Policy Goal	1.1	Development Control Policy
Policy Sub Group	1.1.21	Planning Agreement Policy & Procedure
Version	1	
Date Adopted	<Insert Adoption Date>	

Kempsey Shire Council Planning Agreement Policy & Procedure

POLICY GOAL	1.1	Development Control Policy
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1. Objectives

1.1 This Policy outlines the process for Council to enter into planning agreements with developers to provide public benefits in conjunction with a development or rezoning, in line with the provisions of the *Environmental Planning and Assessment Act 1979* (the Act) and the *Environmental Planning and Assessment Regulation 2021* (the Regulation) or as amended.

1.2 The objectives of this policy are to:

a) set out Council's specific policies and procedures relating to the use of planning agreements within the Kempsey Shire;

b) facilitate flexible and innovative approaches to the provision of public infrastructure, facilities, works services and social amenities that reflects a balance of environmental standards, community expectations and funding priorities in line with Council strategic planning objectives for Planning Proposals and/or development proposals;

c) establish a fair, efficient, transparent and accountable framework governing the use and preparation of planning agreements by the Council;

d) facilitate a flexible means of achieving tailored development outcomes and focused public benefits; including better agreement by communities to the redistribution of the costs and benefits of development;

e) facilitates the provision of public facilities, services and amenity outcomes that are consistent with Council's key strategic documents, in particular the Community Strategic Plan, Delivery Plan, Long Term Financial Plan and Development Contributions plans;

1.3 The outcomes to be achieved from this policy are to ensure planning agreements:

a) are directed towards proper or legitimate planning purposes in accord with all relevant planning controls;

b) provide for public benefits that bear a relationship to development;

c) facilitate the provision of public facilities and amenity outcomes that align with, or are not inconsistent with, Council's corporate and strategic planning documents; and

d) produce outcomes that meet the general values and expectations of the public, protect the overall public interest and enable the public to share the public benefits provided under the planning agreements.

2. Scope

2.1 This policy establishes a framework to guide the use of Planning Agreements by Kempsey Shire Council, in keeping with the provisions of the Act and Regulation.

2.2 This policy applies to new agreements and any applications to vary existing agreements.

2.3 This policy is to be read in conjunction with the current versions of Council's Contributions Plans, Local Growth Management Strategy, Local Strategic Planning Statements and other relevant district and regional strategies or policies.

3. Legal & Policy Framework

3.1 This policy forms part of the Council's development contribution system.

3.2 This policy and the preparation, content and implementation of planning agreements have regard to and may be governed by:

a) the provisions of Subdivision 2 (Planning agreements) of Division 7.1 (Development contributions) of Part 7 (Infrastructure contributions and finance) of the Act,

b) the provisions of Division 1 (Planning agreements) of Part 9 (Development contributions) of the Regulation,

c) the Planning Agreements Practice Note issued by the NSW Department of Planning and Environment in February 2021.

The Practice Note is made for the purposes of clause 203 of the Regulation.

3.3 The Practice Note is not legally binding. If there is any inconsistency between this policy and the Practice Note, this policy prevails.

3.4 If amendments to the Act and/or Regulations create any inconsistency with this policy, the Act and/or Regulation prevails.

3.5 References to numbered provisions of the Act and Regulations in this policy are provided for advice only. If amendments to the Act and/or Regulation alter the numbering of legislative provisions, the revised numbering should be applied to the interpretation of this policy.

3.6 Subdivision 2 of Division 7.1 of Part 7 of the Act sets out, amongst other matters:

- the definition of a planning agreement (s.7.4(1))
- the definition of a public purpose (s.7.4(2))
- the mandatory, minimum requirements for a planning agreement (s.7.4(3))
- the relationship of a planning agreement to the application of section 7.11 and section 7.12 of the Act (s7.4(2, 3A, 5,6)
- the ability of the Council to enter into a joint planning agreement with another council of other public authority (s.7.4(8))
- limitations on the content of a planning agreement (s.7.4(9))

3.7 Division 1 of Part 9 of the Regulation sets out, amongst other matters:

- the form and subject matter of planning agreements (cl.203)
- the signing and commencement of a planning agreement (cl.203)
- amendment and revocation of a planning agreement (cl.203)
- public notice requirements, including the timing of that notice in regard to a development application and a planning proposal (cl.204)
- requirements for an explanatory note and the content of that note (cl.205)
- requirements for the public inspection of planning agreements (cl.206).

