



Hawkesbury City Council

attachment 1  
to  
item 185

Voluntary Planning Agreement Policy

date of meeting: 29 September 2020  
location: by audio-visual link  
time: 6:30 p.m.





Hawkesbury City Council  
Policy

**DRAFT**  
Voluntary Planning  
Agreements Policy

Adopted by Council at the  
Ordinary Meeting Held on  
<<Insert Date and Resolution Number>>

Hawkesbury City Council

<b>Division:</b>	City Planning	<b>Policy Number:</b>	Enter No
<b>Branch:</b>	Enter HCC Branch	<b>Adopted Date:</b>	Enter Date
<b>Responsible Officer:</b>	Enter Position of Responsible Officer	<b>Next Review Date:</b>	Enter Date
<b>Director:</b>	Director - City Planning	<b>Version:</b>	Enter No



## Table of Contents

<b>1. INTRODUCTION.....</b>	<b>5</b>
1.1 Purpose.....	5
1.2 Commencement of this policy.....	5
1.3 Why use a voluntary planning agreement (VPA)?.....	5
1.4 What is a voluntary planning agreement? .....	6
1.5 Types of development contributions .....	6
1.6 In this policy the following terminology is used: .....	7
<b>2. ABOUT THIS POLICY .....</b>	<b>8</b>
2.1 When may Council consider entering into a voluntary planning agreement? .....	8
2.2 Cross boundary voluntary planning agreements .....	8
2.3 When will this policy be used? .....	8
2.4 Land to which the policy applies .....	8
2.5 Periodic review of Policy .....	8
<b>3. PRINCIPLES AND FRAMEWORK ON THE USE OF VOLUNTARY PLANNING AGREEMENTS.....</b>	<b>8</b>
3.1 Fundamental principles applying to the use of planning agreements.....	9
3.2 Initial written offer to enter into a voluntary planning agreement .....	9
3.3 Entering into a voluntary planning agreement .....	9
3.4 Acceptability test - general.....	10
3.4.1 Acceptability test – land dedication .....	10
3.4.2 Acceptability test – material public benefits .....	10
3.5 Consideration of voluntary planning agreements in relation to instrument changes and development applications .....	10
3.6 Implementation of a material public benefit .....	11
3.7 Relationship between voluntary planning agreements and development contributions.....	11
3.8 Relationship between voluntary planning agreements and clause 4.6 of the LEP.....	11
<b>4. CONTENTS OF VOLUNTARY PLANNING AGREEMENTS.....</b>	<b>11</b>
4.1 Form of development contributions under a voluntary planning agreement .....	11
4.2 Standard contributions .....	11
4.3 Recurrent charges and maintenance costs .....	12
4.4 Pooling of monetary contributions .....	12
4.5 Credits and refunds.....	12
4.6 When developer’s obligations arise under a voluntary planning agreement .....	12
4.7 Preparation and Documentation of the voluntary planning agreement .....	13
4.8 Modification or discharge of the developer’s obligations under a voluntary planning agreement....	13
4.9 Costs of entering into a voluntary planning agreement .....	13
4.10 Method for valuing the public benefits under a voluntary planning agreement.....	13
4.11 Implementation agreements.....	14
4.12 Assignment and dealings by the developer .....	14
4.13 Form for voluntary planning agreements .....	14
<b>5. NEGOTIATION PROCEDURES.....</b>	<b>14</b>



## HAWKESBURY CITY COUNCIL POLICY

### DRAFT- Voluntary Planning Agreements Policy

---

5.1 A senior Council officer, who is not involved with the regulatory/assessment process, will lead the negotiation of VPAs on behalf of Council .....	15
5.2 Separation of Council's negotiation and planning assessment roles .....	15
5.3 Involvement of independent third parties in the negotiation process .....	15
5.4 Negotiation process – third parties.....	15
5.5 Amending or revoking a voluntary planning agreement .....	16
<b>6. PUBLIC NOTIFICATION AND EXHIBITION OF VOLUNTARY PLANNING AGREEMENTS .....</b>	<b>16</b>
6.1 Public notification of voluntary planning agreements .....	16
6.2 Amendment to voluntary planning agreement.....	16
6.3 Consideration of a voluntary planning agreement.....	16
<b>7. IMPLEMENTATION AND CONDITIONS OF VOLUNTARY PLANNING AGREEMENTS.....</b>	<b>17</b>
7.1 Entering into a voluntary planning agreement .....	17
7.2 Registration of voluntary planning agreements .....	17
7.3 Monitoring and review of a voluntary planning agreement .....	17
7.4 Council's annual report and register .....	18
7.5 Provision of security under a voluntary planning agreement.....	18
7.6 Dispute resolution .....	18
7.7 Hand-over of works.....	18
7.8 Management of land or works after hand-over.....	18
7.9 Public use of privately-owned facilities .....	19
7.10 Notations on certificates under Section 10.7 of the Act .....	19



