



# Ku-ring-gai Council Planning Agreement Policy 2024

Being a Guideline for the preparation of Planning Agreements with Ku-ring-gai Council under Division 7.1 of the Environmental Planning and Assessment Act 1979.



**Effective Date: 27 November 2024**





Ku-ring-gai Council

# Planning Agreement Policy

Version Number 4

Adopted: 26 November 2024

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# Planning Agreement Policy

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## Controlled Document Information

### Authorisation Details

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## Related Document Information, Standards & References

<p><b>Related Legislation:</b></p>	<ul style="list-style-type: none"> <li>• <i>Environmental Planning and Assessment Act 1979</i> – Part 7 Infrastructure Contributions and finance – Division 7.1 Development Contributions – Subdivision 2 Planning Agreements – Sections 7.4 – 7.10.</li> <li>• <i>Environmental Planning and Assessment Regulation 2021</i> – Part 9 Infrastructure Contributions and Finance Development contributions Division 1 Planning agreements – sections 202 - 206</li> <li>• <i>Local Government Act 1993</i></li> <li>• <i>Ku-ring-gai Local Environmental Plan 2015 (consolidated LEP)</i></li> </ul>	<p>The content of and process and procedures for negotiating, exhibiting and executing planning agreements are set out in the Act and Regulation. All planning agreements must meet these requirements. Current legislation may be found at <a href="http://www.legislation.nsw.gov.au">www.legislation.nsw.gov.au</a></p>
<p><b>Related Policies (Council &amp; Internal)</b></p>	<ul style="list-style-type: none"> <li>• Ku-ring-gai Contributions Plan 2010 (s7.11 formerly s94)</li> <li>• Ku-ring-gai Council Local Levy Contributions Plan 2023 (s7.12 formerly s94A)</li> <li>• Ku-ring-gai Development Control Plan</li> <li>• Community Strategic Plan</li> <li>• Acquisition and Divestment Policy 2024.</li> <li>• Statement of Business Ethics 2020</li> <li>• Ku-ring-gai Public Domain Plan 2022</li> <li>• Community Participation Plan</li> </ul>	<p>Council's approach to the consideration of planning agreements will be based on the planning purpose of achieving the vision and strategic aims for the Ku-ring-gai area, as set out in the Community Strategic Plan 2032, Ku-ring-gai LEP 2015, Ku-ring-gai DCP and the Acquisition and Divestment Policy 2024.</p> <p>The Planning Agreement Policy continues to apply even if the documents listed at left are superseded and replaced by any subsequent document.</p> <p>The Statement of Business Ethics sets out the ethical framework in which Council will work with private, public and non-profit sectors in a business arrangement, such as the negotiation of planning agreements.</p> <p>Council plans and policies can be found on council's website at <a href="http://www.krg.nsw.gov.au">www.krg.nsw.gov.au</a></p>
<p><b>Other References</b></p>	<ol style="list-style-type: none"> <li>a) Planning Agreements Practice Note – February 2021 – Department of Planning</li> <li>b) DRAFT Exhibition version – Local planning agreements Practice note December 2023 (on exhibition until 23 February 2024)</li> </ol>	<p>Practice notes are issued to assist planning authorities, developers and others in the preparation of planning agreements and to understand the role of planning agreements in the planning process. The practice note seeks to provide best practice guidance in relation to their use. Councils must have regard to Practice Notes. Practice Notes may be found on the website of the NSW Department of Planning at <a href="http://www.planning.nsw.gov.au">www.planning.nsw.gov.au</a></p>

## Version History

Version Number	Version Start Date	Version End Date	Author	Details and Comments
1	15 July 2008	14 June 2016	Kate Paterson	Ku-ring-gai Planning Agreement Policy 2008
2	15 June 2016	19 November 2019	Kate Paterson Alexandra Plumb	The key governing legislation, being Division 6 of the Environmental Planning and Assessment Act 1979 has not changed and the 2005 Guidelines issued by the Department of Planning remain in place. This review was chiefly to benchmark against more recent examples of best practice in Local Government.
3	20 November 2019	26 November 2024	Kate Paterson	The key governing legislation under the Environmental Planning and Assessment Act 1979 has been restructured and renumbered. To ensure this policy continues to reference current legislation, a review has been instigated. Related references to other Council policies and plans have also been updated in this review.
4	27 November 2024	TBA	Kate Paterson	The key supporting legislation under the Environmental Planning and Assessment Regulation 2021 has been restructured and renumbered superseding the Environmental Planning and Assessment Regulation 2000. Revised Department of Planning Guidelines were issued in 2021. Best practice has been benchmarked following the Contributions Reform processes of 2020-2022 instigated by the NSW Government. A further review of the Guidelines was exhibited in late 2023 / early 2024 (ending 23 February 2024) but had not yet been adopted at the time of finalising this review. Experience with more proposed Planning Agreements associated with Planning Proposals as distinct from works-in-kind agreements associated with Development Applications further informed this comprehensive review. Related references to other Council policies and plans have also been updated in this review.



# 1. Introduction

## 1.1 Purpose

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

Planning agreements form one part of Council's development contributions system, which aims to ensure that new development makes reasonable and appropriate contributions towards the provision or improvement of public amenities or services within the Council area.

The purpose of this Policy is:

- a) To establish a transparent, accountable and equitable framework to guide the negotiation and implementation of Planning Agreements for the provision of public benefits as part of applications for development and/or rezoning in in the Ku-ring-gai Local Government Area.
- b) to facilitate the effective delivery of public benefits such as public domain improvements, open space works, community facilities, and works in the existing road reserves and the delivery of new roads, identified in Development Control Plans, Development Contribution Plans and other plans and policies of the Council as part of the development process in Ku-ring-gai.
- c) to facilitate improvements to the street vitality, amenity and economic viability of commercial centres within Ku-ring-gai.
- d) to facilitate the delivery of affordable housing in association with rezoning and/or development in the Ku-ring-gai area, whether under policies of the NSW State Government or of Ku-ring-gai Council, including the early involvement of Community Housing Providers.
- e) To facilitate public participation in the planning agreement process to support transparency.

## 1.2 Objectives

The objectives of this Policy are:

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

## 1.3 Application of the Policy

Circumstances in which this Policy may apply include:

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

- a) where a developer proposes to provide a public benefit as part of the development process whether or not that benefit will be on public or private land and whether or not that benefit is valued by the Contributions Plan.
- b) where Council owned land is proposed to be incorporated as part of any development site other than the direct sale of a parcel of land in its entirety.
- c) where land dedication into council ownership is proposed and that land is not identified in an adopted contributions plan of the council;
- d) where affordable housing is to be dedicated to an affordable housing provider, that provider may request the right to be a party to the agreement to ensure their requirements are addressed at the design stage;
- e) any other circumstances where council considers it desirable to have a planning agreement.

A reference to 'provision' also includes a reference to 'recoupment' where applicable.

While the Planning Agreement Policy is not legally binding, prospective applicants are placed on notice that Ku-ring-gai Council will seek to apply this policy in all circumstances where council is an intended signatory to the proposed Planning Agreement.

## 1.4 Legislation

The legal and procedural framework for planning agreements is set out in:

- a) *Environmental Planning and Assessment Act 1979* - Part 7 Infrastructure contributions and finance – Division 7.1 Development Contributions – Subdivision 2 Planning Agreements – Sections 7.4 – 7.10.
- b) *Environmental Planning and Assessment Regulation 2021* - Division 1 Planning Agreements – Sections 202 – 206.

A revised Practice Note entitled: *Planning agreements Practice note – February 2021* was issued by the Department of Planning, Industry and Environment (DPIE) for the purposes of sec.203(6) of the Regulation (formerly clause 25B of the 2000 Regulation). This Policy has been prepared having regard to the revised Practice Note. A further review of the Guidelines and Practice Notes for Planning Agreements was placed on exhibition until 23 February 2024 together with draft reviewed guidelines and practice notes for other aspects of the Local Infrastructure Contributions system, however, at the time of finalising the present review of the Planning Agreement Policy, no further amendments have been formally made to the *Planning agreements Practice note – February 2021* which remains in effect.

A Ministerial Direction issued on 28 February 2019 also remains in effect at the time of the 2024 revision of this Planning Agreement Policy.