4. Background

4.1 Planning agreements may be negotiated between Council and developers in relation to development applications or changes sought by developers to environmental planning instruments.

4.2 They provide a way for Council and developers to negotiate flexible outcomes around development contributions and enable innovative or complex infrastructure and public benefit outcomes in connection with planning proposals and development applications by enabling tailored development outcomes and focused public benefits, including agreement by communities to the redistribution of the costs and benefits of development.

4.3 The Council may impose a condition of consent to a development application or a complying development application requiring a development contribution under section 7.11 or the payment of a levy under section 7.12 of the Act (if consistent with the relevant contributions plan).

4.4 A planning agreement can be used in conjunction with or instead of a contributions plan in several ways. They can allow the Council and a developer to negotiate the delivery of public benefits in a manner that may normally be unavailable in a way a contributions plan allows or requires.

4.5 Sections 7.4 and 7.11 of the Act set out the manner in which a planning agreement can influence contributions and levies imposed as conditions of development consent. This includes the ability of a planning agreement to wholly or partly exclude the application of section 7.11 or section 7.12 in respect of a development. However, this can only occur where the Council, as consent authority for the development, or the Minister is a party to the agreement.

4.6 Where the Council is the consent authority for development, the exclusion of section 7.11 or section 7.12 through a planning agreement will be a matter of negotiation between the Council and the developer on a case by case basis.

4.7 Planning agreements should be negotiated between Council and developers before a related development application or planning proposal is made so that the application may be accompanied by the draft agreement.

Policy

5. Guiding Principles

5.1 When considering a planning proposal or development application, Council will:

a) not give undue weight to a planning agreement;

b) not allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed planning agreement;

c) not improperly rely on its position in order to extract unreasonable public benefits from developers under planning agreements;

d) where Council has a commercial interest in development that is the subject of a planning agreement, it will take appropriate steps to ensure that it avoids a conflict of interest between its role as a planning authority and its interest in the development.

6. When May Council Consider Entering Into a Planning Agreement?

6.1 Section 7.4 of the Act sets out the circumstances under which a planning agreement may be entered into. It provides that a planning agreement may be made between a planning authority (or two or more planning authorities) and a person (developer) under:

a) when a developer:

i. proposes to, or has made a request for a planning proposal seeking a change to Kempsey Local Environmental Plan 2013 to facilitate the carrying out of development, or

ii. proposes to, or has made, a development application or an application under section 4.55 of the Act to modify a development consent, or

iii. has entered into an agreement with, or is otherwise associated with, a person to whom (i) or (ii) applies.

6.2 Section 7.7(3) of the Act also 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:

a) the development application or application for a complying development certificate, or

b) 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.

6.3 Notwithstanding the above, the Council is not obliged to enter into a planning agreement with a developer.

7. Probity

7.1 The Council is committed to ethical behaviour, equity and fairness in the care, control and management of the Kempsey Shire and in the administration of this policy. To this end, the following practices will apply:

a) Roles and responsibilities within the processes for a planning agreement, a planning proposal and a development application will be managed to ensure transparency, impartiality and accountability and to avoid conflicts of interest. This will generally include separation of roles and responsibilities.

b) Commercial and financial information will be treated as confidential material. Depending on the type of planning agreement and the Council's involvement, the Council may engage a probity expert for advice and assistance with the agreement. Costs associated with this service will be shared between the Council and the other parties associated with the agreement.

