



Cessnock City Council User Guide - Planning Agreements



Image: Mount Yengo, located in Yengo National Park, is of great significance to local Aboriginal peoples.

ACKNOWLEDGEMENT OF COUNTRY

Cessnock City Council acknowledges that within its local government area boundaries are the Traditional Lands of the Wonnarua people, the Awabakal people and the Darkinjung people. We acknowledge these Aboriginal peoples as the traditional custodians of the land on which our offices and operations are located, and pay our respects to Elders past and present. We also acknowledge all other Aboriginal and Torres Strait Islander people who now live within the Cessnock Local Government Area.

WARNING: Aboriginal and Torres Strait Islander people are warned that this document may contain images of people who have died.

Disclaimer

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1. INTRODUCTION AND PURPOSES

This guide compliments Council's adopted Planning Agreement Policy (Policy) and sets out the framework for the negotiation and management of Planning Agreements. All proponents proposing to enter into negotiations for a Planning Agreement should read both documents, together with any reference documents, prior to initiating negotiations.

The purposes of this document is to provide clarity for proponents regarding the procedures and practices in negotiating, executing and implementing Planning Agreements with Cessnock City Council.

2. WHAT IS A PLANNING AGREEMENT?

A Planning Agreement is a voluntary agreement between a planning authority and developer that allows contributions whether it is to dedicate land free of cost, pay a monetary contribution, and provide other material benefit or a combination of all to deliver a public benefit.

A Planning Agreement can provide a flexibility to deliver a range of public facilities and services. Planning Agreements arise through a change to an environmental planning instrument (planning proposal) or a proposal to make a development application or application for a complying development certificate

3. CIRCUMSTANCES IN WHICH COUNCIL WILL CONSIDER THE NEGOTIATION OF A PLANNING AGREEMENT

3.1 Council, at its complete discretion, may consider the negotiation of a Planning Agreement with a Proponent who has voluntarily offered to enter into a Planning Agreement in association with a Planning Proposal or Development Application. All proposals for a Planning Agreement should begin prior to lodgement of any Planning Proposal or Development Application.

3.2 Council may also consider negotiating a Planning Agreement with a Proponent when that proposed Planning Agreement is considered to:

3.2.1 Compensate for the loss of, or damage to, a public infrastructure, facilities, services, resources or environmental assets caused by the proposed development through replacement, substitution, repair or regeneration;

3.2.2 Meet the demands created by the development for new public infrastructure, amenities and services or when, in Council's opinion, an environmental offset represents a public and a Planning Benefit;

3.2.3 Address deficiencies in existing provision of public infrastructure, services and facilities which have a connection with the Planning Proposal/Development Application and would otherwise prevent the development occurring. There should also be demonstrable public benefit from the re-dress of those deficiencies;

- 3.2.4 Achieve recurrent funding in respect of public infrastructure, services and/or facilities and for on-going maintenance of land of environmental significance which is to be conserved;
- 3.2.5 Prescribe inclusions in the development that meet specific planning and environmental objectives of Council e.g. Council's Biodiversity Offsets Policy and any relevant Ministerial Directives and Practice Notes;
- 3.2.6 Monitor the planning impacts of the Planning Proposal/proposed development;
- 3.2.7 Clearly secure Planning Benefits for the wider community;
- 3.2.8 Enable items in the work schedules of Council's Developer Contributions Plans to be brought forward and/or when deficiencies and/or omissions in Council's existing Development Contributions Plans can be addressed; and
- 3.2.9 Not involve any unreasonable financial liabilities for Council.