## 1.5 Relationship to other Plans and Policies

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

- a) Ku-ring-gai Contributions Plan 2010 (now a s7.11 Contributions Plan).
- b) Ku-ring-gai Council Local Levy Contributions Plan 2023 (being a fixed development consent levy contributions plan under Division 7.1 of the Environmental Planning and Assessment Act 1979).
- c) Community Strategic Plan 2032

- d) Ku-ring-gai Local Environmental Plan 2015 (consolidated)
- e) Ku-ring-gai Development Control Plan
- f) Ku-ring-gai Acquisition and Divestment Policy 2024
- g) Any other plans and policies as determined in the circumstances of the planning agreement.

Council's approach to the consideration of planning agreements will be based on the planning purpose of achieving the vision and strategic aims for the Ku-ring-gai area, as set out in the Community Strategic Plan 2032, Ku-ring-gai LEP 2015, Ku-ring-gai DCP, Ku-ring-gai Acquisition and Divestment Policy 2024 and other key Council documents.

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

## 1.6 Variations to the Policy

It is intended that the Council and all persons dealing with the Council in relating to planning agreements will follow this Policy to the fullest extent possible.

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

## 2. Definitions

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

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

**Affordable Housing Contribution** means a contribution under s7.32 of the Act permitted by an adopted housing contributions scheme.

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

**Developer** means a person who has sought a change to an environmental planning instrument or who has made, or proposes to make, an application for development consent. In the case of a development application, the term **applicant** may also be used. In the case of a planning proposal, the term **proponent** may also be used.

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

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

**Development Contribution** means the provision made by a developer under a planning agreement, being payment of a monetary contribution, the dedication of land, the carrying out of a work-in-kind, the provision of a material public benefit to be used for or applied towards a public purpose, or any combination of the above.

**Explanatory Note** means a written statement associated with a draft planning agreement in accordance with sec.205 of the Regulation.

**Instrument Change** means a change to an environmental planning instrument to enable a development application to be made to carry out development under revised planning controls.

**Material Public Benefit** means a work not identified in or valued by an adopted Contributions Plan and proposed to be offset against any local infrastructure contributions (s7.11, s7.12 or affordable housing contributions) required as a consequence of the development of a site.

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

**Planning Agreement** means an agreement negotiated and made in accordance with the *Environmental Planning and Assessment Act 1979* (Part 7 Infrastructure contributions and finance Division 7.1 Development Contributions Subdivision 2 Planning Agreements) and the *Environmental Planning and Assessment Regulation 2021* (Part 9 Infrastructure Contributions and Finance Division 1 Planning Agreements).

**Planning Benefit** means a development contribution that confers a net public benefit being a benefit that exceeds anything required to be done to address the direct impacts of a particular development on surrounding land or the wider community. A clear link to the proposal must still be established, however, in the interests of probity. Benefits unrelated to the proposal are considered inappropriate.

**Planning Obligation** means an obligation imposed by a planning authority on a developer requiring the developer to make a development contribution.

**Planning Proposal** has the same meaning as in the Act.

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

**Public Benefit** is the benefit enjoyed by the public beyond the inhabitants of the proposed development as a consequence of a development contribution.

**Public Facilities** means public infrastructure, facilities, amenities or services.

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

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

**Regulation** means the *Environmental Planning and Assessment Regulation 2021*.

**Works-in-Kind** means undertaking a work identified in and valued by a Local Infrastructure Contributions Plan (s7.11) or a Local Levy Contributions Plan (s7.12) and proposed to be delivered in kind and offset against monetary contributions.

### 3. What must a planning agreement contain?

#### 3.1 Mandatory inclusions

A planning agreement must be in writing and signed by all of the parties to the agreement. A planning agreement is not entered into until it is signed. The *Environmental Planning and Assessment Act 1979* requires planning agreements to include provisions specifying:

- a) a description of the land to which the agreement applies,
- b) a description of the change to the environmental planning instrument to which the agreement applies or the development to which the agreement applies,
- c) the nature and extent of the provision to be made by the developer under the agreement, the time or times by which the provision is to be made and the manner by which the provision is to be made,
- d) in the case of development, whether the agreement excludes (wholly or in part) or does not exclude the application of section 7.11, section 7.12 or section 7.24 (HAPs) to the development
- e) if the agreement does not exclude the application of section 7.11 to the development, whether benefits under the agreement are or are not to be taken into consideration in determining a development contribution under section 7.11.
- f) a mechanism for the resolution of disputes under the agreement,
- g) the enforcement of the agreement by a suitable means, such as the provision of a bond or guarantee, in the event of a breach of the agreement by the developer.

**Note:** In the case of d) above it should be noted that Ku-ring-gai Council has no jurisdiction over the calculation, levying and payment of the Housing and Productivity Contributions (HAPs) under Part 7 Division 7.1 Subdivision 4 of the Act and cannot make any arrangements concerning them within a Planning Agreement without the concurrence of the Minister or the Minister being a party to the agreement. As such, references to the delivery of local infrastructure works being offset against s7.24 / HAPs contributions should not be made in letters of offer to enter into local planning agreements.

A template for a planning agreement can be found at **Attachment A**.

#### 3.2 Explanatory note

Sec.205(1) of the Regulation requires that an explanatory note must accompany a Planning Agreement that:

- a) Summarises the objectives, nature and effect of the proposed planning agreement, amendment or revocation, and
- b) Contains an assessment of the merits of the proposed planning agreement, an amendment or revocation include the impact (positive or negative) on the public or any relevant section of the public.

A sample explanatory note can be found at **Attachment B**.

### 3.3 General inclusions

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

- the date or circumstances at which times a planning agreement may come into effect;
- the application of the goods and services tax to the agreement;
- whether money contributed under a planning agreement may be pooled with other money from planning agreements and/or monetary development contributions and paid progressively towards the purposes for which the money has been levied;
- the circumstances in which a developers obligations may be modified which may include material changes to the planning controls applying to the land, material changes to the development consent applying to the land, the lapsing of a development consent, the revocation or modification of a relevant development consent by the Minister, or other material changes affecting the operations of the planning agreement;
- the circumstances in which a developers obligations shall be considered to be discharged;
- the procedure for modifying a planning agreement;
- clauses related to the specific nature of the land dedication, monetary contributions, recurrent funding, material public benefits or works of the types listed in Part 5 of this policy; and/or
- any other clauses as may be required in the circumstances of the negotiation.

### 3.4 Other inclusions

The *Environmental Planning and Assessment Act 1979* does not preclude a planning agreement from containing other provisions that may be necessary or desirable in the circumstances of the cases with the exception of the specified exclusions in 3.5 and 3.6 below.

Planning agreements may be used in a wide variety of circumstances and achieve a variety of planning outcomes. Accordingly, it is not appropriate for Ku-ring-gai Council to seek to limit the potential scope of a planning agreement in this context.

More detail on the types of considerations that would be incorporated in planning agreements for different purposes are listed in Part 5 of this Policy.

### 3.5 No fetter

Section 7.4(9) of the Act precludes a planning agreement from imposing an obligation on a planning authority to grant development consent or to exercise a function under the Act in relation to a change to an environmental planning instrument.

The existence of a planning agreement entered into in association with a planning proposal for the development controls on the site cannot fetter and will not be held to fetter the independent assessment of any subsequent development application.

The existence of, or proposal to enter into a planning agreement as part of a development application, cannot fetter, and will not be held to fetter the independent assessment of any development application.

### 3.6 Breach of the Act

Section 7.4(10) of the Act provides that a planning agreement is void to the extent, if any, to which it authorises anything to be done in breach of the Act or any environmental planning instrument or development consent applying to the land to which the agreement applies.

## 4. Principles underlying the use of planning agreements

### 4.1 Fundamental principles

Ku-ring-gai Council's use of and participation in planning agreements will be guided by the fundamental principles set out in the Practice Note, guidelines and safeguards as follows:

- ✓ planning decisions cannot be bought or sold and therefore there can be no fetter on a planning authority in the exercise of their planning functions;
- ✓ planning agreements must be voluntary on both sides. No party can be compelled to enter into a planning agreement;
- ✓ public interest is paramount in the negotiation of a planning agreement;
- ✓ the need for transparency including the opportunity for public comment on draft planning agreements;
- ✓ Council will not seek benefits under a planning agreement that are unrelated to that particular development;
- ✓ Council may decline to accept benefits under a planning agreement where a planning purpose related to the development has not been clearly established by the proponent in making the offer;
- ✓ planning agreements will not be used to engage in revenue raising or to overcome particular spending limitations;
- ✓ the benefits offered by a developer will not render an otherwise unacceptable development in planning terms, anything other than unacceptable unless the purpose of the benefits is to directly mitigate an unacceptable impact e.g. traffic generation, emissions, etc.
- ✓ Council not allow the interest of individuals or an interest group to outweigh the public interest when considering planning agreements;
- ✓ Council will not improperly rely on its statutory position to exact unreasonable public benefits;
- ✓ where Council has a commercial stake in a development that is the subject of a planning agreement, it will take steps to ensure it avoids a conflict of interest in the development.