8. Key Considerations

8.1 The benefits Council will consider under a planning agreement may, but will not necessarily, comprise one or more of the following:

a) a monetary contribution; and/or

b) delivery of infrastructure free of costs, including any ongoing contribution towards

i. ongoing maintenance of those works; and / or

ii. dedication of land / affordable housing or the like free of cost; or

iii. any combination of the above, towards public purposes

9. Acceptability Test

9.1 The Practice Note sets out guidelines and safeguards in the application of planning agreements. These include determining the planning agreements acceptability and reasonableness. Council will apply the following test in order to assess the desirability of a Planning Agreement. The Planning Agreement must:

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

b) Provide for the delivery of infrastructure or public benefits not wholly unrelated to the development.

c) Produce outcomes that meet the general values and expectations of the public and protect the overall public interest.

d) Provide for a reasonable means of achieving the desired outcomes and securing the benefits.

e) Protect the community against adverse planning decisions.

10. Mandatory Requirements of a Planning Agreement

10.1 Section 7.4(3) of the Act requires planning agreements to include provisions specifying:

a) a description of the land to which the agreement applies;

b) a description of the change to the environmental planning instrument to which the agreement applies, or the development to which the agreement applies;

c) the nature and extent of the provision to be made by the developer under the planning agreement, the time or times by which the provision is to be made and the manner by which the provision is to be made;

d) in the case of development, whether the agreement excludes (wholly or in part) or does not exclude the application of section 7.11, 7.12, or 7.24 of the Act to the development;

e) 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 of the Act;

f) a mechanism for the resolution of disputes under the agreement; and

g) 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.

10.2 The Act does not preclude a planning agreement containing other provisions that may be necessary or desirable in particular cases, except as provided by law. However, any planning agreement entered into by Council must contain the provisions as required by section 7.4 (3) of the Act.

11. Process

11.1 Reference should be given to the NSW Planning Agreement Practice notes and any Ministerial Directions and/or relevant Circulars.

11.2 The developer must submit a letter of offer to enter into a planning agreement to Council which includes the following:

a) Details of the land to which the planning agreement will apply;
b) The parties to the agreement, including the developers and landowners the authority to act where the developer is not the landowner;
c) The relevant DA, CDC or planning proposal that the planning agreement relates to;
d) Details of the contributions proposed under the planning agreement, including the cost of works, land or material public benefit (with appropriate verification of costs as outlined in Section 15 of this policy), a description of the works/land and plans identifying their location, standards or specifications for the works (concept designs or specifications are acceptable at the letter of offer stage), the proposed staging/timing of the contributions, and whether the proposed agreement will exclude the application of section 7.11, 7.12 or 7.24 of the Act to the agreement;
e) Demonstration that the offer has considered the requirement of the Act, Regulations, Practice Note and this policy.

11.3 Council will require a planning agreement to provide that the developer's obligations under the agreement take effect when the first development consent operates in respect of development that is the subject of the agreement.

11.4 Council will determine on a case by case basis and at its sole discretion whether to agree to a planning agreement that generates a surplus value. A surplus value may arise where a planning agreement includes land and works identified in a contributions plan and the value of the land and works exceeds the amount of development contributions that would have otherwise been levied on the proposed development. The consideration of Council's ability to repay surplus credits to a developer will be informed by careful

consideration of the financial position and cash flow of the contributions plan and the continued implementation of the works schedule contained in the contributions plan by the Council. If Council agrees to a planning agreement that generates a surplus value, the surplus value may be either refunded to the developer on terms specified in the planning agreement, or be offset against development contributions required to be made by the developer in respect of other development in the Council's area under the same contributions plan.

11.5 The Manager, Strategic & Asset Planning or their delegate shall be responsible for administering this Policy and will be responsible for the following:

i. Administration, implementation and management of planning agreements in accordance with *EP&A Act* and *Regulations*

ii. Maintaining and monitoring records of offers made under planning agreements:

- Reporting;
- Point of contact about the meaning and application of this Policy;
- Review process – as required.

11.6 Except for matters related to Section 8 of this Policy, the Applicant is responsible for all costs, both Developer and Council, of and incidental to negotiating, preparing and entering into the agreement as well as administering and enforcing the agreement.