4 CONTEXT

The implementation of procedures and practices are aimed at underpinning high levels of efficiency. Council should be accountable in a transparent manner for the costs of professional, administrative and legal staff who are involved. Accordingly, Council:

- 4.1 Will ensure that it will adhere to the strict probity procedures as outlined in this document and in the Policy;
- 4.2 Seeks to obtain reimbursement for the costs incurred in negotiating, executing and implementing Planning Agreements, in accordance with the policy;
- 4.3 Will ensure that the Steering Group will oversee the negotiation of all Planning Agreements;
- 4.4 Negotiation approach for Planning Agreements aims to be efficient, predictable, transparent and accountable in line with the Policy.
- 4.5 Seeks to ensure that the final negotiation of all Planning Agreements run in parallel with planning proposals or development applications so as not to unduly delay any assessments or determinations.
- 4.6 Will make every endeavour to have Planning Agreements fully documented with the explanatory note in readiness for the public notification of the planning proposal or development application.
- 4.7 Will encouraged that the proponent hold discussions with Council before the lodgement of the relevant planning proposal or development application regarding a proposed Planning Agreement.

5 PUBLIC INTEREST AND PROBITY

The following procedures will be implemented to address the above probity matters:

- 5.1 Council staff with appropriate delegated authority will negotiate a Planning Agreement on behalf of Council. These Council staff (subject to resource capacity) will not be

involved in the direct assessment of the relevant Planning Proposal or Development Application.

- 5.2 If Council has a commercial interest in the subject development project or the property of the subject Planning Agreement, Council staff with key responsibility for determining Development Applications will not play an active role in the assessment of any commercial aspects of the agreement, except where advice is required on matters relating to the conditions of Consent for a particular proposal.
- 5.3 Council, may at its discretion, involve an independent person(s), particularly where Council has a commercial interest in the matter or where the size or complexity of the project requires an independent person(s) with specialist skills to participate in the negotiations or any aspect of the negotiations.
- 5.4 Council will ensure that all negotiations with Proponents and their representatives are documented.

6 CONTENTS OF A PLANNING AGREEMENT

6.2 Cost and value estimations

- 6.2.1 Council will provide standard, consistent values and costs for capital and recurrent aspects of planning agreement where possible.
- 6.2.2 It is anticipated that a principle used increasingly in future planning of Public Facilities will be one of maximising co-location e.g. community facilities and recreational facilities; multi-use halls and community facilities etc. This will also enable multi-use of facilities (and therefore sharing of costs) such as car parking, lighting, landscaping and security.
- 6.2.3 Council will require the Proponent to fund an independent quantity surveyor to provide cost estimates to form the basis of Planning Agreement costs for capital and recurrent items.
- 6.2.4 Where the benefit under a Planning Agreement is for the provision of land for a Public Purpose, Council will require a valuation of the said land at the Proponent's cost and seek to value the benefit of the said land on the basis of the estimated amount of compensation to which the Proponent would be entitled under the Land Acquisition (Just Terms Compensation) Act 1991 upon the compulsory acquisition of the land.

6.3 Recurrent costs

- 6.3.1 Council may request Proponents, through a Planning Agreement, to make Development Contributions towards the recurrent costs of Public Facilities. Where the Public Facility primarily serves the development to which the Planning Agreement relates or to a neighbouring development, the arrangement for recurrent funding may be in perpetuity. Where the Public Facility or Public Benefit is intended to serve the wider community, the Planning Agreement may only require the Proponent to make contributions towards the recurrent costs of the facility for a set period which will be negotiated according to the impact of the development.

6.3.2 If the funding of recurrent costs is required to be part of the Planning Agreement, the Planning Agreement will include the following matters:

- a) The specific purpose of the recurrent funding;
- b) The nature and extent of the recurrent funding;
- c) The time period over which the funding shall be provided;
- d) Any mechanisms for the indexing of the recurrent funding;
- e) The heads of consideration for any endowment fund or trust that may be required to be established to manage the recurrent funding;
- f) The provision of security such as bank guarantee, bond or other form of security to secure the ongoing funding;
- g) Circumstances in which funding would be renegotiated or revoked; and
- h) Any other matter relevant to securing the public interest in the achievement of an ongoing Public Benefit.

6.4 Land dedication in Planning Agreements

6.4.1 A Planning Agreement may make provision for the dedication of land given intrinsic environmental values of as environmental offsets. 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.

