



Fairfield City Council Planning Agreements Policy 2023

Adopted: 11 July 2023

Effective: 11 August 2023

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1. Legislative Framework

This document establishes a framework for Fairfield City Council to guide the preparation of Planning Agreements. The Planning Agreements Policy has been prepared in accordance with Subdivision 2 of Division 7.1 of Part 7 of the *Environmental Planning and Assessment Act 1979* (NSW) (Sections 7.4 to 7.10) and Division 1 of Part 9 (and any other relevant sections) of the *Environmental Planning and Assessment Regulation 2021* (NSW).

This document has also been prepared taking into consideration the Practice Note on Planning Agreements published by the Department of Planning, Industry and Environment (February 2021). Except as otherwise specified, this document adopts the terms of the Practice Note and the definitions in the EPA Act and EPA Regulations.

1.1 Commencement of this policy

The Planning Agreements Policy 2023 replaces the Fairfield City Voluntary Planning Agreements Policy 2018.

The Planning Agreements Policy 2023 was adopted by resolution of Council on 11 July 2023 and became effective on 11 August 2023.

Action	Date
Date Adopted	11 July 2023
Effective Date	11 August 2023
Responsible Division	Strategic Land Use Planning

The following dates are relevant to the making of this policy:

Action	Date
Review by Development Contributions Steering Committee	24 May 2022
Reported to Council recommending exhibition	9 August 2022
Public Exhibition	16 September 2022 to 17 October 2022
Review completed by Council's Solicitors	20 June 2023
Reported to Council recommending adoption	11 July 2023
Adoption Date	11 July 2023
Commencement of Policy	11 August 2023

1.2 Purpose of Planning Agreements

Planning agreements are used widely in the planning system as a tool for delivering innovative or complex infrastructure and public benefit in connection with Planning Proposals and Development Applications.

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

Planning Agreements enable the provision of development contributions for a variety of public purposes, some of which extend beyond the scope of local infrastructure contributions (section 7.11 and 7.12 of the EP&A Act). For example, these additional purposes could include the recurrent funding of Public Facilities provided by Council, the capital or recurrent funding of transport, the protection and enhancement of the natural environment, and the monitoring of the planning impacts of development.

Where a development proposal or planning proposal (and the resulting increase in resident or worker population) 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 planning agreement may be the most appropriate development contributions approach. The different infrastructure provided by way of a Planning Agreement may be for example (but not limited to), land dedication, public car parking, vehicle or pedestrian access, affordable housing, conservation or enhancement of the natural environment or other public infrastructure required because of the development.

Planning agreements are negotiated between planning authorities (in this instance Council) and developers in the context of applications for changes to environmental planning instruments (Planning Proposals) or for consent to carry out development (Development Applications).

Part 7 Division 7.1 Subdivision 2 of the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act) provides the legislative framework for Planning Agreements.

A Planning Agreement 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, 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.

Under section 7.4(2) of the EP&A Act, a **public purpose** includes (without limitation) any of the following:

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

Part 9 Division 1 of the *Environmental Planning and Assessment Regulation 2021* (NSW) (EP&A Regulation) has further requirements relating to the form and subject matter of Planning Agreements, making, amending and revocation of planning agreements, giving public notice and other procedural arrangements relating to Planning Agreements.

Chapter 2 Part 1 of the *State Environmental Planning Policy (Housing) 2021* is the enabling mechanism for securing affordable housing contributions through imposing a condition of consent. To secure contributions through this pathway, councils must establish an affordable housing contribution scheme and arrange for the relevant local environmental plan to be amended to authorise the imposition of the condition. Environmental Planning Assessment (Planning Agreements) Direction 2019 sets out the matters to be considered by council if negotiating a Planning Agreement which provides for affordable housing. At the writing of this Policy, Council is preparing an affordable housing contributions scheme, a condition of the endorsement of the Local Housing Strategy. Discussions on future Planning Agreements may consider the provision of affordable housing contributions.

1.3 Rationale for Planning Agreements

A Planning Agreement may be used for a variety of reasons in order to achieve Public Benefits that are not ordinarily available through the planning and development system or are available in a restricted manner. They permit tailored governance arrangements and the provision of infrastructure in an efficient, co-operative and coordinated way.

Specifically Planning Agreements:

- Provide a flexible means of achieving tailored development outcomes and focused Public Benefits.
- Provide enhanced and more flexible infrastructure funding opportunities and better planning implementation.
- Allow for the flexible delivery of infrastructure for a development proposal, which may have good planning merit, but be out of sequence with broader strategic planning processes.
- 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 Planning Agreement may also assist developers through:

- Allowing greater flexibility in the provision of public infrastructure and responding to the needs of the proposed development,
- Providing more immediate outcomes in the provision of Public Benefits,
- Enabling the timely provision of public infrastructure that provides a more attractive environment for the development and surrounds.

Discussion of the potential for a Planning Agreement is encouraged at the pre-lodgement stage of Development Applications, Planning Proposals and State Significant Developments. Generally, Council will require a Planning Agreement to be offered, negotiated and documented before lodgement of a Development Application, or before Gateway approval for a Planning Proposal to allow the proposed Planning Agreement to be publicly exhibited simultaneously with the relevant Development Application or Planning Proposal.

1.4 Types of development contributions

Types of development contributions authorised by a Planning Agreement 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.

1.5 Terminology

The following terminology is used to convey key concepts in relation to Planning Agreements:

EP&A Act means the *Environmental Planning and Assessment Act 1979* (NSW),

Code of Conduct means the Fairfield City Council Code of Conduct (22 September 2020).

Conflict of Interest occurs when a Council Official is in a position to influence, be influenced or appear to be influenced due to personal or pecuniary private interest in the workplace. A conflict of interest may be actual, perceived or potential.

Contributions Plan means a contributions plan approved under section 7.11 or section 7.12 of the EP&A Act

Council means Fairfield City Council,

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

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 EP&A Act,

Development Consent has the same meaning as in the EP&A Act,

Development Contribution means a contribution made by a developer under a Planning Agreement, being a monetary contribution, the dedication of land free of cost or the provision of a material public benefit, to be used for or applied towards a public purpose,

Explanatory Note means a written statement made by Council in accordance with clause 205 of the EP&A 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 Agreement is a voluntary agreement or other arrangement in accordance with s7.4 of the EP&A Act between a planning authority (i.e., Council) and a developer, who has:

- sought a change to an environmental planning instrument, or
- made or proposes to make a Development Application or application for complying development certificate,

under which the developer is required to:

- dedicate land free of cost,
 - pay a monetary contribution,
 - provide any other material benefit, or
 - provide any combination of the above,
- to be used for or applied towards a public purpose.

Planning Authority has the same meaning as in Division 7.1 of Part 7 of the EP&A Act.

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 Circular means the Planning Circular PS 21-002 Reporting and Accounting Requirements for Infrastructure Contributions published by the Department of Planning, Industry and Environment (12 February 2021) as amended from time to time.

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

Planning Proposal has the same meaning as in the EP&A Act,

Practice Note means the Practice Note on Planning Agreements published by the Department of Planning, Industry and Environment (February 2021) as amended from time to time.

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,

EP&A Regulation means the *Environmental Planning and Assessment Regulation 2021* (NSW),

1.6 Application

This Planning Agreements Policy applies to all new or amended planning agreement with Council on and from the date this Planning Agreements Policy is adopted.