12. Discharge or Modification of Obligations

12.1 Upon completion of all the developer's obligations in the planning agreement to the Council's satisfaction, Council will upon request provide a letter of discharge to the developer.

12.2 Council may agree to a provision in a Planning Agreement permitting the Developer's obligations under the agreement to be modified or discharged in the following circumstances:

a) the Developer's obligations have been fully carried out in accordance with the agreement, or

b) the development consent to which the agreement relates has lapsed or been modified to such an extent that the planning obligations may not be appropriate, or

c) the performance of the Planning Agreement has been frustrated by an event or events beyond the reasonable control of the parties, or

d) the Developer has fully and completely assigned the Developer's interest under the agreement in accordance with its terms, or

e) other material changes affecting the operation of the Planning Agreement have occurred, or

f) Council and the Developer otherwise agree to the modification or discharge of the agreement.

g) Such a provision will require the modification or revocation of the Planning Agreement in accordance with the Act and Regulation.

13. Explanatory Note

13.1 Clause 205 of the Regulation requires that an explanatory note must accompany a planning agreement, or an agreement that revokes or amends a planning agreement. The explanatory note must:

a) summarise the objectives, nature and effect of the proposed agreement, amendment or revocation, and
b) contain an assessment of the merits of the proposed agreement, amendment or revocation, including the impact (positive or negative) on the public or any relevant section of the public.

13.2 Clause 205 (2) states that reference must be given to the relevant Practice Notes when preparing the explanatory note.

14. Pooling of Development Contributions

14.1 Where a proposed Planning Agreement provides for a monetary contribution by the developer, the Council may seek to include a provision permitting money paid under the agreement to be pooled with money paid under other Planning Agreements or by other developer contributions and applied progressively for the different purposes under those agreements or contributions, subject to the specific requirements of the relevant agreements. Pooling may be appropriate to allow public benefits, particularly essential infrastructure, to be provided in a fair, equitable and timely way.

15. Methodology for Valuing Public Benefits under a Planning Agreement

15.1 The value of a development contribution or an offer by a developer comprising land to be dedicated or a material public benefit is to be determined prior to a draft planning agreement being publicly notified. Public benefits will be valued as follows:

a) *Provision of land for a public purpose* - Where the benefit under a Planning Agreement is the provision of land for a public purpose, the value of the benefit will be determined by an independent valuer with a minimum of 10 years' experience in valuing land in New South Wales (and who is acceptable to Council), on the basis of a scope of work which is prepared by Council. The developer and the Council may agree that an independent valuer be engaged to provide valuations. Where the developer engages a valuer to provide the valuations, the Council will engage an independent valuer to verify the valuations. In all instances, costs of the independent valuer in carrying out such a valuation will be borne by the Developer.

b) *Carrying out of works for a public purpose* - Where the benefit under a Planning Agreement is the carrying out of works for a public purpose, the value of the benefit will be

determined by an independent quantity surveyor with a minimum of 10 years' experience (and who is acceptable to Council), on the basis of the estimated value of the completed works being determined using the method that would ordinarily be adopted by a quantity surveyor. The developer and the Council may agree that an independent quantity surveyor be engaged to provide valuations. Where the developer engages a quantity surveyor to provide the valuations, the Council will engage an independent quantity surveyor to verify the valuations. In all instances, costs of the independent valuer in carrying out such a valuation will be borne by the Developer.

c) *Other public benefit* - Where the benefit under a Planning Agreement is the provision of public benefit other than under (a) or (b) above, Council and the Developer will negotiate the manner in which the benefit is to be valued for the purposes of the agreement.

16. Costs

16.1 The costs for preparing, executing, stamping and registering the planning agreement are to be met by the developer.

16.2 The Council's costs in negotiating, assessing, reviewing, administering and enforcing the planning agreement will be met in part or full by the developer depending on the circumstances.

16.3 The Council's costs may be related to matters and actions including the use of independent consultants, legal advice, notification and advertising, and Council staff preparation and administration time.

