

Planning Agreements Policy

1 Purpose

The purpose of this policy is to set out the approach, procedures and requirements relating to all planning agreements entered into by the Bellingen Shire Council (**Council**).

2 Adoption

This policy was adopted by Council on XXXX.

3 Application

This policy applies to all land in the Bellingen local government area (**Bellingen LGA**).

This policy may also apply to land outside of the Bellingen LGA in the circumstances of a joint planning agreement between Council and another council or planning authority.

4 Guiding principles of this policy

The guiding principles of this policy are:

- (a) To establish a fair, transparent and accountable framework governing the use and preparation of planning agreements by Council.
- (b) To ensure that the planning agreements complement other processes for the funding of public infrastructure, amenities and services such that outcomes are fair, transparent and accountable for all residents in the local government area.
- (c) To enhance the range and extent of public benefits.
- (d) To ensure a consistent approach is undertaken in the negotiation and preparation of all planning agreements.
- (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 establish a probity framework for the negotiation, preparation, and implementation of planning agreements.
- (g) To facilitate public participation and to allow the community to gain an understanding of the benefits of appropriate planning agreements for the provision of public benefits.
- (h) Value capture should not be the primary purpose of a planning agreement.

5 What is a planning agreement?

Section 7.4(1) and (2) of the Environmental Planning and Assessment Act, 1979 (**EP&A Act**) defines what a planning agreement is and the public purposes that it should seek to pursue:

- (1) *A planning agreement is a voluntary agreement or other arrangement under this Division between a planning authority (or 2 or more planning authorities) and a person (the developer)—*
 - (a) *who has sought a change to an environmental planning instrument, or*
 - (b) *who has made, or proposes to make, a development application or application for a complying development certificate, or*

- (c) *who has entered into an agreement with, or is otherwise associated with, a person to whom paragraph (a) or (b) applies,*

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

(2) A public purpose includes (without limitation) any of the following—

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

6 Objectives of planning agreements

Planning agreements should be directed towards achieving the following broad objectives:

- (a) Meeting the demands created by the development for new or augmented public infrastructure, amenities, and services.
- (b) Securing on-site or off-site benefits for the community so that development delivers a net community benefit.
- (c) The replacement, substitution, repair or regeneration of a public amenity, service, resource, or asset by the development.
- (d) Requiring a development to incorporate particular elements that confer a public benefit such as the provision of public facilities, open space, or the rehabilitation of bushland.
- (e) Requiring a development to make contributions towards the recurrent costs of infrastructure, facilities, or services.

7 Acceptability test

Council requires that all planning agreements provide a positive planning outcome and a demonstrable public benefit for the Bellingen Shire community. This should be clearly demonstrated in the planning agreement offer and application documentation. The following acceptability test will be used to assess whether a planning agreement:

- (a) Is directed towards legitimate planning purposes, which can be identified in the statutory planning controls and other adopted planning strategies and policies applying to development.
- (a) Provides for the delivery of infrastructure or public benefits not wholly unrelated to the development.
- (b) Produces outcomes that meet the general values and expectations of the public and protect the overall public interest.
- (c) Provides for a reasonable means of achieving the desired outcomes and securing the benefits.

(d) Protects the community against adverse planning decisions.

8 When should planning agreements be used?

Planning agreements have the potential to be used in a wide variety of circumstances. The following are some examples:

- (a) In major development sites or precincts that are owned by a single landowner or a consortium of landowners.
- (b) Where the developer has a direct incentive, such as bringing forward potential development, to be involved in the delivery of community infrastructure.
- (c) Where the developer wants to provide community infrastructure in addition to, or at a higher standard than, what has been specified under the contributions plan.
- (d) Where a council and the developer negotiate a different and better or more innovative outcome than can be achieved through imposing direct or indirect contributions.
- (e) Where a proposed development has not been anticipated by local council and thus works and facilities to cater for this development have not been identified. A planning agreement can be prepared to specifically target the needs of the development.

