

REPORT CM/7.13/17.12



Subject: Planning Agreement Policy 2014 - Update

TRIM No.: A15/0046

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RECOMMENDATION:

That Council:

1. Adopts Waverley Planning Agreement Policy 2014 (Amendment No. 2) attached to this report for the purposes of public exhibition for a period of 28 days.
2. Notes the purpose of this amendment to the Waverley Planning Agreement Policy 2014 is to implement pre-scheduled development contribution rates, implement and clarify the process for applying planning agreements to planning proposals in order to fund public infrastructure needs and housekeeping updates.
3. Notes that the proposed amendments relating to standardised, pre-scheduled development contribution rates are consistent with the value sharing principles that have been applied to Planning Agreements negotiated to date.
4. Notes that the proposed amendments relating to a planning proposal are consistent with the principles which have been applied to planning agreements negotiated for development applications, with the latter providing certainty for the community and development industry.

1. Executive Summary

The 'Waverley Planning Agreement Policy 2014' (Amendment No. 2) proposes changes to the 'Waverley Planning Agreement Policy 2014', to include the following amendments:

- Update the approach to calculate monetary contributions for Development Applications: from the current case-by-case basis to a series of pre-scheduled, standardised benchmarks.
- Build upon the draft process for applying voluntary planning agreements (VPA) to planning proposals (PP) identified in the 20 October 2015 Council meeting (Amendment 1), which was publicly exhibited but not reported to Council for adoption.
- Housekeeping amendments.

Adopting pre-scheduled, standardised development contribution rates would result in a more efficient, consistent, transparent policy that creates greater certainty for the community, Council and developers. It would also reduce the resource and time intensiveness of the current approach and limit opportunities for the development industry to 'game the system'.

Amendment 1 to the 'Waverley Planning Agreement Policy 2014' included a process for applying VPAs to PPs. This amendment was endorsed for public exhibition at the October 2015 Council meeting. It was noted

in this Council meeting that further work needed to be completed to determine the timing and mechanism for a planning agreement contribution associated with a PP.

The application of a VPA to a PP was planned to occur using the planning proposal at 194 Oxford Street as a case study. Following which the policy could be further refined based on the practical lessons learnt in the negotiation of a VPA with a PP. A VPA was not entered into for 194 Oxford Street and has not been successfully entered into for any other PPs; hence this Amendment 1 was never reported to Council for adoption. Notwithstanding, Council officers have sought legal advice regarding the best way to implement a VPA with a PP and believe that the changes outlined in Amendment 1 should be adopted by Council, along with further details about the timing and mechanism indicated in Amendment 2 (see Attachment 1). A number of housekeeping amendments have also been identified and addressed in Amendment 2 to the 'Waverley Planning Agreement Policy 2014'. Amendment 2 therefore incorporates the changes proposed in Amendment 1, standardised benchmarks for Planning Agreements related to Development Applications and certain minor housekeeping amendments.

2. Introduction/Background

The 'Waverley Planning Agreement Policy 2014' has been successfully utilised to negotiate and draft planning agreements accompanying Development Applications seeking a Clause 4.6 variation to Clause 4.4 Floor space ratio for an additional 15%.

Value sharing approach

The value sharing (or value capture) approach seeks to share the value uplift (also known as windfall gain, planning gain, unearned increment or economic rent) that developers receive from increases to density above the current controls. The share that Council pursues is 50% of the value uplift gained by the developer. This share of value is used to fund community infrastructure and affordable housing. Waverley's policy received a Commendation from the 2015 PIA NSW awards in the category of '*Improving Planning Processes & Practices*'.

The rationale underpinning value sharing is that planning decisions are made in the public interest and the value of land is created by planning decisions. Therefore, value uplift is conceptually community property and the community have a legitimate claim to the benefits created by planning decisions and a reasonable share of development profit. To this extent, value capture is not just a valuable funding mechanism, but a fundamental equity issue that places the public interest at the forefront of planning.

Development proposals, in the form of development applications or planning proposals, often seek to go beyond the existing development standards (i.e. height and floor space controls). This approach acknowledges that there are some instances where additional development can occur on sites beyond existing planning controls, while not unacceptably impacting on the amenity of neighbouring residents. It allows each development to not only be subject to standard controls, but also to be assessed on its merits. This approach has been built into the planning system for some time under a standard clause (cl4.6) in the Standard Instrument Local Environmental Plan (and before that in SEPP 1 – Development Standards) to "achieve better outcomes for and from development by allowing flexibility in particular circumstances".