6.4.2 In all cases, the agreed value of the particular parcel of land will be negotiated as part of the Planning Agreement. In this regard, Council will take into account the unique characteristics of the property and the circumstances of the dedication which may include:

- a) Whether the land proposed to be dedicated has been identified by Council in any Strategic Plan, Development Control Plan, Contributions Plan or other policy as having intrinsic environmental significance.
- b) Whether the land has been identified as having intrinsic environmental significance in studies supporting the Planning Proposal or Development Application which underpin a recommendation that the land be rezoned to E2 Environmental Conservation Zone.
- c) Intrinsic environmental significance may also be land which achieves linkages of critical habitat or corridors.
- d) Whether the land is located in or adjacent to a riparian corridor or bush fire prone land.
- e) Whether the land supports the habitat of threatened fauna or flora species or endangered ecological communities.

- f) 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.
- g) The location, configuration, size, accessibility, topography, existing infrastructure and existing use of the land proposed to be dedicated.
- h) Whether the land adjoins an existing area of open space and can be consolidated into that area.
- i) Whether the land will create or improve accessibility within the locality.
- j) Any other factors which may affect the usability of the land e.g. soil characteristics, flood liability, potential soil 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 etc.
- k) In the case of a Material Public Benefits 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.
- l) The ongoing maintenance costs to Council after the improvement works are carried out on the land.
- m) A land review by Council's property area together with other relevant matters, based on the circumstances of the case.

6.4.3 If the proposed land is to be dedicated or subject to transfer of ownership to Council or any other public authority, then the land must be:

- a) Identified by Council in any Strategic Plan, Development Control Plan, Contributions Plan or other policy as having intrinsic environmental significance/value.
- b) As having intrinsic environmental significance in studies supporting the Planning Proposal or Development Application which underpin a recommendation that the land be rezoned to E2 Environmental Conservation. Then, that land should be valued based upon the E2 Environmental Conservation zoning.

6.4.4 The Planning Agreement must specify 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. This trigger will usually be the expiry of a maintenance period for which the Proponent is responsible.

6.4.5 Following the 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.

6.4.6 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.

6.5 Monetary contributions in Planning Agreements and pooling of contributions

6.5.1 A Planning Agreement may make provision for monetary contributions other than contributions under an adopted and in force section 7.11 or section 7.12 Contributions Plan.

6.5.2 Council's acceptance of such contributions will be based on alignment with other Council Plans, a clearly articulated Public Purpose and the following matters:

- a) The amount of the monetary contribution;
- b) The purpose and extent of the monetary contribution;
- c) When such contributions are to be paid;
- d) In the case of staged payments, the nature of the staging or the dates at which time payments are to be made;
- e) Any mechanisms for the indexing of the monetary contribution against inflation over time;
- f) Details of any security that is to be provided in lieu of the monetary contribution until such time as it becomes due and payable;
- g) Any obligations on Council for the expenditure of the monetary contributions and related financial reporting; and
- h) Any other matter relevant to securing the public interest in the management and expenditure of the monetary contributions.

6.6 Works in Kind (WIK)

6.6.1 Council may, subject to certain criteria being met, accept a provision of a Material Public Benefit by a Proponent in lieu of the payment of Development Contributions. Any application must be made in writing to Council. Strategic Planning will be responsible for recording the application and coordinating the consideration, negotiation and execution of the agreement on behalf of Council. Once agreement has been reached in principle, the agreement is to be drafted using Council's WIK Agreement template.

6.6.2 An application for a Material Public Benefit or WIK may be considered by Council based upon the following criteria:

- a) Works to be undertaken: WIK agreements will only be negotiated on those works detailed in the relevant Planning Agreement and/or Contribution Plan.
- b) Timing of works:
 - i. Demonstration that earlier timing of the works provides planning and/or Public Benefit(s); and
 - ii. No WIK agreements will be negotiated retrospectively i.e. after works have commenced.