9 Planning agreements to run with the land

In certain circumstances Council will agree to enter into a planning agreement only when the offer includes an agreement by all persons with an estate or interest in the land to register the agreement pursuant to the provisions of s7.6 of the EP&A Act. Examples of such circumstances include:

- (a) when a development will be required to provide recurrent funding, or
 - (b) when there is a requirement for ongoing maintenance of infrastructure post construction,
- Planning agreements that have been registered by the Registrar-General under this section are also binding on, and enforceable against, all subsequent owners of the land as if they had entered into the agreement.

10 Provisions required to be included in a planning agreement

Section 7.4(3) of the EP&A Act provides the mandatory provisions to be included in a planning agreement. This policy reiterates these minimum requirements and seeks to ensure these are met in every planning agreement.

- (3) *A planning agreement must provide for the following—*
 - (a) *a description of the land to which the agreement applies,*
 - (b) *a description of—*
 - i. *the change to the environmental planning instrument to which the agreement applies, or*
 - ii. *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, 7.12 or 7.24 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.*

The EP&A Act does not preclude a planning agreement containing provisions in addition to the mandatory matters.

For consistency and process efficiency, all planning agreements must be in the form of the template planning agreement included in **Attachment A**. This template provides the legal framework for the agreement and will include the Infrastructure and Services Plan (see clause 12 below) as an attachment. This allows for the scope of works and services, monetary contributions and timing of delivery to be negotiated separately from the legal terms

11 Explanatory note

In accordance with clause 205(1) of the EP&A Regulation, when Council proposes to enter into, amend, or revoke a planning agreement, an explanatory note must be prepared for the purposes of community and public authority consultation purposes. The explanatory note must:

- (c) summarise the objectives, nature and effect of the proposed agreement, amendment, or revocation, and
- (d) contain an assessment of the merits of the proposed agreement, amendment or revocation including the positive and negative impacts on the public or a relevant section of the public.

For consistency and process efficiency, all explanatory notes must be in the form of the template included in **Attachment B**. The developer offering to enter into a planning agreement must prepare a draft explanatory note in the form of the template.

A summary form of the Infrastructure and Services Plan should be included in the explanatory note.

12 Infrastructure and Services Plan

A planning agreement must be accompanied by an Infrastructure and Services Plan. This will form part of the planning agreement and must include:

- (a) Scope of infrastructure works and any services to be delivered by the developer, and
- (b) Monetary contributions, including up-front and recurring payments, and
- (c) The timetable for provision of planning obligations under the agreement by reference to the issuing of development consent, construction, occupation or subdivision certificates, or other relevant regulatory stages,
- (d) Ongoing operation and management arrangements for infrastructure and services.

The planning agreement may also include the following:

- (a) The design, technical specification and standard of any work required by the agreement to be undertaken by the developer.
- (b) The manner in which works are to be handed over to Council.

- (c) The manner in which a material public benefit is to be made available for its public purpose in accordance with the agreement.
- (d) A warranty period for work, materials, buildings, and any other property that form part of any public benefit. These warranties would generally be for a minimum of 12 months for materials and services such as electrical works and 15 years for structural items.

13 Preferred process

The preferred process relating to the consideration, notification and entering into planning agreements is as follows:

- **Step 1 Prior to commencement.** Before making a development application or submitting a planning proposal, the planning authority and developer should have informal discussions as to whether to negotiate a planning agreement. In these discussions consideration should be given to this policy, relevant practice notes, legislation, and regulations. The parties should also consider whether other planning authorities and other persons associated with the development should be additional parties to the planning agreement, such as the landowner if the landowner is a different person to the developer. This preliminary discussion, on Council's part, will be undertaken by a Responsible Officer in consultation with the Group Leader Planning Services and Executive Leadership Team where appropriate.
- **Step 2 Lodgement of offer.** If Council agrees, in principle, to proceed with the preparation and negotiation of a planning agreement, the developer should prepare a formal offer to Council in the form of a draft explanatory note (see clause 11 of this policy and Attachment B).
- **Step 3 Negotiation.** Formal negotiation of a planning agreement may only formally commence when the developer has submitted a development application or a proposal to change an environmental planning instrument. Nevertheless, Council may, at its discretion, agree to commence negotiations at an earlier time where sufficient documentation describing the development is made available. The negotiation shall address the legal wording of the draft planning agreement (see template at **Attachment A**), the details of the offer in the Infrastructure and Services Plan, and accompanying explanatory note (**Attachment B**). The offer will be assessed against the acceptability test outlined in clause 7 of this policy. Compliance with the acceptability test criteria does not guarantee that Council will agree to enter into a planning agreement. Other matters to be negotiated include:
 - how the draft planning agreement will be enforced,
 - when the draft planning agreement will be executed,
 - what security provisions and other conditions will be included in the agreement.
- **Step 4 Preparation of draft agreement.** Legal advice should be sought in respect of the completed package of draft documents to ensure that the appropriate provisions are included in the planning agreement.
- **Step 5 Application.** When the developer makes the application or submits a planning proposal to the relevant authority, it should be accompanied by the draft planning agreement and the explanatory note. The application must clearly stipulate that it is made in conjunction with the offer to enter into the planning agreement.
- **Step 6 Notification.** Relevant public authorities are consulted and the application or planning proposal, draft planning agreement and explanatory note are publicly notified together in accordance with the EP&A Act and EP&A Regulation. The EP&A Act requires that, a draft planning agreement must be publicly notified and made available for public inspection for a minimum period of 28 days. Council may decide to notify a planning

agreement for a longer period at its discretion. The parties may then make any amendments required to the application or planning proposal and draft agreement as a result of submissions received. If necessary, the amended application, draft planning agreement and explanatory note are re-notified. Council may also resolve not to proceed with a planning agreement as a result of matters raised in a public submission or for any other appropriate reason in Council's absolute discretion

- **Step 7 Assessment.** The draft planning agreement and public submissions are considered in the determination of the related application. The weight given to the draft planning agreement and public submissions is a matter for the relevant authority acting reasonably. The assessment of the relevant application will be undertaken by the Responsible Officer on behalf of the Planning Services Team.

NOTE: The notification and assessment processes for proposals to amend a planning instrument are significantly different from those for development applications. Each will be carried out in accordance with the provisions of the EP&A Act and EP&A Regulation.

- **Step 8 Execution.** The draft planning agreement is either executed before the relevant application is determined or not long after the application is determined.

Council may also impose conditions of consent requiring compliance with the planning agreement and the delivery of the relevant planning agreement contributions at the required time.

Council will usually require a planning agreement in connection with an application for instrument change to be executed before the Council submits the relevant draft planning instrument change to the Minister to be made, or before Council makes the instrument change under delegation. If the planning agreement is not executed at an appropriate time, the Council may (or may request the Minister to) not proceed with the instrument change, in accordance with Section 3.35 of the EP&A Act.

14 Costs

Council will require a planning agreement to make provision for payment by the developer of Council's costs of, and incidental to negotiating, preparing, entering into and administering, the planning agreement. Costs may include payment for legal advice, property valuation and/or quantity surveyor to establish the value of the key items of the planning agreement.

All costs associated with the delivery of the obligations under the planning agreement are to be borne by the developer.

15 Pooling of development contributions

Where a proposed planning agreement provides for a monetary contribution by the developer, the Council may, in accordance with section 7.3 of the EP&A Act, pool money paid for different purposes and apply that money progressively for different purposes.

Where a proposed planning agreement provides for a monetary contribution by the developer, the planning agreement should provide that money paid under the planning agreement may be pooled with money paid under other planning agreements and applied progressively for the different purposes under those planning agreements.

Pooling may be appropriate to allow public benefits, particularly essential infrastructure, to be provided in a fair and equitable way.

16 Monitoring and review of a planning agreement

Council will routinely monitor the performance of the developer's obligations under a planning agreement and report them in accordance with the EP&A Act.

Council will require the planning agreement to contain a provision establishing a mechanism under which the planning agreement is periodically reviewed with the involvement of all parties. This will include a review of the developer's performance under the planning agreement and obligations specified in the Implementation Plan.

17 Recurrent charges

Where a planning agreement proposes works or dedication of land and/or building assets, Council may require the developer to provide supporting documentation outlining the lifecycle costs to Council, including operation or ongoing service delivery, as well as likely maintenance and replacement costs. This information will assist Council in determining whether to accept a planning agreement offer and what contribution towards those recurrent costs should be made by the developer.