## 1. INTRODUCTION

This document establishes a framework for Hawkesbury City Council to guide the preparation of Voluntary Planning Agreements (VPA). The VPA policy has been prepared in accordance with Subdivision 2 of Division 7.1 of Part 7 of the Environmental Planning and Assessment Act 1979 (EP&A Act) and the relevant sections of the Environmental Planning and Assessment Regulation 2000.

This Policy is not legally binding. However, it is intended that Council and all persons dealing with Council in relation to VPAs will follow this Policy to the fullest extent possible.

### 1.1 Purpose

The purpose of this policy is to set out Council's policy and procedures relating to planning agreements under section 7.4 of the Environmental Planning and Assessment Act 1979 to:

- a) Establish a fair, transparent, efficient and accountable framework governing the use and preparation of VPAs by Council;
- b) Set out Council's specific policies and procedures relating to the use of VPAs within Council's LGA;
- c) Establish a probity framework for the negotiation, preparation and implementation of VPAs;
- d) Provide an enhanced and more flexible development contributions system for Council; and
- e) Facilitate the provision of public facilities, services and amenity outcomes that align with, or are not inconsistent with, Council's corporate and strategic planning context, including Council's Community Strategic Plan, Delivery Plan, Operational Plan, Development Contribution Plans or other Infrastructure Planning Documents.

### 1.2 Commencement of this policy

This Policy was adopted by resolution of Council on **XXX** and became effective on **XXX**.

Action	Date
Date Adopted	
Effective Date	
Responsible Division	City Planning Directorate - Strategic Planning Branch

### 1.3 Why use a voluntary planning agreement (VPA)?

A VPA may be used for a variety of reasons in order to achieve public benefits which are not ordinarily available through the planning and development system or are available in a restricted manner. Voluntary planning agreements:

- provide a means for allowing the local community to share in the financial benefit obtained by a developer due to a change in planning controls or a consent to a development application;
- provide a way for the local community to secure public benefits in addition to measures which are required to address the impact of development on private and public lands;
- allow for a flexible means for achieving good development outcomes and targeted public benefit;
- provide opportunities for the local community to participate in the quality and delivery of public benefits; and
- allow developers to have an input to the type, quality, timing and location of public benefits.

A VPA can assist in the following ways:

- by allowing greater flexibility in the provision of public infrastructure;
- by involving developers, builders, other stakeholders and public in the provision of public infrastructure and the charging of development contributions;
- it provides the flexibility required to respond to the particular public infrastructure needs of the proposed development and/or proposed change to an environmental planning instrument;



- it can provide more immediate outcomes in the provision of public benefits;
- it is an alternative approach to the charging of development contributions and the many rigid requirements in charging section 7.11 contributions; and
- it is a mechanism for providing a win-win outcome in that the timely provision of public infrastructure can assist by providing a more attractive environment for development or for a change to an environmental planning instrument.

Discussion of the potential for a VPA is encouraged at the pre-lodgement stage of Development Applications, Planning Proposals and State Significant Developments. The contact to initiate discussions about a proposed VPA is Council's Manager, Strategic Planning.

#### 1.4 What is a voluntary planning agreement?

VPAs offer a highly flexible tool for the provision of public infrastructure. VPAs allow agreement for the provision of public infrastructure in a way that can meet the particular needs arising from a specific development proposal or change to an environmental planning instrument (including amending or repealing an environmental planning instrument) and the greater public interest.

Where a development proposal or change to an environmental planning instrument would require the provision of different (in terms of quantum, type, timing, etc.) public infrastructure than provided under Council's existing infrastructure works programs, then a VPA may be the most appropriate development contributions approach. A VPA may be appropriate in a wide range of development situations including Local, Regional and State Significant development.

The different infrastructure provided by way of VPA may be for example, land dedication, public car parking, vehicle or pedestrian access, affordable housing, conservation or enhancement of the natural environment or other public infrastructure required as a result of the development.

A VPA is defined in section 7.4 (1) of the EP&A Act as:

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

- a) who has sought a change to an environmental planning instrument (such as a planning proposal), or
- b) who has made, or proposes to make, a development application or application for a complying development certificate, or
- c) who has entered into an agreement with, or is otherwise associated with, a person to whom paragraph (a) or (b) applies, under which the developer is required to dedicate land free of cost, pay a monetary contribution, or provide any other material public benefit, or any combination of them, to be used for or applied towards a public purpose.

