

# Table of Contents

<b>Table of Contents</b>	<b>1</b>
<b>Part 1 - Policy Framework</b>	<b>1</b>
1.1 Name of this Policy	1
1.2 Application of the Policy and commencement	1
1.3 Objectives of this Policy	1
1.4 What does the Policy set out?	1
1.5 Statutory framework	2
1.6 What are the mandatory requirements of a planning agreement?	2
1.7 Guiding principles	3
1.8 Terms and definitions used in this Policy	4
<b>Part 2 - Principles for Planning Agreements</b>	<b>5</b>
2.1 Purposes of planning agreements	5
2.2 Principles underlying the use of planning agreements	6
2.3 What matters will the Council consider?	6
2.4 What will Council require to be provided under planning agreements?	7
2.5 Recurrent charges	7
2.6 Pooling of development contributions	7
2.7 Do other development contributions apply?	7
<b>Part 3 - Negotiation Procedures and Probity</b>	<b>9</b>
3.1 Introduction	9
3.2 Steps in the negotiation process	9
3.3 Probity	10
<b>Part 4 - Notification and Exhibition</b>	<b>12</b>
4.1 Public notification of planning agreements	12
4.2 Re-notification	12
4.3 Public comment on planning agreements	12
<b>Part 5 - Implementation and Conditions</b>	<b>13</b>
5.1 Preparation of the planning agreement	13
5.2 When is a planning agreement required to be entered into?	13
<b>5.3 When will planning obligations arise?</b>	<b>13</b>
5.4 Implementation agreements	14
5.5 Monitoring and review of a planning agreement	14
5.6 Modification or discharge of obligations	14
5.7 Assignment and dealings by the developer/ <b>proponent</b>	14
5.8 Provision of security under a planning agreement	15
5.9 Registration of planning agreements	15
5.10 Dispute resolution	15
5.11 Methodology for valuing public benefits under a planning agreement	15
5.12 How will the Council seek to determine the amount of Monetary Contribution that may be payable for Developments with FSR above clause 4.4 of WLEP (the WLEP Provisions)	16
<b>5.13 How will the Council seek to determine the amount of Monetary Contribution that may be payable for an amendment to the Waverley Local Environmental Plan 2012</b>	<b>16</b>

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**Appendix 1** Valuation Methodology for Development Applications

**Appendix 2** Valuation Methodology for Planning Proposals

**Appendix 3** Planning Agreement Template

**Appendix 4** Explanatory Note Template

**Appendix 5** Bondi Beach and Bondi Junction Precinct Maps

**Appendix 6** Works for Planning Agreements

**Appendix 7** Flowchart of Planning Agreement Process for Development Applications

**Appendix 8** Waverley Council Statement of Business Ethics

# Part 1 - Policy Framework

## 1.1 Name of this Policy

This Policy is known as the *Waverley Council Planning Agreement Policy 2014* (“**the Policy**”). It sets out Waverley Council’s policy and procedures relating to planning agreements under the *Environmental Planning and Assessment Act 1979*.

## 1.2 Application of the Policy and commencement

This Policy applies to development applications lodged pursuant to *Waverley Local Environmental Plan 2012* (“WLEP 2012”) and **planning proposals** seeking a change to WLEP 2012 for land and development within the local government area of Waverley Council (“Council”) with particular application to the Bondi Junction Precinct and Bondi Beach Precinct Areas. Although Council will consider entering planning agreements in other parts of its local government area it is anticipated that most, ~~if not all~~, planning agreements will relate to development in Bondi Junction Precinct and Bondi Beach Precinct Areas.

This Policy was adopted by resolution of the Council on **[insert date]**. The Policy is effective from **[insert date]**.

## 1.3 Objectives of this Policy

The objectives of this Policy are:

- (a) to establish a fair, transparent and accountable framework governing the use of planning agreements by the Council;
- (b) to explore the range and extent of development contributions made by development towards public facilities and other public benefits in the Council’s area;
- (c) to set out the Council’s specific policies and procedures relating to the use of planning agreements within the Council’s area;
- (d) to give all stakeholders in development greater involvement in determining the type, standard and location of public facilities and other public benefits; and
- (e) 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.
- (f) to enhance the understanding within Council’s area as to possibilities for development and associated public benefits and planning benefits facilitated by planning agreements in the Bondi Junction Precinct Area and Bondi Beach Precinct Area.

## 1.4 What does the Policy set out?

This Policy sets out the Council’s approach to the use of planning agreements through negotiation when considering development applications and applications for a change to WLEP 2012 in the Waverley area. Council is guided by the policy approach set out in the Department of Planning’s Practice Note titled *Planning Agreements* (19 July 2005) (“the Practice Note”) although it should be noted Council is not bound to follow the Practice Note.

In particular, this Policy sets out

- timing considerations in respect to planning agreements and procedures for negotiating and entering into planning agreements,
- the circumstances in which the Council may consider entering into a planning agreement,

- the matters ordinarily covered by a planning agreement, the form of development contributions which may be sought under a planning agreement. Unless otherwise agreed in a particular case, development contributions **negotiated as part of a development application or as part of a planning proposal** will be valued or calculated as set out in Sections 5.12 and 5.13 (and detailed in Appendix 1 and Appendix 2).
- examples of the kinds of public benefits which may be sought and, in relation to each kind of benefit, whether it involves a planning benefit,
- the method for determining the value of public benefits,
- whether money paid under different planning agreements is to be pooled and progressively applied towards the provision of public benefits to which the different agreements relate,
- when, how and where public benefits may be provided with particular reference to the Bondi Junction Precinct Area and Bondi Beach Precinct Area,
- probity measures, and
- the Council's policies on other matters relating to planning agreements, such as their review and modification, the discharging of the developer's obligations under agreements, the circumstances, if any, in which refunds may be given, dispute resolution and enforcement mechanisms, and the payment of costs relating to the preparation, negotiation, execution, monitoring and other administration of agreements.

### 1.5 Statutory framework

The current legal and procedural framework for planning agreements is set in Subdivision 2 of Division 6 of the *Environmental Planning and Assessment Act 1979*. Council is also bound by the provisions of Division 1A of Part 4 of the *Environmental Planning and Assessment Regulation 2000*.

Section 93F sets out the circumstances under which a planning agreement may be entered into. It provides a planning agreement may be made between a planning authority (or two or more planning authorities) and a person (developer):

- a) who has sought a change to an environment planning instrument (such as a rezoning application); or
- b) who has made or proposes to make a development application; or
- c) who has entered into an agreement with or is otherwise associated with a person in one of the above two categories.

### 1.6 What are the mandatory requirements of a planning agreement?

Section 93F(3) of the Act requires planning agreements to include provisions specifying:

- (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 94 or 94A to the development,
- (e) if the agreement does not exclude the application of section 94 to the development, whether benefits under the agreement are or are not to be taken into consideration in determining a development contribution under section 94,
- (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 Act does not preclude a planning agreement containing other provisions that may be necessary or desirable in particular cases, except as provided by law. However, Council has prepared a template agreement that will form the basis for a planning agreement and this may be used as the basis for any agreement. This is attached as Appendix 3.

Clause 25E(1) of the Regulation requires that an explanatory note must accompany a planning agreement that:

- summarises the objectives, nature and effect of the proposed agreement, amendment or revocation, and
- contains an assessment of the merits of the proposed agreement, amendment or revocation, including the impact (positive or negative) on the public or any relevant section of the public.