All planning agreements that involve the provision of public infrastructure through works to be carried out by the developer should include a reasonable contribution toward ongoing maintenance and replacement costs of the infrastructure. The developer may make monetary contributions towards ongoing maintenance and replacement costs or may offer to maintain infrastructure delivered for a certain period of time after handover.

The amount of any monetary contribution acceptable to Council will depend on the type and value of the works being handed over to Council, whether repair and maintenance works are likely to be needed and the anticipated costs of maintenance and repair works.

If the developer proposes to maintain the works after completion, a bond or bank guarantee may be required by Council to cover the likely maintenance works in the event the developer defaults.

Provisions may also be included in planning agreements requiring a developer to make contributions towards other recurrent costs of public facilities such as operational or service provision costs.

18 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
- Practice Note on Planning Agreements published by the Department of Planning, Infrastructure and Environment (February 2021)

19 Attachments

- A. Planning Agreement template
- B. Explanatory Note template

20 Definitions

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

Council means the Bellingen Shire 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 EP&A 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,

Explanatory note has the same meaning as in the Regulation,

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

Planning obligation means an obligation imposed by a Planning Agreement on a developer requiring the developer to make a monetary contributions, carry out works or dedicate land,

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*, **planning agreement** means a Voluntary Planning Agreement.

21 Responsible Officer

- Group Leader Planning Services
- Senior Strategic Planner

22 Review Date

XXXX 2024

Revision	Date	Change	ECM Ref

Planning Agreement

1	Planning Agreement under the Act	3
2	Application of this Agreement	3
3	Definitions and interpretations	3
4	Development Contributions to be made under this Agreement	5
5	Application of Development Contributions	5
6	Application of sections 7.11, 7.12 and 7.24 of the Act	5
7	Registration of this Agreement	5
8	Review of this Agreement	6
9	Dispute resolution	6
10	Enforcement	8
11	Notices	8
12	Approvals and consent	9
13	Assignment and dealings	10
14	Costs	10
15	Entire Agreement	10
16	Further acts	10
17	Governing law and jurisdiction	10
18	Joint and individual liability and benefits	10
19	No fetter	10
20	Representations and warranties	11
21	Severability	11
22	Waiver	11
23	Goods and Services Tax	11

PARTIES

Name	<u>Bellingen Shire Council</u>
ABN	<u></u>
Short form name	<u>Council</u>
Name	<u></u>
ABN	<u></u>
Short form name	<u>Planning Authority</u>
Name	<u></u>
ABN	<u></u>
Short form name	<u>Developer</u>

BACKGROUND

(For Development applications)

- A. On, _____, the Developer made a Development Application to Council for Development Consent to carry out the Development on the Land.
- B. That Development Application was accompanied by an offer by the Developer to enter into this Agreement to make development contributions towards the Public Facilities/works in kind if that Development consent was granted.

(For changes to Environmental Planning Instruments)

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

OPERATIVE PROVISIONS

1 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 is made in respect of the Project and applies to the subject land.

(Specify the land to which the Agreement applies and the development to which it applies)

3 Definitions and interpretations

3.1 Definitions

In this agreement the following definitions apply:

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

Claim means all third party claims, actions demands, proceedings, judgements and damages.

Commencement date means #####

Construction Certificate means a construction certificate issued pursuant to the Act authorising construction works to commence.

Contribution item means any single item within the list of public purposes listed in the *Infrastructure and Services Plan* attached to this planning agreement.

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

Development means #####

Development Application has the same meaning as in the Act.

Development Consent has the same meaning as in the Act.

Development Contribution means a monetary contribution, the dedication of land free of cost or the provision of a material public benefit to be provided by the Developer under this Agreement and identified in the *Infrastructure and Services Plan*.

GST has the same meaning as in the GST Law.

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

Infrastructure and Services Plan means the *Infrastructure Services and Plan* which is attached to this Agreement as Annexure 1.

Instrument Change means a change to the ##### Local Environmental Plan #####.

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

Material public benefits means the contribution items governed by this Agreement other than monetary contributions and the dedication of land

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

Public Purposes includes (without limitation) any of the items identified in section 7.4(2) of the Act.