- c) Community benefit: It can be demonstrated that approval of the application will be of significant benefit(s) to the public.
- d) Prejudicial impact: The application must not prejudice the timing or the manner of the provision of the infrastructure for which the contribution was required. Prejudicial impact will have regard of all items in the Plan's work schedule, not only the item(s) in the application, and will consider any impacts, both negative and positive, upon service levels.
- e) Financial Impact: The application must be of reasonable cost when compared to the cost of Council's day labour (or regular contractors) to complete the work and the cost (if any) listed in the Plan's work schedule. Attention will also be paid to the financial health of the Plan, both with and without the approval of the application.

6.6.3 Prior to a formal WIK Agreement being prepared, Council and the Proponent will need to agree to the value of works and ensure the infrastructure meets any standards as required by Council

6.6.4 Once formal negotiations commence, requests for extras will not be considered. Once commenced, non-compliance with the agreement will result enforcement, as such, construction of any item in the agreement must not commence until the WIK agreement has been signed.

6.6.5 On completion of the negotiation of the Works in Kind Agreement, the Proponent shall pay to Council 10% of the cost of the WIK as a security bond against the future provision of the intended works. 5% WIK value (50% of the 10% security bond) shall be returned to the Proponent following practical completion, in accordance with the definitions of the Policy, and the remaining 5% value (50% security bond) will be refunded after the final inspection and warranty period expiry.

6.6.6 Council may agree to a reduction in the amount of the Development Contributions prior to completion of the agreed WIK (i.e. to enable the release of a construction certificate). If this agreement is reached, the Proponent is required to lodge with Council a security bond for 10 percent of the amount of the agreed value of the agreed works and the agreed value security bond will be held by Council until Council provides a written notification to the Proponent that the agreed works have been completed in accordance with the WIK Agreement. Where a WIK application is not approved by Council, the monetary contribution, as per the Consent, remains applicable.

6.7 Pooling of Development Contributions

6.7.1 Where a proposed Planning Agreement provides for a monetary contribution by the Proponent, Council may seek to include a provision permitting money paid under the agreement to be pooled with money paid under other Planning Agreements and applied progressively for the different purposes under those agreements, subject to the specific requirements of the relevant agreements. Pooling may be appropriate

to allow Public Benefits, particularly essential infrastructure, to be provided in a fair and equitable way.

6.7.2 If pooling of contributions are agreed to in the Planning Agreement. Council must keep a detailed record of contributions collected and allocation of where the contributions were expended.

6.7.3 Monetary contributions required by a standard condition of Consent in accordance with an adopted section 7.11 or section 7.12 Contributions Plan will not be normally referenced in a Planning Agreement, except where the Planning Agreement must clarify its the relationship to any contributions which may be required as a consequence of granting a Consent on land to which the Planning Agreement applies.

6.8 Capital Works in Kind and Planning Agreements

6.8.1 A Planning Agreement may make provision for a Proponent to carry out work on land to be dedicated to Council or that is already in the public domain. In such circumstances, the provision of quality work which is fit for purpose is critical to Council. Council may appoint a Quantity Surveyor, at the proponent's expense, to verify cost estimates submitted by the Proponent. 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:

- a) Requirements and specifications for detailed design plans for future approval or specific references to endorsed plans.
- b) Public liability insurance during construction and during the defects liability period.
- c) Requirements for inspections by Council prior to and during the course of construction including the notice to be given in order to arrange such an inspection.
- d) Requirements for the commencement of handover proceedings.
- e) Details of the defects liability period.
- f) Security such as bonds or bank guarantees to be held during the course of construction and during the defects liability period.
- g) Access for Council officers during the course of construction to ascertain progress or to assess asset value.
- h) In some cases, permitting Council to carry out the work itself and recover the costs of so doing from the security and/or the Proponent.
- i) Any other matter relevant to securing the public interest in the achievement of a quality Public Benefit.

