



VOLUNTARY DRAFT AMENDED PLANNING AGREEMENTS POLICY

Adopted by Council on 28 February 2017





List of amendments

Council adopted the Voluntary Planning Agreements Policy on 28 February 2017 and it came into effect on 1 March 2017.

The Voluntary Planning Agreements Policy was amended and renamed the Planning Agreements Policy on XXXX and it came into effect on XXXX.



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Definitions

In this Policy, the following terminology is used:

Act means the Environmental Planning and Assessment Act 1979 (NSW).

Consent Authority means Council or the applicable ~~Joint Regional~~ **Local** Planning Panel.

Contributions Plan means a contributions plan (within the meaning of the Act) applying to development to which a ~~VPA~~ **PA** applies.

Contributions Plan Credit means the \$ amount by which the value of a public benefit provided for in a ~~VPA~~ **PA** exceeds a Contribution Plan Requirement.

Contributions Plan Requirement means a contribution requirement under s94 **s7.11** or s94A **s7.12** of the Act authorised by a Contributions Plan in respect of development to which a ~~VPA~~ **PA** applies.

Contributions Plan Value means the value of works or land provided for in a Contributions Plan.

Council means Canterbury-Bankstown City Council.

DA means Development Application.

Developer, in relation to a ~~VPA~~ **PA**, has the same meaning as in ~~s93F~~ **s7.4** of the Act.

Development Application has the same meaning as in the Act.

Development Consent has the same meaning as in the Act.

Modification Application (MA) means an application to modify a Development Consent.

Planning Agreement (PA) means a planning agreement referred to in s7.4 of the Act.

PA Proposal means a proposal for a PA made by a Developer to the Council.

Part 4A 6 Certificate means a construction certificate, occupation certificate or subdivision certificate within the meaning of Part 4A **6** of the Act.

Planning Proposal means a planning proposal within the meaning of Part 3 of the Act.

Regulation means the Environmental Planning and Assessment Regulation 2000 (NSW).

Section 94 7.11 Contribution means a contribution under ~~s94(1)~~ **s7.11** of the Act.

Section 94A 7.12 Levy means a levy under s94A **s7.12** of the Act

VPA means a planning agreement referred to in ~~s93F(1)~~ of the Act.



VPA Proposal means a proposal for a VPA made by a Developer to the Council.



1 Introduction

1.1 Purpose

This Policy sets out the Council's policy and procedures relating to VPAs PAs under s93F s7.4 of the Act.

The purpose of this Policy is to:

- establish a fair, transparent and accountable framework relating to the Council's use of VPAs PAs,
- ensure participants in the negotiation of VPAs PAs understand their roles and responsibilities to maintain the highest standards of probity,
- set out Council's specific policy position and procedures relating to the use of VPAs PAs,
- promote public participation and to allow the community to gain understanding of the benefits of an appropriate VPA PAs,
- enhance flexibility in delivering public benefits in the Council's area through the use of VPAs PAs.

1.2 Policy not binding

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

Where the parties to a proposed VPA PA include other public authorities (such as a Minister for the State or another council), Council will generally seek to apply this Policy as far as practicable in relation to the VPA PA.

1.3 The statutory scheme for VPAs PAs

Division 6 7.1 of Part 4 7 of the Act establishes a statutory scheme for contributions by developers to local councils in connection with development. The scheme has compulsory and voluntary elements.

The scheme provides for the Council to grant consent to development subject to a condition requiring development contributions to be made to the Council under:

- section 94 7.11 of the Act by means of the payment of money or the dedication of land free of cost, or
- section 94A 7.12 of the Act by means of the payment of a levy to the Council of a fixed percentage of the proposed cost of carrying out the development.



The scheme also provides for VPAs PAs. A VPA PA is defined in s93F s7.4 to be a voluntary agreement or other arrangement between a '*planning authority*' and a '*developer*' and an associated person under which the Developer is required to make a monetary contribution, dedicate land free of cost, or provide any other material public benefit, or any combination, towards a public purpose.

'Public purposes' includes (without limitation) the following:

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

A VPA PA can apply to:

- a Planning Proposal made to the Council to change the planning controls applying to land, and
- a Development Application made to the Council for consent to carry out development, and
- the modification of a Development Consent.

A VPA PA must describe the land, the Planning Proposal (if applicable), and the development to which it applies.

A VPA PA must also provide for the following:

- details of the nature, manner and timing of the provision to be made by the Developer under the agreement,
- whether the agreement excludes (wholly or in part) or does not exclude the application of section 94 7.11 and other development contributions provisions to development,
- if the application of s94 section 7.11 is not excluded, whether benefits under the agreement are or are not to be taken into consideration in determining a development contribution under section 94 7.11,
- a dispute resolution mechanism,
- a suitable means of enforcing the agreement in the event of a breach of the agreement by the Developer.

There is no need for any connection between the development to which a VPA PA applies and the object of expenditure of any money paid under the agreement.



A proposed VPA PA must be the subject of public notice and public inspection. Where practicable, this must occur in connection with public notice and public inspection of the related Planning Proposal, Development Application, or Modification Application.