2. About this Policy

2.1 Objectives

The objectives of this Policy are:

- a) To establish a fair, transparent and accountable framework to ensure that Planning Agreements:
 - i. Meet the demands created by the development for new or augmented public infrastructure, amenities and services,
 - ii. Securing off-site benefits for the community so that development delivers a net community benefit,
 - iii. Compensating for the loss of or damage to a public amenity, service, resource or asset by development through replacement, substitution, repair or regeneration,
- b) To set out Council's specific policies and procedures relating to the use of Planning Agreements within Fairfield City;
- c) To establish a probity framework for the negotiation, preparation and implementation of Planning Agreements; and
- d) To provide an enhanced and more flexible development contributions system for Council.

2.2 When may Council consider entering into a Planning Agreement?

Council may consider entering into a Planning Agreement where there will be an opportunity or likely requirement for a development contribution:

- a) where a developer:
 - i. proposes to, or has made a request for a Planning Proposal seeking a change to Fairfield Local Environmental Plan 2013 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. proposes or has made 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 EP&A 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:

- the Development Application or application for a complying development certificate, or
- 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, the acceptance of an offer to enter into a Planning Agreement is at the absolute discretion of Council. Planning Agreements are voluntary, but once entered into, they become legally binding contracts that apply to the development and the land to which they apply.

2.3 Use of Planning Agreements

Planning Agreements have the potential to be used in a wide variety of planning circumstances and to achieve many different planning outcomes. Their use will be dictated by the circumstances of individual cases and the policies of Council. As detailed in the Practice Note (Appendix A), examples of the potential scope and application of Planning Agreements include:

- **Meeting demand created by development**

Planning agreements can provide for development contributions that meet the demand for new public infrastructure, amenities and services created by development (e.g., increase in resident and worker population), for example development may create a demand for public open space, drainage, public road, streetscape and other public domain improvements, community and recreational facilities.

The public benefit provided under the agreement could be the provision, extension or improvement of public infrastructure, amenities and services to meet the additional demand created by the development. An agreement may be used to meet the requirements set out in a Contributions Plan in relation to certain land, or in the case of a large development area being delivered by one or a small number of developers, provide public amenities and services in lieu of preparing a Contributions Plan.

- **Compensation for loss or damage caused by development**

Planning agreements can provide for development contributions that compensate for increased demand on the use of a public amenity, service, resource or asset that will or is likely to result from the carrying out of the development. For example, development may result in the loss of or increased impact on the provision of public open space, public car parking, public access, bushland and natural habitat. The Planning Agreement could impose Planning Obligations directed towards replacing, substituting or restoring public amenity, service, resource or asset to an equivalent standing to that existing before the development is carried out.

- **Prescribing inclusions in development**

Planning Agreements can be used to secure the implementation of particular planning policies by requiring development include Public Benefit elements, for example Public Facilities, open space or the retention of urban bushland.

- **Providing benefits to the wider community**

Planning Agreements can also be used to secure provision of broader benefits for the wider community. The benefit may be provided in conjunction with planning obligations or other measure that address the impacts of the development on surrounding land or the wider community.

Alternatively, the benefit could wholly or partly replace such measures if the developer and Council agree to a redistribution of the costs and benefits of development to allow the wider community, Council and the developer to realise their specific preferences for the provision of Public Benefits.

Broader benefits may take the form of additional or better-quality Public Facilities than is required for a particular development. Alternatively, benefits may invoice the provision of public facilities that, although not strictly required to make the development acceptable in planning terms, are not wholly unrelated to the development.

- **Recurrent funding**

Planning agreements may provide for public benefits that take the form of Development Contributions towards the recurrent costs of infrastructure, facilities and services. Such benefits may relate to the recurrent costs of items that primarily serve the development to which the Planning Agreement applies or neighbouring development. In such cases, the planning agreement may establish an endowment fund

managed by a trust, to pay for the recurrent costs.

Broader benefits may also take the form of interim funding of the recurrent costs of infrastructure, facilities and services that will ultimately serve the wider community. The Planning Agreement would only require the developer to make such contributions until a public revenue stream is established to support the on-going costs of the facility.

- **Biodiversity offsetting**

A Planning Agreement may make provision with respect to the offset of the impact on biodiversity values of proposed development, including by the retirement of biodiversity credits in accordance with the Biodiversity Conservation Act 2016 (NSW) (s7.18 Planning Agreements – biodiversity offsets).

2.4 Cross boundary Planning Agreements

In the case where a development has been proposed in an area close to the boundary of the LGA, and the planning agreement 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.

2.5 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 EP&A Act.

2.6 Land to which the policy applies:

This Policy applies to land within the Local Government Area of Fairfield City.

2.7 Periodic review of Policy:

The Policy will be periodically reviewed and updated to reflect changes to legislation, updated Practice Notes and guidelines issued by the Department of Planning and Environment.

3. Principles and policy for Planning Agreements

3.1 Fundamental principles

Planning agreements are governed by a set of policy principles that ensure transparency, fairness and flexibility of planning decisions. A Planning Agreement will not purport to fetter Council's exercise of statutory functions, in particular the function in relation to a planning proposal or as the consent authority for a Development Application.

A planning agreement related to a development application is one of several matters for consideration identified by the EP&A Act when Council is determining a development application. Public benefits offered by developers will not make unacceptable development acceptable.

Council and developers that are party to a Planning Agreement must adhere to the following fundamental principles:

- Council will always consider a development proposal on its merits, not on the basis of a Planning Agreement.
- Planning Agreements must be underpinned by proper strategic land use and infrastructure planning carried out on a regular basis and must address expected growth and the associated infrastructure demand resulting from the Planning Proposal or Development Application.
- Strategic planning should ensure that development is supported by the infrastructure needed to meet the needs of the growing population.
- Council cannot refuse to grant Development Consent on the grounds that a Planning Agreement has not been entered into in relation to the proposed development or that the developer has not offered to enter into such an agreement.
- Planning Agreements will not be used as a means of general revenue raising or to overcome revenue shortfalls.
- Planning Agreements must not include Public Benefits wholly unrelated to the development.
- Value capture should not be the primary purpose of a Planning Agreement. However, the Planning Agreement should take into consideration the expected population growth (both resident and worker) from the Planning Proposal changes and/or development proposal and the associated demand on Public Facilities, services and infrastructure.

3.2 Public interest and probity considerations

It is critical to consider whether a planning agreement is in the public interest. Generally speaking, the public interest is directed towards ensuring planning controls are imposed fairly for the benefit of the community. In some cases, the

public interest may be directed towards the need to mitigate adverse impacts of development on the public domain or towards providing a benefit to the wider community.

Planning Agreements are matters of public interest and this is a relevant consideration in negotiating outcomes. The negotiation of Planning Agreements involves the use of discretion on both sides, allowing planning authorities and developers to consider different values and varying concepts of the public and private interests.

The ability for a Planning Agreement to wholly or partly exclude the application of other infrastructure contributions gives Council scope to prioritise the items of infrastructure that is most needed under an agreement. This means that the financial, social and environmental costs and benefits of development can be redistributed through a Planning Agreement.

3.3 Public participation

Public participation in the planning agreement process is important to ensure the community has an opportunity to provide input in decisions being made relating to public benefit and development. Planning agreements redistribute the costs and benefits of a development, and it is critical the public can comment on whether they think the balance between development and Public Benefit is achieved successfully. Public participation processes are discussed in Section 7 Public participation and notification.

3.4 Conflict of Interest

Conflict of interest occurs when a Council Official is in a position to influence, be influenced or appear to be influenced due to personal or pecuniary private interest in the workplace. A Conflict of Interest may be actual, perceived or potential. Council's Code of Conduct addresses conflict of interest including both pecuniary and non-pecuniary conflicts. Under the Code, Council Officers are required to complete a disclosure of interest return annually.