### 4.2 Acceptability test

The Practice Note sets out the following test for determining whether a planning agreement is acceptable and appropriate. Ku-ring-gai Council will apply the test to all planning agreements:

- ✓ is the proposed planning agreement directed towards a proper or legitimate planning purpose ordinarily ascertainable from the statutory planning controls and other adopted planning policy applying to the development and the circumstances of the case?
- ✓ does the proposed planning agreement provide for public benefits that bear a relationship with the development and are not wholly unrelated to the development?
- ✓ will the proposed planning agreement produce outcomes that meet the general values and expectation of the public and protect the overall public interest?

- ✓ does the planning agreement provide for a reasonable means of achieving the relevant purposes and outcomes and securing the benefits?
- ✓ does the planning agreement protect the community against adverse planning decisions?

### 4.3 Relationship between planning agreements and Clause 4.6

The benefits proposed by a developer under a planning agreement cannot be used to justify a dispensation with or a variation to an applicable development standard (such as building height, floorspace ratio, and minimum lot size) under Clause 4.6 Exceptions to Development Standards of Ku-ring-gai Local Environmental Plan 2015.

This clause continues to apply to any LEP in effect in the Ku-ring-gai Local Government Area.

## 5. Planning Agreements

### 5.1 When is a planning agreement required?

The circumstances in which Ku-ring-gai Council would consider negotiating a planning agreement with a developer, a landowner and/or proponent of a change to a planning instrument include:

- meeting the demands created by the intended development, or, in the case of a planning proposal, development potential, for new public infrastructure, amenities and services;
- compensating for the loss of or change to a public facility, amenity or service, resource or asset;
- securing planning benefits for the wider community so that the intended future development delivers a net benefit to the community;
- achieving benefits of a type that either cannot be sought through formal contributions plans, or are not currently included in the adopted contributions plans, such as recurrent funding, affordable housing (in the absence of an adopted Affordable Housing Contributions Plan), regeneration or rehabilitation of bushland, biodiversity offsets and the like;
- achieving works which were excluded from contributions plans for the purpose of achieving a reasonable contributions rate;
- clarifying the relationship between development contributions under an adopted contributions plan and the works to be provided on any given development site; and/or
- specifying the standards to be met in the provisions of works in kind or the provisions of a material public benefit; and
- facilitating the dedication of land and/or units of affordable housing based on feasibility assessments.\*

\* provisions related to affordable housing will be further supported by the adoption of an Affordable Housing Policy which is currently under preparation, but are currently foreshadowed in the Ku-ring-gai Housing Strategy and Local Strategic Planning Statement, supported by the North District Plan. See **5.7 Affordable housing and planning agreements**.

Ku-ring-gai Council requires developers to commence negotiation of a planning agreement where there is any proposal to dedicate land and/or carry out works-in-kind included in a Development Contributions Plan and/or provide a material public benefit or a public benefit whether or not it is of the kind identified in a Development Control Plan and whether or not an offset to development contributions under s7.11 or s7.12 is sought.



A planning agreement is required to facilitate the dedication of land unless such land is formally valued within a contributions plan (generally a s7.11 contributions plan).

Council may also enter into negotiations for works-in-kind, land dedication and/or material public benefits to mitigate the additional impacts of private planning proposals.

## 5.2 What will Council require to be provided under planning agreements?

Council will consider development contributions that provide a demonstrable public benefit. An outline of the potential public benefits is set out in the Potential Public Benefits table at **Attachment C**.

**Attachment C** is not intended to be exhaustive, and recognizes that the consideration of each proposed development will reflect the circumstances of each case and the needs created by the scale of the development. The types of benefits that generally could be included in a planning agreement are:

- land dedication;
- works of the type that appear in the works schedules of Council's adopted Contributions Plan(s);
- public domain works in the Ku-ring-gai Development Control Plan or Public Domain Plan(s);
- monetary contributions;
- affordable housing;
- recurrent funding for a public purpose;
- bushland regeneration;
- any other work that provides for a net public benefit.

The following sections provide more detailed information on different types of public benefits that may be provided under a planning agreement.

## 5.3 Land dedication and planning agreements

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

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

- the extent, if any, to which any development potential attaching to that part of the land to be dedicated can be incorporated elsewhere within the development;
- whether the land proposed to be dedicated has been identified by Ku-ring-gai Council in any Development Control Plan, Development Contributions Plan or other policy of the Council;
- the location, configuration, size, accessibility, topography and existing use of the land proposed to be dedicated;
- whether the land is located in or adjacent to a riparian corridor or bushfire prone land;
- whether the land adjoins an existing area of open space and can be consolidated into that area;
- whether the land will create or improve accessibility within the area whether by pedestrians, cyclists, private vehicles, public transport or any combination of these;
- whether the land supports the habitat of threatened or endangered species of fauna or endangered ecological communities of flora;

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

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

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

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

#### **5.4 Capital works and planning agreements**

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

- requirements and specifications for detailed design plans for future approval or specific references to endorsed plans;
- public liability insurance during construction and during the defects liability period;
- requirements for inspection by Council prior to and during the course of construction including the notice to be given in order to arrange such an inspection;
- details of the defects liability period;
- security such as bonds or bank guarantees to be held during the course of construction and during the defects liability period;
- access for Council officers during the course of construction to ascertain progress or to assess asset value; and
- any other matter relevant to securing the public interest in the achievement of a quality public benefit.

## 5.5 Monetary contributions and planning agreements

A planning agreement may make provision for monetary contributions other than contribution required under an adopted and in force s7.11 or s7.12 Contributions Plan (formerly known as s94 and s94A Contributions Plans respectively).

In such circumstances the planning agreement will include:

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

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

## 5.6 Recurrent costs and planning agreements

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

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

## 5.7 Affordable housing and planning agreements

Ku-ring-gai Council is in the process of preparing an Affordable Housing Policy which is expected to be completed during the 2024/2025 financial year. Monetary contributions for affordable housing can only be imposed as a condition of consent in accordance with an Affordable Housing Contributions Scheme (AHCS), following exhibition, adoption and publication. There are no such documents in effect at the time of this 2024 version of the Planning Agreement Policy. As such, a Planning Agreement for Affordable

Housing associated with a Development Application cannot be considered until the affordable housing policies are formalised because of the operation of a Ministerial Direction.

In parallel, two initiatives of the NSW State Government make provision for the delivery of affordable housing in kind (as complete dwellings) together with associated consent conditions:

The Transport Orientated Development (TOD) policy (now formalised as Chapter 5 of the Housing SEPP) currently applies in the vicinity of Gordon, Lindfield, Killara and Roseville Stations, and is effective from 1 April 2024. These amendments require the imposition of a consent condition requiring at least two percent (2%) affordable housing in perpetuity as an in-kind dedication from the specific development types and size criteria to which it applies (see sec86A of the Environmental Planning and Assessment Regulation 2021 and Chapter 5 of the Housing SEPP).

Additionally, individual development sites may be able to justify floorspace bonuses of 20%-30% for the provision of 10%-15% affordable housing (by gross floor area) delivered as whole dwellings and for a time-limited period of a minimum of 15 years.

There are provisions for land in the Transport Orientated Development (TOD) chapter of the Housing SEPP to utilise the above-mentioned provisions to provide additional time-limited affordable housing in return for floor space bonuses. Proponents are advised to refer directly to the Housing SEPP, as these provisions may change.

As indicated above, as at June 2024, Ku-ring-gai Council cannot yet enter into a planning agreement incorporating affordable housing provisions associated with a Development Application due to the operation of a Ministerial Direction dated 28 February 2019 and remaining in effect at the time of updating this policy, until such time as it has adopted an Affordable Housing Policy; to be followed by an affordable housing contributions scheme. The Direction relates explicitly to Development Applications and does not refer to Planning Agreements associated with Planning Proposals.