A VPA PA may, but is not required to, be registered on the title to the land to which it applies. A number of important provisions in the Act protect the probity of the bargaining process relating to VPAs PAs, including the following:

- Development Consent cannot be refused because a VPA PA has not been entered into or the Developer has not offered to enter into a VPA PA,
- Development Consent conditions can only require a VPA PA to be entered into strictly in accordance with an offers made by the Developer,
- planning controls have no effect to the extent that they require a VPA PA to be entered into before a Development Consent is granted, or prevent a consent from being granted unless a VPA PA is entered into.

Likewise, there are important provisions protecting the probity of the planning process in which VPAs PAs operate, including the following:

- a VPA PA cannot require planning controls to be changed or a Development Consent to be granted,
- a VPA PA is void to the extent that it allows or requires a breach of the Act, planning controls, or a Development Consent.

1.4 Departmental best practice guidelines

The NSW Department of Infrastructure Planning Natural Resources (as it then was) published a *Practice Note on Planning Agreements* in 2005 shortly after the Act was amended to include provision for VPAs PAs.

The practice note states that it is intended to provide best practice guidance on the use of VPAs PAs, and expressly recognises that it may advocate greater restrictions on their use than is provided for in the statutory scheme.

Recognising the role of VPAs PAs as a regulatory planning tool, the practice note identifies that the paramount need of the planning system is to secure the fair imposition of planning control for the benefit of the community and as between different developers.

In some cases the public interest served by VPAs PAs may be development impact mitigation, and in others it may be securing benefits for the wider community.

It advocates the need for principles, policies, and procedures relating to VPAs PAs to safeguard the public interest and the bargaining process.

The practice note discusses the need for an awareness of the ways in which VPAs PAs can be misused by planning authorities.



The practice note states that the primary fundamental principle governing the use of VPAs PAs is that planning decisions may not be bought or sold through VPAs PAs.

It recommends that planning authorities apply an 'acceptability test' when assessing proposals for VPAs PAs.

The practice note sets out a framework of policies and practices intended to promote best practices relating to the use of VPAs PAs, and requires these to be complied with '*to the fullest extent possible*'.

Some key elements of the framework directed towards planning authorities include:

- identifying the objectives of the use of VPAs PAs,
- using VPAs PAs to overcome past deficiencies in infrastructure provision,
- limiting the use of VPAs PAs for value capture,
- limiting the funding of maintenance and other recurrent costs through VPAs PAs,
- using standard charging where possible,
- involving independent third parties in VPA PAs negotiations in appropriate cases,
- publishing VPAs PAs policies and procedures,
- standardising VPAs PAs documents and procedures,
- implementing efficient negotiation systems.

This Council policy on VPAs PAs seeks to comply with the Practice Note on Planning Agreement's as far as is possible.

1.5 Corporate strategic planning context

An important strategic role for VPAs PAs is the implementation of the Council's Community Strategic Plan through the provision of funding and works to key projects.

The Council is required to publish a suite of corporate strategic planning documents under Part 2 of Chapter 13 of the *Local Government Act 1993*. These documents, including the community strategic plan, resourcing strategy and delivery program, require the Council to set out strategic priorities for its area supported by financial planning and asset management planning, and the main activities it proposes to undertake to implement the priorities.

The Council's long-term Community Strategic Plan is based on the outcomes of engagement with the community, and establishes a vision and goals which flow through to supporting plans. The following documents support the Community Strategic Plan and guide Council's medium and short term priorities:

- Long term Resourcing Strategy:



- Asset Strategy (10 years)
- Finance Strategy (10 Years)
- Workforce Strategy (4 years)
- Four Year Delivery Program
- Annual Operational Plan

The above documents are available on the Council's website.

1.6 Land use planning context

An important strategic role for VPAs PAs is achieving specific land use planning outcomes.

Land use planning is one mechanism for the implementation of the Council's corporate strategic planning documents.

Council considers VPAs PAs as an important planning tool that enables Council to achieve developer funding for public infrastructure, facilities, and services that are necessary to support and manage growth across the local government area and deliver valuable community benefits where appropriate.

Used along-side or in lieu of Section 94 7.11 Contributions or Section 94A 7.12 Levies, VPAs PAs provide a transparent legal framework that involves community participation.

An underlying intent of this Policy is to ensure that VPAs PAs entered into with Council are properly structured, well thought out and produce positive outcomes for all parties – both for Developers, which have more certainty and control over what works are done and how and when they are done and for Council.

1.7 Council's objectives for the use of VPAs PAs

The Council's objectives for using VPAs PAs include:

- to enable the adoption of innovative approaches to the delivery of infrastructure and services that is consistent with the Council's corporate strategic planning documents and land use planning outcomes,
- to enhance the range and extent of development contributions made to Council by developers for and towards public services and facilities in the Council's area,
- to supplement or replace, as appropriate, the application of s94 7.11 and s94A 7.12 of the Act to development,
- to fund or provide new or upgrade existing infrastructure to appropriate levels that reflect and balance environmental standards, community expectations and funding priorities,



- to provide certainty for the community, developers and Council in terms of infrastructure and development outcomes,
- to give all stakeholders in development greater involvement in determining the type, standard and location of public facilities and other public benefits,
- to allow the community, through the public participation process under the Act, to agree to the redistribution of the costs and benefits of development in order to realise community preferences for the provision of public benefits.