In addition to the annual disclosure of interest, a new Planning Agreements Procedure has been prepared to ensure that any Conflict of Interest is identified prior to the relevant Council Officer working on the Planning Agreement. The Procedure also ensures that there is a separation (including different Council officers) in the consideration of the planning proposal or Development Application and any Planning Agreement.

4. Procedures and decision making

4.1 Basic procedures for entering into a Planning Agreement

Planning agreements may be negotiated between Council and developers in relation to development applications or changes sought by developers to local environmental plans (planning proposals). Where possible, Planning Agreements should be negotiated early in the process so that the Planning Proposal may be exhibited, or the Development Application notified alongside the draft Planning Agreement. The indicative steps for Planning Agreements are described below and shown in Appendix B.

Indicative steps for Planning Agreements

Step 1 Commencement Before making a Development Application or submitting a Planning Proposal, Council and developer decide whether to negotiate a Planning Agreement. In making this decision consideration should be given to this Policy, the Planning Agreements Practice Note (DPE), relevant legislation and any relevant policies. The parties consider whether other planning authorities and other persons associated with the development should be additional parties to the Planning Agreement, including the landowner if the developer is not the landowner.

Step 2 Negotiation If an agreement or arrangement is negotiated, it is documented as a draft Planning Agreement with an accompanying Explanatory Note (refer draft templates in Appendices). The draft Planning Agreement should be assessed against the acceptability test outlined in this Policy. The parties should consider how the draft Planning Agreement will be enforced and when the draft planning agreement will be executed, as this will inform the security provisions and conditions of the agreement. Legal advice should be sought in each case to ensure that the appropriate provisions are included in the Planning Agreement.

Step 3 Application When the developer makes the application or submits a Planning Proposal to the Council, it should be accompanied by the draft Planning Agreement that has been signed by the developer and the explanatory note.

Step 4 Council's Consideration Council officers assess the draft Planning Agreement and prepares a report for Council's consideration. If the draft Planning Agreement is supported, Step 5 will commence.

Step 5 Notification Relevant public authorities are consulted and the application or Planning Proposal, draft Planning Agreement and Explanatory Note are publicly notified in accordance with the EP&A Act and EP&A Regulation. Any amendments required to the application or Planning Proposal and draft agreement as a result of submissions received are made. If

necessary, the amended application, draft Planning Agreement and Explanatory Note are re-notified.

Step 6 Assessment The draft Planning Agreement and public submissions are considered in the determination of the related application. The weight given to the draft Planning Agreement and public submissions will be considered by Council.

Step 7 Council's Consideration Council officers prepare a report on the comments received during notification for Council's consideration.

Step 8 Execution The draft Planning Agreement is either executed before the relevant application is determined or not long after the application is determined.

4.2 Offer and negotiation

The EP&A Act does not define what constitutes and 'offer' for the purpose of section 7.7(3) of the EP&A Act. The Practice Note states that an offer should:

- Be in writing.
- Be addressed to the Council.
- Be signed by or on behalf of all parties to the proposed Planning Agreement other than the Planning Authority (Fairfield City Council) to whom the offer is made.
- Outline in sufficient detail the matters required to be included in a Planning Agreement as specified in s.7.4(3) of the EP&A Act to allow proper consideration of the offer by Council (refer below).
- Address in sufficient detail any relevant matters required to be included in an offer as specified in this Policy to allow proper consideration by Council.
- Outline in sufficient detail all other key terms and conditions proposed to be contained in the Planning Agreement to allow property consideration by Council.

Note: Council cannot refuse to grant Development Consent on the grounds that a planning agreement has not been entered into in relation to the proposed development or that the developer has not offered to enter into such an agreement.

However, if a developer has offered to enter into a Planning Agreement in connection with the development application or a change to an environmental planning instrument (Planning Proposal), then a consent authority is authorised

to require a Planning Agreement to be entered into in the terms of the offer as a condition of development consent or prior to the planning proposal being finalised.

A Planning Agreement cannot impose an obligation on Council to grant Development Consent or exercise any function under the EP&A Act in relation to a change to an environmental planning instrument (Planning Proposal).

A Planning Agreement is void to the extent, if any, to which it requires or allows anything to be done that, when done, would breach the EP&A Act, or would breach the provisions of an environmental planning instrument or a Development Consent applying to the relevant land.

The Planning Agreement should be negotiated between developers, Council officers and other planning authorities as part of the submission of the application or Planning Proposal, so that copies of draft agreement or Planning Agreement offer letter may accompany the exhibition/notification.

4.3 Initial written offer to enter into a Planning Agreement

Any offer to enter into a planning agreement with Council is to be initiated in writing to the Council by the Developer (written offer).

The written offer is to contain adequate information (including, as a minimum, the information outlined in s7.4(3) of the EP&A Act) for Council to properly consider whether or not to accept the offer, including (but not limited to):

- (a) A description of the land to which the Planning Agreement applies, including its legal description and ownership details.
- (b) The Developer's details. If the Developer is not the owner of the land subject to the Planning Agreement, then the landowner's details and whether the landowner intends to enter into the Planning Agreement as well (if so, a written offer will also be required from the relevant landowner(s)).
- (c) A description of how the Planning Agreement relates to:
 - A Planning Proposal (change to Fairfield LEP 2013), or
 - The Development Application to which it applies.
- (d) The nature and extent of the provision of Public Benefits (i.e., land dedication, payment of monetary contribution, provision of Material Public Benefit (or any combination)) to be used for or applied towards a public purpose to be made by the developer under the Planning Agreement, the time or times by which the provision is to be made and how the provision is to be made,
- (e) In the case of development, whether the agreement excludes (wholly or in part) or does not exclude the application of section 7.11, section 7.12 or section 7.24 (special infrastructure contributions) to the development.

- (f) If the agreement does not exclude the application of section 7.11 to the development, whether benefits under the agreement are or are not to be taken into consideration in determining a Development Contribution under section 7.11,
- (g) A mechanism for the resolution of disputes under the agreement,
- (h) The nature of the security to be provided for the Public Benefits including 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.

Note: a planning agreement cannot exclude the application of section 7.11 or section 7.12 in respect of development where Council is not the relevant consent authority unless the relevant consent authority and/or the relevant Minister is also party to the Planning Agreement. If the planning agreement excludes the application of section 7.11 or section 7.12 to a particular development, Council cannot impose a condition of development consent in respect of that development under either of those sections (except in respect of the application of any part of those sections that is not excluded by the agreement).

4.4 Negotiation and entering into a Planning Agreement

Council, in its complete discretion, may negotiate a Planning Agreement with a developer in connection with any proposed application by the developer for a Planning Proposal or for Development Consent or proposed Development Applications relating to any land in Fairfield City.

Council will aim to implement fast, predictable, transparent and accountable negotiation systems for planning agreements to ensure that negotiation does not unnecessarily delay applications to change environmental planning instruments (planning proposals) or development applications. Negotiation will be based on principles of co-operation, full disclosure, early warning, and agreed working practices and timetables.

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

4.5 Acceptability test

Council will apply the following principles to assess the acceptability of the proposed Planning Agreement, including whether the agreement:

- (a) Is directed towards legitimate planning purposes, which can be identified in the statutory planning controls and other adopted planning strategies and policies applying to development.

- (b) Provides for the delivery of infrastructure or public benefits not wholly unrelated to the development.
- (c) Produces outcomes that meet the general values and expectations of the public and protect the overall public interest and environment from adverse impact.
- (d) Provides for a reasonable means of achieving the relevant purposes and desired outcomes and securing the benefits.
- (e) Protects the community against adverse planning decisions.
- (f) Whether there are any relevant circumstances that may operate to preclude Council from entering into the proposed Planning Agreement; and
- (g) Proposes the quantum of the Public Benefit commensurate with (or greater than) the value of the Development Contribution.