6.9 Methodology for valuing Public Benefits under a Planning Agreement

- 6.9.1 Where the Public Benefit under a planning agreement is the provision of land for a Public Purpose, Council will require a valuation at the Proponent's cost and seek to value the Public Benefit on the basis of the estimated amount of compensation to which the Proponent would be entitled under the Land Acquisition (Just Terms Compensation) Act 1991 upon the compulsory acquisition of the land.
- 6.9.2 Adequately skilled Council staff will review and validate cost estimates provided by Proponents of a Planning Agreement and reserve the right to obtain quotations from other relevant parties to ensure accuracy of cost estimates to be included into Planning Agreements.
- 6.9.3 If the Public Benefit under a Planning Agreement is the carrying out of works for a Public Purpose, Council will generally seek to value the Public Benefit on the basis of the estimated value of the completed works in accordance with a cost estimate prepared by a registered quantity surveyor. In either case, the costs of the valuation of the benefits are to be at no cost to Council.

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

- 6.10.1 The Proponent shall pay Council's full costs in negotiating, executing and implementing the Planning Agreement, including legal costs and the costs of engaging of any independent expert(s).
- 6.10.2 A Planning Agreement will specify that other costs related to the core purposes of the Planning Agreement such as architectural design plans and detailed landscape plans will be sought to be borne by the Proponent.
- 6.10.3 A Planning Agreement may also make provision for Council's costs for the monitoring and enforcing of the Planning Agreement to be borne by the Proponent. In particular cases, Council may require the Planning Agreement to make provision for a development contribution by the Proponent towards the on-going administration of the agreement.
- 6.10.4 Council will at all times strive to be fair, reasonable and accountable when seeking the Proponent to reimburse the costs incurred for negotiating, executing and implementing the Planning Agreement.

6.11 ACCEPTABILITY TEST

- 6.11.1 When Council assesses an offer in relation to Planning Agreements, an acceptability test will be undertaken by Council's Senior Infrastructure Contributions Planner. The acceptability test ensures that Planning Agreements are directed towards legitimate planning purposes that can be identified in the statutory planning controls and other adopted planning strategies and policies applying to development.
- 6.11.2 Provide for the delivery of infrastructure or Public Benefits not wholly unrelated to the development.
- 6.11.3 Produce outcomes that meet the general values and expectations of the community and protect the overall public interest.

6.11.4 Provide for reasonable means of achieving the desired outcomes and securing the benefits.

6.12 When applying the acceptability test, Council will consider the following:

6.12.1 Is the proposed Planning Agreement directed towards proper and legitimate planning and/or environmental purposes having regard to statutory planning controls and other adopted planning policies and the circumstances of the case?

6.12.2 Is provision made for reasonable means of achieving the relevant purpose?

6.12.3 Can the proposed Planning Agreement be taken into consideration in the assessment of the relevant Planning Proposal or Development Application?

6.12.4 Will outcomes be produced that meet the expectations of the community and serve the public interest?

6.12.5 Do the contents of the proposed Planning Agreement align with Council's strategic objectives contained in this policy?

6.12.6 Does the proposed Planning Agreement conform to the fundamental principles governing Council's use of Planning Agreements?

6.12.7 Is it clear that no relevant circumstances may preclude Council from entering into the proposed Planning Agreement?

6.12.8 Does the proposed Planning Agreement have a clear and strong connection with the development subject of the Planning Proposal/Development Application? (The Planning Agreement does not necessarily have to be wholly related).

6.12.9 Is the content of the proposed Planning Agreement fair, reasonable, financially sound and equitable to the parties who will be signatories to the agreement?

6.13 Involvement of independent third parties in the negotiation process

6.13.1 Council may, at its sole discretion, appoint an independent person(s) to facilitate or otherwise participate in the negotiations or aspects of it, particularly where:

- a) An independent assessment of a proposed Instrument Change or Development Application is necessary or desirable.
- b) Factual information requires validation in the course of negotiations.
- c) Sensitive financial or other confidential information must be verified or established in the course of negotiations.
- d) Facilitation of complex negotiations are required in relation to large projects or where numerous parties or stakeholders are involved.
- e) Dispute resolution is required under a Planning Agreement.