1.8 Guiding principles for use of VPAs PAs

The Council's use of VPAs PAs will be guided by the following principles:

- planning decisions may not be bought or sold through VPAs PAs,
- 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,
- the Council will not allow VPAs PAs to improperly fetter the exercise of its functions under the Act, Regulation or any other Act or law,
- the Council will not use VPAs PAs for any purpose other than to achieve a positive planning outcome,
- the Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed VPA PA,
- the Council will not seek to require developers to provide unreasonable public benefits under VPAs PAs,
- if the Council has a commercial stake in development the subject of agreements, 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.

Additional principles governing the use of VPAs PAs for the payment of monetary development contributions in lieu of providing on-site parking are:

- such VPAs PAs shall be entered into at the discretion of Council,
- Council will only enter into such a VPA PAs if Council is satisfied that there is a clear public benefit in doing so, and that there will not be a significant impact associated with meeting the parking requirements of the relevant development off-site,
- the development contributions collected through such VPAs PAs will be used by Council to develop parking facilities at sites identified and adopted by Council for the development of parking facilities,
- the parking facilities Council develops with the development contributions made under such VPAs PAs will be available for use at all times by the general public and will not be available exclusively to service the demands generated by the development to which the VPAs PAs relate,



- the timing of development of parking facilities by Council shall be at the sole discretion of Council,
- the amount of monetary development contributions payable under such VPAs PAs is ~~\$32,476.35~~ \$34,272.63 for each car space in Bankstown and Chester Hill which Council's planning controls requires to be provided on-site for the relevant development, but which is not provided on-site. That amount is to be indexed quarterly between the date of adoption of this policy, and the date of payment, in accordance with changes to the *Consumer Price Index (All Groups – Sydney)* published by the Australian Bureau of Statistics, and may also be reviewed periodically by Council. In the event that the current CPI is less than the previous CPI, the current CPI shall be taken as not less than the previous CPI.

1.9 Review of Policy

This Policy will be reviewed every 12 months to ensure it remains up to date and in line with Council expectations.



2 Preparing Voluntary Planning Agreements

2.1 Circumstances when VPAs PAs will be negotiated

The Act allows VPAs PAs to be entered into in connection with:

- Planning proposals,
- Development Applications,
- Modification Applications.

This Policy does not limit the broad circumstances in which the Council may enter into VPAs PAs.

The Council is not obliged to negotiate or enter into a VPA PA that is offered by a Developer.

2.2 Form of contributions

The Act allows development contributions made under VPAs PAs to be in the form of:

- cash payments,
- the dedication of land free of cost,
- material public benefits (such as but not limited to works), or
- any combination of the above.

This Policy does not limit the form of contributions under VPAs PAs entered into by the Council.

If a VPA PA provides for the Developer to make a privately-owned facility or land to be made available for public use, the Council will require appropriate encumbrances on terms satisfactory to the Council to be registered on title to that land.

Council may require a Developer offering to construct significant works to provide evidence to the Council's satisfaction of the Developer's expertise, and financial capacity to deliver the works before the Council will proceed with the VPA PA.

2.3 Purpose of contributions

The Act allows development contributions made under VPAs PAs to be used for or applied towards a public purpose.

Public purposes include, without limitation,



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

Without limiting the types of public benefits that the Council may seek through VPAs PAs, the Council may seek public benefits that:

- compensate for the loss of, or damage to, a public amenity, service, resource or asset caused by the development through its replacement, substitution, repair or regeneration,
- meet the demands created by the development for new public infrastructure, amenities and services,
- address a particular deficiency or deficiencies in the existing provision of public facilities in the Council's area,
- achieve recurrent funding in respect of public facilities,
- prescribe inclusions in the development that meet specific planning objectives of the Council,
- monitor the implementation of development,
- secure planning benefits for the wider community.

2.4 Application of s94 s7.11 and s94A s7.12 of the Act to development which a VPA PA relates

The Council has no general policy position on whether a VPA PA should exclude the application of s94 s7.11 or s94A s7.12 of the Act to development to which a VPA PA relates. This is a matter for negotiation between the Council and a Developer having regard to the circumstances of each particular case.

Where the application of s94 s7.11 of the Act to development is not excluded by a VPA PA, the Council will consider, on a case by case basis, whether or not it will consider the development contributions and benefits provided under the VPA PA when determining a Section 94 7.11 Contribution.

Having said the above, the exclusion of s7.11 or s7.12 contributions will be factored into consideration of a VPA offer.



2.5 Valuing public benefits

The Act does not require VPAs PAs to set out the monetary value of non-monetary benefits provided by Developers under VPAs PAs. Values need only, and should only, be included in a VPA PA for particular purposes, such as (but not limited to):

- determining the amount of Contribution Plan Credits,
- determining the amount of security.

