

## Council Policy

### Voluntary Planning Agreements

#### Policy Statement

This Policy sets out Northern Beaches Council's position relating to voluntary planning agreements (VPAs) under section 7.4 of the *Environmental Planning and Assessment Act 1979*.

The current legal and procedural framework for VPA obligations is set out in Division 7.1 of Part 7 of the Act and Division 1A of Part 4 of the *Environmental Planning and Assessment Regulation 2000*.

A Practice Note *Planning Agreements* (July 2005) was issued by the Department of Infrastructure Planning and Natural Resources for the purposes of clause 25B of the Regulation. While Council is not legally bound to follow the Practice Note, Council will be guided by the Practice Note, including any amendments to the Practice Note or any replacement Practice Note. If there is any inconsistency between the Practice Note and this Policy, then Council will be guided by this Policy.

As at the date of this Policy, the Department of Planning, Industry and Environment had exhibited for comment a new draft VPA Practice Note (exhibited in early 2017), however it is yet to be finalised. Accordingly, this Policy may be amended following finalisation of the draft Practice Note.

This Policy and any outcomes sought through the VPA process will also be undertaken in the context of delivering the vision, goals and outcomes of the Northern Beaches Community Strategic Plan.

#### Scope and Application

This Policy applies to all VPAs entered into by the Northern Beaches Council, and applies to all land in the Northern Beaches Council local government area (LGA), including any land owned by the Council.

This Policy also applies to land outside of the Northern Beaches Council LGA in case of a joint VPA between Council and another council or planning authority for land outside of the Northern Beaches Council LGA.

Section 7.4 of the Act sets out the circumstances under which a VPA may be entered into. It provides that a '*...planning agreement is a voluntary agreement or other arrangement between a planning authority (or 2 or more planning authorities) and a person (the developer):*

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

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

#### Principles

The guiding principles of this Policy are:

- a) To establish a fair, transparent and accountable framework governing the use and preparation of VPAs by Council.

- b) To enhance the range and extent of public benefits arising from a VPA.
- c) To ensure a consistent approach is undertaken in the negotiation and preparation of all VPAs that is efficient, fair and accountable.
- d) To supplement the application of section 7.11 or section 7.12 of the Act.
- e) To align with Council's corporate and strategic planning context, including Council's Local Strategic Planning Statement, Community Strategic Plan, Delivery Plan, Operational Plan, Development Contribution Plans or other Infrastructure Planning Documents.
- f) To ensure greater probity and establish a probity framework for the negotiation, preparation and implementation of VPAs.
- g) To facilitate public participation and to allow the community to gain an understanding of the benefits of appropriate VPAs for the provision of public benefits.

### **Types of VPA contributions**

The contribution negotiated under a VPA could comprise of one or more of the following (to Council):

- a) a monetary contribution,
- b) provision of any material public benefit including (without limitation) public facilities,
- c) dedication of land free of cost, or
- d) a combination of the above,

to be used for or applied towards a public purpose.

### **Consideration of a VPA offer**

Council will ultimately require that a VPA provides a positive planning outcome for the Northern Beaches community. There must be a demonstrable public benefit arising from a VPA and this should be clearly demonstrated in the VPA offer documentation. This information will help Council to consider the VPA offer. However, Council has the discretion not to enter into a VPA for any reason, including if the development contribution is not considered to deliver a sufficient demonstrable public benefit.

In consideration of a VPA offer, the following will be taken into account:

- a) Whether it is acceptable and reasonable to use a VPA.
- b) Whether the offer proposed in a VPA can be achieved via an alternate mechanism such as a condition of development consent.
- c) Whether the VPA meets the requirements of the Act and the Regulation.
- d) Whether the VPA meets the current and future demands created by the development for new public infrastructure, amenities and services.
- e) Whether the VPA aligns with Council's corporate strategic documents.
- f) Whether compensation is required for the loss of, or damage to, a public amenity, service, resource, the natural environment or asset caused by the development through its replacement, substitution, repair or regeneration.
- g) Whether the VPA rectifies an existing deficiency in the provision of public facilities and services on the Northern Beaches.