Where development exceeds the established planning controls, and can do so without having an unacceptable impact, then value sharing can provide the community a net benefit from the development in terms of additional infrastructure and amenity.

Prior to the adoption of the '*Waverley Planning Agreement Policy 2014*', development applications would seek to exceed Council's planning controls, in accordance with clause 4.6 of the LEP, and could be approved with no contributions to community infrastructure. In instances where these applications were refused, they were often subject to lengthy and costly court cases. However, the '*Waverley Planning Agreement Policy 2014*' is clear that "*development that is unacceptable on planning grounds will not be given consent*".

because of benefits offered by a developer” and that “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”. For instance, Council has refused several development applications and s96 modification applications involving VPAs on the grounds that these would have unacceptable impacts in planning terms. This includes developments seeking two additional storeys that would have contributed VPAs worth \$4.2 million, \$3.2 million and \$1million.

Success of Council’s policy

The case-by-case value sharing method used in Council’s ‘Waverley Planning Agreement Policy 2014’ has been very successful in delivering community benefits. To date, close to \$23 million has been negotiated under the ‘Waverley Planning Agreement Policy 2014’, with \$2.3 million of this being contributed towards Waverley’s affordable housing program (much of this amount will be paid at Occupation Certificate stage). To place this number into context, the development contributions (s94A) provided by all development across Waverley LGA for 2016/17 was \$3.2million.

Contributions have been dedicated towards a number of public domain upgrades including Waverley’s Complete Streets program in Bondi Junction (for development relating to Bondi Junction), the Campbell Parade upgrade in Bondi Beach and a number of upgrades to local parks nearby developments. In particular, there have been a number of instances where parks directly adjacent to a subject development have been upgraded as a result of VPA contributions. To this extent, the VPA policy ensures that increases in density are associated with an increase in liveability, rather than a decrease. On average, monetary contributions have delivered \$3,300 per square metre of additional floor space.

All of the revenue from VPAs has come from development applications and Council has yet to successfully negotiate a planning proposal in accordance with the ‘Waverley Planning Agreement Policy 2014’.

3. Relevant Council Resolutions

Council or Committee Meeting and Date	Minute No.	Decision
Council Meeting 20 October 2015	CM/7.6/15.10	<p>That Council:</p> <ol style="list-style-type: none"> Notes the key purpose of this amendment to the ‘Waverley Planning Agreement Policy 2014’ is to identify and capture the increase in value arising from a Planning Proposal in order to fund public infrastructure needs. Notes that the proposed amendments relating to a Planning Proposal are consistent with the principles which have been applied to Planning Agreements negotiated for development applications, with the latter providing certainty for the community and development industry. Further notes that this is the first time a detailed Planning Agreement methodology has been proposed for Planning Proposals, and it would be valuable to advertise the draft amendments to generate community and industry feedback for Council’s consideration of issues that may arise. Adopts for the purpose of exhibition the ‘Waverley Planning Agreement Policy 2014’ (Amendment No. 1) for a period of 28 days, subject to the following: <ul style="list-style-type: none"> a) Amend Section 4.3 by replacing the second paragraph with new wording as follows: <p>4.3 Public comment on planning agreements The Council encourages the public to make submissions on planning</p>

Council or Committee Meeting and Date	Minute No.	Decision
		<p>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, the planning agreement is usually advertised separate to the development application once satisfactory negotiations have taken place. In the case of planning proposals, the planning agreement will be advertised at the same time as the planning proposal during the formal exhibition period.</p> <p>b) Amend the wording under Section 5.3.1 to read as follows: The Council will generally require a planning agreement to provide that the developer's obligations must be met prior to the issuing of any construction certificate related to the subject development application.</p> <p>c) Amend the wording under Section 5.3.2(a) to read as follows: If the proponent of the planning proposal is also the development applicant and continues to develop the site, then the developer's obligations must be met prior to the issuing of any construction certificate related to the subject development application.</p> <p>d) Amend the note under Section 5.3.2(a) to read as follows: 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.</p> <p>e) Council officers are to further investigate during the public exhibition period, in relation to Section 5.3, the timing requirements for when a developer contribution is to be made to Council to ensure that the value of the public benefit reflects the market at the time when a construction certificate is issued for any subsequent development of the subject site.</p>
Operations Committee Meeting 7 October 2014	OC/5.2/14/10	<p>That Council resolves to adopt the 'Waverley Planning Agreement Policy 2014' provided at Attachment 1 to this report, which will replace the Interim Voluntary Planning Agreement Policy 2013 subject to the following amendments:</p> <ol style="list-style-type: none"> On page 42 of the Committee Agenda, Section 3.3 Probity, dot point 1 be amended to read as follows: <ul style="list-style-type: none"> "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 7."