### 1.7 Guiding principles

The Practice Note sets out guidelines and safeguards in the application of planning agreements. These include determining the planning agreements acceptability and reasonableness. As such attention will be directed towards:

- proper or legitimate planning purposes, ordinarily ascertainable from the statutory planning controls and other adopted planning policies applying to development,
- providing for public benefits that bear a relationship to development that are not wholly unrelated to the development and are located in the precinct area in which the development is located.
- producing outcomes that meet the general values and expectations of the public and protect the overall public interest,
- providing for a reasonable means of achieving the relevant purposes and outcomes and securing the benefits, and
- protecting the community against planning harm.

Generally, **negotiations of a planning agreement should commence before lodgment of a development application/submission of a planning proposal to the Gateway** so as to ensure a practical outcome for public notification (see 3.2 and Part 4). **In most cases, by way of safeguard, a planning agreement should be entered into before a planning proposal is submitted to the Gateway.**

In addition, by way of safeguard, Council will seek to ensure probity of its processes involving planning agreements by ensuring applications involving planning agreements which involve Council land, or development applications made by or on behalf of Council, are independently assessed by an external planning consultant.

## 1.8 Terms and definitions used in this Policy

In this Policy, the following terminology is used:

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

**Bondi Beach Precinct Area** means the area shown in the attached map at Appendix 5.

**Bondi Junction Precinct Area** means the area shown in the attached map at Appendix 5.

**Council** means Waverley 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 (s93F(11)), or who has made or proposes to make a development application, or who has entered into an agreement with or is otherwise associated with such a person.

**development application** has the same meaning as in the Act.

**development contribution** means the kind of provision made by a developer under a planning agreement, being a monetary contribution, the dedication of land free of cost or the provision of any other material public benefit.

**explanatory note** means a written statement that provides details of the objectives, nature, effect and merits of a planning agreement, or an amendment to or revocation of a planning agreement.

**instrument change** means a change to an environmental planning instrument to facilitate a development the subject of a planning agreement.

**planning benefit** means a development contribution that confers a net public benefit.

**public facilities** means public infrastructure, facilities, amenities and services.

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

**planning proposal** means an application to amend the Waverley Local Environmental Plan 2012

**proponent** means the party that is responsible for lodging a planning proposal with Council.

**Practice Note** means the *Practice Note on Planning Agreements* published by the former 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.

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

**WLEP 2012** means the *Waverley Local Environmental Plan 2012*

## Part 2 - Principles for Planning Agreements

### 2.1 Purposes of planning agreements

Section 93F(1) of the Act provides that a planning agreement is a voluntary agreement or other arrangement between one or more planning authorities and a developer under which the developer agrees to make development contributions towards a public purpose.

The Council's approach to the negotiation of planning agreements is based on the planning purpose of furthering the Council's planning vision for the area as set out in the Waverley Strategic Plan and housing strategies (as amended from time to time). It is also informed by the mission and values of the Corporate Plan. The Bondi Junction Precinct Area and Bondi Beach Precinct Area in particular are the subject of a number of policies and plans aimed at upgrading public facilities, including infrastructure upgrading, improving and maintaining public areas including paths, footpaths and landscaping within the Precincts (refer to Appendix 6). When negotiating planning obligations the Council will ~~adopt a flexible approach,~~ generally take ~~ing~~ into account Council's vision and mission statement, the Strategic Plan's general priorities set out in the programs to that Plan, the site circumstances and also the obligation preferences of the developer.

Within the Bondi Junction Precinct Area and Bondi Beach Precinct Area (identified in maps at Appendix 5) as an incentive towards the provision of development contributions to be applied towards public benefits and planning benefits, Council may consider, subject to its statutory obligations and other matters set out in this Policy or any other relevant Council policies, plans or procedures:

- a) **applications for development up to an additional area of 15% of maximum gross floor area permitted under clause 4.4 of WLEP 2012.**

Notwithstanding (a) above Council will consider each proposed planning agreement on a case by case basis. In circumstances where significant variation of applicable development standards is proposed consideration should be given to the preparation of a planning proposal to amend WLEP2012.

The Council may negotiate a planning agreement with a developer/~~proponent~~ in connection with any proposed application by the developer/~~proponent~~ for an instrument change (eg rezoning application) or for development consent relating to any land in the Council's area. The Council may also negotiate a planning agreement in association with another Council or another authority where relevant. The negotiation of a planning agreement is at the absolute discretion of the Council.

**Council will not enter a planning agreement unless it is satisfied that the proposed development is acceptable on planning grounds having regard to the general heads of consideration set out in Section 79C of the Act. Development that is unacceptable on planning grounds will not be given consent because of benefits offered by a developer. It is noted that any exceptions to relevant development standards will be assessed in accordance with the provisions set out in cl.4.6 of WLEP 2012.**

## **2.2 Principles underlying the use of planning agreements**

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

- (a) Planning decisions will not be bought or sold through planning agreements.
- (b) The Council will not allow planning agreements to improperly fetter the exercise of its functions under the act, regulation or any other act or law.
- (c) The Council will not use planning agreements for any purpose other than a proper planning purpose.
- (d) Development that is unacceptable on planning grounds will not be permitted because of planning benefits offered by developers that do not make the development acceptable in planning terms.
- (e) The Council will not seek benefits under a planning agreement that are wholly unrelated to particular development. Development contributions obtained from planning agreements relating to development in the Bondi Junction Precinct Area will be applied in the Bondi Junction Precinct Area and development contributions obtained from planning agreements relating to developments on the Bondi Beach Precinct Area will be applied in the Bondi Beach Precinct Area.
- (f) The Council will not take into consideration planning agreements that are wholly unrelated to an application, nor will the Council give undue weight to a planning agreement.
- (g) The Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed planning agreement.
- (h) The Council will not improperly rely on its position in order to extract unreasonable public benefits from developers under planning agreements.

## **2.3 What matters will the Council consider?**

The matters that the Council may consider in any such negotiation may include, but not be limited to, the following:

- (a) Whether the planning agreement(s) meets the demands created by the development for new public infrastructure, amenities and services.
- (b) If inclusions in the development meet specific planning objectives of the Council.
- (c) If compensation is required for the loss of, or damage to, a public amenity, service, resource or asset caused by the development through its replacement, substitution, repair or regeneration.
- (d) Rectification of an existing deficiency in the existing provision of public facilities in the Council's area is made.
- (e) Whether recurrent funding of public facilities is required or provided.
- (f) The extent to which the Council needs to monitor the planning impacts of development.
- (g) Whether planning benefits for the wider community accrue from the planning agreement.

In respect to the Bondi Junction Precinct Area and Bondi Beach Precinct Area the extent to which the development **or an amendment to the Waverley Local Environmental Plan 2012** may result in a public benefit and or planning benefit in terms of the public works



contemplated in various Council policies and plans for the Bondi Junction Precinct Area and Bondi Beach Precinct Area or as set out in Appendix 6.

The most important factor in deciding what planning obligations might be required **as part of a planning agreement** is the size of the development **or resulting increase in land value from an amendment to the Waverley Local Environmental Plan 2012**, but other factors such as the location or **the resulting** type of development may be relevant. These will establish core information such as likely increases in population and demand for particular public services.

This information will help the Council **as to the determination of the development application/planning proposal** and to prepare the planning agreement.