Any planning agreement including affordable housing and associated with a planning proposal needs to consider:

- the specification of affordable housing for the purposes of the planning agreement;
- if not to be provided in perpetuity or for the life of the building, then the time period over which such housing is to meet the definition of affordable housing;
- provisions for the future management of the affordable housing;
- criteria for assessment of future tenants or reference to another policy of the council which specifies such criteria;
- the mechanism for ensuring the housing remains available as affordable housing;
- the relationship between the proposed affordable housing in the planning agreement and other mechanisms for the provision of affordable housing including State Environmental Planning Policies (SEPPs) and any future affordable housing contributions scheme that may be adopted by Council prior to a future development application on the site the subject of the planning proposal;
- security for the delivery of affordable housing e.g. evidence of an agreement with a CHP prior to the release of the occupation certificate;
- any other matters relevant to securing the public interest in the achievement of affordable housing.

**Note:** Ku-ring-gai Council may request that a Community Housing Provider (CHP) be a party to such an agreement to ensure that any specific requirements they may have are taken into consideration and to ensure that the resultant housing is suitable for on-going management by a CHP. Proponents should consider liaising with a CHP even if they are not a party to the agreement.

**Principle:** Generally speaking, affordable housing should be provided in perpetuity or for the life of the development. Time-limited affordable housing provision does not constitute an effective long-term public benefit and is less likely to be supported as part of a Planning Agreement. The relative value of time-limited affordable housing is considered to be significantly less than affordable housing provided in perpetuity, noting that any such value effectively ends at the expiration of the term.

Until such time as Ku-ring-gai Council has adopted an Affordable Housing Policy (and, potentially, an associated contributions scheme), direct involvement by council in delivery of affordable housing by way of planning agreements remains limited. In the event council does adopt an Affordable Housing Policy, more options will become open for discussion. As such, proponents should check with council concerning the progress of an Affordable Housing Policy. In the interim, it is noted that proponents are not precluded from reaching separate agreements directly with CHPs.

## 5.8 Other matters for planning agreements – Bushland

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

- a description of the site including location, configuration, size, accessibility, topography and existing land uses;
- the nature and extent of the works to be carried out;
- a map of the site identifying the area where the works are to be carried out;
- an assessment of the ecological value of the site in the context of the proposed works;
- reference to a plan of management for the proposed works (initial and on-going);
- reference to a Species Impact Statement if necessary in the circumstances of the matter;
- the mechanism by which the land will be protected in the future; and
- any other matter relevant to securing the public interest in the achievement of natural area management.

## 5.9 Other matters for planning agreements – Material Public Benefits (MPBs)

Material public benefits are works that are not valued in the adopted contributions plans for offset against monetary contributions (as distinct from works-in-kind which are listed in the works programmes to the adopted contributions plans). MPBs may take two main forms: works for which an offset against monetary contributions is sought and works for which no offset is sought.

In this context, it must be noted that Ku-ring-gai Council's contributions plans have already reduced and refined their works programmes either to reduce the total contribution rates under the s7.11 contributions plan; or to support the intended timeframe for the delivery of the works programme as scheduled under the s7.12 contributions plan. Allowing unlisted works to be offset against monetary contributions would impact these objectives. The nature and extent of the MPB and the circumstances in which the offer is made would need to be demonstrated as truly exceptional due to the potential financial impact on the future delivery of the works programme as a whole.

Within the context of delivering the baseline costed works-in-kind, lies the capacity for the developer to deliver these identified works at a higher quality and/or to a greater geographical extent (subject to reasonable on-going maintenance costs to council) at their own cost, without further offset. This enhancement of the works may mutually benefit the public as well as the presentation of the development and may be open to discussion for inclusion in a planning agreement.

With respect to works directly associated with a development site, any works which are considered to be for the primary purpose of the mitigation of a direct impact of the proposed development, or the

increased potential for future development, as distinct from being primarily for a broader public benefit, will not be offset against monetary contributions. Works of which the subject site is the primary beneficiary are likely to fail the public benefit test, and public funds (such as arising from development contributions and intended for specified works) should not be sought in support of any one specific private development.

### **5.10 Other matters for planning agreements – Value Capture**

Council is required by sec203(7) of the *Environmental Planning and Assessment Regulation 2021* to consider the practice notes relating to Planning Agreements. The current Practice Notes issued in February 2021 state that value capture should not be the primary purpose of a Planning Agreement. This is intended to avoid the perception that uplift can be arguably bought as a direct result of an offer.

The guidelines do not explicitly preclude value capture being a component part of any Planning Agreement that provides for a variety of outcomes. This Planning Agreement Policy also addresses probity issues (actual and perceived) by explicitly requiring a statement of clarification of the link between the proposed offer and the planning proposal and requires the planning purpose to be clearly stated. This procedure is an important part of underlining that planning proposals cannot be bought through offers of infrastructure or other community benefits that are unrelated to the impact of the particular proposal.

The application of this Planning Agreement Policy in relation to value capture is to form a framework to evaluate specific items of infrastructure, including social infrastructure such as affordable housing, chiefly as impact mitigation and net community benefit, and not to set any specific target rate such as a monetary value per square metre of uplift or a percentage of the value of uplift on any one site. The latter approach is not supported by the guidelines or this Planning Agreement Policy.

## **6. Negotiation Procedures and Probity**

### **6.1 Steps in the negotiation process**

Council's negotiation of planning agreement aims to be efficient and transparent. The negotiation of a planning agreement will generally involve the following key steps:

- 1) Prospective applicants for development approval or proponents of a planning proposal that is envisaged to include a planning agreement are strongly advised to attend a formal pre-DA or pre-Planning Proposal meeting to discuss the matter and to receive formal feedback or advice from council staff in writing.
- 2) Prior to the lodgment of the relevant application (development application or planning proposal), the developer or proponent will provide a formal letter of offer which is to outline the nature of the offer to be made by way of planning agreement, state the public purpose to be served and clarify the relationship between the proposed works and the intended development or altered development potential of the site. While Planning Agreements do not require as strict an establishment of nexus as s7.11 contributions, it is important to establish a clear relationship between any public benefits proposed and the site for probity reasons.
- 3) Councillors will be notified that a letter of offer has been received, usually by way of a formal council report. As the letter of offer will be reported to council, the letter of offer is to stand alone and must not include, attach, cross-reference, or otherwise incorporate, a formal draft planning agreement prior to reporting the letter of offer to council for authority to proceed to negotiation.

- 4) The parties will consider whether there are other parties that should be involved (e.g. owner of land if the developer is not the owner) and whether to appoint an independent person to facilitate or otherwise participate in the negotiations.
- 5) A timetable for negotiations and the protocols and work practices governing the negotiations will be agreed between the parties.
- 6) A cost agreement will be signed by the parties before work formally commences on the drafting of the planning agreement.
- 7) Initial negotiations between the parties take place regarding the items and matters to be addressed in the planning agreement.
- 8) Once an agreement is reached, the draft planning agreement will be documented, and the parties will agree on the terms of the accompanying explanatory note required by the Environmental Planning and Assessment Regulation.
- 9) The developer will lodge an application (development application or planning proposal) to the Council or other relevant authority accompanied by the draft planning agreement and explanatory note. The application must clearly record the offer to enter into a planning agreement. While this process may occur concurrently with the negotiation phase, this is not ideal and may incur delays. Applicants and proponents should commence the planning agreement process as early as possible.
- 10) The draft planning agreement is to be reported to Council and a resolution sought to the effect that public notice of the planning agreement be given for a period of 28 days.
- 11) The draft planning agreement and explanatory note will be advertised as contemporaneously as possible with the application (development application or planning proposal) in accordance with the Act and Regulation.
- 12) Any person may make a submission on the draft planning agreement and Council is bound to consider the submission.
- 13) The parties may be required to undertake further negotiations as a result of the public notification.
- 14) At a Council meeting, Council will consider a report on the submissions made during the public notification process and decides by resolution whether or not to enter into and sign the draft planning agreement.
- 15) In the case of a Development Application, Council determines the development application to which the planning agreement relates. If it resolves to approve the application, it will impose appropriate conditions on the consent referring to the agreement and other development contributions affected by the agreement. Note: Council can require a planning agreement to be entered into in the terms of a formal offer as a consent condition (generally a deferred commencement condition) if the Planning Agreement has not yet been executed, as such council may require initial Letters of Offer to be amended based on subsequent negotiation and legal advice.
- 16) Council and the developer execute the planning agreement.

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

A flow chart of this process is included at **Attachment D**.

**Note:** The attention of applicants and proponents is also drawn to council's monthly meeting schedule which can be found on council's website at: <https://www.krg.nsw.gov.au/Council/Council-meetings/Council-Meetings-and-Public-Forums>. The publication of the monthly agenda occurs a week prior to the Public Forum (which precedes the council meeting itself by at least one week) and adequate time prior to publication is required for staff to draft reports and prepare the agenda for publication.