Regulation means the Environmental Planning and Assessment Regulation 2000.

Security means a bank guarantee or insurance bond to pay a certain amount on demand, in a form and from a financial institution authorised under the Banking Act (Cth) or Qualified Insurer.

3.2 Interpretations

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.
- (a) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- (b) 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.
- (c) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
- (d) References to the word 'include' or 'including' are to be construed without limitation.
- (h) A reference to this Agreement includes the agreement recorded in this Agreement.

- (i) 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.
- (j) Any schedules, annexures, and attachments form part of this Agreement.

4 Development Contributions to be made under this Agreement

- (a) The Developer will pay by bank cheque to the Council the monetary contributions set out in the Infrastructure and Services Plan by the time or times set out therein, subject to any variations as agreed by the Parties.
- (b) The Developer will dedicate or cause to be dedicated the land identified in the Infrastructure and Services Plan in the manner and by the time or times set out therein, subject to any variations as agreed by the Parties.
- (c) The Developer will carry out and deliver the material public benefits identified in the Infrastructure and Services Plan in the manner and by the time or times set out therein, subject to any variations as agreed by the Parties.
- (d) The Developer must also carry out and complete the material public benefits:
 - a. In accordance with the requirements of any legislative approvals issued by any governmental authority,
 - b. In accordance with any Australian Standards applicable to the works of the same nature,
 - c. In a proper and workmanlike manner complying with current industry practice and standards.

5 Application of Development Contributions

The public purposes for which the Development Contributions are to be applied are detailed in the Infrastructure and Services Plan.

6 Application of sections 7.11, 7.12 and 7.24 of the Act

- (a) This Agreement **excludes/ does not exclude (subject to agreement)** the Developer's requirement to pay Local Infrastructure Contributions pursuant to section 7.11 or section 7.12 of the Act.
- (b) This Agreement **excludes/ does not exclude (subject to agreement)** the Developer's requirement to pay Special Infrastructure Contributions pursuant to section 7.24 of the Act.
- (c) The Infrastructure and Services Plan may provide for any relevant contributions to be offset by the direct delivery of other development contributions.

7 Registration of this Agreement

- (a) **(Compulsory for regenerative villages but otherwise subject to agreement)** The parties agree to register this Agreement on the title of the Land in accordance with the provisions of section 7.6 of the Act, such that it is binding on, and enforceable against, current and future owners of the land as if they had entered into the Agreement.
- (b) **(Compulsory for regenerative villages but otherwise subject to agreement)** The Developer must do all things necessary to procure the registration of this Agreement under clause (a).
- (c) **(Compulsory for regenerative villages but otherwise subject to agreement)** Upon the satisfaction of the Developer's obligations under this Agreement, the Council agrees to

provide to the Developer a release and discharge of this Agreement with respect to the land.

8 Review of this Agreement

No variation or modification of this Agreement will be in force or effect except with the express written approval of all the Parties and in compliance with the Act.

9 Dispute resolution

9.1 Notice of Dispute

If a party claims that a dispute has arisen under this Agreement (Claimant), it must give written notice to the other party (Respondent) stating the matters in dispute and designating as its representative a person to negotiate the dispute (Claim Notice). No party may start court proceedings (except for proceedings seeking interlocutory relief) in respect of a dispute unless it has first complied with this clause 9.

9.2 Response to Notice

Within ten (10) business days of receiving the Claim Notice, the Respondent must notify the Claimant of its representative to negotiate the dispute.

9.3 Negotiation

The nominated representative must:

- (a) meet to discuss the matter in good faith within five (5) business days after service by the Respondent of notice of its representative,
- (b) use reasonable endeavours to settle or resolve the dispute within 15 business days after they have met.

9.4 Further Notice if not settled

If the dispute is not resolved within 15 business days after the nominated representatives have met, either party may give to the other a written notice calling for determination of the dispute (Dispute Notice) by mediation under clause 9.5 or by expert determination under clause 9.6.

