

Voluntary Planning Agreement Policy

1 Purpose

The NSW planning framework enables Council's to enter into agreements with proponents to provide public benefits in conjunction with a development or instrument change. The agreements are voluntary and the public benefits can be in the form of a monetary contribution, the dedication of land or the provision of material public benefits directly.

This Policy sets out Coffs Harbour City Council's position and procedures relating to voluntary planning agreements ('VPAs') under the Environmental Planning and Assessment Act 1979 and the Environmental Planning and Assessment Regulation 2000.

This Policy applies to any development application or request for an instrument change where a VPA is proposed, for land and development within the local government area of Coffs Harbour City Council.

This policy may be used in conjunction with Council's Local Biodiversity Offsets Policy and Dedication of Land Policy to legally facilitate offset arrangements on Council Land and/or private land.

2 Policy

2.1 Policy Objectives

- To establish a fair, transparent and accountable framework governing the use of VPAs within the Coffs Harbour Local Government Area.
- To set out specific guidelines relating to the use of VPAs within the Coffs Harbour Local Government Area.
- To enable the community to gain an understanding of the public benefits of appropriate VPAs.
- To facilitate innovative and flexible approaches to the provision of infrastructure and public benefits in a manner that is consistent with the relevant legislation.
- To provide certainty for the community, proponents and Council in respect to infrastructure and development outcomes.

2.2 Statutory Framework

The statutory framework for VPAs is set in Part 7 Division 7.1 Subdivision 2 of the Act and Division 1A of Part 4 of the Regulation.

Section 7.4 of the Act, sets out the circumstances under which a VPA may be entered into. It provides that a VPA may be made between a planning authority (or two or more planning authorities) and a proponent(s):

- a) who has sought a change to an environment planning instrument (such as the rezoning of a site, or a change to development controls); or
- b) who has made, or proposes to make, a development application; or

- c) who has entered into an agreement with, or is otherwise associated with, a person in one of the above two categories,

under which the proponent is required to provide a development contribution to be used for or applied towards a public purpose.

Section 7.4(3) of the Act provides the mandatory requirements of a VPA. Clause 25E(1) of the Regulation requires that an explanatory note must accompany a VPA that summarises the objectives, nature and effect of the VPA and contains an assessment of the merits of the VPA, including the impact (positive or negative) on the public or any section of the public.

The Act does not preclude a VPA from containing other provisions that may be necessary or desirable in particular cases, except as provided by law. Council has prepared a VPA template to be used as the basis and minimum requirements for any VPA (see clause 7.2 - Attachment B). Council has also prepared a template explanatory note (see clause 7.3 - Attachment C).

2.3 Process

The general process relating to the consideration, notification and entering of VPAs is as follows:

- a) Before the proponent makes an application, it must indicate to the Council its intention to accompany its Application with a draft VPA. This will be undertaken by a meeting with the Group Leader Sustainable Places. The Council will indicate whether or not it agrees, in principle, to negotiate a VPA with the proponent. Both the proponent and the Council must consider who the parties to the VPA should be, including whether there are other planning authorities or other parties (such as the landowner) who should be a party to the agreement.
- b) The proponent must provide the Council with the key terms of its offer addressing each key term required by this policy and the VPA template in clause 7.2 Attachment B. The Council will consider the proponent's proposed terms and, if it considers the offer reasonable, negotiate the terms with the parties to the proposed VPA. If an agreement is negotiated in principle, the Council will arrange for the agreed terms to be documented in a draft VPA.
- c) If the proponent makes an Application, it must accompany the Application with the draft VPA signed by the proponent and each party to the VPA who is not a planning authority. The Application must clearly state the proponent's offer to provide the public benefits outlined in the VPA if the Application is approved (or if the Application relates to a change in instrument, to provide the public benefits outlined in the VPA if development consent is subsequently granted to a development application relating to the change to the instrument).
- d) The Council will publicly notify the Application, draft VPA and explanatory note in accordance with the Act, Regulations and clause 2.14 below. The Council will also notify any public authorities it considers might have an interest in the Application and draft VPA.
- e) If, as a result of the notification, the Council requires changes to the draft VPA and explanatory note, the Council will identify the changes to the proponent and the proponent must consider whether it agrees to adopt the changes. If the proponent agrees to adopt the changes the Council will provide the proponent with an updated version of the draft VPA and the proponent must arrange for the updated version of the draft VPA to be signed by each party to the VPA who is not a planning authority and clearly state the proponent's offer to enter into the VPA if the Application is approved.
- f) If changes are made to the draft VPA, the Application to which the VPA relates, or both, the Council will consider if the draft VPA must be renotified in accordance with clause 2.14 below.