The key types of applications for which Council may, at its discretion, enter into a planning agreement are:

- a) a planning proposal; and
- b) a development application (or an application to modify a development consent).

#### 1.5 Types of development contributions

Types of development contributions authorised by a VPA can be:

- a) monetary contributions,
- b) the dedication of land free of cost,
- c) any other material public benefit including, but not limited to, affordable housing, provision of community facilities and conservation and enhancement of the natural environment,
- d) any combination of (a), (b), and (c).





Development contributions will be used for or applied towards a public purpose.

**1.6 In this policy the following terminology is used:**

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

**Dealing** in relation to the land means, without limitations, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with land,

**Council** means Hawkesbury City Council,

**Contributions plan** means a contributions plan approved under section 7.11 of the Act,

**Developer** is a person who has:

- a) sought an instrument change, or
- b) made or proposes to make a development application, or
- c) entered into an agreement with or is otherwise associated with, a person to whom paragraph (a) or (b) applies,

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

Development **contribution** means the kind of provision made by a developer under a VPA, being a monetary contribution, the dedication of land free of cost or the provision of a material public benefit,

**Explanatory note** means a written statement made by a planning authority in accordance with clause 25E of the Regulation,

**Instrument change** means a change to an environmental planning instrument whether it be for the making, amendment or repeal of that instrument,

**Material public benefit** means a benefit that is not a monetary contribution or the dedication of land, but is for a public purpose. A material public benefit does not need to be a physical work

**Planning benefit** means a development contribution that confers a net public benefit, that is, a benefit that exceeds the benefit derived from measures that would address the impacts of particular development on surrounding land or the wider community,

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

**Practice note** means the Practice Note on VPA published by the Department of Planning and Environment (November 2016) or the current Practice Note released by the Department of Planning, Industry and Environment.

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

**Public benefit** is the benefit enjoyed by the public as a consequence of a development contribution,

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

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

**Surplus value** means the value of the developer's provision under a VPA less the sum of the value of public works required to be carried out by the developer under a condition imposed under s4.17 (1) of the Act and the value of development contributions that are or could have been required to be made



under s7.11 or s7.12 of the Act in respect of the subject of the agreement.

## 2. ABOUT THIS POLICY

### 2.1 When may Council consider entering into a voluntary planning agreement?

Council may consider entering into a VPA where there will be an opportunity or likely requirement for a development contribution;

- a) when a developer:
  - i. proposes to, or has made a request for a planning proposal seeking a change to Hawkesbury Local Environmental Plan 2012 to facilitate the carrying out of development or State Significant Development; or
  - ii. proposes to, or has made, a development application under Part 4 of the EP&A Act; or
  - iii. an application under s 4.55 of the EP& A Act to modify a development consent; or
  - iv. has entered into an agreement with, or is otherwise associated with, a person to whom (i), (ii) or (iii) applies; or
- b) in the circumstances of an offer by a developer as set out in section 7.7(3) of the Act, [s 7.7 (3) states in part: a consent authority can require a planning agreement to be entered into as a condition of a development consent, but only if it requires a planning agreement that is in the terms of an offer made by the developer in connection with:
  - i. the development application or application for a complying development certificate, or
  - ii. a change to an environmental planning instrument sought by the developer for the purposes of making the development application or application for a complying development certificate, or that is in the terms of a commitment made by the proponent in a statement of commitments made under Part 3A.

Notwithstanding the above, Council in its absolute discretion is not obliged to enter into a voluntary planning agreement with a developer.

### 2.2 Cross boundary voluntary planning agreements

In the case where a development has been proposed in an area close to the boundary of the LGA, and the VPA offer benefits the adjoining Council, then that adjoining Council may be liaised with to collectively agree to enter into the agreement to contribute towards a community benefit.

### 2.3 When will this policy be used?

This policy will be used by Council while considering, negotiating, and entering into planning agreements as defined under the Act.

### 2.4 Land to which the policy applies:

This Policy applies to land within the Hawkesbury City Council Local Government Area.

### 2.5 Periodic review of Policy:

It is intended that this Policy will be periodically reviewed and, depending on the outcome of any review, may be updated from time to time. The updates may cover additional matters to those covered in this policy or provide more detailed information or guidance on specific matters covered in this Policy.