## 6.2 Roles and Responsibilities

Ku-ring-gai Council will delegate the appropriate authority to a Council officer, or group of officers, to negotiate a planning agreement on behalf of Council.

In order to ensure that there is a clear separation of responsibilities in the consideration of Development Applications that involve planning agreements, Council staff who are involved in the assessment of the Development Application, are not to have a role in the assessment of commercial aspects of the planning agreement nor on the conditions of the planning agreement except where advice is required on matters relating to the conditions of consent for a particular proposal.

Councillors will not be involved in the negotiation of a planning agreement as there is a requirement to separate the regulatory powers of Council to ensure probity is maintained in the negotiation process. Councillors will ultimately determine by resolution whether to enter into the planning agreement.

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

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

If a third-party facilitator or coordinator is commissioned, this will be included as part of the costs agreement to be agreed prior to the commencement of the negotiation process in addition to legal costs.

## 6.3 Probity

Public probity is important to Ku-ring-gai Council and it will seek to ensure that the negotiation of any planning agreement is fair, transparent and directed at achieving public benefits in an appropriate manner free from corruption.

In this regard, Council will:

- inform any developer about Council values and business ethics as set out in Council's *Statement of Business Ethics*, specifically about ethical behaviour appropriate to business dealings. A copy of Council's *Statement of Business Ethics* may be found on council's website at:



<https://www.krg.nsw.gov.au/Business/Tenders-and-procurement/Statement-of-Business-Ethics> or search “Business Ethics”

- ensure any considerations of the planning agreement are consistent with the fundamental principles outlined in Section 4 of this Policy.
- publicly notify planning agreements to ensure they are open and transparent, and achieving public awareness of the matters contained in the planning agreement and the potential benefits of an agreement.
- ensure appropriate delegations and the separation of responsibilities in considering development applications that involve planning agreements, specifically the need to ensure processes adequately address the level of risk of corruption of a process.
- ensure that Councillors and Council staff understand their varied roles, some of which have potential to conflict.
- ensure that Council staff involved in planning agreement considerations are free from conflicts of interest.
- ensure that planning agreements are to be negotiated independently of the development application assessment process.
- take every step to ensure conflicts of interest are ameliorated to the greatest extent possible.
- ensure where Council has a commercial stake in development of the subject of 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 interest in the development. In this respect, Council shall have regard to its *Statement of Business Ethics* and the publication from the Independent Commission Against Corruption (ICAC) entitled: *Direct Negotiations – Guidelines for managing risks in direct negotiations*.
- if Council has a commercial interest in the subject matter or site of a planning agreement as a landowner, developer or financier, Council will ensure that the Council officer who assesses the application to which the planning agreement relates is not the same person, or a subordinate of the person, who negotiated the planning agreement on behalf of Council. In the case of a planning proposal, the need for an independent coordinator for the planning agreement or planning proposal or both is enhanced.
- ensure that all discussions with a developer and their consultants are sufficiently documented.

## 7. Notification and Exhibition

Section 7.5(1) of the Act precludes a planning agreement from being entered into, amended or revoked unless public notice is given of the proposed agreement, amendment or revocation. Ku-ring-gai Council will formally exhibit a draft Planning Agreement for a minimum of 28 days. The exhibition must include the draft planning agreement and explanatory note.

Sec.204(1) of the Regulations states that a draft planning agreement must be exhibited concurrent with a Development Application or application to modify an Environmental Planning Instrument. Only if this is not practicable, may it be exhibited at another time but as soon as it is practicable and in a manner that

the parties agree under sec.204(3). In order to satisfy these requirements, a prospective applicant needs to notify Council of their intent to negotiate a planning agreement prior to the lodgment of any Development Application or concurrent with any application to modify an Environmental Planning Instrument.

Applicants should note that extensive delays can arise as a result of delaying the submission of a letter of offer and a draft planning agreement concurrent with a Development Application or application to modify an Environmental Planning Instrument.

Applicants should be mindful that Ku-ring-gai Council runs a monthly Ordinary Meeting of Council (OMC) between February and December and that the statutory exhibition period for a draft planning agreement is a minimum of 28 days between reporting prior to exhibition and post-exhibition.

Council encourages the public to make submissions on planning agreements. This will allow Council to better understand local needs and permit fine tuning of the planning obligations set out in the planning agreement.

Following the exhibition of the draft planning agreement, public submissions will be assessed by the Council when it considered whether it should enter the proposed planning agreement.

## **8. Planning agreements and other planning processes**

### **8.1 Planning agreements and development assessment**

Section 4.15(1)(iia) of the Act requires a consent authority to take into consideration any planning agreement entered into, or draft planning agreement proposed to be entered into, by a developer together with any submissions made in response to the exhibition of the planning agreement or draft planning agreement.

Section 7.7(2) of the Act precludes a consent authority from refusing to grant consent on the grounds that a planning agreement has not been entered into in relation to the proposed development or that the developer has not offered to enter into a planning agreement.

### **8.2 Planning agreements and conditions of consent**

Section 7.7(3) of the Act authorises a consent authority to require a planning agreement to be entered into as a condition of a development consent. However, a consent condition can only require a planning agreement if it is in the terms of an offer made by the developers as part of making the development application or application for a complying development certificate made to Ku-ring-gai Council.

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

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

### **8.3 Planning agreements and contributions plans**

Following the execution of a planning agreement, that planning agreement will then take precedence over any reference in a contributions plan, including a subsequent contributions plan, adopted by Ku-ring-gai Council.

## 9. Administration and Implementation

### 9.1 Preparation of the planning agreement

The developer will prepare a draft planning agreement relating to the particular development application or proposed instrument change. The developer is encouraged to use the standard form, **Attachment A**, as a template for preparing the draft planning agreement.

### 9.2 Modification or discharge of the developers' obligations

Council may agree to a provision in a planning agreement permitting the developers' obligations under the agreement to be modified or discharged in the following circumstances:

- a) the developers' obligations have been fully carried out in accordance with the agreement
- b) the development consent to which the agreement relates has lapsed
- c) the development consent to which the agreement relates has been modified to such an extent that the planning obligations may not be appropriate
- d) the performance of the planning agreement has been frustrated by an event or events beyond the reasonable control of the parties
- e) other material changes affecting the operation of the planning agreement
- f) the council and the developer otherwise agree to the modification or discharge of the agreement

Such a provision will require the modification or revocation of the planning agreement in accordance with the Act and Regulation.

### 9.3 Registration of planning agreements (caveats)

Section 7.6 of the Act permits a planning agreement (or any amendment or revocation of a planning agreement) to be registered on the title of the land to which the planning agreement relates if each person with an interest in the land agrees to its registration. If a planning agreement has been so registered, it is binding on, and enforceable against, the owner of the land as if that owner had entered into the planning agreement.

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

Council may also make notation under s10.7(5) of the Act about a planning agreement on any certificate issued under s10.7(2) of the Act relating to the land which is the subject of a planning agreement whether or not the planning agreement has been registered on the title of the land.

A planning agreement may also make provision for Council to apply for a caveat on the land in the event that the registration on title is not attended to promptly by the developer.

### 9.4 Land and Environment Court

Section 7.8(1) of the Act expressly precludes a person from appealing to the Land and Environment Court against the terms of a planning agreement or against the failure of a planning authority to enter

into an agreement. There is a core principle that a planning agreement must be made voluntarily on both sides, therefore, once voluntarily entered into, there are no appeal rights.

This does not affect the jurisdiction of the Land and Environment Court under s9.45 of the Act to remedy or restrain a breach of the Act.

## 9.5 Amendment and revocation of planning agreements

Sec203(5) of the Regulation provides that a planning agreement can be amended or revoked by a further agreement, or with the agreement of all parties by the advertising of an intent to revoke and the execution of a revocation.

## 9.6 Monitoring and review

Council will monitor the performance of the developers' obligations under a planning agreement. This may include Council requiring the developer (at the developers' cost) to report periodically to Council on its compliance with obligations under the planning agreement.

Council may require a planning agreement to contain provisions establishing a mechanism under which the planning agreement is periodically reviewed with the involvement of all parties.

Council will require a planning agreement to contain a provision requiring the parties to use their best endeavours to agree on any modification to the agreement having regards to the outcome of the review.

## 9.7 Dispute resolution

Council will require a planning agreement to provide for mediation of disputes between parties to the agreement, before the parties may exercise any other legal rights in relation to the dispute. Unless agreed to otherwise by the parties, the planning agreement will provide that such mediation will be conducted pursuant to the Mediation Rules published by the Law Society of NSW current at the time the agreement is entered into.