Where land is dedicated under a VPA PA, the value for the purposes of the VPA PA will generally be the market value of the land determined in accordance with Division 4 of Part 3 of the *Land Acquisition (Just Terms Compensation) Act 1991*. The Council may require the Developer, at its cost, to provide the Council with a written opinion on the estimated value of the land by a suitably qualified and experienced valuer. If negotiations are protracted, then Council may require the Developer to provide an updated valuation before execution of the VPA PA.

Where a VPA PA provides for the carrying out of works, the value of the works for the purposes of the VPA PA will generally be the reasonable design and constructions costs agreed to by the Council. The Council may require the Developer, at its cost, to provide the Council with a written opinion on the estimated cost of completion of the works by a suitably qualified and experienced quantity surveyor. Council may ~~will in its discretion and~~ at the Developer's cost, have any estimated cost of completion provided by the Developer reviewed by an independent quantity surveyor.

Where a VPA PA provides for the provision of a material public benefit, the Council and the Developer will negotiate the manner in which the benefit is to be valued for the purposes of the agreement.

2.6 Contributions Plan Credits

The Council will not agree to a refund of a Contributions Plan Credit.

In exceptional circumstances ~~and subject to compliance with the Act~~, the Council may consider whether a Contributions Plan Credit may be applied towards offsetting the Developer's obligation to pay a Section 94 7.11 Contribution or a Section 94A 7.12 Levy in respect of other development in the Council's area.

No Contributions Plan Credit is available for works or land provided for in a VPA PA which are additional to the works or land provided for in the Contributions Plan.

Council will consider and negotiate on a case by case basis the timing of the application of any Contributions Plan Credit.



2.7 Development feasibility

The Council is committed to ensuring that obligations under VPAs that exceed those which could have been imposed under a Contributions Plan do not unreasonably adversely affect development feasibility. This includes obligations relating to development contributions and the provision of security for the performance of obligations.

Where a Developer claims that such VPA obligations will adversely affect development feasibility, the onus is on the Developer, at its cost, to submit a development feasibility analysis acceptable to the Council. The Council may require the Developer, at the Developer's cost, to retain a suitably qualified independent person appointed by the Council to review the Developer's feasibility.

Generally, the basis of the feasibility analysis will be based on a residual land value analysis applying to the development site.

The Council may in its discretion agree to modify, reduce or postpone development contributions or security obligations under a VPA based on a submitted feasibility analysis.

The Council may require a submitted feasibility analysis to be reviewed periodically or in specified circumstances at the Developer's cost. It may also require a Developer to submit revised feasibility analysis at the Developer's cost.

If a revised or new feasibility analysis established that development feasibility has improved, the Council may 'clawback' development contributions or security obligations.

2.8 Commencement of VPA PA

A VPA PA is in force:

- from the date on which the last of the parties execute the VPA PA,
- if each party executes a separate copy of the VPA PA, the date on which the executed copies are exchanged, or
- if specifically defined in the VPA PA.

2.9 Recurrent charges

The Council may request Developers, through a VPA PA, to make development contributions towards the recurrent costs of public facilities such as for maintenance or landscaping. Details regarding recurrent charges will need to be negotiated between Council and the Developer and documented within the VPA PA.

Council will consider the need for recurrent charges on a case by case basis, based on the type of benefits to be delivered through the VPA PA. Recurrent costs may be applied for a limited period or in perpetuity.



Where the public facility primarily serves the development to which the VPA PA relates or neighbouring development, the arrangement for recurrent funding may be in perpetuity.

Where the public facility or public benefit is intended to serve the wider community, the VPA PA will only require the Developer to make contributions towards the recurrent costs of the facility until a sufficient public revenue stream is established to support the ongoing costs of the facility.

2.10 Expenditure of monetary contributions

Where more than one Developer under different VPAs PAs or pursuant to conditions of Development Consent imposed under s94 s7.11 or s94A s7.12 of the Act pays monetary contributions for a particular public purpose, the Council will pool the contributions and apply them towards the purpose when sufficient funds exist to do so.

The Council may seek to include a provision in a VPA PA permitting money paid under the VPA PA to be pooled with monetary contributions paid under different VPAs PAs or pursuant to conditions of Development Consent imposed under s94 s7.11 or s94A s7.12 of the Act agreement and applied towards a different public purposes for which it was required if the Council reasonably considers that the public interest would be better served by applying the monetary contributions towards that other purpose. Pooling may be appropriate to allow public benefits, particularly essential infrastructure, to be provided in a fair and equitable way.

The Council is under no legal obligation, and will not under any circumstances, refund monetary contributions to a Developer that were paid to the Council under a VPA PA which exceed the funds necessary to for the public purpose for which they were paid. In such circumstances, the funds will be applied by the Council towards another public purpose in the Council's discretion having regard to the public interest prevailing at the time.

2.11 Indexation

All dollar amounts to which development contributions under a VPA PA apply are to be adjusted or indexed in accordance with the method of adjustment or indexation provided for in the Contributions Plan or, if the Contributions Plan does not apply or it is otherwise appropriate to do so, such other indexation method agreed to between Council and the Developer.