## 3. PRINCIPLES AND FRAMEWORK ON THE USE OF VOLUNTARY PLANNING AGREEMENTS

This section sets out the principles and framework regarding the use of VPA.



### 3.1 Fundamental principles applying to the use of planning agreements

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

- a) planning decisions may not be bought or sold through planning agreements,
- b) 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,
- c) Council will not allow planning agreements to improperly fetter the exercise of its functions under the Act, Regulation or any other Act or law,
- d) Council will not use planning agreements for any purpose other than a proper planning purpose,
- e) Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed planning agreement,
- f) Council will not improperly rely on its statutory position in order to extract unreasonable public benefits from developers under planning agreements,
- g) if the Council has a commercial interest in development the subject of a planning agreement, it will take appropriate steps to ensure that it avoids a conflict of interest between its role as a planning authority and its interest in the development,
- h) when considering a planning proposal or development application, Council will not give undue weight to a planning agreement offer.

### 3.2 Initial written offer to enter into a voluntary planning agreement

A proposed planning agreement should be discussed with Council's Manager, Strategic Planning before lodgement of the relevant application. An initial written offer to enter into a planning agreement should accompany the application on lodgement. The written offer can be finalised once negotiations about the exact terms of the planning agreement have been agreed.

The written offer is to contain adequate information for Council to properly consider whether or not to accept the offer. In this regard, the offer should include as much information as possible including but not limited to the following matters:

- a) the land to which the Planning Agreement relates, including its legal description;
- b) the Development Application, Planning Proposal or State Significant Development that relates to the Planning Agreement;
- c) the Developer's details;
- d) if the Developer is not the owner of the subject land, then the land owner's details and whether the land owner intends to enter into the Planning Agreement as well (if so, a written offer will also be required from the relevant land owner(s));
- e) the public benefits being offered under the terms of the Planning Agreement; and
- f) the nature of the security to be provided for the public benefits;

### 3.3 Entering into a voluntary planning agreement

Any offer to enter into a VPA with Council is to be initiated in writing to Council by the developer. Council, in its absolute discretion, may negotiate a VPA with a developer in connection with any proposed application by the developer for an instrument change or proposed development application relating to any land in Hawkesbury LGA.

The VPA should be negotiated between developers, delegated Council officers and (if relevant) other planning authorities as part of the submission of application, so that copies of draft agreement or VPA offer letter may accompany the exhibition of the application.

Although the process for negotiating a VPA will vary depending on the individual circumstances, the typical process involved in negotiating a VPA is outlined in Appendix 'A'.



### 3.4 Acceptability test - general

Council will apply the following principles in order to assess the acceptability of the proposed VPA:

- a) whether the proposed VPA is directed towards a proper or legitimate planning purpose ordinarily ascertainable from the statutory planning controls and other adopted planning policies applying to development and the circumstances of the case;
- b) whether the proposed VPA provide for public benefits that bear a relationship to development
- c) that is not wholly unrelated to development;
- d) whether VPA produce outcomes that meet the general values and expectations of the public and protect the overall public interest and environment from adverse impact;
- e) whether the proposed VPA provide for a reasonable means of achieving the relevant purposes
- f) and outcomes and securing the benefits;
- g) whether rectification of an existing deficiency in the existing provision of public facilities and services in Hawkesbury City LGA will occur;
- h) whether there are any relevant circumstances that may operate to preclude Council from entering into the proposed VPA;
- i) Planning agreements should not be utilised where infrastructure delivery can be achieved via a condition of development consent in accordance with Section 4.17 of the Act. No value will be attributed under a planning agreement to works or land dedication that would otherwise be required by a condition of development consent relating to the land; and
- j) whether the quantum of the public benefit proposed through the VPA commensurate with the value of the Development Contribution.

#### 3.4.1 Acceptability test – land dedication

Acceptability of land to be dedicated in deciding whether land to be dedicated is acceptable, Council will consider, where relevant, matters including:

- a) the monetary value of the land;
- b) the dimensions, location and topography of the land
- c) the current use and improvements on the land;
- d) factors affecting the usability of the land, including soil condition; accessibility, solar access and relationship with existing public facilities,
- e) ongoing operational and maintenance costs to Council; and
- f) works proposed to be undertaken by the applicant.

#### 3.4.2 Acceptability test – material public benefits

Acceptability of a material public benefit in deciding whether a material public benefit is acceptable, Council will consider, where relevant, matters including:

- a) the monetary value of the benefit;
- b) what needs of the community would be satisfied;
- c) the financial implications for Council;
- d) the timing of completion of works or the delivery of the benefit; and
- e) future recurrent costs associated with the benefit.