- g) The Council will consider the Application and draft VPA in accordance with the Act and Regulations. The weight given to the draft VPA in determining the Application is a matter for Council acting reasonably.
- h) If the Application, being a development application, is approved, the Council will impose a condition on the development consent requiring the VPA to be entered into and, unless there are exceptional circumstances, resolve to enter into the VPA.
- i) After the Council has resolved to enter into the VPA, the Council will endorse the signed VPA and will arrange for the VPA to be registered on the title to the land in accordance with clause 2.21 below.
- j) If the Application, being a change to an instrument, is approved, the Council may require that the VPA be entered immediately or entered into if consent is subsequently granted to a development application relating to the change to the instrument.

2.4 Objectives of VPAs

The primary objective of a VPA is to provide material public benefits by the provision of developer contributions to be used for or applied towards public purposes.

In considering, negotiating and entering into a VPA, the Council will consider, amongst other things, if the terms of the proposed VPA:

- a) meets the current and future demands created by the development for new public infrastructure, amenities and services;
- b) meets specific planning objectives of Council and provides planning benefits;
- c) compensates for the loss of, or damage to, a public amenity, service, resources, the natural environment or asset caused by the development through its replacement, substitution, repair or regeneration;
- d) rectifies an existing deficiency in existing public facilities in Council's area;
- e) provides future and recurrent funding and whether that funding is sustainable.

Development that is unacceptable on planning grounds will not be given consent merely because the proponent offers to enter a VPA, particularly if the material public benefits offered by the proponent are unrelated to the development.

2.5 General Principles

In considering, negotiating and entering a VPA Council will be guided by the following principles:

- a) planning decisions may not be bought or sold;
- b) VPAs must not fetter the exercise of the Council's statutory functions or discretion;
- c) VPAs will not to be entered by Council for an improper purpose (for example, to overcome revenue-raising or spending limitations);
- d) public benefits offered as part of VPAs must related to the particular development to which the VPA relates. Council will not enter into a VPA where the public benefits offered are wholly unrelated to the subject matter of the Application;
- e) Council will not give disproportionate weight to a VPA in determining an Application;

- f) Council will not allow the interests of individuals or interest groups to outweigh the public interest;
- g) Council will not improperly use its position to extract unreasonable public benefits from proponents; and
- h) Council will avoid, wherever possible, being party to a VPA where it also has a stake in the development subject to the agreement.

2.6 Acceptability Test

In considering, negotiating and entering a VPA , the Council will consider whether the terms of the VPA satisfy the 'acceptability test' as provided by the planning note.

In particular, Council will consider the following matters to determine if a proposed VPA is acceptable:

- a) is the proposed VPA directed towards proper or legitimate planning purposes, ordinarily ascertainable from the statutory planning controls and other adopted planning policies applying to development?
- b) does the proposed VPA provide for public benefits that are not wholly unrelated to the development?
- c) does the proposed VPA produce outcomes that meet the general values and expectations of the public and protect the overall public interest?
- d) does the proposed VPA provide for a reasonable means of achieving the relevant purposes and outcomes and securing the benefits?
- e) does the VPA conform to the general principles governing Council's use of VPAs?
- f) are there any relevant circumstances that may operate to preclude Council from entering into the proposed VPA?
- g) does the proposed VPA protect the community against planning harm?

2.7 Material Public Benefits

Council will consider development contributions that provide a demonstrable material public benefit.