9.5 Mediation

If a party gives a Dispute Notice calling for the dispute to be mediated:

- (a) the parties must agree to the terms of reference of the mediation within five (5) business days of the receipt of the Dispute Notice (the terms shall include a requirement that the mediation rules of the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply);
- (b) the Mediator will be agreed between the parties, or failing agreement within five (5) business days of receipt of the Dispute Notice, either party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator;
- (c) the Mediator appointed pursuant to this clause 9.5 must:
 - a. have reasonable qualifications and practical experience in the area of the dispute;
 - and

- b. have no interest or duty which conflicts or may conflict with his function as mediator, he being required to fully disclose any such interest or duty before his appointment;
- (d) the Mediator shall be required to undertake to keep confidential all matters coming to his knowledge by reason of his appointment and performance of his duties;
- (e) the parties must within five (5) business days of receipt of the Dispute Notice notify each other of their representatives who will be involved in the mediation;
- (f) the parties agree to be bound by a mediation settlement and may only initiate judicial proceedings in respect of a dispute which is the subject of a mediation settlement for the purpose of enforcing that mediation settlement;
- (g) in relation to costs and expenses:
 - a. each party will bear their own professional and expert costs incurred in connection with the mediation; and
 - b. the costs of the Mediator will be shared equally by the parties unless the Mediator determines a party has engaged in vexatious or unconscionable behaviour in which case the Mediator may require the full costs of the mediation to be borne by that party.

9.6 Expert Determination

If the dispute is not resolved under clause 9.3 or 9.5, the dispute may, by agreement between the parties, both acting reasonably having regard to the nature of the dispute, be resolved by expert determination, in which event:

- (a) The dispute must be determined by an independent expert in the relevant field:
 - a. agreed upon and appointed jointly by Council and the Developer; or
 - b. in the event that no agreement is reached or appointment made within 30 business days, appointed on application of a party by the then current President of the Law Society of New South Wales;
- (b) the expert must be appointed in writing and the terms of appointment must not be inconsistent with this clause;
- (c) the determination of the dispute by such expert will be made as an expert and not as an arbitrator and will be in writing and contain the reasons for the determination;
- (d) the expert will determine the rules for the conduct of the process but must conduct the process in accordance with the rules of natural justice;
- (e) each party will bear its own costs in connection with the process and the determination by the expert together with an equal proportion of the expert's fees and costs; and
- (f) any determination made by an expert pursuant to this clause is final and binding upon the parties except where the determination is in respect of, or relates to, termination or purported termination of this agreement by any party, in which event the expert is deemed to be giving a non-binding appraisal and any party may commence litigation in relation to the dispute if it has not been resolved within 20 business days of the expert giving his or her decision.

9.7 Litigation

If the dispute is not finally resolved in accordance with this clause 9, either party is at liberty to litigate the dispute.

9.8 Continue to perform obligations

Each party must continue to perform its obligations under this Agreement, notwithstanding the existence of a dispute.

10 Enforcement

- (a) Nothing in this Agreement prevents Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Agreement (including the breach of this Agreement by the Developer) or any matter to which this Agreement relates.
- (b) Until such time as the development contribution has been paid in full the Developer must:
 - a. Notify Council in writing of the name and contact details of any Certifying Authority to which it has applied for a Construction Certificate at the same time that such application is made;
 - b. At the time it lodges any application for a construction certificate notify the Certifying Authority in writing of the existence and terms of this Agreement;
 - c. Procure and provide to Council a written acknowledgement from the Certifying Authority addressed to Council confirming that the Certifying Authority will not issue a Construction Certificate until Council provides written confirmation that the development contribution has been paid.
- (c) The Developer acknowledges and agrees that Council has a caveatable interest in the Land from the date of Development Consent and shall be entitled to lodge and maintain a caveat on the title to the Land notifying Council's interest created by this Agreement.
- (d) The Developer will upon execution of this Agreement deliver to Council a caveat in registrable form with the consent to caveat signed by the Developer notifying Council's interest created by this Agreement together with a cheque in favour of NSW Land Registry Services for the registration fee on the caveat.
- (e) Council will provide such written consents and registrable documents to the Developer to enable the Land to be mortgaged provided that the mortgagee acknowledges Council's interest in the Land under this Agreement and agrees to the registration of this Agreement in accordance with its terms.
- (f) Upon registration of the Agreement on the title to the Land in accordance with clause 8 or payment of the development contribution to Council or surrender of the Development Consent, the Developer will be entitled to withdrawal of the caveat.