Specific matters in relation to the acceptability of types of Public Benefits (including land dedication and Material Public Benefits) are detailed below.

Acceptability test – land dedication

In deciding whether land to be dedicated towards a public purpose as part of a Planning Agreement is acceptable, Council will consider the following matters:

- (a) Monetary value of the land,
- (b) Dimensions, location and topography of the land,
- (c) Current use and any improvements on the land,
- (d) Factors affecting the usability of the land, including soil condition; land contamination, flood affectations, road and pedestrian accessibility, solar access and any relationship with existing Public Facilities,
- (e) Ongoing costs to Council in managing the land, and
- (f) Works proposed to be undertaken by the developer (if any) prior to the dedication of the land.

Acceptability test – Material Public Benefits

In deciding whether a Material Public Benefit (including but not limited to affordable housing, provision of community facilities and conservation and enhancement of the natural environment) to be used towards a public purpose is

acceptable, Council will consider the following matters:

- (a) Monetary value of the benefit,
- (b) What needs of the community would be satisfied,
- (c) Financial implications for Council,
- (d) Timing of completion of works or the delivery of the benefit, and
- (e) Future recurrent costs associated with the benefit.

4.6 Consideration of Planning Agreements in relation to Instrument Changes and Development Applications

When exercising its functions under the EP&A Act in relation to an application by a developer for an instrument change or a development consent to which a proposed Planning Agreement relates, Council will consider:

- (a) whether the proposed planning agreement is relevant to the application and hence may be considered in connection with the application; and
- (b) if so, the proper planning weight will be given to the proposed Planning Agreement.

4.7 Implementation of a Material Public Benefit

A planning agreement 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. A list of examples of Material Public Benefit is included in Appendix F.

4.8 Relationship between Planning Agreements and Development Contributions

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

However, a planning agreement may seek to wholly or partly exclude the application of Development Contributions relating to the development that is the subject of the agreement.

This is a matter to be negotiated between Council and a developer having regard to the circumstances of the specific case. Council is not obliged to offset any of the Development Contributions under Section 7.11 or Section 7.12.

Any offset of Section 7.11 Development Contributions related to a Planning Agreement will only be considered for contributions related to additional floor space above that already provided for in Fairfield Local Environmental Plan 2013.

However, where the application of Section 7.11 of the EP&A Act to development is not excluded by a planning agreement, Council will not agree to a provision allowing benefits under the agreement to be taken into consideration in determining a Development Contribution under S7.11.

4.9 Relationship between Planning Agreements and clause 4.6 (Exceptions to development standards) 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 Planning Agreement, will not be approved by Council unless Council is of the opinion that the contravention sought under clause 4.6 meets the relevant test on its own planning merits.

5. Contents of Planning Agreement

5.1 Type of Development Contributions under a Planning Agreement

The type of Development Contributions to be made under a proposed Planning Agreement will be determined by the particulars of the Planning Agreement (instrument change) or Development Application to which the proposed Planning Agreement relates.

5.2 Standard contributions

Wherever possible, Council will seek to standardise Development Contributions sought under a planning agreement in order to streamline negotiations and provide fairness, predictability and certainty for developers. This, however, does not prevent public benefits being negotiated on a case-by-case basis, particularly where Planning Benefits are also involved.

5.3 Recurrent charges

Council may request developers, 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.

However, where the public facility or public benefit is intended to serve the wider community, the planning agreement will only require the developer to make contributions towards the recurrent costs of the facility until a public revenue stream is established to support the ongoing costs of the facility.

5.4 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. These monetary contributions will allow Public Benefits to be provided in a fair and equitable way, particularly for essential infrastructure. The pooling of funds will only be considered where it will be the most effective method of providing a Public Benefit having regard to the circumstances of a particular matter.

5.5 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
- (b) The developer will not be able to make any further claim against Council for those additional costs.

5.6 When developer's obligations arise under a Planning Agreement

Council will require a Planning Agreement to provide that the developer's obligations under the agreement take effect when:

- The Planning Proposal has been finalised and an amendment to the Fairfield LEP 2013 has been published, or
- the first Development Consent operates in respect of development that is the subject of the agreement.

5.7 Preparation and documentation of the Planning Agreement

Council's Solicitor will ordinarily prepare a Planning Agreement relating to a particular application for amendment to Instrument Change or Development Consent (refer below in relation to Planning Agreement Template).

5.8 Modification or discharge of the developer's obligations under a Planning Agreement

Council may agree to a provision in a Planning Agreement 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 their 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 Planning Agreement 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 Planning Agreement in accordance with the EP&A Act and EP&A Regulation.

5.9 Costs of entering into a Planning Agreement

The costs for negotiating, preparing, executing, stamping and registering the Planning Agreement are to be met by the developer.

Council's costs in assessing, reviewing, advertising, engaging consultants where necessary, administering and enforcing the Planning Agreement will be met in part or full by the developer depending on the circumstances.

5.10 Method for valuing the Public Benefits under a Planning Agreement

Reasonable Public Benefit for the community is guided through the planning frameworks such as:

- Local and State planning strategies; and
- Council's strategic plans and policies including the 'City Plan' and 'Local Strategic Planning Statement'.

Where the benefit under a Planning Agreement is the carrying out of works for a public purpose, Council will seek to value the benefit on the basis of the estimated value of the completed works determined by a suitably qualified quantity surveyor appointed by Council.

Where the benefit includes dedication of land and the value of the land has to be taken into account, Council may seek the services of an appropriately qualified land valuer as appointed by Council.

Where the planning agreement proposes benefits that would normally be provided as a condition of development consent then those works will be deemed to have no value towards the Planning Agreement.

5.11 Implementation agreements

In appropriate cases, Council may require a planning agreement 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) Times at which and, if relevant, the period during which, the developer is to make provision under the Planning Agreement;
- (c) Design, technical specification and standard of any work required by the Planning Agreement to be undertaken by the developer;
- (d) Manner in which work is to be handed over to Council; and
- (e) Manner in which Material Public Benefit is to be made available for its public purpose in accordance with the Planning Agreement.

5.12 Assignment and dealings by the developer

The Planning Agreement template (Appendix C) includes sample clauses for assignment and Dealings that address the transfer or sale of land the subject of the Planning Agreement. A Planning Agreement will include a provision requiring Council's prior consent to:

- (a) Sale and transfer of the land which is subject of the agreement,
- (b) Assignment of the developer's rights and obligations under the agreement to a third party, or
- (c) Any novation of the agreement.

Should land subject to a planning agreement be sold, the agreement will be required to be assigned to the new land owner. In addition the restriction on title will be required to be amended to reflect the new land owner and their responsibilities under the Planning Agreement.

5.13 Template for Planning Agreements

A Planning Agreement will be in writing and should contain the same, or substantially the same, terms as Council's template Planning Agreement (see Appendix C). This template is included in this policy as a guide to assist in the negotiations of the relevant Planning Agreement with the Developer. Council will not generally agree to amend the terms of the template Planning Agreement at Annexure C unless the specific circumstances require it, at Council's discretion.

6. Negotiation Procedures

This section outlines the broad procedures for the negotiation of Planning Agreements.

6.1 Who will negotiate a Planning Agreement on behalf of Council?

A senior Council officer, who is not involved with the regulatory / assessment process, will lead the Planning Agreement Team and the negotiation of Planning Agreements on behalf of Council.

Councils Executive Leadership Team (ELT) will review the Planning Agreement and may set up a negotiation team (Planning Agreement Team). Where there is a negotiation team it will include officers with appropriate technical expertise. The officers involved in assessment and negotiation of the Planning Agreement 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 Planning Agreement.

