

Template for planning agreement

PLANNING AGREEMENT

PARTIES

Hornsby Shire Council of 296 Peats Ferry Road, Hornsby New South Wales 2077
(Council) and [##] of [##], New South Wales (Proponent/Developer).

BACKGROUND

(For Development Applications)

- A. On [##], the Developer made a Development Application to the Council for Development Consent to carry out the Development on the Land.
- B. That Development Application was accompanied by an offer by the Developer to enter into this Agreement to make Development Contributions for public purposes.

(For Planning Proposals)

- A. On [##], the Proponent made an application to the Council for the Instrument Change for the purpose of making a Development Application to the Council for Development Consent to carry out the Development on the Land.
- B. The Instrument Change application was accompanied by an offer by the Proponent to enter into this Agreement to make Development Contributions for public purposes.
- C. The Instrument Change was published in NSW Government Gazette No. [##] on [##] and took effect on [##].
- D. On, [##], the Proponent made a Development Application to the Council for Development Consent to carry out the Development on the Land.

OPERATIVE PROVISIONS

1) Planning Agreement under the Act

The Parties agree that this deed constitutes a planning agreement within the meaning of section 7.4 of the Act.

2) Application of this Agreement

This deed applies to:

- a. the Land; and
- b. the Development.

3) Operation of this Agreement

This Agreement commences on the date that this Agreement is signed by all the parties.

4) Definitions and interpretation

In this Agreement the following definitions apply:

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

Agreement means this Agreement.

Bank Guarantee means an irrevocable and unconditional undertaking:

- a. by an Australian bank; and
- b. on terms acceptable to the Council, in Council's absolute discretion.

Base CPI means the CPI number published on 1 July of the previous calendar year to the date of this Agreement.

Contribution Amount means the amount of the monetary contribution to be paid by the Proponent as described in Schedule 4.

Current CPI means the most recent and published Consumer Price Index (Sydney – All Groups), or if that index is no longer published, then any other index which, in the reasonable opinion of Council, is a similar index for the purpose of this Agreement.

Development means [##]

Development Application has the same meaning as in the Act.

Development Consent has the same meaning as in the Act.

Development Contribution means a monetary contribution, the dedication of land free of cost or the provision of a material public benefit.

GST has the same meaning as in the GST Law.

Instrument Change means [##] Local Environmental Plan [##].

Land means Lot [##] DP [##], known as [##].

Party means a party to this agreement, including their successors and assigns.

Security means a Bank Guarantee or a bond or other form of security to the satisfaction of the Council.

5) Development Contributions to be made under this Agreement

- a. The Proponent must provide the Development Contributions in accordance with Schedule 4.
- b. Each Contribution Amount is to be adjusted, at time of payment, by multiplying the Contribution Amount payable by an amount equal to the Current CPI divided by the Base CPI.
- c. The Council and the Proponent recognise that Schedule 6 contains supporting documents aimed at facilitating the proper documentation of this Agreement and the Development Contributions.
- d. In circumstances where the Development Contributions include works, the

following matters may also be addressed in Schedule 6:

- i. the design and specification of works to be agreed by Council;
 - ii. details on the commencement and completion of works;
 - iii. inspection of the works by Council;
 - iv. insurances required by the proponent to deliver works including contract works insurance (noting Council as an interested party), public liability insurance and workers compensation insurance;
 - v. rectification of defects – agreement to rectifying any defects to completed works during a defects liability period;
 - vi. conditions on which the Council will accept the handover of the completed works.
- e. In the event of any discrepancies between Schedule 4 and Schedule 6, the provisions of Schedule 4 take precedence.

6) Application of the Development Contributions

The Council must apply the Development Contributions towards the public purpose for which it is made.

7) Application of 7.11, 7.12 and 7.24 of the Act to the Development

The application of sections 7.11, 7.12 and 7.24 of the Act is set out in Schedule 1.

8) Registration of this Agreement

- a. The Proponent must take all practical steps to register this Agreement on the title for the Land within three months of the date of this Agreement, at its own cost.
- b. The Proponent must provide Council with evidence of the registration within 10 Business Days of such registration.

9) Interest in Land

The Proponent represents and warrants that it is:

- a. the owner of the Land; or
- b. legally and beneficially entitled to obtain all consents and approvals to assist, cooperate and to otherwise do all things necessary to comply with its obligations under clause 8.

10) Right to lodge caveat

- a. Until this Agreement is registered on the title of the Land, the Proponent acknowledges and agrees that Council has an interest in the Land and consents to Council lodging and maintaining a caveat on the title to the Land.
- b. If the Council lodges a caveat, then the Council will do all things reasonably necessary to:

- i. ensure that the caveat does not prevent or delay the registration of this Agreement; and
- ii. remove the caveat from the title to the Land promptly, following registration of this Agreement.

11) Variation of this Agreement

This Agreement must not be varied except by a written document executed by all parties.