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

Existing growth levels place strain on existing infrastructure which cannot be met by s94A contributions and Council has identified a range of infrastructure which either requires substantial upgrade or provision. The programs identified in Appendix 6 address these infrastructure requirements with respect to the Bondi Junction and Bondi Beach Precinct Areas.

It is to be noted that **10% of all planning agreement contributions will form a monetary contribution to Waverley's Affordable Housing Program fund.**

Appendix 6 provides an outline of the potential works to which development contributions could be applied. It is also recognised that development contributions that facilitate works in addition to the works listed in Appendix 6 may be appropriate because negotiations for each proposed development will reflect the circumstances of each case and the needs created by the scale of proposed change.

Consequently, Appendix 6 does not prevent development contributions being negotiated on a case by case basis, particularly where planning benefits are also involved.

#### **2.5 Recurrent charges**

The Council may request developers/**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 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, where appropriate, only require the developer/**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.

#### **2.6 Pooling of development contributions**

Where a proposed planning agreement provides for a monetary contribution by the developer/**proponent**, the 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.

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

#### **2.7 Do other development contributions apply?**

Generally the Council will not enter a planning agreement that excludes the application of s94 or s94A of the Act to development to which the agreement relates. This, however, is a matter for negotiation between the Council and a developer having regard to the particular circumstances of the case.

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However, where the application of s94 of the Act to development is not excluded by a planning agreement, the Council will generally not agree to a provision allowing benefits under the agreement to be taken into consideration in determining a development contribution under section 94.

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# Part 3 - Negotiation Procedures and Probity

## 3.1 Introduction

The Council's negotiation system for planning agreements aims to be efficient, predictable, transparent and accountable. Council will seek to ensure that the final negotiation of planning agreements runs in parallel with applications for instrument changes or development applications so as not to unduly delay the approval.

Where possible Council will publicly notify a planning agreement in the same manner and at the same time as the application for the instrument change or the development application to which it relates.

Council's preference is therefore to have the planning agreement negotiated and documented before it is publicly notified as required by the Act and Regulation. It is also preferable that a planning agreement is negotiated before lodgement of the relevant application and that it accompanies the application on lodgement.

## 3.2 Steps in the negotiation process

The negotiation of a planning agreement will generally involve the following key steps which are outlined in Appendix 7:

1. Prior to the lodgement of the relevant application by the developer/~~planning proposal by the proponent~~, the Council and developer/~~proponent~~ (and any other relevant person) will decide whether to negotiate a planning agreement. The initial point of contact to discuss a planning agreement with Council will be the Director of Waverley Futures.
2. The parties will decide whether to appoint an independent person to facilitate or otherwise participate in the negotiations or aspects of it, and appoint such person.
3. A timetable for negotiations and the protocols and work practices governing their negotiations will be agreed between the parties.
4. The key issues for negotiation will be identified by the parties, and the negotiations over these issues will take place.
5. If agreement is reached, the ~~Council developer~~ (and any other relevant party) will prepare the proposed planning agreement including the explanatory ~~note statement~~, and provide a copy of it to the ~~developer / proponent Council~~.
6. The parties may undertake further negotiation on the specific terms of the proposed planning agreement as necessary.
7. Once agreement is reached on the terms of the proposed planning agreement, the developer/~~proponent~~ may then make the ~~development~~ application/~~planning proposal~~ to the Council accompanied either by a copy of the proposed agreement or by an offer to enter into such an agreement with specifics of the agreement set out in detail.
8. The Council will publicly exhibit the ~~development~~ application/~~planning proposal~~ and planning agreement in accordance with the Act. The Council may approve the ~~development~~ application/~~planning proposal~~ and set out the conditions for the agreement or, if an agreement has been executed, set out in the consent/~~determination~~ the terms of the agreement.

The parties may be required to undertake further negotiations and, hence, a number of the above mentioned steps mentioned may need to be repeated as a result of the public notification process or its formal consideration by the Council in connection with the relevant application. For further information please see the flow chart set out in Appendix 7.

Note that all costs associated with the negotiation of a planning agreement, ~~such as~~ including the appointment of an independent person, are to be borne by the developer.

It is also noted that where the value of the development exceeds \$20 million the development application will be dealt with by the independent ~~Joint Regional Sydney~~ Planning Panel ~~or any other relevant planning authority~~.

### 3.3 Probity

Public probity is important to Waverley Council and it will ensure that the negotiation of any planning agreements is fair, transparent and is directed at achieving public benefits in an appropriate manner free of corruption.

In this regard, Council will:

- Inform any applicant about Council values and business ethics - specifically, about ethical behaviour appropriate to business dealings. A copy of Council's Statement of Ethics Policy (as amended from time to time) is attached at Appendix 8.
- Ensure that its communities understand the system and the Council's role – specifically, how the planning agreements system operates and how Council will deal with developments/ ~~planning proposals~~ objectively.
- Notify planning agreements to ensure they are open and transparent – specifically, achieving maximum public awareness of the matters contained in a planning agreement(s) and the potential benefits of an agreement.
- Ensure appropriate delegations and separation of responsibilities in considering development applications/~~planning proposals~~ that involve planning agreements – specifically, the need to ensure processes adequately address the level of risk of corruption of a process while at the same time being appropriate to the likely level of risk.
- Ensure that modifications to approved development should be subject to the same scrutiny as the original development application.
- Ensure that Councillors and Council staff understand their varied roles, some of which have potential to conflict.
- ~~Complete negotiations via written correspondence, rather than face-to-face meetings, to ensure that all discussions are clearly documented to ensure the highest level of transparency, accountability and ease of filing. This also allows due consideration of any issues raised and facilitates more deliberated decision making by all parties.~~
- Take every step to ensure that conflicts of interest are ameliorated to the greatest extent possible – specifically, independent assessment by third parties where Council has an interest and not entering into any contractual arrangement which purport to guarantee outcomes that are subject to separate regulatory processes.

Apart from the above procedures, further procedures that will be implemented to address these matters may also include, but not be limited by, the following procedures:

- (a) The Councillors will not be involved in the face to face negotiation of the agreement but will ultimately execute the planning agreement as part of their duties as Councillors.



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- (b) A Council officer with appropriate delegated authority will negotiate a planning agreement on behalf of the Council in accordance with this Policy.
  - (c) The Council will, in all cases, ensure that Council staff with key responsibility for providing advice on approvals, approving applications or ensuring compliance, do not have a role in the assessment of the commercial aspects of the agreement nor on the conditions of the planning agreement except where advice is required on matters relating to the conditions of consent for a particular proposal.
  - (d) The Council may involve an independent person(s) to facilitate or otherwise participate in the negotiations or aspects of it, particularly where this will lead to a better planning outcome.
  - (e) The Council will ensure that all negotiations with a developer/~~proponent~~ and their consultants are sufficiently separated and documented.
  - (f) Where the Council has a commercial stake in development the subject of an agreement, it will take appropriate steps to ensure that it avoids a conflict of interest between its role as a planning authority and its commercial interest in the development.
  - (g) Where Council is the consent authority and an applicant has proposed to enter into a Planning Agreement, the development application must be determined by the Waverley Development Assessment Panel (WDAP), the ~~Sydney Joint-Regional~~ Planning Panel (~~JRSPP~~), ~~or any other relevant planning authority unless the matter is of minor significance as determined by the Director, Waverley Futures.~~

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## Part 4 - Notification and Exhibition

### **4.1 Public notification of planning agreements**

In accordance with the Act, a planning agreement must be publicly notified and available for public inspection for a minimum period of 28 days. The Council may decide to notify a planning agreement for a longer period or shorter period as permitted by the Act.