If the dispute is not resolved under mediation, the dispute may, by agreement between the parties, be agreed to be resolved by expert determination by an independent expert in the relevant field.

## 9.8 Planning agreement register

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

Ku-ring-gai Council maintains an online planning agreement register which includes:

- copies of all planning agreements (and any amendments) that apply within the Ku-ring-gai local government area; and
- copies of explanatory notes relating to those agreements (including any amendments)
- copies of any draft planning agreements that council has resolved to place on public exhibition.

The planning agreement register does not form part of the exhibition content for any draft Planning Agreement. The exhibition of draft Planning Agreements takes place on a dedicated part of the site which hosts all council exhibitions and requests for feedback.

## 9.9 Planning portal requirements

All formal draft planning agreements, which have been endorsed for public exhibition but not yet entered into, and all executed planning agreements are uploaded to council's online register at:

<https://www.krg.nsw.gov.au/Planning-and-development/Building-and-renovations/Development-contributions/Planning-agreements>.

Additionally, all executed Planning Agreements are provided to the Minister for Planning (or his delegate) for upload to the NSW Government Planning Portal.

Council must also report particulars relating to planning agreements as part of its financial statements.

## 9.10 Costs

A planning agreement will make provision for payment by the developer of Council's costs of and incidental to:

- a) negotiating, preparing and entering into the agreement,
- b) monitoring and enforcing the agreement.

The above may include costs relating to legal advice, independent consultants/facilitators, land valuers, quantity surveyors, probity specialists and the like.

The planning agreement will specify that other costs related to the core purpose of the planning agreement, such as detailed landscape plans, architectural plans and/or subdivision plans, will be borne by the developers.

A planning agreement may make provision in respect of any other costs.

The costs incurred by Council will be borne by the developer at the time the cost is incurred, regardless of whether or not the agreement is finalised.

A signed undertaking for the costs of preparing a draft Planning Agreement will be sought prior to the formal commencement of the negotiation process and will be enforced in the event the property is on-sold during the negotiation period.

A reasonable limitation on costs may, subject to mutual agreement, be included in the costs agreement at which time costs could be reasonably estimated, but a fixed dollar cap is not an appropriate inclusion in a letter of offer made before the costs can be reasonably estimated.

The signed undertaking may specify parameters for payment to enable efficiencies in the process and reduce financial risks.

Any delay in settling invoices within the timeframe agreed as part of the signed undertaking may flow on to a delay in progressing work on the planning agreement.

## 9.11 Goods and Services Tax (GST)

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

## 9.12 Council contact

Persons making enquiries regarding planning agreements are advised to contact Ku-ring-gai Council by email: [krg@krg.nsw.gov.au](mailto:krg@krg.nsw.gov.au).

## Attachment A – Draft Planning Agreement Template

**Note: While a template is provided for reference purposes in good faith, it is strongly advised that proponents refer to existing executed planning agreements on council's website which have been further refined by experience. Attachment A – Draft Planning Agreement Template**

Note: While a template is provided for reference purposes in good faith, it is strongly advised that proponents refer to existing executed planning agreements on council's website which have been further refined by experience.

# Planning Agreement

## Parties to the Agreement

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

## Background

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

1. On [INSERT DATE] the Developer [MADE/AUTHORISED TO BE LODGED] a Development Application [TO/WITH] the Council to carry out the Development on the Land.
2. That Development Application was accompanied by an offer by the Developer to enter into this Agreement to make Development Contributions for public purposes.
3. The Developer is the owner of the Land / has entered into a Contract for Sale of Land dated [INSERT DATE] for the purchase of the land / has an option to purchase the land the subject of this agreement dated [INSERT DATE]. [DELETE AS APPLICABLE]

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

1. On [INSERT DATE] the Developer made an application to the Council for the Instrument Change specified in this Agreement for the purposes of making a Development Application to the Council for Development Consent to carry out the Development on the Land.
2. That Instrument Change application was accompanied by an offer by the Developer to enter into this Agreement to make Development Contributions for public purposes.
3. The Instrument Change was published in the NSW Government Gazette No. [INSERT NUMBER] on [INSERT DATE] and took effect on [INSERT DATE].
4. On [INSERT DATE] the Developer [MADE/AUTHORISED TO BE LODGED] a Development Application [TO/WITH] the Council to carry out the Development on the Land.

5. The Developer is the owner of the Land / has entered into a Contract for Sale of Land dated [INSERT DATE] for the purchase of the land / has an option to purchase the land the subject of this agreement dated [INSERT DATE]. [DELETE AS APPLICABLE]

## Operative Provisions

### 1 Planning Agreement Under the Act

The parties agree that this Agreement is a Planning Agreement governed by subdivision 2 of Division 7.1 of Part 7 of the Act.

### 2 Application of this Agreement

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

### 3 Operation of this Agreement

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

## 4 Definitions and Interpretation

### 4.1 Definitions

In this Agreement, the following definitions apply:

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

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

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

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

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

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

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

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

**Development Application** means [SPECIFY DA NUMBER] including any modifications made under section 4.55 or 4.56 of the Act and includes all plans, reports, models, and other supplementary information submitted to the consent authority and pertaining to the determination of [SPECIFY DA NUMBER].

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

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

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

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

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

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

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

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

**Land** means [IDENTIFY THE LAND THE SUBJECT OF THE PLANNING AGREEMENT BY REFERENCE TO LOT AND DP, GIVEN ADDRESS AND ANY OTHER IDENTIFYING PARTICULARS BEING THE LAND THE SUBJECT OF THIS PLANNING AGREEMENT].

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

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

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

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

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



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

**Regulation** means the *Environmental Planning and Assessment Regulation, 2021* (as amended).

**Security** means a Guarantee or bond or other form of security to the satisfaction of Council.

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

## 4.2 Interpretation

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

- a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
- b) A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- c) If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.
- d) A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
- e) A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- f) A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- g) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.
- h) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- i) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- j) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other gender.
- k) References to the word 'include' or 'including' are to be construed without limitation.
- l) A reference to this Agreement includes the agreement recorded in this Agreement.
- m) A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.

- n) Any schedules and attachments form part of this Agreement.
- o) Unless otherwise specified in this Planning Agreement, a word defined in the Act has the same meaning in this Agreement.

## 5 Development Contributions to be made under this Agreement

### 5.1 Payment of Monetary Development Contributions [DELETE IF NOT APPLICABLE]

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

### 5.2 Dedication of Land [DELETE IF NOT APPLICABLE]

[INSERT CLAUSES RELATING TO THE DEDICATION OF LAND GENERALLY GUIDED BY THE HEADS OF CONSIDERATION DOCUMENTED IN SECTION 5.3 OF THE PLANNING AGREEMENT POLICY]

### 5.3 Capital Works [DELETE IF NOT APPLICABLE]

[INSERT CLAUSES RELATING TO THE CARRYING OUT OF CAPITAL WORKS GENERALLY GUIDED BY THE HEADS OF CONSIDERATION DOCUMENTED IN SECTION 5.4 OF THE PLANNING AGREEMENT POLICY]

### 5.4 Other Contributions [DELETE IF NOT APPLICABLE]

[INSERT CLAUSES RELATING TO OTHER TYPES OF CONTRIBUTIONS GENERALLY GUIDED BY THE HEADS OF CONSIDERATION DOCUMENTED IN SECTIONS 5.5-5.10 OF THE PLANNING AGREEMENT POLICY]

## 6 Application of Development Contributions

### 6.1 Application of Development Contributions under this agreement

The Council must apply the Development Contributions towards the public purpose for which it is made.

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

## 7 Application of s7.11 and s7.12 and s7.24 of the Act to Development

- 7.1 [SPECIFY THE RELATIONSHIP BETWEEN THIS AGREEMENT AND SECTION 7.11 OR SECTION 7.12 OR S7.24 CONTRIBUTIONS DUE AND PAYABLE UNDER THIS CONSENT. I.E. IS THERE AN OFFSET? AGAINST HOW MANY CATEGORIES? OR DOES SECTION 7.11 OR SECTION 7.12 APPLY UNCHANGED?]

## 8 Registration of this Agreement

- 8.1 The Developer must take all practical steps to register this Agreement on the title for the Land within [SPECIFY TIME PERIOD] of the date of this Agreement, at its own cost.
- 8.2 The Developer must provide Council with evidence of the registration within 10 Business Days of such registration.