12) Assignment and transfer

- a. The Proponent must not assign its rights or novate its obligations without the prior written consent of the Council, with such consent not to be unreasonably withheld.
- b. The Proponent must satisfy Council that the person to whom the rights or obligations are to be assigned or novated has sufficient assets, resources and expertise required to perform the obligations under this Agreement.
- c. At its own costs, the Proponent must procure the execution of an agreement under which the person to whom rights are being assigned or novated agrees to comply with the terms and conditions of this Agreement.

13) Right to transfer land

The Proponent must not sell or transfer the whole or part of any part of the Land unless:

- a. The Council is satisfied that the proposed transferee has sufficient assets, resources and expertise to perform any of the remaining obligations of the Proponent;
- b. The Proponent procures the execution of an agreement by the transferee, under which the transferee agrees to comply with the terms of this Agreement;
- c. The Proponent is not in material breach of its obligations under this Agreement; and
- d. The Council has received a replacement Security.

14) Dispute Resolution

- a. This clause does not apply to an application for urgent interlocutory relief.
- b. Parties must not commence court or arbitration proceedings unless that party has participated in a mediation.
- c. The parties must participate in mediation upon receiving written notice of any dispute arising from this Agreement.
- d. If the parties do not agree to the procedures to be adopted in mediation within 7 days of being notified of a dispute, then the parties must mediate the dispute with a mediator appointed by President of The Law Society of New South Wales in accordance with the Mediation Guidelines of The Law

Society of New South Wales.

- e. No party may use any information or documents obtained through any dispute resolution process for any purpose other than in an attempt to settle the dispute.

15) Enforcement

The Proponent has agreed to provide security to the Council in accordance with the terms and procedures set out in Schedule 5.

16) GST

In this clause:

Adjustment Note, Consideration, GST, GST Group, Margin Scheme, Money, Supply and Tax Invoice have the meaning given by the GST Law.

GST Amount means in relation to a Taxable Supply the amount of GST payable in respect of the Taxable Supply.

GST Law has the meaning given by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Input Tax Credit has the meaning given by the GST Law and a reference to an Input Tax Credit entitlement of a party includes an Input Tax Credit for an acquisition made by that party but to which another member of the same GST Group is entitled under the GST Law.

Taxable Supply has the meaning given by the GST Law excluding (except where expressly agreed otherwise) a supply in respect of which the supplier chooses to apply the Margin Scheme in working out the amount of GST on that supply.

- a. Subject to clause 17(c), if GST is payable on a Taxable Supply made under, by reference to or in connection with this Deed, the Party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration.
- b. Clause 17(a) does not apply to the extent that the Consideration for the Taxable Supply is expressly stated in this Deed to be GST inclusive.
- c. No additional amount shall be payable by the Council under clause 17(a) unless, and only to the extent that, the Council (acting reasonably and in accordance with the GST Law) determines that it is entitled to an Input Tax Credit for its acquisition of the Taxable Supply giving rise to the liability to pay GST.
- d. If there are Supplies for Consideration which is not Consideration expressed as an amount of Money under this Deed by one Party to the other Party that are not subject to Division 82 of the *A New Tax System (Goods and Services Tax) Act 1999*, the Parties agree:
 - i. to negotiate in good faith to agree the GST inclusive market value of those Supplies prior to issuing Tax Invoices in respect of those Supplies;

- ii. that any amounts payable by the Parties in accordance with clause 17(a) (as limited by clause 17(c) to each other in respect of those Supplies will be set off against each other to the extent that they are equivalent in amount.
- e. No payment of any amount pursuant to this clause 17, and no payment of the GST Amount where the Consideration for the Taxable Supply is expressly agreed to be GST inclusive, is required until the supplier has provided a Tax Invoice or Adjustment Note as the case may be to the recipient.
- f. Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred by a party, must exclude the amount of any Input Tax Credit entitlement of that party in relation to the relevant cost, expense or other liability.
- g. This clause continues to apply after expiration or termination of this Deed.

17) Entire deed

This deed constitutes the entire agreement between the parties regarding the matters set out in it and supersedes any prior representations, understandings or arrangements made between the parties, whether orally or in writing.

18) Governing law and jurisdiction

The laws applicable in New South Wales govern this Agreement.

19) Severance

If any clause is in any way unenforceable, invalid or illegal, it is to be read down so as to be enforceable, valid and legal. If this is not possible, the clause (or where possible, the offending part) is to be severed from this deed without affecting the enforceability, validity or legality of the remaining clauses (or parts of those clauses) which will continue in full force and effect.

20) Good faith

Each party must act in good faith towards all other parties and use its best endeavours to comply with the spirit and intention of this deed.

21) No fetter

Nothing in this Agreement is to be construed as requiring the Council to do anything that would cause the Council to breach any of the Council's obligations at law.

22) Expenses and stamp duty

Prior to the execution of this deed, or otherwise on being made aware of such costs following execution of this deed, the Proponent must pay:

- a. Council's reasonable costs and disbursements, including legal costs, in connection with the negotiation, preparation, execution and carrying into effect of this deed.
- b. All costs and expenses associated with the giving of public notice of this Agreement and the Explanatory Note.

- c. All Taxes in respect of this Agreement including stamp duty and registration fees, if applicable.
- d. Council's reasonable costs and disbursements in connection with the release and discharge of this Agreement, if applicable.