~~If a Contributions Plan does not apply to development contributions under a VPA PA, \$ amounts relating to the contributions will be adjusted or indexed in accordance with the method agreed by negotiation between the Council and the Developer.~~

2.12 Works contract

The Developer will be required to submit to the Council for approval any draft contract with a third party for the carrying out of building or construction works under a VPA PA.



2.13 Principal contractor warranties

Upon completion and delivery to the Council of works under a VPA PA, the Developer will be required to assign to the Council the principal contractor's warranties under building or construction contract.

2.14 Design & specification of works

The Developer will be required to obtain the Council's approval to the design and specification of works under a VPA PA.

2.15 Access to land and Inspection of Works

If works under a VPA PA will be carried out on land not owned by the Council, the Developer will be required to allow or procure the owner of the land to allow the Council to enter the land to inspect the works with prior reasonable notice.

If works under a VPA PA will be carried out on land owned by the Council, the Council will give the Developer access to the land to undertake the works.

The Developer will be required to allow the Council reasonable access to the site on which works are being carried out under a VPA PA upon reasonable notice being given by the Council to enable the Council to inspect the works.

2.16 Control of development site

The Developer will be required to have control of, and responsibility for, the site (whether owned by the Developer, the Council or a third party) on which works are carried out under a VPA PA until the works are completed and delivered to the Council.

2.17 Commencement of works

The Developer will be required to give the Council advance notice of its intention to commence works under a VPA PA. The period of notice required will be negotiated and included in the VPA PA.

2.18 Completion & delivery of works

The Developer will be required to give the Council not less than four weeks written notice or as otherwise agreed of the date on which it will complete works under a VPA PA.

The written notice must be accompanied by a handover report (**Handover Report**) that includes, without limitation, the following (where relevant):



- construction plans,
- data and modelling assumptions used,
- relevant certification and Inspection sign offs by certifier and councils,
- principal contractor's warranties under the building or construction contract,
- maintenance manuals and other operating information as appropriate, and
- up to date maintenance schedule.

The Council will inspect the works within two weeks of the Developer completing the works and providing the Handover Report.

After inspection the Council will give the Developer written notice of whether:

- the works have been satisfactorily completed (subject to a defects liability period), or
- the works have not been completed or have not been carried out to an acceptable standard and specifying further works required to enable the Council to give the Developer a notice that the works have been satisfactorily completed.

The Council will assume responsibility for the works completed under a VPA PA on the later to occur of:

- four weeks after the Council gives the Developer a notice that the works have been completed, or
- the ownership of the land on which the completed works have been carried out is transferred to the Council.

2.19 Rectification of defects

The Developer will be required to agree to a defects liability period and defects rectification for works completed and delivered to the Council under a VPA PA. Ordinarily, the defects liability period will be 12 months, but may be more or less depending on the nature of the work.

2.20 Works-as-executed plan

At the time when ~~Not later than four weeks after~~ works are completed and delivered to the Council under a VPA PA, the Developer will be required to submit to the Council a full works-as-executed-plan in respect of the works.

The Developer will be required to assign or procure the assigning to the Council of the copyright in the plans and specifications of the works.



2.21 Land dedication

Land on which a work is required to be carried out under a VPA PA must be dedicated to the Council free of cost upon completion of the work to the Council's satisfaction unless otherwise specified in the VPA PA.

Ordinarily, any land which is required to be dedicated or transferred to the Council under a VPA PA must be dedicated or transferred free of encumbrances.

In respect of any dedication or transfer of land to the Council, or the creation of any interest in land in the Council's favour under a VPA PA, the Developer will be responsible for preparing all documents and meeting all costs relating to the following:

- removing an encumbrance on the title,
- creating an interest in land in the Council's favour,
- subdividing land,
- preparing and lodging documents for registration,
- obtaining the consent of any person to registration,
- dealing with any requisition from Land and Property Information Land Registry Services relating to any dealing lodged for registration.

2.22 Security for performance

The security for performance of VPA PA obligations required under a VPA PA is dependent on the type of obligation, as set out below.

2.22.1 Monetary development contributions

Generally, the appropriate security is to require monetary contributions to be paid before the issuing of a specified kind of Part 4A 6 Certificate under the Act, usually a subdivision certificate or a construction certificate.

In some cases, particularly where the payment of monetary contributions is deferred until after the issuing of a construction certificate, Council may require a financial security such as a bond or bank guarantee or a registered charge over land or assets.

2.22.2 Dedication of land

Where land is required to be dedicated or transferred to the Council or where Council is to receive the benefit of an encumbrance over land not to be owned by Council, the Council will require the landowner to be a party to the VPA PA.

Generally, the dedication or transfer of land under a VPA PA will be tied to the issuing of a specified kind of Part 4A 6 Certificate under the Act, which will usually be a subdivision certificate.



Generally, the landowner will also be required to agree to a provision in the VPA PA allowing the Council to compulsorily acquire the land to be dedicated or transferred under the VPA PA or an encumbrance to be registered on the land benefitting Council for a nominal sum if the landowner defaults. Compulsory acquisition by the Council is provided for in the *Land Acquisition (Just Terms Compensation) Act 1991*. The provision in the VPA PA will constitute a pre-acquisition agreement between the landowner and the Council for the purposes of that Act.