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

- (a) endorsing a draft Planning Agreement for exhibition purposes through consideration at a Council meeting;
- (b) endorsing an offer to enter into a Planning Agreement through consideration at a Council meeting; and
- (c) approval of a Planning Agreement through consideration at a Council meeting.

6.2 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 planning agreement 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.

6.3 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 (Planning Proposal) 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 Planning Agreement.

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

6.4 Negotiation process – third parties

Before the lodgement of the relevant application (Planning Proposal or development application) by the developer, Council and the developer will decide whether to negotiate a Planning Agreement. 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 Planning Agreement, the negotiation of that agreement will involve the following key steps:

- (a) Parties will appoint a person to represent them in the negotiations (Council staff with appropriate delegations to negotiate a Planning Agreement);
- (b) Parties will decide whether to appoint an independent person to facilitate or otherwise participate in the negotiations or aspects of it;
- (c) Parties will also agree on a timetable for negotiations and the protocols and work practices governing their negotiations;
- (d) Parties will then identify the key issues for negotiation and undertake the negotiations;
- (e) If agreement is reached, the proposed Planning Agreement will be prepared (based on the template provided in Appendix C) and a copy will be provided to the developer. This will include an Explanatory Note, as required by the EP&A Regulation, which is in the form set out in Appendix D;
- (f) Parties will undertake further negotiation on the specific terms of the proposed Planning Agreement and Explanatory Note;
- (g) Once agreement is reached on the terms of the proposed Planning Agreement, the developer will be required to finalise the draft agreement in preparation for lodgement;
- (h) Developer may then make the relevant application to Council accompanied by a copy of the agreement and Explanatory Note (refer to Appendix 'C' & 'D'). The application must clearly record that the

developers offer is made on the basis that the Planning Agreement will apply if application is approved; and

- (i) 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 Planning Agreement or its formal consideration by Council in connection with the relevant application, may need to be repeated including publicly re-notifying the agreement.

6.5 Amending or revoking a Planning Agreement

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

7. Public participation and notification

7.1 Public notification of Planning Agreements

A Planning Agreement cannot be entered into, amended, or revoked unless it is publicly notified and made available for public inspection (publicly exhibited) for a period of at least 28 days.

The EP&A Regulation requires that the notification of a proposed Planning Agreement occurs at the same time as the planning proposal or Development Application, or if this is not practicable, as soon as possible after. 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.

A planning agreement relating to a development application or Planning Proposal will be publicly notified in accordance with the EP&A Act and EP&A Regulation.

The terms of the planning agreement and its proposed public benefits will be clearly shown as part of the consultation material to assist the community to make informed decisions on the overall proposal.

Planning agreements will be accompanied by an explanatory note (refer template in Appendices) to assist the public in understanding the agreement. Additional written material, diagrams and plans may also be included in the consultation material.

Amendment to proposed Planning Agreement after public notification

Any material changes that are proposed to be made to a planning agreement after a public notice has been undertaken should be subject to re-notification if the changes would materially affect:

- How any of the matters specified in the Planning Agreements (section 7.4) of the EP&A Act are dealt with by the Planning Agreement.
- Other key terms and conditions of the Planning Agreement.
- Council's interests or the public interest under the Planning Agreement.
- Whether a non-involved member of the community would have made a submission objecting to the change if it had been publicly notified.

7.2 Explanatory Notes

Planning agreements are legal documents and may not be easily understood by the public. An explanatory note can help the public understand a Planning Agreement and facilitate informed discussion. The EP&A Regulation requires that an explanatory note is provided with the public notice of a Planning Agreement.

In practice, the explanatory note can be prepared either by the developer or Council but should be reviewed and agreed on by any other party to the agreement.

The Explanatory Note must assist the broader community to simply and clearly understand what a planning agreement is proposing, how it delivers Public Benefit, and why it is acceptable and in the public interest. It should be easy to understand, written in plain English and address all considerations outlined in this Policy.

The Explanatory Note must:

- Identify how the Planning Agreement promotes the public interest.
- Identify whether the Planning Agreement conforms to Council's capital works program, if any.
- State whether the agreement specifies that certain requirements of the agreement must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued.

It should be possible for a person to be able to readily understand the nature of the development proposed and the public benefits to be provided. The Explanatory Note will indicate timing of delivery and include maps, diagrams and other material to help explain what is proposed.

An Explanatory Note will summarise the objectives, nature and effect of the Planning Agreement and contain an assessment of the merits of the agreement, including the impact on the public (refer template in Appendix D).

7.3 Amendment to Planning Agreement

Where Council has entered into a planning agreement and the parties to the planning agreement 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 Planning Agreement.

The deed of variation will follow the same administrative process as the original planning agreement and 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.

7.4 Consideration of a Planning Agreement

A proposed Planning Agreement 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 Planning Agreement and public submissions made in relation to that agreement is a matter for Council to evaluate.

8. Implementation and Conditions of Planning Agreements

8.1 Entering into a Planning Agreement

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

Planning Proposals

A planning agreement must be executed before Council will finalise any Instrument Change associated with an accompanying Planning Proposal application. If the Developer refuses to execute a Planning Agreement offered in connection with a Planning Proposal, the Council will ask the Minister not to proceed with the relevant Instrument Change under section 3.35(4) of the EP&A Act.

If the application is for an Instrument Change (Planning Proposal), and that application is approved, the Planning Agreement 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.

Development Application

Where a planning agreement is made in conjunction with a Development Application (including modification of consent), the Development Consent will be subject to conditions requiring the planning agreement to be complied with. If the agreement is not executed prior to development consent being granted, a condition will be imposed requiring execution of the Planning Agreement in accordance with the offer made and subsequent registration of the agreement. Conditions requiring the execution and registration of a planning agreement may be deferred commencement conditions that must be satisfied before the consent becomes operational.

If the application is for development consent, Council will require the Planning Agreement 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 which is in the form set out in **Appendix E**, but only in terms of the developer's offer made in connection with the application.

If the application for Development Consent is approved on terms different to the developer's offer, the Planning Agreement cannot be entered into.

8.2 Monitoring and review of a Planning Agreement

Council will continuously monitor the performance of the developer's obligations under a Planning Agreement.

Council requires the Planning Agreement to contain a provision establishing a mechanism under which the Planning Agreement is periodically reviewed with the involvement of all parties. This will include a review of the developer's performance of the agreement.

Council requires the Planning Agreement 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.

8.3 Publication and reporting requirements

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

Annual financial statement information for Planning Agreements is required to include a breakdown between land, money and works, including the:

- Opening and closing balances of money held by Council for the accounting period covered by the report,
- Value of land contributed,
- Value of Material Public Benefits (other than land or money) contributed (i.e., works in kind).

Council is to keep a register of any Planning Agreement that applies to land within Fairfield Local Government Area, whether or not Council is a party to a Planning Agreement. 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) at Council's Customer Service at the Administration Centre during ordinary office hours:

- (a) Planning Agreement register kept by Council;
- (b) Copies of all Planning Agreements (including amendments) that apply to the LGA of Council; and
- (c) Copies of the Explanatory Notes relating to those agreements or amendments.