23) Notices

Any notice, demand, consent, approval, request or other communication must be in writing and given to the recipient at its address for Service as set in Schedule 2.

DRAFT

Execution

Dated: [#]

Executed as a Deed

[#insert execution blocks#]

DRAFT

Schedule 1

Table 1 – Requirements under section 7.4 of the Act (clause 2.2)

The parties acknowledge and agree that the table set out below provides for certain terms, conditions and procedures for the purpose of the deed complying with the Act.

Requirement under the Act	This deed
<p>Planning instrument and/or development application – (section 7.4(1))</p> <p>The Proponent has:</p> <p>(a) sought a change to an environmental planning instrument.</p> <p>(b) made, or proposes to make, a Development Application.</p> <p>(c) entered into an agreement with, or is otherwise associated with, a person, to whom paragraph (a) or (b) applies.</p>	<p>(a) [#]</p> <p>(b) [#]</p> <p>(c) [#]</p>
<p>Description of land to which this deed applies – (section 7.4(3)(a))</p>	See Schedule 3
<p>Description of development to which this deed applies – (section 7.4 (3)(b))</p>	See definition of Development in clause 4.
<p>Description of change to the environmental planning instrument to which this deed applies – (section 7.4 (3)(b))</p>	[#]
<p>The scope, timing and manner of delivery of contribution required by this deed – (section 7.4 (3)(c))</p>	See Schedule 4
<p>Applicability of sections 7.11 and 7.12 of the Act – (section 7.4 (3)(d))</p>	The application of sections 7.11 and 7.12 of the Act is [#excluded/not excluded#] in respect of the Development.
<p>Applicability of section 7.24 of the Act – (section 7.4 (3)(d))</p>	The application of section 7.24 of the Act is [#excluded/not excluded#] in respect of the Development.
<p>Consideration of benefits under this deed if section 7.11 applies – (section 7.4 (3)(e))</p>	[#]
<p>Mechanism for Dispute Resolution – (section 7.4(3)(f))</p>	See clause 15.
<p>Enforcement of this deed – (section 7.4(3)(g))</p>	See clause 16.
<p>No obligation to grant consent or exercise functions – (section 7.4(10))</p>	See clause 25.

Table 2 – Other Matters

Requirement under the Act	This deed
Registration of the Planning Agreement – (section 7.6 of the Act)	Yes (see clause 9)
Whether the Planning Agreement specifies that certain requirements of the agreement must be complied with before a construction certificate is issued – (section 21 of <i>Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021</i>)	[#]
Whether the Planning Agreement specifies that certain requirements of the agreement must be complied with before an occupation certificate is issued – (section 48 of <i>Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021</i>)	[#]
Whether the Planning Agreement specifies that certain requirements of the agreement must be complied with before a subdivision certificate is issued – (section 6.15(1)(d) of the Act)	[#]

Schedule 2

Address for Service

Council

Contact: The General Manager
Address: PO Box 37, Hornsby NSW 1630
Email: hsc@hornsby.nsw.gov.au

Proponent

Contact: [#]
Address: [#]
Email: [#]

DRAFT

Schedule 3

Land

1. Lots proposed for development

Lot	Deposited Plan	Folio Identifier
[#]	[#]	[#]

DRAFT

Schedule 4

Development Contribution

1. Development Contribution

- a. The Proponent will provide the Development Contribution as set out in the table below:

Development Contribution	Value	Timing	Public purpose
[#]	[#]	[#]	[#]

The Development Contribution specified in 1(a) above is to be indexed in accordance with clause 5(b).

DRAFT

Schedule 5

Security terms

1. Proponent to provide Security

- a. The Proponent has agreed to provide the Security.
- b. The Security must:
 - i. name the Council as the relevant beneficiary;
 - ii. be unconditional; and
 - iii. not have an expiry date.

2. Amount of Security

- a. At the time the Proponent signs this Agreement, the Proponent must provide the Security to the Council having a face value amount of \$[#].
- b. From the date of execution of this Agreement until the date that the Proponent has provided the Development Contribution, the Council is entitled to retain the Security.

3. Claims under Bank Guarantees

- a. The Council may:
 - i. call upon the Security where the Proponent has failed to pay a Contribution Amount; and
 - ii. retain and apply such monies towards the Contribution Amount and any costs and expenses incurred by the Council in rectifying any default by the Proponent under this Agreement.
- b. Prior to calling upon the Security the Council must give the Proponent not less than 10 Business Days written notice of its intention to call upon the Security.
- c. If the Council calls upon the Security and applies all or part of such monies towards the Contribution Amount and any costs and expenses incurred by the Council in rectifying any default by the Proponent under this deed, then the Proponent must provide a replacement Security.

4. Release of Security

If:

- a. the Proponent has satisfied all its obligations under this Agreement; and
- b. the monies secured by the Bank Guarantee has not been expended,

then the Council will promptly return the Bank Guarantee (less any costs, charges, duties and taxes payable), or the remainder of the monies secured by the Bank Guarantee (as the case may be), to the Proponent.

Schedule 6

Miscellaneous Documents

DRAFT