.3)	
Is it consistent with Council's principles regarding the use of planning agreements (cl 4.4)?	
Does it meet the acceptability test for planning agreements (cl 4.5)?	
Does it comply with other clauses of Council's Policy (cl 4.7)?	
Has a valid Explanatory Note been prepared	
Does the council need to be further involved at this stage	
Is the Agreement approved for exhibition	