16.4 The planning agreement will include provision for the payment of costs by the developer and the Council.

16.5 Costs incurred by the Council will be payable by the developer at particular stages of the process.

Implementation and Management

17. Annual Report

17.1 The Council will provide details in its annual report of all planning agreements that are in force during the year. The details will include particulars of compliance with and the effect of the planning agreements.

18. Planning Agreement Register

18.1 Council will establish and maintain a planning agreement register. The register will:

a) contain all planning agreements, with any amendments, that apply to the Kempsey Shire LGA, including those to which the Council is not a party but which have been provided to the Council under the Act;

b) contain the relevant information required by the Act and the Regulation;

c) be available made available online or incorporated into the online planning register of the planning authority's website.

19. Monitoring of Planning Agreement

19.1 Planning agreements are to contain a mechanism for their periodic review that should involve the participation of all parties.

19.2 Depending on the nature of the agreement and the type of public benefits, Council will monitor the agreement to ensure it is operating effectively and that the developer's obligations are being met.

19.3 This may require the developer to report at specified times to the Council.

19.4 Where the Council needs to engage experts or other personnel to assist with the monitoring, the costs will be borne by the developer.

20. Provision of Security Under a Planning Agreement

20.1 Council will require a planning agreement to make provision for security to cover the developer's obligations under the agreement.

20.2 The form of security for obligations to deliver works or make monetary contributions will generally be an unconditional bank guarantee from an Australian Bank in favour of the Council to the full value of the developer's obligations under the Agreement and on terms otherwise acceptable to the Council.

20.3 In respect to development contributions in the form of land, Council may require a planning agreement to include provisions allowing Council to acquire any land to be dedicated for one Australian dollar if the developer defaults.

20.4 Council may also require, in appropriate cases, the creation of a charge over land, and may require the landowner to agree to not object to Council lodging caveats on the title of all or any of the land the subject of the planning agreement. Council will generally require a planning agreement to include provisions acknowledging Council has a caveatable interest over:

a) The whole of the land until the planning agreement is registered; and

b) Any land to be dedicated to Council, once the relevant portion of land has been created.

20.5 Any amount to be secured by a Bank Guarantee or bond will be adjusted on each anniversary date in accordance with increases in the consumer price index. The formula for adjustment of security amounts will be consistent with the indexations of contributions specified in the planning agreements.

21 Timing of Provision of Security

21.1 Council will require any security (such as bank guarantees) for contributions that do not involve monetary payment to be provided prior to the issue of a construction certificate, or where the works involve the subdivision of land, prior to the issue of a subdivision works certificate, or at such other appropriate times depending on the nature and timings of the contributions.

21.2 Where security is required under a planning agreement for a monetary contribution, the security will be provided as follows:

a) a bank guarantee for 25% of the monetary contribution upon execution of the planning agreement; and

b) a bank guarantee for 75% of the monetary contribution prior to the issue of a construction certificate.

22 Registration of a Planning Agreement

22.1 Registration of a planning agreement ensures that the developer's obligations run with the land to which the agreement relates and binds future landowners.

22.2 Council will require a planning agreement to contain a provision requiring the developer to register the agreement, at the developer's expense, pursuant to s7.6 of the Act.

22.3 Council will require a planning agreement to acknowledge that Council has a caveatable interest in the land and may register a caveat against the title to the land prior to the planning agreement being registered. Once the agreement is registered, Council will withdraw any caveat it has.

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

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

22.6 The registration of the planning agreement against the title to land can be removed once all the contributions have been delivered. Where contributions are to be delivered after the registration of a subdivision or strata plan, Council may agree to removal of the planning agreement from the title to final lots (lots that are not to be further subdivided), subject to adequate security being provided to Council for any outstanding contributions to be delivered.

This may include:

a) A requirement to register the planning agreement against the title to the common property;

b) Caveats to be registered over any land to be dedicated to Council; and

c) Bank guarantees or bonds to secure the cost of any works and/or monetary contributions that remains outstanding

22.7 The costs of registering the planning agreement on the title of the land are to be borne by the developer.

23 Dispute Resolution

23.1 A planning agreement will include a provision for the mediation of disputes.

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