### **3.5 Consideration of voluntary planning agreements in relation to instrument changes and development applications**

When exercising its functions under the Act in relation to an application by a developer for an instrument change or a development consent to which a proposed VPA relates, Council will consider to the fullest extent permitted by law:

- i. whether the proposed VPA is relevant to the application and hence may be considered in connection with the application; and
- ii. if so, the proper planning weight will be given to the proposed VPA.

### **3.6 Implementation of a material public benefit**

A VPA may include provision for Council and a developer to enter into a separate contractual arrangement relating to the delivery of a material public benefit in the form of:

- public amenities and public services;
- affordable housing;
- transport or other infrastructure;
- conservation or enhancement of the natural environment;
- monitoring of the planning impacts of development; and
- any other material community benefit.

Council and the developer will maintain the confidentiality of such an arrangement where sensitive commercial information is involved.

### **3.7 Relationship between voluntary planning agreements and development contributions**

Normally public benefits provided by way of voluntary planning agreement will be in addition to contributions required under Council's Development Contributions Plans.

However, a VPA may seek to wholly or partly exclude the application of development contributions relating to the development that is the subject of the agreement. Council will only consider excluding the application of s7.11 of the Act where the public benefit to be delivered via the planning agreement contribution exceeds the public benefit to be delivered under the s7.11 or s7.12 development contribution. This is a matter to be negotiated between Council and a developer having regard to the circumstances of the specific case.

Where the application of s7.11 of the Act to development is not excluded by a VPA, Council will generally not agree to a provision allowing benefits under the agreement to be taken into consideration in determining a development contribution under s7.11.

### **3.8 Relationship between voluntary planning agreements and clause 4.6 of the LEP**

Any variation to development standards under clause 4.6 of the LEP, as part of a development application sought in connection with a VPA, will not be permitted by Council unless Council is of the opinion that the dispensation sought under clause 4.6 meets the relevant test on its own planning merits.

## **4. CONTENTS OF VOLUNTARY PLANNING AGREEMENTS**

### **4.1 Form of development contributions under a voluntary planning agreement**

The form of development contributions to be made under a proposed VPA will be determined by the particulars of the instrument change or development application to which the proposed VPA relates.



#### 4.2 Standard contributions

Wherever possible, Council will seek to standardise development contributions sought under a VPA in order to streamline negotiations and provide fairness, predictability and certainty for developers. However, this does not prevent public benefits being negotiated on a case by case basis, particularly where planning benefits are also involved.

#### 4.3 Recurrent charges and maintenance costs

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

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

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

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

Planning agreements may also require a developer to make contributions towards other recurrent costs of public facilities such as operational or service provision costs.

#### 4.4 Pooling of monetary contributions

Where a proposed Planning Agreement provides for a monetary contribution by the developer, Council may seek to include provisions permitting money paid under the agreement to be pooled with money paid under other Planning Agreements, and apply that money progressively for different purposes. These monetary contributions will allow public benefits to be provided in a fair and equitable way, particularly for essential infrastructure.

#### 4.5 Credits and refunds

In the event that the costs of any works-in-kind that are to be provided by a Developer exceed the costs of those works as agreed with Council in a Planning Agreement:

- a) Council will not agree to a Planning Agreement providing for those additional costs to be:
  - refunded to the developer; or
  - off-set against any Development Contributions required to be made by the developer; and
  - The developer will not be able to make any further claim against Council for those additional costs.

#### 4.6 When developer's obligations arise under a voluntary planning agreement

Unless otherwise agreed, Council will require a VPA to provide that the developer's obligations under the agreement take effect when the first development consent operates in respect of development that is the subject of the agreement.





#### 4.7 Preparation and Documentation of the voluntary planning agreement

Council's Solicitor will ordinarily prepare a VPA relation to instrument change or development consent.

#### 4.8 Modification or discharge of the developer's obligations under a voluntary planning agreement

Council may agree to a provision in a VPA permitting the Developer's obligations under the agreement to be modified or discharged where the modification or discharge is linked to the following circumstances:

- a) the developer's obligations have been fully carried in accordance with the agreement;
- b) the developer has assigned his/her interest under the agreement in accordance with its terms and the assignee has become bound to Council to perform the developer's obligations under the agreement;
- c) the development consent to which the agreement relates has lapsed;
- d) there has been a material modification to the development consent to which the agreement relates;
- e) the performance of the VPA has been frustrated by an event beyond the control of the parties;
- f) Council and the developer otherwise agree to the modification or discharge of the agreement;
- g) material changes have been made to the planning controls applying to the land to which the agreement applies; and
- h) the revocation or modification by the Minister for Planning of a development consent to which an agreement relates.