- h) Whether future recurrent funding related to the proposed public benefit is sustainable.
- i) Whether the public benefit accrues over time.
- j) Whether the VPA is directed towards proper or legitimate planning purposes, ordinarily ascertainable from the statutory planning controls and other adopted planning policies applying to development.
- k) Whether or not there is a nexus between the public benefit and the development application or application for instrument change (note section 7.4(4) of the Act does not require any nexus between the public benefit and the development application or application for instrument change).
- l) Producing outcomes that meet the general values and expectations of the public and protect the overall public interest.
- m) Providing for a reasonable means of achieving the relevant purposes and outcomes and securing the benefits.
- n) Protecting the environment and community against planning harm.
- o) Whether there any relevant circumstances that may operate to preclude Council from entering into the proposed VPA.

Notwithstanding the above, Council is not obliged to enter into a VPA.

In addition, Council will ensure:

- a) All dealings relating to VPAs, including assessment and implementation, will be subject to strict compliance with the Northern Beaches Council Code of Conduct.
- b) That planning decisions will not be bought or sold through VPAs.
- c) That a VPA will not improperly fetter the exercise of its functions under the Act, Regulation or any other act or law.
- d) That VPAs are not used for any purpose other than that contemplated by section 7.4 of the Act.
- e) That undue weight is not given to a VPA in consideration of a development application or application for instrument change.
- f) That the consideration, negotiation and assessment of a proposed VPA will, to the extent reasonably practicable, be separate from the consideration of the planning merits of a development application or an application for instrument change. Council will, consistently with section 4.15 of the Act, take into consideration relevant provisions of a proposed VPA when evaluating a development application.
- g) That the interests of individuals or interest groups will not outweigh the public interest when considering a VPA.
- h) That it will not improperly use its position to extract disproportionate public benefits from developers under VPAs.
- i) That it will not use VPAs as a means to overcome revenue raising or spending prohibitions to which it is subject or for other improper purposes.

## Probity

Public probity is important to Council and it will ensure that the consideration of any VPA is fair, transparent and is directed at achieving public benefits in an appropriate manner free of corruption or perception of bias.

In this regard, Council will:

- a) Comply with the requirements of the Act and Regulation in respect of VPAs.
- b) Provide a copy of this Policy to any person who seeks to enter into a VPA with Council.
- c) Ensure all parties operate in accordance with Council's Code of Conduct.
- d) Ensure that Council officers and Councillors understand the circumstances in which VPAs are appropriate.
- e) Ensure that Council officers and Councillors understand their particular role and responsibility, some of which carry the potential for conflicts of interest.
- f) Ensure that the community understands Council's role, including how the VPA operates and how Council will assess VPAs objectively.
- g) Notify VPAs in accordance with the Act and Regulation, to ensure they are open and transparent, and to achieve maximum public awareness of the matters contained in a VPA and the potential benefits of a VPA.
- h) Ensure appropriate delegations and separations of responsibilities in considering development applications or applications for instrument change that involve VPAs. This involves ensuring processes adequately address the level of risk of corruption of a process while at the same time being appropriate to the likely level of risk.
- i) Ensure that modifications to approved development should be subject to the same scrutiny as the original development application and include notification to the Development Contributions Working Group prior to determination.
- j) Take every step to ensure that conflicts of interest are ameliorated to the greatest extent possible. This may include independent assessment by a third party where Council has an interest and not entering into any contractual arrangement which purport to guarantee outcomes that are subject to separate regulatory processes.
- k) Ensure that appropriate probity mechanisms are in place.

The procedures that will be implemented to address these matters may include, but not be limited by, the following:

- a) The Councillors will not be involved in the preparation of the VPA but will ultimately decide whether to accept any VPA offer as part of their duties as Councillors.
- b) The Development Contributions Working Group and Development Contributions Committee will assess a VPA offer on behalf of Council in accordance with this Policy and make appropriate recommendations to Council.
- c) Council will, in all cases, ensure that Council staff with key responsibility for providing advice on development application approvals, approving development applications or ensuring compliance, do not have a role in the assessment of the commercial aspects of the VPA nor on the conditions of the VPA except where advice is required on matters relating to the conditions of consent for a particular proposal.
- d) Council may involve an independent person(s) to facilitate or otherwise participate in the consideration of a VPA offer, particularly where this will lead to a better outcome.