Examples of material public benefits are set out in the Potential Public Benefits table which is attached to this Policy in clause 7.1 - Attachment A.

2.8 Valuation Methodology

Unless otherwise agreed in a particular case, where the development contribution under a VPA is the provision of land for a public purpose, the value of the development contribution will be the market value of the land (within the meaning of the Land Acquisition (Just Terms Compensation) Act 1991) determined by an independent registered valuer with at least 10 years' experience in valuing land in New South Wales (and who is acceptable to Council and the proponent). All costs of the independent valuer in carrying out such a valuation will be borne by the proponent.

Unless otherwise agreed in a particular case, where the development contribution under a VPA is the carrying out of works for a public purpose, the value of the benefit will be determined by an independent quantity surveyor with at least 10 years' experience (and who is acceptable to Council and the proponent), on the basis of the estimated value of the completed works determined using the method that would be ordinarily adopted by a quantity surveyor. All costs of the independent quantity surveyor in carrying out this work will be borne by the proponent.

Where the development contribution under a VPA is the provision of some other type of public benefit, Council and the Proponent will negotiate the manner in which the development contribution is to be valued for the purposes of the agreement.

The Council may require the value of contributions to be made to be indexed using the same indexation methodology as in Council's contributions plans.

Generally, in negotiating a VPA, Council will seek to determine the uplift in value of the proponent's land based upon a valuation of the land for the current planning controls compared with the valuation of the land in the event that the Application is approved and the VPA is entered into, less any additional costs the proponent may incur in realising the increased value. Such valuation is to be undertaken by a suitably qualified valuer.

2.9 Recurrent Charges

A VPA may require a proponent to make development contributions towards the recurrent costs of public facilities. Where the public facility primarily serves the development to which the VPA relates, or a neighbouring development, the arrangement for recurrent development contributions may be in perpetuity.

Where the public facility or public benefit is intended to serve the wider community, the VPA may only require the proponent to make development contributions towards the recurrent costs of the public facility for a set period which will be determined on a case by case basis.

2.10 Pooling of Development Contributions

Where a VPA provides for a monetary contribution by the proponent, the VPA must provide that money paid under the VPA may be pooled with money paid under other VPAs and applied progressively for the different purposes under those VPAs.

Pooling may be appropriate to allow public benefits, particularly essential infrastructure, to be provided in a fair and equitable way.

2.11 Application of Section 7.11 and 7.12 of the EP&A Act

A VPA may wholly or partly exclude the application of s7.11 or s7.12 to development the subject of the agreement. As a general position, the Council will only agree to wholly or partially exclude the application of s7.11 or s7.12 in exceptional circumstances and proponents should assume that s7.11 and s7.12 will apply to the development. This is a matter to be negotiated between Council and a proponent having regard to the circumstances of the case.

Where the application of s7.11 of the Act is not excluded by a planning agreement, the Council will generally not agree to a provision allowing benefits under the agreement to be taken into consideration in determining a development contribution under section 7.11.

2.12 Implementation Requirements

In most circumstances, the Council will require that VPAs include an implementation plan which sets out:

- a) the timetable for the fulfilment of obligations under the VPA;
- b) the design, technical specification and standard of any work required by the VPA to be undertaken;
- c) the manner in which ownership of land or other property to be transferred to Council;
- d) the manner in which a material public benefit is to be made available for its public purpose; and
- e) a warranty period for work, materials, buildings and any other property provided. These warranties must be for a minimum of 12 months for materials and services such as electrical works and 15 years for structural items.