In some cases, the landowner may be required to give the Council an irrevocable option to purchase land for a nominal sum, or a power of attorney enabling the Council to do such things as may be necessary in the name of the landowner to cause the relevant land to be dedicated or transferred to the Council.

If the landowner does not agree to the above arrangements, Council may require the landowner provide a financial security such as a bond or bank guarantee or a charge over land or assets equal to the full market value of the land.

The landowner will be required to warrant to the Council in the VPA PA that it has done all things necessary to ensure that nothing, including the interests of third parties, prevents the relevant land from being dedicated or transferred to the Council in accordance with the VPA PA.

2.22.3 Works

The Developer will be required to provide security to the Council for the carrying out of works for an amount determined by the Council.

The security must be in the form of a cash deposit, bond or bank guarantee on terms acceptable to the Council.

The amount of the security will depend on the circumstances of the case, and other security mechanisms in the VPA PA, and may be up to 100% of the estimated value of the works to be carried out by the Developer, but may be greater based on a risk assessment undertaken by the Council.

A bond or bank guarantee must be issued by a financial institution approved by the Council.

The Council at its discretion may require a charge over land or assets in addition to a bond or bank guarantee.

2.23 Step-in rights

In addition to any other security required in the VPA PA, the Developer will be required to allow the Council to step-in and remedy any breach of the Developer in carrying out works under a VPA PA. Specifically, the Developer will be required to agree to the following:



- allow the Council to enter, occupy and use any land owned or controlled by the Developer and any equipment on such land to remedy a breach, and
- allow the Council to recover its costs of remedying the breach by either or a combination of calling-up and applying the security provided by the Developer to the Council or as a debt due in a court of competent jurisdiction.

2.24 Registration

Section 93H 7.6 of the Act provides for the registration of a VPA PA on the title to land.

Registration requires the agreement of all persons having a registered interest in the land. Such persons include mortgagees, charges, lessees and the like.

The Council will require VPAs PAs to be registered on the title unless the Council is satisfied there is a good reason not to do so and the Council's interests under the VPA PA will not be prejudiced. For this reason, the landowner, if different to the Developer, will generally be required to be an additional party to a VPA PA.

The Council will generally agree that registration can be removed on any part of the subject land in conjunction with the issuing of a subdivision certificate to create lots that are to be sold to end-purchasers or otherwise created for separate occupation, use and disposition. Any costs incurred by Council as part of this process are to be met by the Developer.

Registration will ordinarily be required to be undertaken by the Developer immediately upon commencement of the VPA PA. This means that the Council will generally not execute a VPA PA unless and until the landowner has produced evidence to the Council's satisfaction of the agreement of all third parties to its registration on title. Registration will be a precondition to a development consent operating (such as through a deferred commencement condition) or to gazettal of a planning proposal.

~~The landowner, at its cost, will be required to submit to the Council in registrable form all documents necessary to enable the Council to effect registration of the VPA PA, and to assist the Council to address any requisition from Land and Property Information relating to any dealing lodged for registration.~~

2.25 Restriction on dealings

Unless and until all VPA PA obligations are completed by the developer to the satisfaction of the Council, restrictions will apply to transactions with third parties involving:

- the sale or transfer the land to which the VPA PA applies,
- the assignment of the Developer's rights or obligations under the VPA PA, or
- novation of the VPA PA.



Such a sale, transfer, assignment or novation may not occur unless and until:

- the Developer has, at no cost to the Council, first procured the execution by purchaser, transferee, assignee or novatee of a deed in favour of the Council on terms reasonably satisfactory to the Council,
- the Council notifies the Developer that it considers that the purchaser, transferee, assignee or novatee, is reasonably capable of performing its obligations under the VPA PA, and
- the Developer is not in breach of the VPA PA, and
- the Council has given its consent to the sale, transfer, assignment or novation.

A deed of assignment / novation, which will be required to be used for any assignment or novation of a VPA PA may be prepared by Council as required on a case by case basis.

2.26 Insurance

The Developer will be required to take out and keep current to the satisfaction of the Council the following insurances in relation to work to be carried out under a VPA PA:

- **contract works insurance**, noting the Council as an interested party, for the full replacement value of the works (including the cost of demolition and removal of debris, consultants' fees and authorities' fees),
- **public liability insurance** for at least \$20,000,000.00 for a single occurrence, which covers the Council, the Developer and any subcontractor of the Developer, for liability to any third party,
- **workers compensation insurance** as required by law, and
- any other insurance required by law.

2.27 Indemnity

The Developer will be required to indemnify the Council from and against all claims that may be sustained, suffered, recovered or made against the Council arising in connection with the carrying out of works under the VPA PA except if, and to the extent that, the claim arises because of the Council's negligence or default.

2.28 Dispute resolution

VPAs PAs will be required to make provision for mediation or expert determination depending on the nature of the dispute. Expert determination would ordinarily be applicable in relation to disputes about technical or quantifiable matters such as costs and values, designs and specifications and the like, which lend themselves to resolution by an independent expert.