The Council will also notify the application to which a planning agreement relates in accordance with the Act.

### **4.2 Re-notification**

The Council may publicly re-notify and make available for public inspection a proposed planning agreement and the application to which it relates if, in the Council's opinion, a material change is made to the terms of the agreement or the application after it has been previously publicly notified and inspected. Such a change may arise as a consequence of public submissions made in respect of the previous public notification and inspection of the agreement or the application, or their formal consideration by the Council, or for any other reason.

### **4.3 Public comment on planning agreements**

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

*In the case of development applications, whilst Council aims to advertise the planning agreement at the same time as the development application it may be advertised separately to the development application once satisfactory negotiations have taken place.*

*In the case of planning proposals, the planning agreement will be advertised before the planning proposal is sent to the Gateway or at the same time as the planning proposal during the formal exhibition period.*

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# Part 5 - Implementation and Conditions

## 5.1 Preparation of the planning agreement

The Council will prepare a planning agreement relating to a particular application for an instrument change or development application. The Council uses a standard form of planning agreement on which every planning agreement is based which reflects the policies and procedures set out in this document (refer Appendix 3). This planning agreement will include an explanatory note (refer Appendix 4).

The Council will require a planning agreement to make provision for payment by the developer of the Council's costs of and incidental to negotiating, preparing and entering into the agreement as well as administering and enforcing the agreement.

## 5.2 When is a planning agreement required to be entered into?

A planning agreement is entered into when it is signed by all of the parties. The 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 **or as part of the Gateway process for a planning proposal**. However, a planning agreement can be entered into at any time after the agreement is publicly notified in accordance with the Act and Regulation.

## 5.3 When will planning obligations arise?

### 5.3.1 Development Applications

The Council will generally require a planning agreement to provide that the developer's obligations **in relation to securing the delivery of development contributions must be met prior to the issuing of any construction certificate related to the subject development application. Delivery of the development contribution may be prior to occupation certificate.**

### 5.3.2 Planning Proposals

**There are a number of possible scenarios which are to be detailed in the terms of the planning agreement to ensure that the obligations of the agreement are fulfilled by the proponent of the planning proposal.**

**(a) Generally, the developer's obligations in relation to caveat and registration of the PA must be met as soon as possible after gateway determination and prior to gazettal notice, bank guarantee must be delivered to Council upon gazettal notice and delivery of the contribution (e.g. payment of monetary contribution), prior to the issuing of any construction certificate related to the subject development application otherwise, generally the delivery of the contribution will be upon gazettal notice.**

**Note: there may be a significant time gap between the gazettal of the planning proposal and the issuing of a construction certificate for any subsequent development of the subject site. Timing must be a key consideration during the negotiation of the planning agreement terms. As such a mechanism such as CPI increases may be applied to the calculation of the development contribution.**

**(b) If the proponent of the planning proposal intends to sell the site it must immediately notify Council in writing. Generally, the proponent must meet the obligations of the planning agreement, particularly the delivery of developer contributions (e.g. payment of monetary contribution), on or before settlement of the sale of the land. This is to be secured through registration of the planning agreement, caveat against the title of the land and provision of bank guarantee as required under (a).**

#### 5.4 Implementation agreements

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

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

#### 5.5 Monitoring and review of a planning agreement

The Council will continuously monitor the performance of the developer's/**proponent's** obligations under a planning agreement and report them in accordance with the Act.

#### 5.6 Modification or discharge of obligations

The Council may agree to a provision in a planning agreement permitting the developer's/**proponent's** obligations under the agreement to be modified or discharged in the following circumstances:

- (a) The developer's/**proponent's** obligations have been fully carried out in accordance with the agreement, or
- (b) The development consent to which the agreement relates has lapsed, or
- (c) The development consent to which the agreement relates has been modified to such an extent that the planning obligations may not be appropriate, or
- (d) The performance of the planning agreement has been frustrated by an event or events beyond the reasonable control of the parties, or
- (e) The developer/**proponent** has fully and completely assigned the developer's/**proponent's** interest under the agreement in accordance with its terms, or
- (f) Other material changes affecting the operation of the planning agreement have occurred, or
- (g) The Council and the developer/**proponent** otherwise agree to the modification or discharge of the agreement.

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

#### 5.7 Assignment and dealings by the developer/**proponent**

The Council will not **generally** permit the assignment of any or all of the developer's/**proponent's** rights or obligations under the agreement, nor will the Council permit any dealing in relation to any part or the whole of the land the subject of the agreement **unless. However the Council may agree to an assignment when:**

- (a) The developer/**proponent** has, at no cost to the Council, first procured the execution by the person with whom it is dealing of all necessary documents in favour of the Council by which that person agrees to be bound by the agreement as if they were a party to the original agreement, and
- (b) If the proposed dealing involves a mortgage, charge or other encumbrance in relation to the party's right, title and interest in the land, such documents provide for an agreement



by the person to the effect that they, and any receiver appointed by them, will not enjoy rights greater than those of that party, and

(c) The party is not in breach of ~~the~~<sup>this</sup> Agreement.

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

### **5.8 Provision of security under a planning agreement**

The Council will generally require a planning agreement to make provision for security to cover the developer's/~~proponent's~~ obligations under the agreement. ~~The A~~ form of security will generally be an unconditional bank guarantee from an Australian Bank in favour of the Council to the full value of the developer's/~~proponent's~~ obligations under the Agreement and on terms otherwise acceptable to the Council. ~~Other security will generally be required.~~

### **5.9 Registration of planning agreements**

The Council may require a planning agreement to contain a provision requiring the developer/~~proponent~~ to agree to registration of the agreement pursuant to s93H of the Act if the requirements of that section are satisfied.

### **5.10 Dispute resolution**

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

### **5.11 Methodology for valuing public benefits under a planning agreement**

Subject to ~~section 2.4~~, unless otherwise agreed in a particular case, public benefits will be valued as follows:

#### *5.11.1 Provision of land or units for a public purpose*

Where the benefit under a planning agreement is the provision of land for a public purpose, or units given to Council in perpetuity, the value of the benefit will be determined by an independent valuer who is experienced in valuing land in New South Wales (and who is acceptable to Council), on the basis of a scope of work which is prepared by Council. All costs of the independent valuer in carrying out such a valuation will be borne by the developer/~~proponent~~.

#### *5.11.2 Carrying out of works for a public purpose*

Where the benefit under a planning agreement is the carrying out of works for a public purpose, the value of the benefit will be determined by an independent quantity surveyor (who is acceptable to Council), on the basis of the estimated value of the completed works being determined using the method that would ordinarily be adopted by a quantity surveyor. Council will prepare the scope of work for the independent quantity surveyor. All costs of the independent quantity surveyor in carrying out the work will be borne by the developer/~~proponent~~.

#### *5.11.3 Other public benefit*

Where the benefit under a planning agreement is the provision of public benefit other than under ~~5.11.1 or 5.11.2~~, Council and the Developer/~~proponent~~ will negotiate the manner in which the benefit is to be valued for the purposes of the agreement.