2.13 Probity

To ensure that the consideration of any VPA by Council is fair, transparent and is directed at achieving material public benefits in an appropriate manner Council will:

- a) ensure that its consideration of VPAs is consistent with this Policy;
- b) comply with the Council's Code of Conduct;
- c) inform proponents about the Council's Statement of Business Ethics;
- d) ensure that its communities understand how VPAs operate and that Council will assess applications objectively;
- e) notify VPAs to ensure they are open and transparent;
- f) ensure that modifications to approved development are subject to the same scrutiny as the original development;
- g) take every step to ensure that conflicts of interest are identified and addressed to the greatest extent possible (for example, it may be appropriate to have assessments undertaken by independent third parties where Council has an interest in the VPA);
- h) ensure that appropriate probity mechanisms are in place;
- i) ensure that Councillors and Council staff understand their roles;
- j) ensure appropriate delegations and separation of roles and responsibilities within Council, including, but not limited to, the following:
 - i. the Councillors must not be involved in the preparation or negotiation of any VPA but will ultimately be responsible for determining the VPA as part of their duties as Councillors;
 - ii. a Council officer with appropriate delegated authority will be involved in the preparation or negotiation of VPAs on behalf of Council in accordance with this Policy;
 - iii. the Council will, in all cases, ensure that Council staff with key responsibilities in assessing or providing advice on development applications (or ensuring compliance), do not have a

role in the assessment of the commercial aspects of the VPA nor on the conditions of the VPA except where advice is required on matters relating to the conditions of consent for a particular proposal;

- iv. Council may involve an independent person(s) to facilitate or otherwise participate in the consideration of a VPA proposal, particularly where this will lead to a better outcome;
- v. Council will ensure that all discussions with a proponent and their consultants are:
 - a. sufficiently documented;
 - b. held at Council offices;
 - c. properly minuted; and
 - d. stored in Council's records management system;
- vi. Council will ensure that Council staff involved in VPA considerations are free from conflicts of interest; and
- vii. where Council has a commercial stake in development the subject of a VPA, it will take appropriate steps to ensure that it avoids a conflict of interest between its role as a planning authority and its commercial interest in the development consistent with the ICAC strategies for managing dual roles in its publication Corruption Risks in the NSW development approval processes: Position Paper (September 2007).

2.14 Public Notification Period

The Act provides that a VPA cannot be entered into, amended or revoked unless public notice has been given and a copy of the proposed VPA, amendment or revocation has been made available for inspection for a period of not less than 28 days. Council reserves the right to extend the exhibition period.

Council will re-notify and make available for inspection a proposed VPA, amendment or proposal to revoke an existing VPA if, in Council's opinion, a material change is made to the terms of the VPA, amendment or proposal to revoke an existing VPA (or the application to which the VPA relates) after it has been previously notified. The period of re-notification is at the discretion of the Council.

2.15 Council's costs

Council will generally require a VPA to make provision for payment by the proponent of Council's reasonable costs of and incidental to:

- a) negotiating, preparing, advertising and entering into the VPA (including but not limited to legal fees, consultant costs, staffing costs);
- b) registration of the VPA on the title of any relevant land; and
- c) enforcing the VPA.

The amount to be paid by the proponent will be determined by negotiation, depending on the circumstances of the case. However as a general rule, Council considers that it is fair and reasonable that the proponent pay the whole of Council's costs.

Council may also require the VPA to make provision of for a development contribution by the developer towards the ongoing administration of the agreement.

2.16 Monitoring and Review

Council will routinely monitor the performance of the proponent's obligations under a VPA and report them in accordance with the Act. The proponent is required to, at its own cost, report periodically to Council on its compliance with obligations under the VPA. The frequency of the proponent's report to the Council will be specified in the VPA.

VPAs must contain a provision establishing a mechanism under which the VPA is periodically reviewed. This will include a review of the proponent's performance under the VPA and obligations specified in the implementation plan referred to in clause 2.12 above.

2.17 Modification and Discharge of Obligations

Council may agree to a provision in a VPA permitting the proponent's obligations under the VPA to be modified or discharged in the following circumstances:

- a) the proponent's obligations have been fully carried out in accordance with the VPA, or
- b) the development consent to which the VPA relates has lapsed, or
- c) the development consent to which the VPA relates has been modified to such an extent that the obligations may not be appropriate, or
- d) the performance of the VPA has been frustrated by an event or events beyond the reasonable control of the parties, or
- e) the proponent has fully and completely assigned the proponent's interest under the VPA in accordance with its terms, or
- f) other material changes affecting the operation of the VPA have occurred, or
- g) Council and the proponent otherwise agree to the modification or discharge of the VPA.