## 9 Interest in Land

- 9.1 The Developer represents and warrants that it is:
- a) the owner of the Land; or
  - b) legally and beneficially entitled to obtain all consents and approvals to assist, cooperate and to otherwise do all things necessary to comply with its obligations under clause 8.

## 10 Right to lodge caveat

- 10.1 Until this Agreement is registered on the title of the Land, the Developer acknowledges and agrees that Council has an interest in the Land and consents to Council lodging and maintaining a caveat on the title to the Land.
- 10.2 If the Council lodges a caveat, then the Council will do all things reasonably necessary to:
- a) ensure that the caveat does not prevent or delay the registration of this Agreement; and
  - b) remove the caveat from the title to the Land promptly, following registration of this Agreement.

## 11 Assignment and transfer

- 11.1 The Developer must not assign its rights or novate its obligations without the prior written consent of the Council, with such consent not to be unreasonably withheld.
- 11.2 The Developer must satisfy Council that the person to whom the rights or obligations are to be assigned or novated has sufficient assets, resources and expertise required to perform the obligations under this Agreement.
- 11.3 At its own costs, the Developer must procure the execution of an agreement under which the person to whom rights are being assigned or novated agrees to comply with the terms and conditions of this Agreement.

## 12 Right to transfer land

- 12.1 The Developer must not sell or transfer the whole or part of any part of the Land unless:
- a) The Council is satisfied that the proposed transferee has sufficient assets, resources and expertise to perform any of the remaining obligations of the Developer;
  - b) The Developer procures the execution of an agreement by the transferee, under which the transferee agrees to comply with the terms of this Agreement;
  - c) The Developer is not in material breach of its obligations under this Agreement; and

d) The Council has received a replacement Security.

## 13 Dispute Resolution

13.1 [SPECIFY AN APPROPRIATE DISPUTE RESOLUTION PROCESS HAVING REGARD TO THE BELOW]

13.2 This clause does not apply to an application for urgent interlocutory relief.

13.3 Parties must not commence court or arbitration proceedings unless that party has participated in a mediation.

13.4 The parties must participate in mediation upon receiving written notice of any dispute arising from this Agreement.

13.5 If the parties do not agree to the procedures to be adopted in mediation within 7 days of being notified of a dispute, then the parties must mediate the dispute with a mediator appointed by President of The Law Society of New South Wales in accordance with the Mediation Guidelines of The Law Society of New South Wales.

13.6. No party may use any information or documents obtained through any dispute resolution process for any purpose other than in an attempt to settle the dispute.

## 14 Enforcement

14.1 [SPECIFY THE MEANS OF ENFORCING THE AGREEMENT E.G. GUARANTEE POLICY MAY INCLUDE SOME OR ALL OF THE PROVISIONS SET OUT BELOW]

14.2 Developer to provide Security

- a) The Developer has agreed to provide the Security.
- b) The Security must:
  - i. name the Council as the relevant beneficiary;
  - ii. be unconditional; and
  - iii. not have an expiry date.

14.3 Amount of Security

- a) At the time the Developer signs this Agreement, the Developer must provide the Security to the Council having a value amount of \$[# TO BE AGREED BUT NOT LESS THAN \$100,000 OR THE COST OF ENFORCEMENT WHICHEVER IS THE GREATER].
- b) From the date of execution of this Agreement until the date that the Developer has provided the Development Contribution, the Council is entitled to retain the Security.

14.4 Claims under Guarantees

- a) The Council may:
  - i. call upon the Security where the Developer has failed to pay a Contribution Amount; and
  - ii. retain and apply such monies towards the Contribution Amount and any costs and expenses incurred by the Council in rectifying any default by the Developer under this Agreement.

- b) Prior to calling upon the Security the Council must give the Developer not less than 10 Business Days written notice of its intention to call upon the Security.
- c) If the Council calls upon the Security and applies all or part of such monies towards the Contribution Amount and any costs and expenses incurred by the Council in rectifying any default by the Developer under this Agreement, then the Developer must provide a replacement Security.

#### 14.5 Release of Security

If:

- a) the Developer has satisfied all its obligations under this Agreement; and
- b) the monies secured by the Guarantee has not been expended,

then the Council will promptly return the Guarantee (less any costs, charges, duties and taxes payable), or the remainder of the monies secured by the Guarantee (as the case may be), to the Developer.

## 15 Notices

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

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

#### Ku-ring-gai Council

Attention:[INSERT NAME OF CONTACT]

Address: 818 Pacific Highway, Gordon, NSW 2072

Locked Bag 1006, Gordon, NSW, 2072

DX number: 8703, Gordon

Email: [krq@krq.nsw.gov.au](mailto:krq@krq.nsw.gov.au) [COMPLETE EMAIL ADDRESS]

#### Developer / Proponent

Attention:[INSERT DETAILS]

Address: [INSERT DETAILS]

Fax Number: [INSERT DETAILS]

DX number: [INSERT DETAILS]

Email: [INSERT DETAILS]

- 15.2 If a Party gives the other Party three business days notice of a change of its address or other details, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.
- 15.3 Any notice, consent, information, application or request is to be treated as given or made at the following time:
- a) If it is delivered, when it is left at the relevant address;
  - b) If it is sent by post, two business days after it is posted;
  - c) If it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number;
  - d) If it is sent by DX, one business day after it is dispatched.
- 15.4 If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

## 16 Approvals and consent

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

## 17 Assignment and Dealings

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

## 18 Costs

- 18.1 [SPECIFY HOW THE COSTS OF NEGOTIATING, PREPARING, EXECUTING, STAMPING AND REGISTERING THE AGREEMENT ARE TO BE BORNE BETWEEN THE PARTIES HAVING REGARD TO THE BELOW]
- 18.2 Prior to the execution of this Agreement, or otherwise on being made aware of such costs following execution of this Agreement, the Developer must pay:
- a) Council's reasonable costs and disbursements, including legal costs, in connection with the negotiation, preparation, execution and carrying into effect of this Agreement.
  - b) all costs and expenses associated with the giving of public notice of this Agreement and the Explanatory Note.
  - c) all Taxes in respect of this Agreement including stamp duty and registration fees, if applicable.

- d) Council's reasonable costs and disbursements in connection with the release and discharge of this Agreement, if applicable.

## 19 Entire agreement

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

## 20 Further acts

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

## 21 Governing law and jurisdiction

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

## 22 Joint and individual liability and benefits

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

## 23 No fetter

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

## 24 Representations and warranties

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

## 25 Severability

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

## 26 Modification or review

- 26.1 No modification of this Agreement will be of any force or effect unless it is in writing and signed by the parties to this Agreement.
- 26.2 [SPECIFY WHETHER AND IN WHAT CIRCUMSTANCES THE AGREEMENT CAN OR WILL BE REVIEWED AND THE PROCESS AND IMPLEMENTATION OF THE REVIEW THAT IS TO OCCUR]

## 27 Waiver

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

## 28 GST

- 28.1 In this clause:

Adjustment Note, Consideration, GST, GST Group, Margin Scheme, Money, Supply and Tax Invoice have the meaning given by the GST Law.

**GST Amount** means in relation to a Taxable Supply the amount of GST payable in respect of the Taxable Supply.

**GST Law** has the meaning given by the A New Tax System (Goods and Services Tax) Act 1999 (Cth).

**Input Tax Credit** has the meaning given by the GST Law and a reference to an Input Tax Credit entitlement of a party includes an Input Tax Credit for an acquisition made by that party but to which another member of the same GST Group is entitled under the GST Law.

**Taxable Supply** has the meaning given by the GST Law excluding (except where expressly agreed otherwise) a supply in respect of which the supplier chooses to apply the Margin Scheme in working out the amount of GST on that supply.

- 28.2 Subject to clause 28.3, if GST is payable on a Taxable Supply made under, by reference to or in connection with this Deed, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.
- 28.3 Clause 28.2 does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Agreement to be GST inclusive.
- 28.4 No additional amount shall be payable by the Council under clause 28.2 unless, and only to the extent that, the Council (acting reasonably and in accordance with the GST Law) determines that it is entitled to an Input Tax Credit for its acquisition of the Taxable Supply giving rise to the liability to pay GST.