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**5.12 How will the Council seek to determine the amount of Monetary Contribution that may be payable for Developments with FSR above clause 4.4 of WLEP (the WLEP Provisions)**

The Council and the Developer will negotiate in this regard. Generally the value of 50% of the increase in net value to the development arising from an increase in FSR beyond WLEP 2012 provisions in clause 4.4 may be considered an appropriate contribution. A series of standardised development contribution rates have been developed to streamline negotiations and provide fairness, predictability and certainty to the community, Council and developers. These pre-scheduled development contribution rates are based on average 50% value uplift for different suburbs in the Waverley LGA. These rates are located in Appendix 1 and will be applied to Development Applications.

~~The value of the benefit will be determined by an independent valuer who is experienced in valuing land in New South Wales (and who is acceptable to Council). All costs of the independent valuer in carrying out such a valuation will be borne by the Developer. The methodology used to determine net value will generally be calculated by determining the gross sale value of the proposed additional lots less the costs of construction.~~

**5.13 How will the Council seek to determine the amount of Monetary Contribution that may be payable for an amendment to the Waverley Local Environmental Plan 2012**

The Council and the proponent will negotiate in this regard. Generally the value of 50% of the net value from the planning proposal may be considered an appropriate contribution. The net value will be determined by an independent valuer who is experienced in valuing land in New South Wales (and who is acceptable to Council). All costs of the independent valuer in carrying out such a valuation will be borne by the proponent. The methodology used to determine the net value will generally be calculated by determining the Residual Land Value resulting from the planning proposal less the Base Case.

## APPENDIX 1

### ~~Valuation Methodology for Development Applications~~ under Waverley Council's Planning Agreement Policy 2014

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The VPA payable rates per square metre are outlined in the following table. VPA payable rates have not been calculated for Bronte, Tamarama, Waverley or Queens Park as there have been few VPAs offered in these areas. If a VPA is offered in these suburbs, then it should be calculated based on the 'Average LGA' rate. These rates should apply to developments that are largely residential. For developments that are largely non-residential the 'Methodology applying to development that is largely non-residential' approach should be taken.

#### BENCHMARK RATES APPLYING TO DEVELOPMENT THAT IS LARGELY RESIDENTIAL

VPA payable benchmarks (\$/sqm) - 2017	
Bondi Junction	\$3,900
Bondi	\$3,700
Bondi Beach	\$4,300
North Bondi	\$4,200
Dover Heights, Rose Bay & Vaucluse	\$3,000
Average LGA	\$3,820

n.b. these rates will be updated on an annual basis based on sales prices.

#### METHODOLOGY APPLYING TO DEVELOPMENT THAT IS LARGELY NON-RESIDENTIAL

There are two components that will make up the valuation. These are:

1. The valuation (end sale value) of the bonus (marginal) floor space; and
2. Assessment of the marginal costs (to be deducted from the marginal revenue in order to calculate marginal profit);

Component 1 must be done by fully qualified Valuers. It is recommended that two Valuers are appointed, one on behalf of Council and the other on behalf of the applicant. ~~The costs of the commissioning should be shared between Council and the applicant.~~ The adopted valuation figures is to be the average of the two valuations, **where these valuations are reasonably close.**

Component 2 must be done by fully qualified quantity surveyors (QS). It is recommended that two consultants are appointed, one on behalf of Council and the other on behalf of the applicant. ~~The costs of the commissioning should be shared between Council and the applicant.~~ The adopted cost estimates is to be the average of the two QS estimates, **where these valuations are reasonably close.**

The principles of valuation of the two components are detailed below:

#### 1. Component 1 – Value of Floor Space Bonus

- 1.1. The Valuer is to provide the end sale value of the bonus floor space. This refers to the additional apartments plus their ancillary car parking spaces.
- 1.2. Where there was a bonus on the height of the building then the bonus apartments will be on the upper most levels of the building. Alternatively it may be on the levels immediately

below the penthouse and sub-penthouse levels (given that a premium may be attached to the penthouse and sub-penthouse levels – refer to example in Paragraph 1.6 below).

- 1.3. The marginal value (or value of the bonus floor space measured in dollars per square metre) should not be less than average value (the building's total value divided by total floor area).
- 1.4. The bonus floor space does not necessarily have to be identified in "whole" apartments. It can be identified in fractions of apartments or even in square metres.
- 1.5. The valuation is to take into consideration the specification and quality of finish of the bonus apartments.
- 1.6. An acceptable method of measure is the difference between the total value of the apartments without the bonus floor space and the total value of the apartments with the bonus floor space.

In the example below a bonus floor space provides an additional increase in the internal leasable area of 14.9% through an increase of building height (one additional floor) plus a slight widening of the building. The result is an increase in the end value by 15.8%.

**Building Without Bonus Floor Space**

Level	Sqm	\$/sqm	\$m
11	300	12,000	3.6
10	400	11,000	4.4
9	500	10,000	5.0
8	500	9,800	4.9
7	500	9,600	4.8
6	500	9,400	4.7
5	500	9,200	4.6
4	500	9,000	4.5
3	500	8,500	4.3
2	500	8,000	4.0
1	500	7,500	3.8
<b>TOTAL</b>	<b>5,200</b>		<b>48.5</b>

**Building With Bonus Floor Space**

Level	Sqm	\$/sqm	\$m
12	300	12,000	3.6
11	425	11,000	4.7
10	525	10,200	5.4
9	525	10,000	5.3
8	525	9,800	5.1
7	525	9,600	5.0
6	525	9,400	4.9
5	525	9,200	4.8
4	525	9,000	4.7
3	525	8,500	4.5
2	525	8,000	4.2
1	525	7,500	3.9
<b>TOTAL</b>	<b>5,975</b>		<b>56.2</b>
Margin	775		7.7
% Increase	14.9%		15.8%

- 1.7. The marginal value shall be the actual price exchanged. Where the apartments have not been exchanged then the market value should be the listed or asking price. If there are no listed or asking prices then the value shall be estimated by the Valuer based on market evidence.
- 1.8. Market evidence should include any pre-sales in the building and/or recent sales and pre-sales of comparable apartments in other buildings in the locality.
- 1.9. The Valuer shall deduct (from the end value of the bonus floor space) GST at one eleventh of the gross end sale value and any other costs on sale such as sales commission and legal costs. Generally these costs will be no more than 3.0% of gross end sale value.
- 1.10. The result is the expected marginal net sale proceeds from the bonus floor space.

## 2. Component 2 – Marginal Cost to Design and Construct

- 2.1. The QS shall provide an estimate of the marginal cost of construction relating to the bonus floor space and bonus car parking spaces. **Generally, Council will not accept exaggerated costs that are significantly higher than the development cost indicated on the submitted DA.**
- 2.2. This simplest method to calculate marginal cost is the pro-rata of the total building cost based on bonus floor space divided by total GFA plus a pro-rata of the car parking cost based on number of parking spaces allocated to the bonus units divided by total car parking spaces.
- 2.3. Various site costs including, **but not limited to**, landscaping, driveways, fencing and external works shall be excluded since these costs are not marginal.
- 2.4. The QS and/or Valuer shall then add the marginal design costs, application fees, marketing and advertising costs and other ancillary costs. Again this would be a pro-rata of total costs. **Evidence of these costs should be provided.**
- 2.5. The QS and/or Valuer shall then add the monetary contributions under Section 94A in relation to the bonus floorspace (if paid or is to be paid).
- 2.6. The QS and/or Valuer can then add finance and interest costs again using the pro-rata method. The method for showing interest calculation must be provided using cash flow or other appropriate method of calculation.
- 2.7. Land cost and profit margins are not to be included as these are not marginal costs.
- 2.8. GST on costs is to be excluded since this will be returned to the developer in the form of input credits.
- 2.9. The result is the total estimated cost in delivering the marginal floor space.