11 Notices

11.1 Delivery addresses

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

- (a) Delivered or posted to that Party at its address set out below.
- (b) Faxed to that Party at its fax number set out below.
- (c) Emailed to that Party at its email address set out below:

Council Attention: General Manager,
Bellingen Shire Council
33 Hyde Street, Bellingen NSW, 2454
council@bellingen.nsw.gov.au

Planning Authority Attention: _____

Developer Attention: _____

11.2 Change of Address

If a Party gives the other Party three (3) business days' notice of a change of its address or fax number, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.

11.3 Notice taken as given

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 (2) business days after it is posted.
- (c) If it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.

11.4 Next business day

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.

12 Approvals and consent

Except as otherwise set out in this Agreement, and subject to any statutory obligations, a Party may give or withhold an approval or consent to be given under this Agreement in that Party's absolute discretion and subject to any conditions determined by the Party. A Party is

not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

13 Assignment and dealings

Until the development contribution is paid in full, the Developer cannot sell, transfer, assign, novate, charge, encumber or otherwise deal with the Land or attempt or purport to do so unless the Developer:

- (a) Gives Council no less than ten (10) business days' notice in writing of the proposed sale, transfer, assignment, novation, charge, encumbrance or other dealing with its rights in respect of the Land;
- (b) Procures that any buyer, transferee, assignee or novatee promptly executes an Agreement in favour of Council whereby the buyer, transferee, assignee or novatee becomes contractually bound with Council to perform the Developer's obligations under this Agreement;
- (c) In the event of a proposed charge, mortgage, encumbrance or other dealing with the Land, provides to Council a bank guarantee unlimited in time from a bank and on terms acceptable to Council to secure the payment of the development contribution.

14 Costs

Council's costs of and incidental to the preparation and execution of this Agreement and any related documents and registration of same shall be borne by the Developer.

15 Entire Agreement

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

16 Further acts

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

17 Governing law and jurisdiction

This Agreement is governed by the law of New South Wales. The Parties submit to the nonexclusive jurisdiction of its courts and courts of appeal from them. The Parties will not object to the exercise of jurisdiction by those courts on any basis.

18 Joint and individual liability and benefits

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

19 No fetter

Nothing in this Agreement shall be construed as requiring Council to do anything that would cause it to be in breach of any of its obligations at law, and without limitation, nothing shall

be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

20 Representations and warranties

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

21 Severability

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

22 Waiver

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

23 Goods and Services Tax

- (a) Unless otherwise indicated, all amounts payable by one party to the other party in relation to a supply under this Agreement have been calculated exclusive of any GST which may be imposed on the supply.
- (b) If any supply made under this Agreement is, or becomes, subject to GST, the party to whom the supply is made ("**Recipient**") must pay to the party making the supply ("**Supplier**"), as consideration, in addition to any consideration payable or to be provided elsewhere in this Agreement, subject to issuing a Valid Tax Invoice, an additional amount on account of GST, such amount to be calculated by multiplying the consideration by the applicable rate of GST.
- (c) Any amount in respect of GST payable under clause 25.2 must be paid to the Supplier immediately on receipt of the Valid Tax Invoice.
- (d) If any party is required to reimburse or indemnify the other party for a cost or expense ("**Cost**") incurred by the other party, the amount of that Cost for the purpose of this Agreement is the amount of the Cost incurred, less the amount of any credit for, or refund of, GST, which the party incurring the Cost is entitled to claim in respect of the Cost.
- (e) If GST is linked with the abolition or reduction of other taxes and charges, all amounts payable by the Recipient to the Supplier under this Agreement (excluding GST) must be reduced by the same proportion as the actual total costs of the Supplier (excluding GST) are reduced either directly as a result of the abolition or reduction of other taxes and charges payable by the Supplier or indirectly by way of any reduction in prices (excluding GST) charged to the Supplier. Both parties must also comply with relevant provisions of the *Trade Practices Act 1974* (Cth).