In addition, in accordance with the amendments to the EP&A Regulation (*Environmental Planning and Assessment Amendment (Development Contributions) Regulation 2021*) the following information will be published on Council’s website (www.fairfieldcity.nsw.gov.au), with a link on the NSW Planning Portal in relation to Planning Agreements and local contributions (from 1 July 2022)¹:

- Copies of all Planning Agreements (including amendments and variations to the agreements),
- Copies of the Explanatory Notes relating to those agreements or amendments,
- Planning Agreement registers with additional information required in the amending EP&A Regulation,
- Local contribution (s7.11 and s.7.12) registers with additional information required in the amendment EP&A Regulation,
- Annual financial statements for Planning Agreements and local infrastructure contributions showing aggregate totals of money, land and works/works-in-kind received (also referred to as ‘Material Public Benefit’),
- Copies of all current contribution plans and current contribution rates under each plan,
- Annual report information related to contribution expenditure, including a detailed breakdown of contribution expenditure by project.

Note: the EP&A Regulation also requires Planning Authorities who enter into Planning Agreements to publish information on their individual websites and on the NSW Planning Portal.

The documents on Council website, with links to the NSW Planning Portal will be updated in accordance with the timeframes in the Table below.

Document	Publication Frequency
Planning Agreement register	Up to date on Council’s website and links to NSW Planning Portal
Copies of Planning Agreements and Explanatory Notes	Whenever an agreement is made or amended/varied
Annual financial statements with money, land and works received as contributions	Once per year

¹ Reporting and online publication requirements do not apply retrospectively. Councils is only required to report on contributions received under planning agreements entered after the new provisions are in force i.e. 1 July 2022).

Document	Publication Frequency
Current contribution rates under each Contributions Plan	Whenever the new contributions rates apply
Detailed breakdown of contributions expenditure by project within annual reports	Once per year
Copies of all current Contributions Plans and Planning Agreement policy	Whenever a plan or policy is made of amended
s.7.11 and s7.12 contribution register	Up to date on Council's website and links to NSW Planning Portal

8.4 Provision of security for enforcement of Planning Agreement obligations

Council will require a Planning Agreement to make provision for security by the developer of the developer's obligations under the agreement to ensure that the Planning Agreement is enforced. The most suitable means of enforcement may depend on the:

- Circumstances of the Planning Agreement.
- Nature and extent of the developer's obligations under the Planning Agreement.
- Council's reasonable assessment of the risk and consequences of non-performance.

Tying the performance of the developer's obligations to the issuing of construction, subdivision or occupation certificates may provide a suitable means of enforcing Planning Agreement obligations in some cases. The EP&A Act and the EP&A Regulation restrict the issuing of a construction certificate, subdivision certificate or occupation certificate by a certifier until any preconditions to the issuing of the certificate specified in a Planning Agreement have been complied with. Where adopting this approach, consideration should be given to including provisions to allow a developer to provide a financial security, such as a bond or bank guarantee, if they subsequently seek release of a certificate before completing the required obligations. This will avoid the need to amend the Planning Agreement.

Financial security, such as a bond or bank guarantee, can be a suitable means of enforcement where a Planning Agreement requires the carrying out of works or the dedication of land by the developer. Financial security can be called on by Council in the event of default, coupled with step-in rights by Council. The value of the financial security should relate to the potential costs that may be incurred by Council in carrying out the relevant works obligations of the developer in the event of default by the developer.

Financial security or additional financial security may also be appropriate where the developer seeks to postpone obligations under a planning agreement to a time later than the time originally specified for performance. An amendment to the planning agreement would ordinarily be required in such circumstances unless the planning agreement already makes provision for such an arrangement.

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 Planning Agreement and on terms otherwise acceptable to Council.

8.5 Registration on title

Section 7.6 of the EP&A Act permits a Planning Agreement (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 Planning Agreement 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 Planning Agreement to contain a provision requiring the developer to agree to registration of the agreement pursuant so s7.6 of the EP&A Act if the requirements of that section are satisfied.

Registration is important to inform people of the existence of a Planning Agreement affecting the land and for the enforcement of a Planning Agreement. Registration on title may bind future owners of the land to the agreement.

To ensure that the intention of the parties to register the planning agreement is not defeated, the developer should obtain written agreement to the registration from each person with an estate or interest in the land to which the planning agreement applies. This should be provided to the Council as a precondition to the execution of the planning agreement.

Provision should be made in a registered planning agreement about when the notation of the planning agreement on the title to land can be removed, for example when:

- The developer has complied with the obligations under the Planning Agreement in respect of a part of the land and the notation of the Planning Agreement will be removed from that part of the land.
- Land the subject of the Planning Agreement is subdivided and titles for new lots are created and the developer has complied with all relevant Planning Agreement obligations relating to the subdivision.
- Additional valuable security for performance of the Planning Agreement

acceptable to Council is provided by the developer in exchange for removal of the registration of the Planning Agreement from the title to land.

8.6 Discharge of developer's obligations

Planning agreements should not impose obligations on developers indefinitely and should clearly set out the circumstances in which the parties agree to discharge the developer's obligations under the Planning Agreement.

8.7 Dispute resolution

The Planning Agreement will include a clause to provide for:

- Mediation to deal with disputes arising from grievances.
- Expert determination to resolve disputes of a technical nature and/or.
- Arbitration for resolving commercial disputes.

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.

8.8 Hand-over of works

Council will only accept the hand-over of a public work carried out under a Planning Agreement, 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 Planning Agreement will include provisions for a defects liability period during which any defects must be rectified at the developer's expense.

8.9 Management of land or works after hand-over

If the Planning Agreement 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 Planning Agreement.

8.10 Public use of privately – owned facilities

If a Planning Agreement 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.

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 Planning Agreement.