- 28.5 If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this Deed by one Party to the other Party that are not subject to Division 82 of the A New Tax System (Goods and Services Tax) Act 1999, the Parties agree:
- a) to negotiate in good faith to agree the GST inclusive market value of those Supplies prior to issuing Tax Invoices in respect of those Supplies;
  - b) that any amounts payable by the Parties in accordance with clause 28.2 (as limited by clause 28.3 to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- 28.6 No payment of any amount pursuant to this clause 28, and no payment of the GST Amount where the Consideration for the Taxable Supply is expressly agreed to be GST inclusive, is required until the supplier has provided a Tax Invoice or Adjustment Note as the case may be to the recipient.
- 28.7 Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred by a party, must exclude the amount of any Input Tax Credit entitlement of that party in relation to the relevant cost, expense or other liability.
- 28.8 This clause continues to apply after expiration or termination of this Agreement.

## 29 Good Faith

- 29.1 Each party must act in good faith towards all other parties and use its best endeavours to comply with the spirit and intention of this deed.

## 30 Explanatory Note

- 30.1 In accordance with section 205(5) of the Regulation the explanatory note must not be used to assist in construing this Agreement.

**EXECUTED** as a Deed/an Agreement [AMEND AS APPROPRIATE]:

**PARTY**

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

Delegate:

Witness:

**PARTY**

[INSERT DEVELOPER & ACN] in accordance with s127 of the Commonwealth Corporations Act 2001:

**PARTY**

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

## Attachment B – Sample Explanatory Note

Environmental Planning and Assessment Regulation 2021  
(Sec.205)

### Explanatory Note

#### Draft Planning Agreement

Under s7.4 of the Environmental Planning and Assessment Act 1979

#### 1. Parties

## (Planning Authority)

## (Developer)

#### 2. Description of Subject Land

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

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

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

The Planning Purposes Served by the Planning Agreement

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

How the Draft Planning Agreement Promotes the Public Interest

For Planning Authorities:

(a) Development Corporations – How the Draft Planning Agreement promotes its Statutory Responsibilities

(b) Other Public Authorities - How the Draft Planning Agreement promotes the Objects (if any) of the Act under Which it is Constituted

(c) Councils – How the Draft Planning Agreement Promotes the Elements of the Council's Charter

(d) All Planning Authorities – Whether the Draft Planning Agreement Conforms with the Authority's Capital Works Programme

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

Other Matters

Signed and Dated by All Parties

## Attachment C – Potential Public Benefits

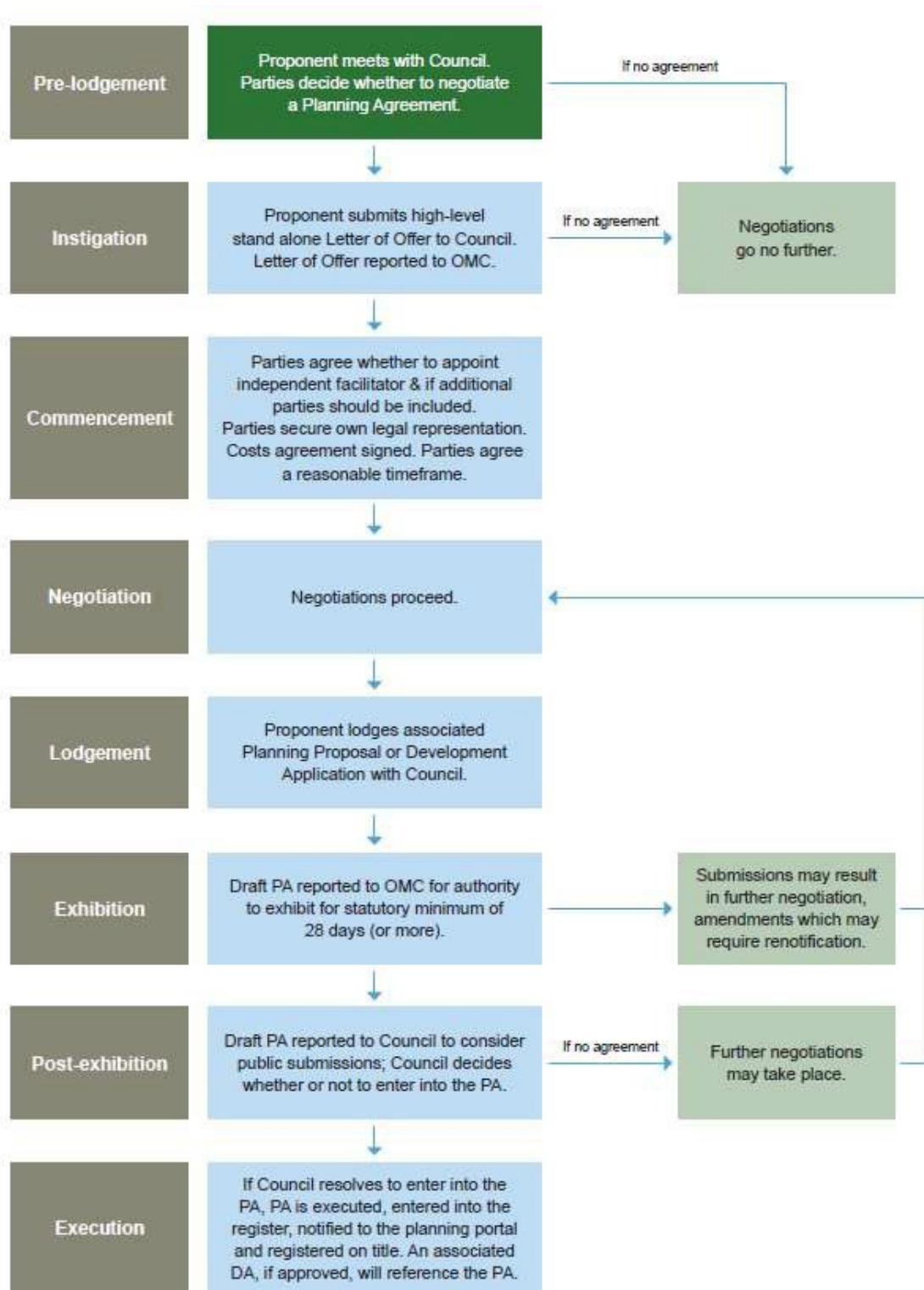
The following is a list of possible public benefits that may be provided by a planning agreement. This list is not exhaustive and developers are encouraged to discuss these or other requirements that may be included in a planning agreement.

Infrastructure	<ul style="list-style-type: none"> <li>• Accessibility improvements</li> <li>• Roads</li> <li>• Drainage and stormwater controls</li> <li>• Traffic measures</li> <li>• Works that facilitate and enhance existing public transport facilities</li> <li>• Pedestrian and cycleway linkages and footpaths</li> <li>• Bridges</li> </ul>
Public Open Space	<ul style="list-style-type: none"> <li>• Parks</li> <li>• Public spaces</li> <li>• Embellishment to new or existing open space, including upgrades to existing open space such as play equipment, lighting, sports facilities, furniture, public art and landscape works</li> </ul>
Public Community Facilities	<ul style="list-style-type: none"> <li>• Recreation facilities (indoor and outdoor)</li> <li>• Cultural and social facilities</li> <li>• Community facilities</li> <li>• Childcare centres</li> </ul>
Bushland Regeneration	<ul style="list-style-type: none"> <li>• Restoration and management of natural areas including bushland and creeks.</li> </ul>
Other	<ul style="list-style-type: none"> <li>• Monetary contributions</li> <li>• Land dedications for parks, facilities, pedestrian connectivity and new roads</li> <li>• Easements for public access and the like</li> <li>• Affordable housing (in perpetuity preferred)</li> <li>• Other works or improvements within the broad categories listed above at the discretion of Council</li> <li>• Maintenance that addresses direct impacts</li> </ul>

### Public Benefits to have a clear relationship with the site

Critical in the determination of public benefits is the relationship to the development proposal or to the planning proposal in the case of a proposed change to the planning controls. Justification for any proposed material public benefits should be clearly linked to the either the mitigation of the additional impact arising from the proposal or the benefits arising to both the new population and the existing population from the proposed works. Works-in-kind deliver works that are already justified as being essential to the progressive redevelopment of the area by virtue of inclusion in the adopted and in-effect s7.11 Contributions Plan, or, more generically, in the case of the s7.12 Local Levy Contributions Plan, however it is still important to clarify why the subject development should deliver them. It is essential to bear in mind that an offer made in good faith, still should not give rise to a public perception that changes to a planning instrument, or the approval of any particular development should be able to be “bought” through the provision of unrelated works. The link between the offer being made and the public benefits arising from the proposal or the timely efficiency of delivery of works-in-kind should be clearly demonstrated in terms of each work proposed to be delivered under a planning agreement within the initial letter of offer.

**Attachment D – Flow Chart of Planning Agreement Process**



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