Council or Committee Meeting and Date	Minute No.	Decision
		<p>2. On page 43 of the Committee Agenda, Section 3.3 Probity, add point (g) as follows: "(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), or the Joint Regional Planning Panel (JRPP) unless the matter is of minor significance as determined by the Director, Waverley Futures."</p> <p>3. On page 47 of the Committee Agenda, Section 5.11 Methodology for valuing public benefits under a planning agreement be amended to read as follows: "Subject to section 2.4, unless otherwise agreed in a particular case, public benefits will be valued as follows:"</p> <p>4. On page 47 of the Committee Agenda, Section 5.11.1 Title be amended as follows: "Provision of land or units", and its first sentence read as follows: "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." 5. On page 69 of the Committee Agenda, Appendix 7 Title be amended to read as follows: "Waverley Council Statement Of Business Ethics (as amended from time to time)".</p>
Council Meeting 10 December 2013	1312.12.7/13	<p>A. Review Clause 4.4B of Waverley LEP 2012 in conjunction with the Department of Planning and Infrastructure and our legal representatives in order to ensure that:</p> <ul style="list-style-type: none"> i. The value of any affordable housing incentive associated with future development is shared equitably between Council and developers. ii. The intent of any future amendment is the continuation of an affordable housing enabling provision in the Waverley Local Environmental Plan. iii. Seek the removal of "Area 1" from WLEP2012 and instead include a subclause in Clause 4.4B that the clause applies to areas zoned R3 Medium Density, R4 High Density and B4 Mixed Use. <p>B. That subject to "A" above, a Planning Proposal be prepared and submitted to the Department of Planning and Infrastructure for a gateway determination seeking approval for the preparation of a draft Local Environmental Plan to amend WLEP 2012.</p> <p>C. However, if as a result of future discussions this is not possible, Clause 4.4b be repealed and objectives to deliver affordable housing be incorporated into the Planning Agreement Policy and/or Development Control Plan.</p> <p>D. That subject to a positive response from the Department of Planning and Infrastructure, the Planning Proposal be</p>

Council or Committee Meeting and Date	Minute No.	Decision
		placed on public exhibition in accordance with the requirements of the Gateway determination.
Finance, Ethics & Strategic Planning Committee 5 November 2013	F-1311.7/13	1. That Council resolve to publicly exhibit the Planning Agreement Policy 2013 attached to this report (Attachment 1)
Council Meeting 18 June 2013	1306.12.8	1. Council adopt the Interim Voluntary Planning Agreement Policy 2013 attached to this report (Attachment 1).

4. Discussion

Despite the success of the 'Waverley Planning Agreement Policy 2014', the current case-by-case approach to calculating VPA amounts is only one way of implementing a value sharing method and has limitations. The number of planning agreements being negotiated over the past 12 months has increased significantly, which has led to a strain on Council resources and exposed some shortcomings of the current approach. Disadvantages of the current approach are that it provides a lack of certainty to the community, Council and development industry (in terms of the monetary contribution rate required), it is time and resource intensive and is open to gaming by developers.

This report reviews best practice approaches to calculating VPA amounts that avoid the drawbacks of the current approach, while also delivering community benefits.

Council has sought legal advice on the best way to implement a VPA associated with a planning proposal. Initial advice from the Department of Planning and Environment (DP&E) was that Council could enter into a Memorandum of Understanding with the applicant prior to gazettal to ensure that a VPA was entered into following the gazettal of the change in LEP. Amendment 1 outlines that the VPA should be exhibited at the same time as the PP, after the Gateway Determination from the DP&E, and that the VPA should be entered into before gazettal of the planning proposal. Legal advice suggests that Council should seek to exhibit and enter into a planning agreement before Gateway Determination from the DPE.

The updates associated with Amendment 1, as well as additional changes relating to the timing and mechanism for securing the VPA with a PP, are recommended to be incorporated into the 'Waverley Planning Agreement Policy 2014'.

Review of different methods to calculate VPAs

The use of different methods to calculate VPA amount payable and contributions split has been investigated by reviewing several different Councils approaches. Only one other Council has a similar policy of calculating contributions rates on a case-by-case basis, while most Councils examined have implemented standardised benchmark rates to calculate the VPA rates payable. The below tables discuss some of the pros and cons associated with the current 'Waverley Planning Agreement Policy 2014'.