<p>The formula for calculating the profit from the bonus floor space is: <b><i>Marginal net sale proceeds less Marginal cost to Construct</i></b></p>
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50% of the profit from the bonus floor space is to be provided as a negotiated form of public benefit through a Planning Agreement.

## APPENDIX 2

### Valuation Methodology for Planning Proposals under Waverley Council's Planning Agreement Policy 2014

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There are two components that will make up the valuation. These are:

1. The Base Case; and
2. Residual Land Value.

Both components must be done by suitably qualified Valuers. It is recommended that two Valuers are appointed, one on behalf of Council and the other on behalf of the applicant. The costs of commissioning the Valuers should be shared between Council and the applicant. The adopted valuation figure is to be the average of the two valuations.

The principles of valuation of the two components are detailed below:

#### **1. Component 1 – Base Case**

- 1.1. The Base Case is the value of the land under the current zoning (assuming in perpetuity). The value under the base case should be assessed on the site's highest and best use permissible under the current zoning. The highest and best use may, or may not be, the current use of the land.
- 1.2. The Valuer is required to test and determine the highest and best use of the land. The base case is to assume that the current zoning on the land and the development standards under the current instruments will remain in perpetuity. The planning proposal itself must not affect the base case.
- 1.3. Standard valuation practices shall apply and at least two methods of valuation should be used. Comparable sales should be one of the methods applied unless there is insufficient evidence. When using comparable sales evidence the Valuer must ensure that the sale prices are not affected by planning proposals or draft instruments that are not related to the base case – or at least make reasonable allowances / adjustments.
- 1.4. If the subject site was sold recently then the purchase price can be adopted provided that the price was not inflated as a result of the planning proposal.

#### **2. Component 2 – Residual Land Value**

- 2.1. The Valuer shall estimate the value of the land under the planning proposal using the residual land valuation (RLV) method. The preferred method for calculating the RLV is discounted cash flow modelling using proprietary software like Estate Master DF or similar. A simple developer's profit model may be acceptable for small-scale single-staged developments.
- 2.2. The assumptions in the RLV calculations must be reasonable and based on industry averages.

- 2.3. If there are no listed or asking prices then the end sale values shall be estimated by the Valuer based on comparable market evidence.
- 2.4. Market evidence should include any recent pre-sales in the building and/or recent sales and pre-sales of comparable apartments in other buildings in the locality.
- 2.5. Estimated construction costs must be supported by a Quantity Surveyor's report. Construction contingency should be no greater than 5%. Soft costs may be included such as design costs, application fees, authority fees, development management, marketing and advertising and finance establishment costs.
- 2.6. In calculating the RLV the project start date should assume the land is zoned appropriately (i.e. the zone that is being proposed).
- 2.7. The RLV should exclude any discounting during the rezoning period as the payment under the VPA will not be made until occupation certificate. A typical development program should be assumed that allows reasonable time for development approval, certification and construction. Council will not accept a program that appears conservative or pessimistic. The table below provides a suggested range of project lives for a single stage project. Any significant departure in project life requires supporting evidence.

Construction Cost	Approvals and Documentation (months)	Construction (months)
Under \$20m	8-9	10-14
\$20m to \$40m	9-11	14-17
Above \$40m	10-12	18-20

- 2.8. It is recognised that these timeframes can vary and are impacted by building height and number of basement levels.
- 2.9. For a short single staged development a developer's profit or "back of envelope" method rather than a cash flow model may be acceptable. Using this method the RLV will be derived from the target profit/risk margin. If this method is used the interest should be calculated as follows:

$$\text{Interest Cost} = (\text{Total Project Costs excluding land \& GST}) \times (\text{Interest Rate} / 12) \times (\text{Months of Construction}) \times 50\%.$$

- 2.10. The RLV model should preferably show both the development margin and Project Internal Rate of Return (IRR) on the cash flow before interest. Reasonable industry standard hurdle rates should be applied. Generally a target margin (on project costs) of 15% to 25% and a target IRR of 16% to 20% should apply but this depends upon the levels of market risk and other project risks.

The formula for calculating the net value from the planning proposal is:  
***Residual Land Value minus the Base Case***

50% of the net value from the planning proposal is to be provided as a negotiated form of public benefit through a Planning Agreement.



## APPENDIX 3 (Clause 1.6) Planning Agreement Template

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PLANNING AGREEMENT NO. \_\_\_\_\_

*Section 93F of the Environmental Planning and Assessment Act, 1979*

THIS AGREEMENT is made on

2017~~5~~

### PARTIES

**WAVERLEY COUNCIL** of Cnr Paul Street and Bondi Road, Bondi Junction NSW 2022 (**Council**)

**AND**

**NAME (A.C.N. #)** of Address ("Developer")

### BACKGROUND

- A.** The Developer is the registered proprietor of the Land.
- B.** The Council is the local authority constituted under the *Local Government Act 1993* and the planning and consent authority constituted under the Act.
- C.** The Developer has made or caused to be made a Development Application to the Council for the Development Consent to carry out the Development on the Land.
- D.** The Development Application was accompanied by an offer by the Developer to enter into a voluntary planning agreement to make the Development Contribution to be applied by the Council towards the Public Purpose if the Development Consent was granted.
- E.** This Agreement is consistent with the Developer's offer referred to in Recital D.

### OPERATIVE PROVISIONS:

#### **1 DEFINITIONS AND INTERPRETATION**

##### **1.1 Definitions**

In this Agreement unless the context otherwise requires:

**“Act”** means the *Environmental Planning and Assessment Act 1979* (NSW)

**“Agreement”** means this agreement;

**“Bank Guarantee”** means an irrevocable and unconditional undertaking by a trading bank approved by the Council to pay the Development Contribution amount on demand without an expiry or end date and containing terms and conditions acceptable to Council and in accordance with clause 9 of this Agreement.

**“Business Day”** means a day that is not a Saturday, Sunday or public holiday, on which banks are open for general services in Sydney, New South Wales;

**“Certifying Authority”** means any accredited private certifier including where appropriate, a Principal Certifying Authority (PCA) appointed or to be appointed to certify the Development or any aspect of it;

**“Council”** means Waverley Council and herein includes any local government authority with which that Waverley Council may merge or any other local government authority responsible for a local government area that the Lot Burdened is located within.

**“Construction Certificate”** means any construction certificate in respect of the Development Consent;

**“Development”** means the development the subject of the Development Application and which is described in Item 4 of the Schedule;

**“Development Application”** means the development application described in Item 3 of the Schedule;

**“Development Consent”** has the same meaning as in the Act and means Council’s approval of the Development Application described in Item 3 of the Schedule;

**“Development Contribution”** means the amount of money referred to in Item 5 of the Schedule.

**“Development Contribution Date”** means the time the Development Contribution is to be paid as specified in Item 8 of the Schedule;

**“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.

**“Land”** means the land described in Item 2 of the Schedule.

**“Development Application”** means the application referred to in Item 4 of the Schedule.

**“Development Consent”** means Council’s approval of the Development Application.

**“Party”** means a party to this Agreement including their successors and assigns.

**“Planning Proposal”** means an application to amend the Waverley Local Environmental Plan 2012

**“Proponent”** means the party that is responsible for lodging a planning proposal with Council.

**“Public Purpose”** for the purpose of this Agreement means the public purpose described in Item 6 of the Schedule.

**“Registration Application”** means an application for registration of this Agreement as a planning agreement on the title of the Land pursuant to Section 93H of the Act in a form approved by the Registrar General.