Either party may notify the other of a dispute. Once this occurs, neither party may exercise their legal rights to commence proceedings in Court under the VPA PA until the mediation or expert determination process runs its course.

The parties will be initially required to resolve the dispute by discussion or negotiation before a mediator or expert can be appointed to deal with the dispute.

Mediation will be required to be undertaken in accordance with the Mediation Rules of the Law Society of New South Wales.

The parties will be required to request the President of the Law Society to select a mediator or expert to deal with a dispute if they are unable to agree on a mediator or expert within a period specified in the VPA PA.

The parties will be required to bear their costs of the dispute and jointly bear the costs of the President and the mediator or expert.

The decision of an expert will be final and binding on the parties.

If mediation fails to resolve a dispute, the parties will be able to exercise their legal rights under the VPA PA.

2.29 Notations on section 149 10.7 Planning Certificates

The Council will generally require a VPA PA to contain an acknowledgement that the Council may, at its absolute discretion, make a notation under s149(5) 10.7(5) of the Act to the effect that the land is subject to the VPA PA on any certificate issued under s149 10.7 of the Act relating to the land the subject of the agreement.

2.30 Monitoring and review

The Council will continuously monitor the performance of the Developer's obligations under a VPA PA. The Council will require a VPA PA to contain provisions requiring the Developer at its cost to report periodically to the Council on its compliance with obligations under the VPA PA.

The Council may require a VPA PA to contain provisions establishing a mechanism under which the VPA PA is periodically reviewed by the parties. If Council considers a VPA PA should include such provisions, the provisions will set out the process and procedures for the review, and will provide that for the purposes of addressing any matter arising from a review of a VPA PA the parties may agree on and implement appropriate amendments to the VPA PA.



2.31 Amendment

VPAs **PA**s can be amended by agreement between the parties. Either party can initiate an amendment.

The parties will be required to act co-operatively, reasonably and in good faith in considering any request to amend a VPA **PA**.

Amendment will generally occur by means of a deed of variation to the VPA **PA** in a form acceptable to Council.

The party proposing the amendment must bear the other party's costs of the modification.

2.32 Discharge of VPA **PA**

A Developer may be discharged from its obligations under a VPA **PA** in certain circumstances.

These include:

- the developer's obligations have been fully carried out in accordance with the VPA **PA**,
- the Development Consent to which the agreement relates has lapsed, or it has been modified to such an extent that the Developer's obligations may no longer apply,
- the performance of the VPA **PA** by the Developer has been frustrated by an event or events beyond the reasonable control of the parties,
- the Developer has transferred the land to which the VPA **PA** relates or assigned its interest under the agreement or novated the VPA **PA** on terms agreed to by the Council,
- other material changes affecting the operation of the VPA **PA** have occurred and the parties have entered into a new VPA **PA** or other suitable arrangement,
- the Council and the Developer otherwise agree to the discharge of the VPA **PA**.

2.33 Implementation agreements

Under the Act, the VPA **PA** must set out the nature and extent of the development contributions to be made by the Developer, the time or times by which the development contributions are to be made and the manner by which the development contributions are to be made.

The Parties may enter into further agreements for the purpose of giving effect to the VPA **PA** provided that those agreements are not inconsistent with the VPA **PA**.

2.34 Works in Kind

All requests for Works in Kind and Land Dedication offsets will be dealt with through the PA process. This is to ensure such matters are dealt with as transparently as possible.



2.35 Refunds

Council will consider requests for refunds of monetary contributions paid as part of a PA only if a associated development consent has lapsed or has been surrendered, if a development has been modified to be reduced in size with a corresponding impact on any contributions payable, or if associated with a planning proposal that has not eventuated. Refunds also will only be permitted if the PA allows for refunds.

3 Procedures for negotiating a VPA PA

3.1 Procedures for consideration of VPA PAs Proposals

The Council's negotiation procedure for VPAs PAs aims to be efficient, predictable, transparent and accountable.

Council will seek to ensure that negotiations of VPAs PAs run in parallel with Planning Proposals or Development Applications or modification application.

3.1.1 Planning Proposals

Where a VPA PA Proposal is made in connection with a Planning Proposal under the Act, the Council requires the Planning Proposal to explain the purpose and nature of the VPA PA and set out in detail its proposed terms.

Any agreement by the Council to the Planning Proposal will generally be conditional on the execution of the VPA PA by the Developer on terms satisfactory to the Council and delivered of the executed VPA PA to the Council before any amendment to the planning controls the subject of the Planning Proposal takes effect.

The Council will refer any such Planning Proposal to the Minister for Planning with a request that:

- any gateway approval require the draft VPA PA be publicly notified and entered into before any amendment to the planning controls the subject of the Planning Proposal, and
- the Minister not agree to any amendment to the planning controls the subject of the Planning Proposal until the VPA PA is executed by the Developer and delivered to the Council.