7 PROCESSES AND PRACTICES

The processes and practices for the negotiation, execution and implementation of PAs are set out below:

7.1 Commencement

7.1.1 Pre-lodgement

- a) All proponents are encouraged to have pre-lodgement discussions and a pre lodgement meeting with Council.
- b) The initial discussions should include:
 - i. The proposed offer for a PA
 - ii. The type of development proposed
 - iii. Could an amendment to the contribution plan be more acceptable
- c) Any pre-lodgement meeting, will include Council's Infrastructure Contributions Planner and a minute taker provided by Council. The meeting is to include:
 - i. Explanation of Council's Policy;
 - ii. The legal framework;
 - iii. The procedures for negotiation; and
 - iv. Proposals for infrastructure or environmental offsets.

7.1.2 Scoping meeting

- a) The Senior Infrastructure Contributions Planner is to discuss the proposed planning agreement offer at Council's internal Local Contributions Steering Group. The Steering Group will consider whether a PA is suitable compared to a Consent condition for contributions;
 - i. The Steering Group will appoint relevant staff to form a working group to negotiate the terms of the PA; and
 - ii. The Steering Group will oversee the negotiation of the PA and ensure all internal Council processes are followed including liaison with the Manager Financial Services/Internal auditor to ensure that the financial contents of the draft PA are consistent with the financial requirements of Council.

7.2 Negotiation

7.2.1 Proposals, Negotiations and Evaluation

- a) Outcomes of the Steering Group are to be provided to the proponent;
- b) If the proposal is acceptable to Council, the proponent makes formal offer to Council;
- c) The offer must be:
 - i. In writing;
 - ii. Address to Council;
 - iii. The offer must be signed by all parties proposed in the planning agreement;
 - iv. Outline sufficient detail in accordance with s7.4(3) of the EP&A Act;
 - v. Address any details required to be included as specified in the Policy and this document; and
 - vi. Allow relevant information to allow proper consideration for approval of the PA
- d) the proponent is to advise if they are appointing a representative in the negotiations of the PA;

- e) Meeting(s) are held with Council, on an as-needs basis involving Council and the proponent to enable the agreement to be reached including but not limited to infrastructure, works in kind, environmental land dedication and management proposals and the proposed agreement should form the contents of the Heads of Agreement which will then form the PA;
- f) The meetings are to:
 - i. negotiate and refine proposals;
 - ii. determination of roles and responsibilities;
 - iii. assess and valid cost estimates in accordance with Council's policy, recurrent costs, workforce planning, needs for inclusion(s) in Council's Capital Works Program and Council budget implications; and
 - iv. include Quantity surveyor and/or specialist professional to assess and validate cost estimates, if required.
- g) Council is ensure they provide a minute taker for all meetings; and
- h) A copy of the minutes are to be provided to the proponent and their representative within 5 working days of the meeting.

7.2.2 Draft Heads of Agreement

- a) Once terms of the proposal is finalised draft Heads of Agreement encompassing provisions of infrastructure, works in kind and/or environmental land dedication and ongoing management and including validated estimates of costs and land values are to be prepared by Council;
- b) Draft Heads of Agreement are to be endorsed by the Steering Group; and
- c) following endorsement they are to be forwarded to the proponent;

7.2.3 Negotiation of Heads of Agreement

- a) The proponent and their representatives are review the draft agreement;
- b) If required, a meeting a meeting to discuss the draft Heads of Agreement can be arranged otherwise this can be completed by emails, telephone calls or letters;

7.2.4 Finalisation of Heads of Agreement

- a) Once agreed, the Heads of Agreement is signed by all parties.