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

#### 4.9 Costs of entering into a voluntary planning agreement

The costs for preparing, executing, stamping and registering the VPA are to be met by the developer. Council's costs in negotiating, assessing, determining values, reviewing, advertising, engaging consultants where necessary, administering and enforcing the VPA will be met in by the developer.

#### 4.10 Method for valuing the public benefits under a voluntary planning agreement

Unless otherwise agreed, all benefits under a planning agreement will be dedicated at no cost to Council and free of all and any encumbrances, except any permitted encumbrances as agreed by Council.

The Council may attribute a "value" to benefits provided under a planning agreement, for the purposes of determining the "value" of the planning agreement contributions being offered by the developer.

Unless otherwise agreed in a particular case, planning agreement contributions will be valued as follows:

- a) In the case of the dedication of land for a public purpose, the Council will attribute a value to the land in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991*. However, where any FSR entitlement is transferred from the land proposed to be dedicated to Council to the development component on the remaining parcel, a nominal value of one (1) dollar will be attributed to the land. The value of land to be dedicated will be determined by an independent registered valuer with an appropriate depth of experience in valuing land in New South Wales.



- b) In the case of works for a public purpose, the Council will attribute a value to the works in accordance with a cost estimate prepared by an independent registered quantity surveyor with an appropriate depth of experience.
- c) In the case of dedication of dwelling units for affordable housing, the value to be attributed will be based on a market analysis of comparable sales in the previous 12 months, taking into account any other deliverables in connection with the transfer of the unit.
- d) In the case of any other type of benefit, Council may, at its discretion, consult with the developer and apply an appropriate valuation methodology to determine the value to be attributed to those benefits.
- e) As specified in clause 3.4 (g) of this policy, in the event that a planning agreement proposes works and services that would otherwise be required as a condition of development consent, then those works and services will be deemed to have no value under the planning agreement. All costs associated with the determination of values will be borne by the developer.

#### 4.11 Implementation agreements

In appropriate cases, Council may require a VPA to provide that, before the commencement of development and subject to the agreement, all relevant parties are to enter into an implementation agreement that provides for matters such as:

- a) Issues of commercial sensitivity;
- b) the times at which and, if relevant, the period during which, the developer is to make provision under the VPA;
- c) the design, technical specification and standard of any work required by the VPA to be undertaken by the developer;
- d) the manner in which work is to be handed over to Council; and
- e) the manner in which material public benefit is to be made available for its public purpose in accordance with the VPA.

#### 4.12 Assignment and dealings by the developer

A VPA will include a provision requiring Council's prior consent to:

- a) the sale and transfer of the land which is subject of the agreement;
- b) the assignment of the developer's rights and obligations under the agreement to a third party, or;
- c) any novation of the agreement.

#### 4.13 Form for voluntary planning agreements

A VPA will be in writing. The final content of the agreement will be subject to the outcome of negotiations between the responsible Council officer and the developer and any decision of Council.

### 5. NEGOTIATION PROCEDURES

This section outlines the broad procedures for the negotiation of VPAs.





**5.1 A senior Council officer, who is not involved with the regulatory/assessment process, will lead the negotiation of VPAs on behalf of Council.**

Council's Developer Contributions Committee will review the VPA and may set up a negotiation team. Where there is a negotiation team it will include officers with appropriate technical expertise. The officers involved in assessment and negotiation of the VPA will not be involved in the processing of the particular development application, planning proposal or State Significant Development which has resulted in the requirement for a VPA.

Councillors will not participate in negotiations with a developer or their representatives but will have a role in:

- a) endorsing a draft VPA for exhibition purposes;
- b) endorsing an offer to enter into a VPA; and
- c) approval of a VPA.

**5.2 Separation of Council's negotiation and planning assessment roles**

If Council has a commercial interest (such as Council owned land or Council projects) in the subject matter of a VPA as a landowner, developer or financier, Council will ensure that there is a probity plan that maintains a separation between Council's negotiation and planning assessment roles.

**5.3 Involvement of independent third parties in the negotiation process**

Council will encourage the appointment of an independent person to facilitate or participate in the negotiations or aspects of it, particularly where:

- a) an independent assessment of a proposed change to an environmental planning instrument or development application is considered to be necessary or desirable;
- b) factual information requires validation in the course of negotiations;
- c) sensitive financial or other confidential information must be verified or established in the course of negotiations;
- d) facilitation of complex negotiations are required in relation to large projects or where numerous parties or stakeholders are involved; and
- e) dispute resolution is required under a VPA.