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

2.18 Assignment and dealings by the proponent

Council will not permit the assignment of any or all of the proponent's rights or obligations under the VPA, nor will Council permit any dealing in relation to any part or the whole of the land the subject of the VPA unless:

- a) the proponent has, at no cost to Council, first procured the execution by the person with whom it is dealing of all necessary documents in favour of Council by which that person agrees to be bound by the VPA as if they were a party to the original VPA, and
- b) if the proposed dealing involves a mortgage, charge or other encumbrance in relation to the party's right, title and interest in the land, such documents provide for a VPA by the person to the effect that they, and any receiver appointed by them, will not enjoy rights greater than those of that party, and
- c) the party is not in breach of the VPA.

This does not affect the operation of any of the other requirements of the VPA.

2.19 Provision of Security under a VPA

VPAs are to make provision for security to cover the proponent's obligation under the VPA. The form of security will generally be an unconditional bank guarantee from an Australian bank in favour of Council to the full value of the proponent's obligation under the VPA and on terms otherwise acceptable to Council. In addition to the provision of security, the Council may link obligations under a VPA to the issue of certificates under Part 4A of the Act.

2.20 Notations on Certificates under s10.7 of the Act

VPAs are to contain an acknowledgement by the proponent that Council will make a notation under section 10.7(5) of the Act about the VPA on any certificate issued under section 10.7(2) of the Act relating to the land the subject of the VPA or any other land.

2.21 Registration of VPAs

All VPAs are to:

- be registered on the title to the land to which they relate; and
- contain a provision requiring the proponent to provide Council with all documents necessary to register the agreement pursuant to Section 7.6 of the Act, within ten (10) days after execution of the agreement.

The Council will only sign a VPA if the proponent has provided the Council with the written agreement of each person with an estate or interest in the land in a form sufficient to effect the registration of the VPA at Land and Property Information. Council will attend to the registration of the agreement at the cost of the proponent.

2.22 Dispute Resolution

VPAs are to provide for mediation of disputes between the parties to the VPA before the parties may exercise any other legal rights in relation to the dispute.

2.23 Variation to Development Standards

Variation to development standards as part of a VPA will not be supported by Council unless Council is of the opinion that the tests within Clause 4.6 of Coffs Harbour Local Environmental Plan 2013 are satisfied and the proposed VPA addresses the matters specifically required to be addressed under that clause in relation to the dispensation sought.

3 Definitions

Act means the Environmental Planning and Assessment Act 1979.

Application means a development application or application for instrument change.

Council means Coffs Harbour City Council.



Development application has the same meaning as in the Act.

Development contribution means the kind of provision made by a proponent under a VPA, being a monetary contribution, the dedication of land free of cost, the provision of a material public benefit or a combination of these.

Explanatory note means a written statement that summarises the objectives, the nature and effect of the proposed VPA, amendment or revocation, and contains an assessment of the merits of the proposed VPA, an amendment or revocation including the impact (positive or negative) on the public or any relevant section of the public.

Instrument change means a change to an environmental planning instrument to facilitate a development the subject of a planning agreement.

Material Public Benefit means public benefit that is considerable, significant or substantial that would fairly and reasonably address the impacts of particular development on surrounding land or the wider community.

Planning authority has the same meaning as defined in the Act.

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

Planning note means the Practice Note on Planning Agreements published by the Department of Infrastructure Planning and Natural Resources (July 2005).

Planning obligation means an obligation imposed by a VPA on a proponent requiring the proponent to make a development contribution.

Proponent is a person who has sought a change to an environmental planning instrument (which includes the making, amendment or repeal of an instrument (s7.4(11)), or who has made or proposes to make a development application, or who has entered into an agreement with or is otherwise associated with such a person.

Public include a section of public.

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

Public purpose is defined in s7.4(2) of the Act to include the provision of, or the recoupment of the cost of providing public amenities and public services, affordable housing, transport or other infrastructure. It also includes the funding of recurrent expenditure relating to such things as the monitoring of the planning impacts of development and the conservation or enhancement of the natural environment.