**“Schedule”** means the schedule to this Agreement.

## **1.2 Interpretation**

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

- (a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement;
- (b) A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney, New South Wales;
- (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, Agreement or document is to that agreement, Agreement or document as amended, novated, supplemented or replaced;
- (g) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement;
- (h) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;

- (i) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- (j) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders;
- (k) References to the word 'include' or 'including' are to be construed without limitation.
- (l) A reference to this Agreement includes the agreement recorded in this Agreement; and
- (m) A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.

## **2 PLANNING AGREEMENT UNDER THE ACT**

The Parties to this Agreement agree that it is a planning agreement governed by Subdivision 2 of Division 6 of Part 4 of the Act.

## **3 APPLICATION OF THIS AGREEMENT**

This Agreement applies to the Land and the Development.

## **4 OPERATION OF THIS AGREEMENT**

- 4.1 This Agreement does not take effect until the Development Consent is granted by the Council.
- 4.2 If they have not already done so the Parties must execute this Agreement as soon as possible after the Development Consent is granted and prior to any Construction Certificate issuing.

## **5 DEVELOPMENT CONTRIBUTION**

- 5.1 The Developer agrees to make, and the Council agrees to accept, the Development Contribution to be applied for the Public Purpose.
- 5.2 The Developer must pay the Development Contribution to the Council by bank cheque on or before the Development Contribution Date and time is essential in this respect.

## **6. APPLICATION OF DEVELOPMENT CONTRIBUTION**

- 6.1 The Council will apply the Development Contribution towards the Public Purpose as soon as practicable.

## **7. APPLICATION OF SECTIONS 94 AND 94A OF THE ACT TO THE DEVELOPMENT**

- 7.1 This Agreement does not exclude the application of Sections 94, 94A or 94EF of the Act to the Development.
- 7.2 The Development Contribution provided by the Developer will not be taken into consideration in determining any development contribution under Section 94 of the Act.

## **8 REGISTRATION OF THIS AGREEMENT**

- 8.1 The Parties agree this Agreement is to be registered by the Registrar General as provided for in section 93H of the Act.
- 8.2 The Developer warrants that it has done everything necessary to enable this Agreement to be registered under section 93H of the Act.
- 8.3 Without limiting clause 8.2, the Developer warrants that it has obtained the express written consent to the registration of this Agreement under section 93H of the Act from:
  - (a) If this Agreement relates to land under the *Real Property Act 1900*, each person who has an estate or interest in the Land registered under that Act; or
  - (b) If this Agreement relates to land not under the *Real Property Act 1900*, each person who is seized or in possession of an estate or interest in the Land.
- 8.4 Prior to the issue of a Construction Certificate, the Developer will at its cost arrange and effect registration of this Agreement under s93H upon the title to the Land and as soon as possible following execution of this Agreement:
  - (a) deliver to the Council the Registration Application in registrable form noting the Council as applicant and executed by the Developer and any other person the subject of the warranty in clause 8.3;
  - (b) lodge or cause to be lodged the title deed with LPI and advise Council of the production number;
  - (c) provide the Council with a cheque in favour of Land & Property Information, NSW for the registration fees for registration of this Agreement; and
  - (d) provide the Council with a cheque in favour of the Council for its costs, expenses and fees incurred or to be incurred in connection with the preparation of this Agreement and any documents, form or instrument created or to be created in accordance with the provisions of this Agreement.
  - (e) and take any other necessary action so as to ensure this Agreement is registered on the title to the Land prior to the issue of a Construction Certificate.

- 8.5 Upon compliance with clause 8.4 by the Developer the Council will promptly lodge the Registration Application with the Registrar General.
- 8.6 The Parties will co-operate with each other to ensure that the Agreement is registered by the Registrar General.
- 8.7 Upon payment of the Development Contribution or surrender of the Development Consent, the Developer may request the removal of the dealing created by registration of the Agreement from the title to the Land. The Council will not withhold its consent to such removal, provided that the terms of this Agreement have been complied with and the Developer pays all costs, expenses and fees of the Council relating to such removal.
- 8.8 Should payment of the Development Contribution or surrender of the Development Consent occur on or before the date of this Agreement and prior to issue of a Construction Certificate, then there will be no obligation to register this Agreement in accordance with this clause.
- 8.9 Upon registration of this Agreement by the Registrar General, this Agreement is binding on, and is enforceable against the owner of the Land from time to time as if each owner for the time being had entered into this Agreement.

## **9 BANK GUARANTEE**

### **9.1 Provision of Bank Guarantee**

- (a) On the date of this Agreement and before any application for any Construction Certificate the Developer must deliver to the Council a bank guarantee ("Bank Guarantee"), which must be:
- (i) irrevocable and unconditional;
  - (ii) with no expiry date;
  - (iii) issued in favour of the Council;
  - (iv) for an amount equivalent to the Development Contribution set out in item 5 of the Schedule;
  - (v) drafted to cover all of the Developer's obligations under this Agreement; and
  - (vi) on the terms otherwise satisfactory to the Council and in a form and from an institution approved by the Council.
- (b) The Developer acknowledges that the Council enters into this Agreement in consideration of the Developer providing the Bank Guarantee as a security for the performance of all of the Developer's obligations under this Agreement, including without limitation the delivery of the Development Contribution to Council in accordance with this Agreement.

## **9.2 Calling on Bank Guarantee**

- (a) The Council may call on the Bank Guarantee in the event that the Developer:
  - (i) fails to make a payment of any part of the Monetary Contributions in accordance with this Agreement or any other amount payable under this Agreement by its due date for payment ; or
  - (ii) breaches any other term or condition of this Agreement, and fails to remedy the relevant failure or breach within 7 days after the Council's notice.
- (b) If the Council calls on the Bank Guarantee as a result of the Developer's failure to pay any amount due under this Agreement, then the Council will apply the amount received pursuant to its claim on the Bank Guarantee in satisfaction of the Developer's obligation to pay the relevant amount.

## **9.3 Return of Bank Guarantee**

Provided that the Developer has complied with its obligations under this Agreement including payment to the Development Contribution the Council will return the Bank Guarantee to the Developer.

## **10 REVIEW OF THE AGREEMENT**

- 10.1 The Parties agree that, subject to section 93G of the Act, this Agreement can be reviewed and amended at any time by mutual agreement.

## **11 DISPUTE RESOLUTION**

- 11.1 If any Dispute arises out of or in connection with this Agreement, the following procedure must be followed in order to resolve it:
  - (a) either party may give written notice of the dispute to the other party. A representative nominated by each party must meet within five (5) Business Days of receipt of that notice and attempt in good faith to resolve the dispute;
  - (b) if the dispute is not resolved between the nominated representatives within ten (10) Business Days of receipt of the notice referred to in clause 11.1(a), then the dispute will be notified to the relevant divisional manager (or officer holding the equivalent position) of each party who must meet and attempt in good faith to resolve the dispute within five (5) Business Days of the date of receipt of that notice; and

- (c) if the dispute remains unresolved within ten (10) Business Days of receipt of the notice referred to in clause 11.1(b), notice will be given to the Chief Executive Officers (or officer holding an equivalent position) of each party who must meet and attempt in good faith to resolve the dispute within five (5) Business Days of the receipt of that notice.
- (d) For the purposes of this clause, a meeting may take place by telephone or other means of communication.