7.3 Application

7.3.1 Explanatory Note and drafting PA

- a) The Explanatory Note and draft PA is drafted in accordance with Council approved templates;
- b) Either party can draft these documents provided is it produced on Council's templates; and
- c) Council will not accept any draft PA not produced on Council's template.

7.3.2 Proponent's Review

- a) Each party to consider the draft PA and explanatory note and refers to legal representatives as needed; and

- b) Council's Steering Group must provide final endorsement on behalf of Council

7.4 Notification

7.4.1 Endorsement for Public Exhibition

- a) When the PA is formally agreed, the PA must be reported to Council for consideration and endorsement for public notification.

7.4.2 Public Exhibition

- a) Following endorsement by Council, the PA is placed on public exhibition for a minimum of 28 days concurrently with the planning proposals or development application, or for 28 day period which is as close as possible to the exhibition period of the relevant planning proposal or development application;
- b) If any submissions are received, Council reviewed and if deemed necessary will discuss them with the proponent and their representative;
- c) If changes to the PA is proposed, the parties may be required to undertake further negotiations and a number of the above steps may need to be repeated as a result of the public notification process;
- d) Once any amendments are agreed to, the PA is reported back to Council making recommendations to either re-exhibit or execute the agreement, a detailed justification regarding changes must be included with the recommendations; and
- e) Re-exhibition of the PA if required.

7.5 Assessment

- a) Draft planning agreement is considered in the assessment of the relevant application.

7.6 Execution

- a) Following exhibition and agreement from Council the PA can be executed;
- b) The proponent must sign the PA first and then forward same to Council for execution by the General Manager and
- c) Finalisation of the agreement must be in accordance with the *Environmental Planning and Assessment Act* and the *Environmental Planning and Assessment Regulations*.

8 IMPLEMENTATION

8.1 When is a planning agreement required to be entered into?

- a) A planning agreement is entered into when it is signed by all of the parties and the planning agreement may include timing and/or staging commitments for the Proponent to meet in terms of completion of works etc.
- b) A planning agreement can be entered into at any time after the agreement is publicly notified in accordance with the Act and Regulation.
- c) Council will usually require a planning agreement to be entered into as a condition of granting development Consent to the development to which the agreement relates.

8.2 Implementation agreement

8.2.1 In appropriate cases, Council may require a planning agreement to provide that before the development the subject of the agreement is commenced, the parties are to enter into an *implementation agreement* that provides for matters such as:

8.2.1.1 The times at which and, if relevant, the period during which, the Proponent is to fulfill commitments under the planning agreement.

8.2.1.2 The design, technical specification and standard of any work required by the planning agreement to be undertaken by the Proponent.

8.2.1.3 The manner in which a work is to be handed over to Council.

8.2.1.4 The manner in which a Material Public Benefit is to be made available for its Public Purpose in accordance with the planning agreement.

8.2.2 Council will generally require a planning agreement to provide that the Proponent's obligations under the planning agreement take effect when the first development Consent operates in respect of development that is the subject of the agreement or within an alternative prescribed timeframe.

8.3 Monitoring, review and enforcement of a planning agreement

8.3.1 Council will continuously monitor the performance of the Proponent's obligations under a planning agreement.

8.3.2 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 Proponent's performance in implementing the agreement.

8.3.3 Council will require the planning agreement to contain a provision requiring the parties to use their best endeavors to agree on a modification to the agreement having regard to the outcomes of the review.

8.4 Modification or discharge of the Proponent's obligations under a planning agreement

8.4.1 In most cases, the planning agreement will provide for appropriate review or modification. Council will generally only agree to a provision in a planning agreement permitting the Proponent's obligations under the agreement to be modified or discharged where the modification or discharge is linked to the following circumstances:

a) The Proponent's obligations have been fully carried in accordance with the planning agreement.

b) The Proponent has assigned the Proponent's interest under the planning agreement in accordance with its terms and the assignee has become bound to Council to perform the Proponent's obligations under the agreement.

c) The development Consent to which the planning agreement relates has lapsed.