The costs of the independent person will be borne by the developer

**5.4 Negotiation process – third parties**

Before the lodgement of the relevant application by the developer, Council and the developer will decide whether to negotiate a VPA. The parties should consider whether other planning authorities and other persons associated with the developer should be additional parties to the agreement. If the developer is not the owner of the relevant land, the landowner should be an additional party to the agreement.

After the parties have decided to negotiate a VPA, the negotiation of that agreement will involve the following key steps:

- a) the parties will then appoint a person to represent them in the negotiations (Council staff with appropriate delegations to negotiate a VPA);
- b) the parties will decide whether to appoint an independent person to facilitate or otherwise participate in the negotiations or aspects of it;
- c) the parties will also agree on a timetable for negotiations and the protocols and work practices governing their negotiations;
- d) the parties will then identify the key issues for negotiation and undertake the negotiations;
- e) if agreement is reached, the proposed VPA will be prepared and a copy will be provided to the developer. This will include an explanatory note, as required by the Regulation;



- f) the parties will undertake further negotiation on the specific terms of the proposed VPA and explanatory note;
- g) once agreement is reached on the terms of the proposed VPA, the developer will be required to finalise the draft agreement in preparation for lodgement;
- h) the developer may then make the relevant application to Council accompanied by a copy of the agreement and explanatory note. The application must clearly record that the developers offer is made on the basis that the VPA will apply if application is approved; and
- i) the parties may be required to undertake further negotiations and, hence, a number of the above steps, as a result of the public notification and inspection of the VPA or its formal consideration by Council in connection with the relevant application, may need to be repeated including publicly re-notifying the agreement.

### **5.5 Amending or revoking a voluntary planning agreement**

Council and the developer may negotiate the amendment or revocation of a VPA. A VPA may be amended or revoked by a further agreement in writing signed by representatives of Council and the developer. An amendment of a VPA may be needed to be negotiated where a development application linked to the agreement is modified under s7.11 of the Act and the modification has a bearing on development contributions. Amendment or revocation of a VPA must follow the statutory requirements contained in the Act and the Regulation.

## **6. PUBLIC NOTIFICATION AND EXHIBITION OF VOLUNTARY PLANNING AGREEMENTS**

### **6.1 Public notification of voluntary planning agreements**

A VPA cannot be entered into, amended or revoked unless publicly exhibited for a minimum period of 28 days. The Council may decide to notify a planning agreement for a longer period at its discretion.

A VPA relating to a Development Application or Planning Proposal shall be publicly notified/exhibited in accordance with the Environmental Planning & Assessment Act, 1979 and Regulation. If practicable, the VPA will be exhibited concurrently with the Development Application or Planning Proposal.

Where it is not practicable to give public notice at such times, the public notice will be given as soon as possible after as determined by Council.

Where amendments to a draft VPA are required as a result of public submission or other reasons, the amended draft VPA and explanatory notes may be required to be re-exhibited.

### **6.2 Amendment to voluntary planning agreement**

Where Council has entered into a VPA and the parties to the VPA have agreed to vary the agreement, then a new letter of offer and a deed of variation will be required to be entered into to formally record the changes to the terms of the VPA.

The deed of variation will be publicly exhibited for a minimum period of 28 days prior to the parties executing the document. The deed will also be registered on the title of the subject land.

### **6.3 Consideration of a voluntary planning agreement**

A proposed VPA and public submissions made in relation to that agreement will be considered in the determination of the relevant application for an instrument change or for development consent, so far as relevant to the application.

The weight given to the proposed VPA and public submissions made in relation to that agreement is a matter for the consent authority to evaluate.



## 7. IMPLEMENTATION AND CONDITIONS OF VOLUNTARY PLANNING AGREEMENTS

### 7.1 Entering into a voluntary planning agreement

A VPA is entered into when it is signed by all of the parties. A VPA can be entered into at any time after the agreement is publicly notified in accordance with the Act and Regulation.

If the application is for an instrument change, and that application is approved, the VPA may be entered into immediately upon approval. Alternatively, it can be entered into if consent is subsequently granted to a development application relating to the instrument change.

If the application is for development consent, Council will require the VPA to be entered into as a condition of granting development consent to the development to which the agreement relates. In such a case, a condition of consent may be imposed.

If the application for development consent is approved on terms different to the developer's offer, the VPA cannot be entered into.