8.11 Notations on certificates under Section 10.7 of the Act

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

Appendix A

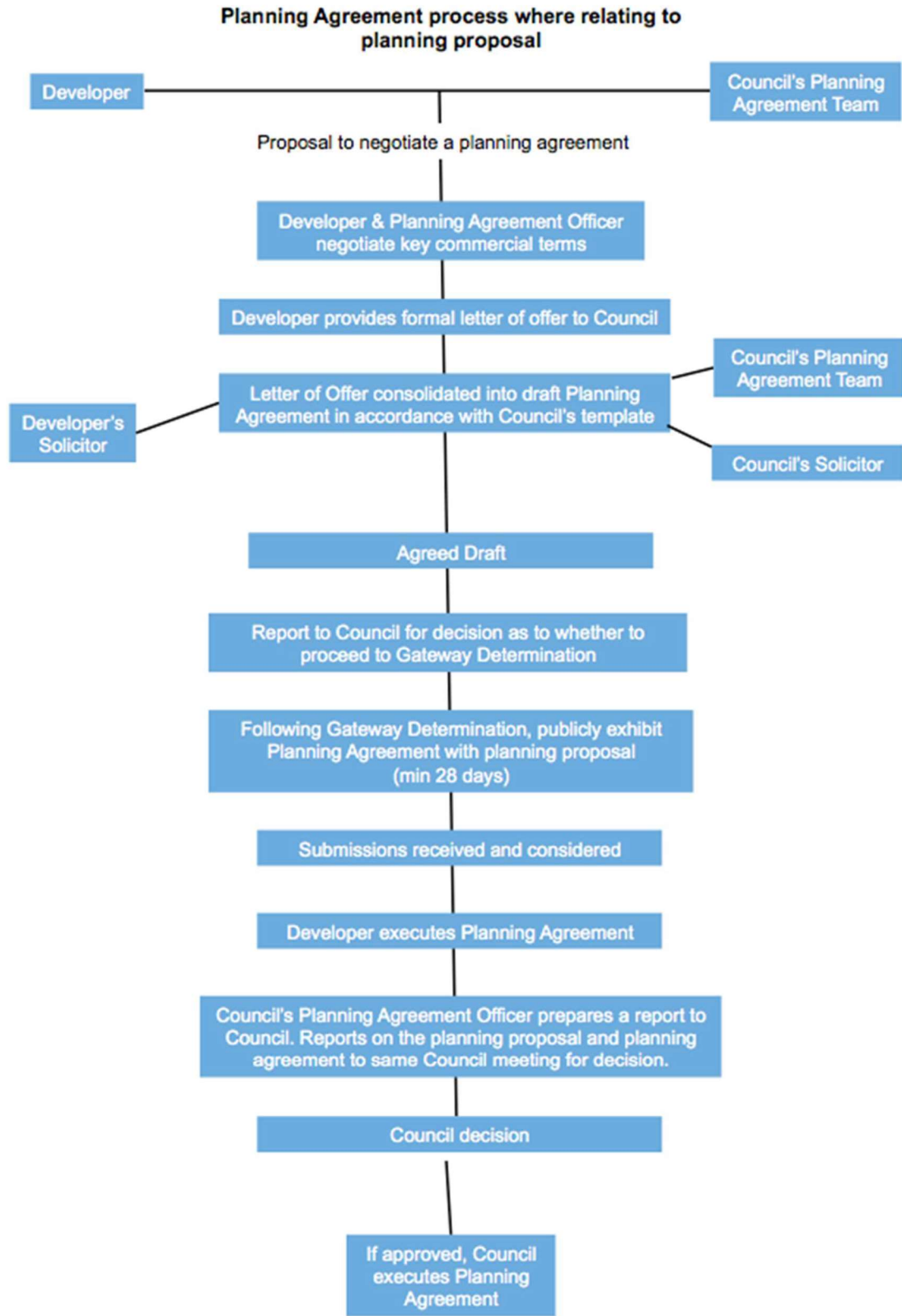
Practice Note on Planning Agreements

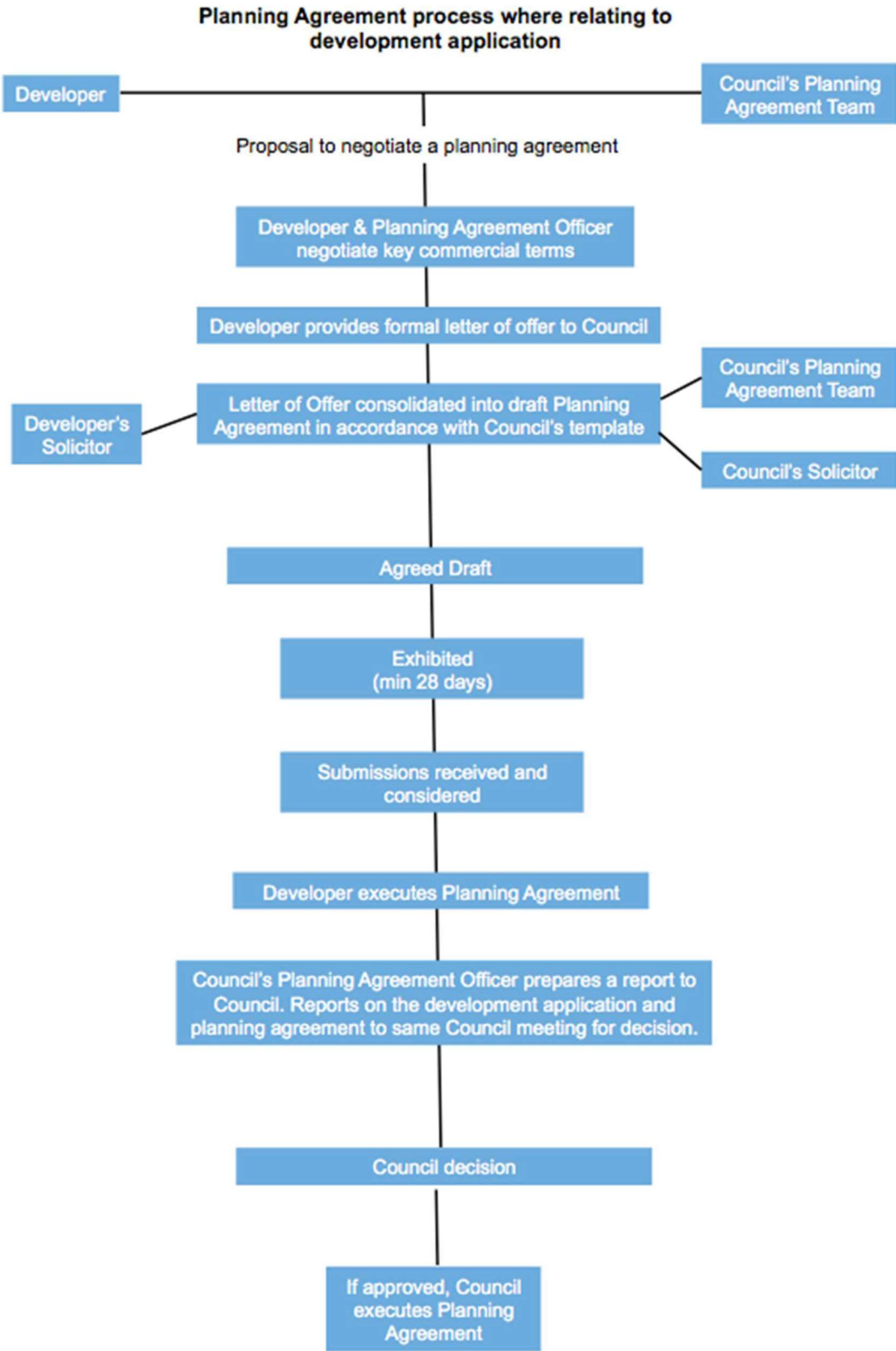
Department of Planning and Environment

Refer to the Department of Planning's website: <http://www.planning.nsw.gov.au>

Appendix B

Steps for Entering into a Planning Agreement





Appendix C

Template Planning Agreement

Refer to separate attachment.

Objective ID A5032488

Appendix D – Template Explanatory Note

Explanatory Note [template]

Planning Agreements are legal documents and may not be easily understood by the public. The Explanatory Note can assist in understanding the Planning Agreement and facilitate informed discussion. The EP&A Regulation requires that an Explanatory Note is provided with the public notice of a Planning Agreement. The Explanatory Note should be written in plain English and:

- Identify how the agreement promotes the public interest
- Identify whether the agreement conforms with the Planning Authority's capital works program (if any).
- State whether the agreement specifies that certain requirements of the agreement must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued.

A template for an Explanatory Note is provided below.

Explanatory Note

(Planning Agreement – (insert name))

Planning Agreement

This Explanatory Notes has been prepared jointly between the parties in accordance with clause 205 of the Environmental Planning and Assessment Regulation 2021 (NSW). [note: to be completed upon finalisation of Planning Agreement]

The purpose of this Explanatory Note is to provide a plain English summary to accompany the notification of a draft Planning Agreement between the parties under s7.4 of the Environmental Planning and Assessment Act 1979 (NSW).

1. Parties

The parties to the Planning Agreement are:

- Fairfield City Council (ABN 83 140 439 239) (**Council**)
- _____ (**Developer**)

2. Description of subject land

The Planning Agreement applies to the land comprising Lot ____ in DP ____ known as _____ as shown in the map below (Land).

(Insert map)

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

The Planning Agreement is entered into in connection with Planning Proposal No. _____ and/or Development Application No. _____.