Assessment of the current valuation approach compared to a standardised benchmark approach

Criteria	Valuation approach	
	Current case-by-case	Standardised benchmarks
Accuracy and equity	Given that no two developments are the same, with varying valuations and costs for different sites, the current policy allows for the assessment of value uplift for each particular development. To this extent a case-by-case approach can be argued to be	Benchmarks apply averages and hence it could be argued that they may not be as accurate or equitable as a case-by-case approach to estimating value uplift. However, case-by-case estimations of contributions are liable to gaming by

	a more accurate and equitable assessment of value capture for each site.	applicants. Applicants typically provide 'lowball' valuations and inflated cost figures. Given the extensive sales evidence available, agreement on the valuation rate is reached relatively quickly. Negotiating development costs can however become a protracted exercise often leading to VPA negotiations stretching over months rather than weeks. Council can and does engage independent advice (at applicant's expense), but there is an inherent difficulty in arguing hypothetical development costs given that these can vary significantly within a range up to 600%. Therefore, in practice a case-by-case approach is likely no more accurate and is likely to be less equitable than a benchmark approach.
Time and labour	The current approach means that considerable time is spent negotiating each particular VPA, with an estimated time spent being a total of 10 days between the Strategic Property Analyst and Strategic Planner. This equates to an average cost of approximately \$3,500 per VPA, with the engagement of legal services adding approximately an additional \$2,000 for each VPA negotiated. If Council engages an independent QS and valuer, then the cost of these are \$4,000 – \$6,000 each. Beyond the financial cost of negotiating each VPA for Council, there is an 'opportunity cost' that could be spent on other strategic and forward planning work.	Using a benchmark approach would mean that each VPA would only take around 1 day of time by the Strategic Planner. Legal costs would still be incurred for the drafting of the legal instrument.
Certainty	Given that the amount payable is not known upfront, there is no certainty provided to the community, Council or developers on the community benefit associated with each development.	A benchmark rate provides certainty as the amount can easily be calculated once the floor space exceedance is known.

Valuation method

Implementing a standardised benchmarks approach for development contribution rates for Development Applications would create a more efficient, consistent, transparent policy resulting in greater certainty for the community, council and developers. It would also improve the resource and time intensiveness of the current approach and limit opportunities for the development industry to 'game the system'.

Based on the above evidence, modelling has been completed to determine a series of VPA benchmark rates (see Attachment 2).

The development contribution rates (dollars per square metre) are outlined in the following table. VPA payable rates have not been calculated in Bronte, Tamarama, Waverley or Queens Park as these suburbs have yet to receive any offers for VPAs. If a VPA is offered in these suburbs, then these could use the

'Average LGA' rates. Similarly, these rates are based on development that is largely residential and for developments that are largely non-residential, the existing value sharing calculations process can be used.

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

Note: these rates will be updated on an annual basis based on sales prices.

5. Relationship to Waverley Together 3 & Delivery Program 2013-17

The relationship to *Waverley Together 3* and *Delivery Program 2013-17* is as follows:

Direction: L5 Buildings are well-designed, safe and accessible and the new is balanced with the old.
 Strategy: L5c Consider the use of planning controls and agreements to provide improvements to built public infrastructure.
 Deliverable: Opportunities to deliver public infrastructure through Voluntary Planning Agreements (VPA)

6. Financial impact statement/Timeframe/Consultation

Financial impact

There are anticipated to be no financial impacts as funds are not expected to be altered from the levels achieved under the current methodology.

Timeframe

Following Council's endorsement of the 'Waverley Planning Agreement Policy 2014' (Amendment No. 2) it is envisaged that public exhibition will be conducted for a period 28 days. The outcome of the public exhibition will be reported to Council in March 2018. It is envisaged that the 'Waverley Planning Agreement Policy 2014' (Amendment No. 2) will be adopted and in force March 2018.

Consultation

Public Exhibition - a copy of the 'Waverley Planning Agreement Policy 2014' (Amendment No. 2) will be available at the Customer Service Office, Library and on Council's "Have Your Say" website.

7. Conclusion

The 'Waverley Planning Agreement Policy 2014' (Amendment No. 2) will allow for greater surety in the negotiation of planning agreements for development applications and planning proposals. The policy has been drafted in accordance with legislation, Council's policies, plans and strategies

8. Attachments:

1. Exhibition Draft Planning Agreement Policy 2014 Amd 2
2. VPA Policy benchmark modelling