Signing Page

EXECUTED as an agreement.

Dated:

**Executed on behalf of Bellingen
Shire Council**

Signature of witness

Signature of delegated officer

Name of officer (print)

Name of witness (print)

Position of officer

Executed on behalf of Developer

Signature of witness

Signature of delegated officer

Name of officer (print)

Name of witness (print)

Position of officer

Proposed Planning Agreement for

Enter name of project

Explanatory Note

Section 7.4 of the Environmental Planning and Assessment Act 1979 (**The EP&A Act**) provides that:

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

- (a) who has sought a change to an environmental planning instrument, or*
- (b) who has made, or proposes to make, a development application or application for a complying development certificate, or*
- (c) 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.

Enter name of developer

proposes to

make a development application and/or seeks to change an environmental planning instrument

and has offered to enter into a planning agreement with Bellingen Shire Council

and add other parties in the agreement if any

under which it proposes to pay certain monetary contributions and provide material public benefits.

This document has been prepared in accordance with clause 205(1) of the EP&A Regulation, which requires that a written statement (an explanatory note) must accompany a planning agreement and be available for the purposes of public consultation. This statement:

- (a) contains a description of the land and the proposed development, and
 - (b) summarises the objectives, nature and effect of the proposed agreement, and
 - (c) contains an assessment of the merits of the proposed agreement, including the positive and negative impacts on the public or a relevant section of the public, and
 - (d) indicates whether the agreement conforms with the planning authority's capital works program, if any
 - (e) Includes a summary version of the infrastructure and services delivery plan.
-

1 Parties

Bellingen Shire Council (Planning Authority)

(Planning Authority)

(Proponent)

2 Description of subject land

Include maps identifying the site in a broader locality

3 Description of the proposed development and/or proposed change to an environmental planning instrument

Include concept plans or other maps and diagrams to describe the project

4 Summary of objectives, nature and effect of the proposed draft planning agreement

4.1 Objectives of the planning agreement

4.2 Nature and effect of the planning agreement

Indicate whether the planning agreement will be registered on the title and run with the land

Indicate under what circumstances the planning agreement may be discharged

4.3 The public purposes towards which the planning agreement contributes

Many developments generate an increase in the demand for public infrastructure, amenities, and services (public goods) particularly where these developments result in an increase in population living or working in the area. To determine the developer's contributions towards various public purposes, it is necessary to firstly identify the developer's ordinary responsibilities to deliver public goods due to the pressures the development generates.

CATEGORY 1 Infrastructure and Services

Where such public goods are supplied solely to meet the increased demand generated by the development itself, these shall be funded and delivered by the developer as a condition of development consent.

Category 1 infrastructure, solely to meet the needs of the incoming population:

1. XXXXX
2. XXXXX

CATEGORY 2 Infrastructure and Services

Some public goods, such as open space, roads, water management, libraries, community facilities and other Council services, usually service a broader precinct or township. The costs associated with delivering, enhancing, or maintaining these are attributed

proportionately to all the users in the catchment that they serve. The developer is therefore responsible for contributing a reasonable portion of these costs. Such contributions towards local infrastructure may be required in accordance with the provisions of s7.11 and s7.12 of the EP&A Act.

Category 2 infrastructure, serving a broader catchment, for which developer is partly responsible:

1. XXXXX
2. XXXXX

Provide statement outlining the effect of this planning agreement on contributions required under s7.11 or s7.12 of the EP&A Act.

5 Assessment of the merits of the proposed agreement, including the positive and negative impacts on the public or a relevant section of the public

6 Consistency with Council's capital works program

7 Infrastructure and Services Plan

Summary list of infrastructure, amenities, and services to be delivered, maintained or their costs managed by the planning agreement. This should include:

- (a) Scope of infrastructure works and any services to be delivered by the developer, and
- (b) Monetary contributions, including up-front and recurring payments, and
- (c) The timetable for provision of planning obligations under the agreement by reference to the issuing of development consent, construction, occupation or subdivision certificates, or other relevant regulatory stages, and
- (d) Ongoing operation and management arrangements for infrastructure and services.

May be included as an attachment.

8 Other Matters