Regulation means the Environmental Planning and Assessment Regulation 2000.

Voluntary Planning Agreement (or VPA) has the same meaning as defined in the Act.

4 Key Responsibilities

Who has key responsibilities for the policy – and what are those responsibilities?

Position	Directorate	Responsibility
Mayor	Council	To lead Councillors in their understanding of, and compliance with this policy.
General Manger	Executive	To lead staff (either directly or through delegated authority) in their understanding of, and compliance with this policy.
Directors	All Directorates	To communicate, implement and comply with this policy.
All Council Officials	Council	To abide by and comply with this policy when considering a VPA offer through the Part 3 and Part 4 planning processes.

5 References

- Environmental Planning and Assessment Act 1979
- Environmental Planning and Assessment Regulation 2000
- Local Government Act 1993
- Local Government (General) Regulation 2005
- The Roads Act 1993
- The Roads Act 2008
- Native Vegetation Act 2003
- Native Vegetation Regulation 2013
- Threatened Species Conservation Act 1995
- Threatened Species Conservation (Biodiversity Banking) Regulation 2008
- Threatened Species Conservation Regulation 2010
- Practice Note on Planning Agreements, Department of Infrastructure Planning and Natural Resources (July 2005).
- Corruption Risks in the NSW development approval processes: Position Paper (September 2007).

6 Details of Approval and revision

- **Approval date: 28/06/2018**
- **Responsible Section: N/A**
- **Superseded policies/procedures:**
- **Next review date: 28/06/2022**

Table of amendments

Amendment	Authoriser	Approval ref	Date

7 Appendices

- Attachment A – Potential Public Benefits
- Attachment B – Voluntary Planning Agreement Template
- Attachment C - Explanatory Note Template

7.1 Attachment A – Potential Public Benefits

Possible requirements:

The following table lists examples of public benefits that VPAs may seek to achieve. The list is not exhaustive and proponents are encouraged to discuss other public benefits with the Council.

<p>Infrastructure</p>	<p>Accessibility improvements – accessible parking, kerb ramps, modifications to public buildings or areas</p> <p>Roads – design and construction</p> <p>Open space – parks, public places, embellishment</p> <p>Drainage and stormwater controls</p> <p>Traffic measures</p> <p>Transport outcomes</p> <p>Pedestrian and cycleway linkages and footpaths</p> <p>Telecommunication networks</p> <p>Power, water, gas</p> <p>Communications and information technology such as WIFI public space</p> <p>Bridges (vehicular and pedestrian)</p> <p>Flood management / mitigation works</p>
<p>Facilities</p>	<p>Community buildings – e.g. meeting rooms, halls, libraries</p> <p>Child care centres</p> <p>Public toilets</p> <p>Youth spaces</p> <p>Public leisure facilities</p> <p>Performance spaces</p> <p>Civic spaces</p> <p>Public car parking areas and commuter parking</p> <p>Bus shelters</p> <p>Family care facilities</p> <p>Sport, recreation and activity centres</p> <p>Business, research and creative industries incubator space and ancillary uses</p> <p>Affordable Housing</p>

<p>Public domain improvements</p>	<p>Paving – paths, streets and open space areas</p> <p>Plantings – streets and open space areas</p> <p>Furniture – seats, bins</p> <p>Banners</p> <p>Public art in streets, open space and other public domain space</p> <p>Kerbs and gutters</p> <p>Treatment and/or features in public places</p> <p>Facilities such as kiosk in parks and open spaces</p> <p>Turf</p> <p>Public leisure, sport and recreation facilities</p> <p>Environmental management improvements such as water and energy minimising devices</p> <p>Restoration and management of natural areas including beaches, bushland, creeks and lagoons</p> <p>Water quality devices</p> <p>Water bubblers, lockers and other amenities</p> <p>Signage including suburb identification, way finding, parking, interpretation and information signs for pedestrians, cyclists and vehicular users</p>
<p>Other</p>	<p>Monetary contributions</p> <p>Land, such as dedications for parks, facilities, pedestrian connectivity and new roads</p> <p>Contributions for the development of community facilities plans and cultural facilities plans</p> <p>Aboriginal site protection</p> <p>Other benefits in line with Council plans and strategies - including plans of management, flood plan management plans, traffic and transport plans, masterplans, development control plans, local environmental plans and the management plan</p> <p>Maintenance/Rehabilitation in perpetuity – e.g. pest control and bush regeneration</p> <p>Other public benefits that provide a positive planning outcome for the people of Coffs Harbour and meet the objectives of the Act</p>