- e) Council will ensure that all discussions with a developer and their consultants relating to a VPA are sufficiently documented.
- f) Council will ensure that Council staff involved in VPA considerations are free from conflicts of interest.
- g) Where Council has a commercial stake in a development that is the subject of a VPA, 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 role in the development consistent with the ICAC strategies for managing dual roles in its publication *Corruption Risks in NSW development approval processes: Position Paper (September 2007)*.

### **How will Council value development contributions under a VPA?**

If the public benefit under a VPA offer is the provision of land for a public purpose, Council will seek to value the benefit on the basis of the market value of the land. This market value is to be provided by the developer and independently verified by a registered property valuer.

If the public benefit under a VPA offer is the carrying out of works for a public purpose, Council will generally seek to value the benefit on the basis of the estimated value of the completed works via a cost estimate prepared by an independent quantity surveyor.

In all instances, the costs of the valuation of the benefits are to be at no cost to Council.

It is acknowledged that in some cases the public benefit may be an intangible benefit that can only be assessed in qualitative terms, such as a particular design outcome for a proposed building. In this case, the Council and the developer will negotiate the manner in which the development contribution is to be valued.

Unless otherwise agreed, all benefits under a VPA will be dedicated at no cost to Council and free of any encumbrances, except any permitted encumbrances as agreed by Council. The Council may attribute a value to benefits provided under a VPA, for the purposes of determining the value of the VPA contributions being offered by the developer.

### **Application of Section 7.11 or Section 7.12 development contributions**

A VPA may wholly or partly exclude the application of section 7.11 or section 7.12 to development the subject of the VPA. As a general position, a developer should assume that contributions under these sections will apply to the development. This is a matter which can be negotiated between the Council and the developer having regard to the circumstances of the case.

Where the VPA is made in conjunction with an application for instrument change that is seeking to vary Council's planning controls to improve the land value, then the VPA contributions should relate to the land value uplift sought. In this case whether section 7.11 or section 7.12 development contributions are also proposed to be paid in addition to any VPA contribution will be relevant to any decision by Council to accept a VPA offer.

Where a VPA is proposed to deliver works in kind, material public benefit or land in lieu of section 7.11 or section 7.12 development contributions levied on an existing development consent, then the VPA contribution would in this case be an alternate to the development contributions (either in full or part). An application to modify the consent by deletion or modification of the existing section 7.11 or section 7.12 conditions of consent would also need to be made.

Where certain infrastructure provision or works would normally be required to be provided as part of a development by way of a condition of development consent, then these would be considered to be in addition to any VPA contribution. No reduction in the VPA contribution would be accepted in recognition of works required to be carried out in connection with the proposed development or already required via a condition of consent.

In all other circumstances Council will generally only favourably consider excluding the application of section 7.11 or section 7.12 where the public benefit to be delivered via the VPA contribution exceeds the public benefit to be delivered under a Development Contributions Plan. A VPA cannot exclude the application of sections 7.11 or 7.12 to a particular development, unless the consent authority for the development or the Minister is a party to the planning agreement (section 7.4(3A) of the Act).

Where section 7.11 or section 7.12 is not excluded by a VPA, Council will generally not agree to a provision allowing benefits under the VPA to be taken into consideration in determining a development contribution under section 7.11 or section 7.12.

### **Modification or discharge of obligations**

Council may agree to a provision in a VPA permitting the developer's obligations under the VPA to be modified or discharged in the following circumstances:

- a) The developer's obligations have been fully carried out in accordance with the VPA, or
- b) The development consent to which the VPA relates has lapsed, or
- c) The developer is able to satisfy the Council that good reason exists for some change to the VPA and that the public benefits provided under the modified VPA are appropriate in the circumstances, or
- d) The developer has fully and completely assigned the developer's interest under the VPA in accordance with its terms.