- d) The performance of the planning agreement has been frustrated by an event beyond the control of the parties.
- e) Other material changes affecting the operation of the planning agreement have occurred.
- f) Council and the Proponent otherwise agree to the modification or discharge of the planning agreement.
- g) The Minister has determined in writing to the parties not to support the Planning Proposal.

8.5 Assignment and dealings by the Proponent

8.5.1 Council will require every planning agreement to provide that the Proponent may not assign its rights or obligations under the planning agreement nor have any dealing in relation to the land the subject of the planning agreement unless, in addition to any other requirements of the planning agreement:

- a) The Proponent 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 planning agreement as if they were a party to the original planning agreement; and
- b) The Proponent is not in breach of the planning agreement.

8.6 Notations on certificates under section 10.7(5) of the Act

8.6.1 Council will generally require a planning agreement to contain an acknowledgement by the Proponent that Council may, in its absolute discretion, make a notation under section 10.7(5) of the Act about a planning agreement on any certificate issued under section 10.7(5) of the Act relating to the land the subject of the agreement or any other land.

8.7 Registration of Planning Agreements

8.7.1 Council will require a planning agreement to contain a provision requiring the Proponent to agree to registration of the planning agreement pursuant to section 7.6 of the Act if the requirements of that section are satisfied. Council will undertake the registration at the Proponent's cost.

8.8 Dispute resolution

8.8.1 Council will require a planning agreement to provide for mediation of disputes between the parties to the planning agreement, at their own cost, before the parties may exercise any other legal rights in relation to the dispute.

9 FINANCIAL MANAGEMENT

9.1 Council's costs

9.1.1 The proponent must pay Council's costs in relation to the preparation of the PA. Council will endeavor, where possible, to provide the proponent as estimation of costs prior to negotiation.

9.2 Credits and refunds

9.2.1 Council will determine on a case by case basis whether to agree to a planning agreement providing for the Surplus Value under a planning agreement being refunded to the Proponent or offset against Development Contributions required to be made by the Proponent in respect of other development in the Cessnock Local Government Area.

9.3 Provision of security under a planning agreement

9.3.1 Council will require a planning agreement to make provision for a non-refundable security payment to the value of 10% of the value of the Proponent obligations under the agreement.

9.3.2 The form of security will generally be the unconditional bank guarantee from an Australian Bank (or other institution approved by Council's Finance Manager) in favour of Council and on terms otherwise acceptable to Council.

9.4 Indexation and adjusting contribution rates

9.4.1 Pursuant to clause 25I of the Regulation, the proposed cost of carrying out development is to be indexed before payment to reflect quarterly variations in the Consumer Price Index All Group Index Number for Sydney between the date the proposed cost was determined by Council and the date the contribution is required to be paid.

9.4.2 The contribution rates identified in Planning Agreements will be indexed and adjusted quarterly in accordance with the Sydney Consumer Price Index (CPI) applicable to each quarter. The CPI is published by the Australian Bureau of Statistics (ABS). Please refer to the ABS website www.abs.gov.au for information regarding the CPI.

9.4.3 In the event that the CPI All Groups Index Number for Sydney is less than the previous CPI All Groups Index Number for Sydney, the current index shall be taken as not less than the previous index.

10 ADMINISTRATION OF THE PLANNING AGREEMENT

10.1 The written planning agreement document is to be prepared and presented using Council's planning agreement template attached as Annexure A.

10.2 Three original copies of the planning agreement are required for execution:

10.2.1 Copy for the Proponent

10.2.2 Copy for Council

10.2.3 Copy for the Land Titles Office.

10.3 A third copy will not be required if the planning agreement is not required to be registered on the title of the land.

10.4 Council will provide the Proponent with the required paper copies for signature.

10.5 Council will sign and date the required paper copies only after the Proponent has signed. Council will then retain one original copy in accordance with the [State Records Act 1998](#). Council will provide the remaining copy(s) to the Proponent.