3.1.2 Development Applications and Modification Applications

Where a VPA PA Proposal is made in connection with a Development Application or modification application, the VPA PA proposal should be the subject of pre-lodgement discussions with Council officers.



Lodgement of the Development Application **or modification application** should be accompanied by a draft of the VPA **PA** acceptable to the Council, or a detailed written irrevocable offer acceptable to the Council for the purposes of ~~s93(3)~~ **s7.7(3)** of the Act.

The Council will publicly notify the VPA **PA** contemporaneously with the Development Application **or modification application** wherever possible.

The Council will require the Developer to execute the agreed draft VPA **PA** or to have provided a detailed written irrevocable offer acceptable to the Council before the Development Application **or modification application** is determined (whether by the governing body or a delegate).

If the Developer has submitted a detailed written irrevocable offer acceptable to the Council, any Development Consent granted by the Council to the Development Application **or modification application** will ordinarily be subject to a deferred commencement condition requiring the VPA **PA** to be entered into in accordance with the offer before the consent operates.

3.2 Preparation and form of VPA **PA**

The Council ~~Developer~~ will have responsibility for preparation of a VPA **PA**.

~~The Council will require the VPA to be in or to the effect of the template VPA contained in the Annexure to this Policy.~~

Templates to guide the preparation of a PA will be provided on Council's website.

3.3 Involvement of independent third parties in negotiation process

The Council may require the appointment of an independent person to facilitate or otherwise participate in the negotiation of a VPA **PA** or aspects of it, particularly where:

- factual information requires validation in the course of negotiations,
- sensitive financial or other confidential information must be verified or established in the course of negotiations,
- facilitation of complex negotiations are required in relation to large projects or where numerous parties or stakeholders are involved.

3.4 Council's costs of negotiating, entering into, monitoring and enforcing a VPA **PA**

Prior to giving consideration to a VPA **PA** Proposal, the Council may, in its sole discretion, require the Developer to pay the Council an amount towards Council's anticipated costs in negotiating, preparing and entering into the VPA **PA**.

The Council will require the VPA **PA** contain a provision requiring the Developer to pay the Council's costs of and incidental to:



- negotiating, preparing and entering into the VPA PA; and
- enforcing the VPA PA.
- costs of registering and removing registration of the PA from title.

The above may include legal costs and costs related to independent consultants/facilitators, land valuers, quantity surveyors and the like and includes staff costs.

Any of Council's costs borne before the PA is entered into are to be paid immediately before or at the time of execution by Council. Costs by Council borne in relation to the PA after the PA is entered into require payment within 14 days of an invoice being issued by Council.

In particular cases, the Council may require the VPA PA to make provision for a development contribution by the Developer towards the ongoing administration of the VPA PA.

3.5 Public notification of VPAs PAs

The Act requires public notification of a VPA PA for a period of not less than 28 days before it is entered into, amended or revoked.

Council is required to ensure that a VPA PA is publicly notified in accordance with the Act and Regulation.

The Council will publicly re-notify and make available for public inspection a VPA PA if, in the Council's opinion, a material change is made to the terms of the VPA PA after it has been previously publicly notified and inspected. In such circumstances the application to which the VPA PA relates will also be made available for inspection as a background document.

Such a change may arise as a consequence of public submissions made in respect of the previous public notification and inspection of the agreement or the application, or their formal consideration by the Council, or for any other reason.

All VPAs PAs will be advertised with an explanatory note as required by clause 25E of the *Environmental Planning & Assessment Regulation 2000*.

3.6 VPA PA Register

The Council is required keep a register of VPAs PAs applying to land within the Council's area, whether or not the Council is a party to a VPA PA. The Council is required to record in the register the date an agreement was entered into and a short description of the agreement (including any amendment).

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

- the VPA PA register kept by the Council;



- copies of all ~~VPAs~~ **PA** (including amendments) that apply to the area of the Council; and
- copies of the explanatory notes relating to those agreements or amendments.



4 Staff roles and responsibilities

Council will publish on its website a flowchart showing staff roles and responsibilities for:

- negotiating VPAs PAs,
- implementation and updating of the VPA PA policy,
- reporting to the Council on VPA PA proposals and draft VPAs PAs,
- contract administration and ongoing monitoring of the performance of VPA PA obligations, and
- enforcing VPAs PAs.



5 Probity matters

5.1 Separation of staff responsibilities within the Council

If the Council has a commercial interest in the subject matter of a VPA PA as a landowner, developer or financier, the Council will ensure that the person assesses the application to which a VPA PA relates is not the same person or a subordinate of the person who negotiated the terms of the VPA PA on behalf of the Council in its capacity as landowner, developer or financier.

There will be a separation of roles during the process of negotiating VPAs PAs. A division of Council will be responsible for negotiating VPAs PAs and representing Council's commercial interests while a separate division will responsible for assessing Planning Proposals and Development Applications.

5.2 Appointment of probity advisor

The Council may appoint a probity advisor in respect of the negotiation, preparation and entering into of a VPA PA in circumstances the Council considers appropriate.

5.3 Involvement of Councillors in VPA PA negotiation process

Councillors will not be involved in the preparation or negotiation of any VPA PA.