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

### **Assignment and dealings by the developer**

Council will not permit the assignment of any or all of the developer's rights or obligations under the VPA, nor will Council permit any dealing in relation to any part or the whole of the land the subject of the VPA unless:

- a) The developer has, at no cost to Council, first procured the execution by the person with whom it is dealing of all necessary documents in favour of Council by which that person agrees to be bound by the VPA as if they were a party to the original VPA, and
- b) If the proposed dealing involves a mortgage, charge or other encumbrance in relation to the party's right, title and interest in the land, such documents provide for a VPA by the person to the effect that they, and any receiver appointed by them, will not enjoy rights greater than those of that party, and
- c) The party is not in breach of the VPA, and
- d) The Council is satisfied that the assignee is capable of complying with the obligations under the VPA.

This does not affect the operation of any of other requirements of the VPA.

### **Provision of security under a VPA**

Council will generally require a VPA to make provision for security to cover the developer's obligation under the VPA. The form of security will generally be an unconditional bank guarantee from an Australian bank in favour of Council to the full value of the developer's obligation under the VPA and on terms otherwise acceptable to Council.

### **Notations on Certificates under Section 10.7(5) of the Act**

Council will generally require a VPA to contain an acknowledgement by the developer that Council will make a notation under section 10.7(5) of the Act about the VPA on any certificate issued under section 10.7(2) of the Act relating to the land the subject of the VPA or any other land.

### Registration of VPAs

Council will generally require a VPA to contain a provision requiring the developer to agree to registration of the VPA under the *Real Property Act 1900* at the developer's expense pursuant to section 7.6 of the Act. The developer will be required to provide the Council with the written agreement of each person with an estate or interest in the land in a form sufficient to effect the registration of the VPA at NSW Land Registry Services.

### Dispute resolution

Council will require a VPA to provide for mediation of disputes between the parties to the VPA before the parties may exercise any other legal rights in relation to the dispute.

### References and Related Documents

- *Environmental Planning and Assessment Act 1979*, particularly Subdivision 2 of Part 7
- *Environmental Planning and Assessment Regulation 2000*, particularly Division 1A of Part 4
- *Real Property Act 1900*
- *Practice Note on Planning Agreements* published by the Department of Infrastructure Planning and Natural Resources (July 2005)
- *Draft Practice Note on Planning Agreements* published by the Department of Planning, Industry and Environment (November 2016)
- Northern Beaches Council Code of Conduct

### Definitions

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

**Council** means the Northern Beaches Council,

**Developer** is a person who has sought a change to an environmental planning instrument (which includes the making, amendment or repeal of an instrument), or who has made or proposes to make a development application, or who has entered into an agreement with or is otherwise associated with such a person,

**Development application** has the same meaning as in the Act,

**Development contribution** means the kind of provision made by a developer under a Voluntary Planning Agreement, being a monetary contribution, the dedication of land free of cost or the provision of a material public benefit to be used for or applied towards a public purpose.

**Development Contributions Committee** means the Northern Beaches Council committee responsible for the preparation, implementation and management of development contributions Plans in the Northern Beaches area, and making recommendations to Council regarding Voluntary Planning Agreements,

**Development Contributions Working Group** means the Northern Beaches Council group that supports the Development Contributions Committee in the preparation, implementation and management of development contributions plans and Voluntary Planning Agreements in the Northern Beaches area. The Working Group undertakes assessments of offers for a Voluntary Planning Agreement,

**Instrument Change** means a change to an environmental planning instrument to facilitate a development the subject of a Voluntary Planning Agreement,

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

**Practice Note** means the Practice Note on Planning Agreements published by the Department of Infrastructure Planning and Natural Resources (July 2005),

**Public** includes a section of the public,

**Public benefit** is the benefit enjoyed by the public as a consequence of a development contribution which may be tangible and / or intangible,

**Public facilities** means public infrastructure, facilities, amenities and services not including water supply or sewerage services,

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

**VPA** means a Voluntary Planning Agreement.

### Responsible Officer

- Executive Manager Strategic & Place Planning
- Executive Manager Development Assessment
- Executive Manager Environment and Climate Change
- Executive Manager Financial Planning & Systems
- Executive Manager Property

### Review Date

October 2023

### Revision History

Revision	Date	Status	TRIM Ref
1	October 2019	Drafted VPA Policy	2019/489894
	15 Dec 2019	Adopted by Council	2019/489894