- 11.2 If the parties fail to resolve the dispute after following the procedures set out in clause 11.1, then they must agree on the appropriate method of alternative dispute resolution (which may include expert determination or mediation) within ten (10) Business Days of the date of the final meeting held in accordance with clause 11.1(c).
- 11.3 If the parties select expert determination as the method of resolving the dispute, the expert must act as an expert and not an arbitrator, his determination will be binding upon the parties unless otherwise agreed and his costs must be shared equally between the parties.
- 11.4 If the parties fail to agree on the appropriate method of alternative dispute resolution in accordance with clause 11.2, the dispute must be referred for mediation to a mediator nominated by the then current Chairman of the Australian Commercial Disputes Centre in Sydney (ACDC), or, if ACDC no longer exists, the chairman of a reputable commercial dispute resolution body, as agreed between the council and the Developer, or if same cannot agree, nominated by the Council. The role of the mediator is to assist in the resolution of the dispute and the mediator may not make a decision which is binding on the parties.
- 11.5 The costs associated with appointing the mediator under clause 11.4 must be shared equally between the parties.



## **12. ENFORCEMENT**

- 12.1 Nothing in this Agreement (including Clauses 10 and 11) prevents the 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.
- 11.2 Until such time as the Development Contribution has been paid in full, an Occupation Certificate must not be issued and the Developer must:
- (a) notify the Council in writing of the name and contact details of any Certifying Authority to which it has applied for an Occupation Certificate at the same time that such application is made;
  - (b) at the time it lodges any application for an Occupation 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 an Occupation Certificate until Council provides written confirmation that the Development Contribution has been paid; and
  - (e) not rely on any Occupation Certificate in respect to the Development.
- 11.3 The Developer acknowledges and agrees that Council has a caveatable interest in the Land from the date of the 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 until the Development Contribution is paid in full.

## **13. NOTICES**

- 13.1 Any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:
- (a) delivered or posted to that Party at its address set out in Item 9 of the Schedule;
  - (b) faxed to that Party at its fax number set out in Item 9 of the Schedule; or
  - (c) emailed to that Party at its email address set out in Item 9 of the Schedule.

- 13.2 If a Party gives the other Party 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.
- 13.3 Any notice, consent, information, application or request is to be treated as given or made at the following time:
- (a) if it is delivered when it is left at the relevant address;
  - (b) if it is sent by post, 2 business days after it is posted; and
  - (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.
- 13.4 If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the Party to who it is sent, it is to be treated as having been given or made at the beginning of the next business day.

#### **14. 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.

#### **15. 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.

#### **16. 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.

**17. 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.

**18. GOVERNING LAW AND JURISDICTION**

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

**19. 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.

**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. MODIFICATION**

No modification of this Agreement will be of any force or effect unless it is in writing and signed by the Parties to this Agreement.

**23. 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.

#### **24. NON FETTER**

The Developer acknowledges and agrees that:

- (a) in addition to its obligations under this Agreement the Council is also responsible for the conduct and administration of local government in the Waverley Local Government Area;
- (b) this Agreement in no way affects Council's statutory obligations, functions or powers, including without limitation, its obligations, functions or powers in respect of the Development Application, Development Consent and any other approvals required in respect of the works to be carried out under the Development Consent;
- (c) nothing which the Council does or fails to do under this Agreement will limit or otherwise affect the Developer's obligations under the Development Consent; and
- (d) nothing which the Council does, fails to do or purports to do in performing the Council's statutory functions or powers will constitute or amount to a breach of this Agreement.

#### **25. GOODS & SERVICES TAX REPRESENTATIONS AND WARRANTIES**

- 25.1 The Parties 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.
- 25.2 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.

- 25.3 Any amount in respect of GST payable under clause 24.2 must be paid to the Supplier immediately on receipt of the Valid Tax Invoice.
- 25.4 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.
- 25.5 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 Part VB of the *Trade Practices Act 1974* (Cth).

**26. COSTS**

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

**27. EXECUTION IN DUPLICATE**

The Parties shall execute this Agreement in duplicate so as to provide one original signed by both parties. This Agreement will be dated on the day of execution by all Parties.

## SCHEDULE

Item Number	Particulars/Description	
1	Developer	NAME (A.C.N. #)
2	Land	Street Address (Lot&DP)
3	Development Application	DA #
4	Development (description)	
5	Development Contribution	
6	Public Purpose	
7	Development Contribution Date (Payment date for the Development Contribution)	
8	Developer Address	
	Developer Fax	
	Developer Email	
	Council Address	CORNER PAUL STREET AND BONDI ROAD, BONDI JUNCTION NSW 2022
	Council Fax	(02) 9387 1820
	Council Email	<a href="mailto:info@waverley.nsw.gov.au">info@waverley.nsw.gov.au</a>

EXECUTED by WAVERLEY COUNCIL with Common Seal of Waverley Council affixed pursuant to a resolution of Waverley Council on

\_\_\_\_\_  
**CATHY HENDERSON** ~~ARTHUR KYRON~~  
Acting General Manager

\_\_\_\_\_  
**CLR JOHN WAKEFIELD** ~~SALLY BETTS~~  
Mayor

EXECUTED by )  
NAME )  
(A.C.N. #) )  
in accordance with section 127 of the )  
*Corporations Act 2001* )

\_\_\_\_\_  
Director / Secretary  
Name of Director / Secretary:

\_\_\_\_\_  
Director  
Name of Director:

## APPENDIX 4

# Explanatory Note Template

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### Explanatory Note

(Clause 25E of the Environmental Planning and Assessment Regulation 2000)

[**Note:** To be completed upon finalisation of Planning Agreement]

#### Draft Planning Agreement

Under s93F of the *Environmental Planning and Assessment Act 1979*

1 Parties

Waverley Council

## (Developer)

2 Description of Subject Land

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

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

5 Assessment of the Merits of the Draft Planning Agreement

#### The Planning Purposes Served by the Draft Planning Agreement

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

#### How the Draft Planning Agreement Promotes the Public Interest

- (a) How the Draft planning Agreement Promotes the Elements of the Council's Charter
- (b) Whether the Draft Planning Agreement Conforms with the Council's Capital Works Program

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

**Signed and Dated by All Parties**



APPENDIX 5  
Bondi Beach and Bondi Junction Precinct Area Maps

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## APPENDIX 6

### Works for Planning Agreements

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#### Possible requirements:

The following is a list of possible requirements that the Council may have for planning agreements. They are not exhaustive and developers are encouraged to discuss these or other requirements that may be included in a planning agreement.

<b>Council Requirement</b>	<b>Project Cost Estimate</b>
<b>Bondi Junction Public Domain and Transport Infrastructure Improvements</b>	<b>\$21,000,000</b>
<b>Bondi Beach Public Domain Improvements</b>	<b>TBD</b>
<b>Contributions to the Waverley Affordable Housing Program</b>	<b>On going</b>

Note: 10% of all planning agreement contributions will form a monetary contribution to Waverley's Affordable Housing Program fund

APPENDIX 7  
Flowchart of Planning Agreement Process for Development Applications

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APPENDIX 8  
Waverley Council Statement of Business Ethics (as amended from time to  
time)

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