### 7.2 Registration of voluntary planning agreements

Section 7.6 of the Act permits a VPA (including where an agreement is amended) to be registered on the title to land if each person with an estate or interest in the land agrees to its registration.

Section 7.6(3) provides that a VPA that has been registered on the title to land under s7.6 is binding on, and enforceable against, the owner of the land from time to time as if each owner for the time being had entered into the agreement.

Council will require a VPA to contain a provision requiring the developer to agree to registration of the agreement pursuant to s7.6 of the Act if the requirements of that section are satisfied.

The developer is to provide evidence of the registration of the planning agreement to Council through provision of each relevant property title within the time frames outlined in the planning agreement.

If the planning agreement is not registered prior to the grant of development consent, Council will require registration of the planning agreement as a condition of development consent.

The registration of the planning agreement against the title to land can be removed once all of the planning obligations have been delivered.

Where planning obligations are to be delivered after the registration of a subdivision, community title or strata plan, Council may agree to removal of the planning agreement from the title to final lots (lots that are not to be further subdivided), subject to adequate security being provided to Council for any outstanding planning obligations to be delivered. This may include:

- a) a requirement to register the planning agreement against the title to the common property;
- b) caveats to be registered over any land to be dedicated to Council; and
- c) bank guarantees to secure the cost of any works and/or monetary contributions that remain outstanding.

### 7.3 Monitoring and review of a voluntary planning agreement

Council will continuously monitor the performance of the developer's obligations under a VPA. Council requires the VPA to contain a provision establishing a mechanism under which the VPA is periodically reviewed with the involvement of all parties. This will include a review of the developer's performance of the agreement. Council requires the VPA to contain a provision requiring the parties to use their best endeavours to agree on a modification to the agreement having regard to the outcomes of the review.



#### **7.4 Council's annual report and register**

The EP&A Act requires that where Council has entered into a VPA, while the VPA is in force that Council must include in its annual report of that year, particulars of compliance with and the effect of the VPA.

Council is to keep a register of any VPA that applies to land within Hawkesbury Local Government Area, whether or not Council is a party to a VPA. Council will record in the register the date the agreement was entered into and a short description of the agreement (including any amendment).

Council will make the following available for public inspection (free of charge) during ordinary office hours:

- a) the VPA register kept by Council;
- b) copies of all VPA (including amendments) that apply to the LGA of Council; and
- c) copies of the explanatory notes relating to those agreements or amendments.

#### **7.5 Provision of security under a voluntary planning agreement**

Council will require a VPA to make provision for security by the developer of the developer's obligations under the agreement.

The form of security should be an unconditional and irrevocable bank guarantee from an Australian Bank in favour of Council to the full value of the developer's provision under the agreement and on terms otherwise acceptable to Council.

#### **7.6 Dispute resolution**

The VPA will include a clause to provide for mediation of disputes between the parties to the agreement before the parties may exercise any other legal right in relation to the dispute.

Should it be necessary to enter into dispute resolution, each party will bear their own costs.

#### **7.7 Hand-over of works**

Council will only accept the hand-over of a public work carried out under a VPA, once the developer furnishes to Council a certificate to the effect that the work has been carried out and completed in accordance with the agreement and any applicable development consent.

The VPA will include provisions for a defects liability period during which any defects must be rectified at the developer's expense, and provision of security for the defects liability period (in the form of an unconditional bank guarantee held for the defects liability period).

#### **7.8 Management of land or works after hand-over**

If the VPA includes that costs relating to management or maintenance of land that has been dedicated to Council or works that have been handed-over to Council will be borne by the developer, Council will require the parties to enter into a separate implementation agreement in that regard .

The failure of the parties to reach agreement in relation to management and maintenance of the land or works may be dealt with under the dispute resolution provisions of the VPA.

#### **7.9 Public use of privately-owned facilities**

If a VPA provides for the developer to make a privately-owned facility available for public use, Council will require the parties to enter into a separate implementation agreement in that regard.

Such an agreement may, subject to Council's agreement, provide for payment to the developer of a reasonable fee by a member of the public who desires to use the relevant facility.



# HAWKESBURY CITY COUNCIL POLICY

## DRAFT- Voluntary Planning Agreements Policy

The failure of the parties to reach agreement in relation to management and maintenance of the land or works may be dealt with under the dispute resolution provisions of the VPA.

### 7.10 Notations on certificates under Section 10.7 of the Act

Council will require a VPA to contain an acknowledgement by the developer that Council may, in its absolute discretion, make a notation under s10.7 (5) of the Act about a VPA on any certificate issued under s10.7 (2) relating to the land the subject of the agreement or any other land.