The Planning Proposal seeks to amend the land use zone and/or development standards under the *Fairfield Local Environmental Plan 2013* (as amended, repealed or replaced) to:

- Change the land use zone from _____ to _____.
- Increase the maximum building height on the land from ____ metres to ____ metres.
- Increase the maximum floor space ratio (FSR) on the land from ____ to _____.
- *(Describe any other changes).*

The Planning Proposal seeks to amend the *Fairfield Development Control Plan* (as amended, repealed or replaced) to:

- *(Describe DCP changes).*

The Development Application seeks approval to:

- *(Describe proposed development)*

4. Summary of objectives, nature and effect of the Planning Agreement

The **objective** of the Planning Agreement is to facilitate the delivery of the Development Contributions (refer Table below) and to make provision for public amenities and infrastructure to benefit the Fairfield community and meet the demands created by the future development, and to ensure that the community does not bear those costs.

(Add any other objectives)

The **nature** and intent of the Planning Agreement is a contractual relationship between Fairfield City Council (**Council**) and _____ (**Developer**) for the provision of Development Contributions to support the future development.

The **effect** of the Planning Agreement is that the Developer will provide the Development Contributions in a manner specified in the Planning Agreement and summarised in the Table below.

The Planning Agreement will be registered on the title of the Land and Council will be able to withhold Subdivision, Construction and/or Occupation Certificates until such time as the Development Contributions are made.

[Note: Insert if Council is providing bank guarantees] The Developer will provide Council with the following bank guarantees to ensure completion of the Development Contributions: **[Note: Insert whichever is relevant]**

- (1) A bank guarantees for an amount equivalent to **[insert]** (**Primary Security**).
- (2) A bank guarantee for an amount equivalent to **[insert]** of the Primary Security prior to the completion of an item of Work to satisfy any defect in the Work (**Defects Security**).

The Planning Agreement provides that the Developer will make the following Development Contributions:

Item	Development Contribution
1.	<p>Name (e.g., Smith Lane Extension)</p> <p>Description (e.g., construction of road widening to Smith Lane generally in accordance with DCP, located in the area marked 'B' on the plan in Schedule XX of the Planning Agreement).</p>
2.	<p>Name (e.g., Pedestrian Link – Smith Street Plaza to Market Square)</p> <p>Description (e.g., construction of a pedestrian link through Smith Street Plaza, located in the area marked 'G' on the plan in Schedule XX of the Planning Agreement and the grant of public access to the Pedestrian Link).</p>
3.	<i>(Describe other Development Contributions)</i>
4.	

5. Summary of the merits of the Planning Agreement

The Planning Agreement satisfies the objectives of making provision for public amenities and infrastructure to meet certain demands created by the Development, and to ensure that the community does not bear those costs.

In this respect, the Planning Agreement is directed towards legitimate planning purposes identified in the statutory planning controls and other adopted planning strategies and policies as follows:

- The Fairfield Local Environmental Plan 2013
- The site-specific Development Control Plan to be adopted in connection with the Instrument Change described above in Item 3.

- The Fairfield City Council Direct Development Contributions Plan 2011 (Section 7.11).

In accordance with section 7.4(2) of the EP&A Act, the Planning Agreement promotes the following public purposes:

- The provision of public amenities and public services;
- The provision of other infrastructure relating to the land; and
- The monitoring of the planning impacts of the development on the land.

6. How the Planning Agreement promotes the objects of the Environmental Planning & Assessment Act 1979

The Planning Agreement promotes following objects of the *Environmental Planning & Assessment Act 1979* (NSW) (*delete those not relevant*):

- a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,
- b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,
- c) to promote the orderly and economic use and development of land,
- d) to promote the delivery and maintenance of affordable housing,
- e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,
- f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),
- g) to promote good design and amenity of the built environment,
- h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,
- i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,
- j) to provide increased opportunity for community participation in environmental planning and assessment.

(Include brief plain English explanation of how objects are promoted through Planning Agreement)

7. How the Planning Agreement promotes the public interest for planning authorities

This section describes the merits of the Planning Agreement, including the positive and negative impacts on the public (or a relevant section of the public) in relation to:

- a) Development Corporations – how the Planning Agreement promotes its statutory responsibilities

(Include summary)

- b) Other Public Authorities – how the Planning Agreement promotes its objects (if any) of the act under which it is constituted

(Include summary if applicable)

- c) Council – how the Planning Agreement promotes the elements of Council's charter, City Plan and Local Strategic Planning Statement.

(Include summary)

- d) All Planning Authorities – whether the Planning Agreement conforms with the authority's Capital Works Program

(Include summary)

8. Impact of the Planning Agreement on the Public (both positive and negative) or Any Section of the Public

(Include summary)

9. Other Matters

(Include summary where relevant)

10. Consideration of Practice Notes

In preparing this Explanatory Note, consideration has been given to the relevant Practice Notes issued by the Planning Secretary under section 203(6) of the EP&A Regulation, including:

(List Practice Notes and guidelines)

Signed and Dated by All Parties

Appendix E

Template condition of Development Consent

(Where Planning Agreement accompanied a Development Application)

##. Pursuant to section 4.17 of the Environmental Planning and Assessment Act 1979 (NSW), the planning agreement that relates to the development application the subject of this consent must be entered into before [*Insert Requirement*].

(Where Planning Agreement accompanied a Planning Proposal (request to change an environmental planning instrument))

##. Pursuant to section 4.17(1) of the *Environmental Planning and Assessment Act 1979* (NSW), the planning agreement that accompanied the application made by [*Insert Name of Developer*] to [*Insert Name of Planning Authority*] dated [*Insert Date*] relating to [*Specify Name of Environmental Planning Instrument*] for the purpose of the making of the development application the subject of this consent.

Appendix F

Examples of Material Public Benefit

Infrastructure Works

- roads – design and construction (roads that have a benefit to the broader community, not just to primarily service the proposed development)
- accessibility improvements – accessible parking, kerb ramps, and modifications to public buildings or areas
- open space – parks, public places, embellishment
- drainage and storm water controls – drainage amplification, integrated water treatment facilities, large scale detention basins, overland flow paths and storm water channel improvements and sediment control measures
- traffic management measures:
 - bus and traffic turning lanes
 - public and “green” transport outcomes
- pedestrian and cycleway connections, through site links and footpaths
- communications and information technology such as WIFI in a public space
- bridges (vehicular and pedestrian)
- undergrounding of overhead powerlines
- public transport - works that facilitate and enhance existing public transport facilities such as bus layovers and turning lanes, bus stops.

Public Community Facilities

- community services – e.g., meeting rooms, halls, libraries
- childcare and family health care centres
- public toilets
- youth spaces
- public leisure facilities
- performance spaces
- civic spaces
- public car parking areas
- bus shelters
- family care facilities

- sport, recreation and activity centres
- business, research and creative industries incubator space
- affordable housing.

Public Open Space and Public Domain Improvements

- embellishment works to new or existing open space, including new play equipment, lighting, sports facilities, furniture and landscaping
- paving – paths, streets and open space areas
- plantings – streets and open space areas
- furniture – seats, bins
- banners
- public art in streets, open space and other public domain space
- kerbs and gutters
- treatment and/or features in public places
- facilities such as kiosk in parks and open spaces
- turf
- environmental management improvements such as water and energy minimising devices
- water bubblers, lockers and other amenities
- signage including suburb identification, way finding, parking, interpretation and information signs for pedestrians, cyclists and vehicular users.

Other contributions

- cash contributions towards community and infrastructure items that provide a community benefit
- land such as dedications for parks, facilities, pedestrian connectivity and new roads
- contributions for the development of community facilities plans and cultural facilities plans
- aboriginal site protection
- other benefits in line with Council plans and strategies - including plans of management, flood plan management plans, traffic and transport plans, masterplans, development controls plans and local environmental plan studies
- other Public Benefits that provide a positive planning outcome for the community of Fairfield City and meet the objectives of the EP&A Act.