7.2 Attachment B – Voluntary Planning Agreement Template Planning Agreement

PARTIES

Coffs Harbour City Council Corner Coff and Castle Streets, Coffs Harbour, New South Wales (Council)

And

of ##, (Proponent)

BACKGROUND

(For Development applications)

- A. On, ##, the Proponent made a Development Application to Council for Development Consent to carry out the Development on the Land.
- B. That Development Application was accompanied by an offer by the Proponent to enter into this Agreement to make Development Contributions towards the Public Facilities if that Development consent was granted.

(for changes to Environmental Planning Instruments)

- C. A. On, ##, the Proponent made an application to Council for the Instrument Change for the purpose of making a Development Application to Council for Development Consent to carry out the Development on the Land.
- D. B. The Instrument Change application was accompanied by an offer by the Proponent to enter into this Agreement to make Development Contributions towards the Public Facilities that Development Consent was granted.
- E. C. The Instrument Change was published in NSW Government Gazette No. ## on ## and took effect on ##.
- F. D. On, ##, the Proponent made a Development Application to 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 Agreement is a planning agreement governed by Subdivision 2 of division 7.1 of Part 7 of the Act.

2 Application of this Agreement

(Specify the land to which the Agreement applies and the development to which it applies)

3 Operation of this Agreement

(Specify when the Agreement takes effect and when the Parties must execute the Agreement)

4 Definitions and interpretation

4.1 In this Agreement the following definitions apply:

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

Dealing, in relation to the Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the Land.

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.

GST Law has the meaning given to that term in A New Tax System (Goods and Services Tax) Act 1999 (Cth) and any other Act or Regulation relating to the imposition or administration of the GST.

Instrument Change means ## Local Environmental Plan ##.

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

Material Public Benefit means public benefit that is considerable, significant or substantial that would fairly and reasonably address the impacts of particular development on surrounding land or the wider community.

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

Public Facilities means ##.

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

4.2 In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:

- a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.
- b) A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.
- c) If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.
- d) A reference in this Agreement to dollars or \$ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.
- e) A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.
- f) A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.
- g) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.

- h) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.
- i) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.
- j) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.
- k) References to the word 'include' or 'including' are to be construed without limitation.
- l) A reference to this Agreement includes the agreement recorded in this Agreement.
- m) A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.
- n) Any schedules and attachments form part of this Agreement.

5 Development Contributions to be made under this Agreement

(Specify the development contributions to be made under the agreement; when they are to be made; and the manner in which they are to be made).

6 Application of the Development Contributions

(Specify the times at which, the manner in which and the public purposes for which development contributions are to be applied)

7 Application of s7.11 and s7.12 of the Act to the development

- 7.1 This Agreement does not exclude the application of section 7.11, section 7.12 and section 7.24 of the Act from the Development. The Parties acknowledge that either section 7.11 or section 7.12 will apply to the Development.
- 7.2 Development Contributions obtained by Council under this Agreement are not to be taken into consideration if determining a development contribution under section 7.11 of the Act with respect to the Development.

8 Registration of this Agreement

- 8.1 The Proponent acknowledges and agrees that Council will register this Agreement on the Land under section 7.6 of the Act.
- 8.2 The Proponent warrants that it has obtained and provided to the Council all consents required for the registration of this Agreement on the title to the Land.
- 8.3 The Proponent do all things reasonably necessary to enable this Agreement to be registered pursuant to section 7.6 of the Act.
- 8.4 The Proponent must pay for Council's expenses including registration fees, legal costs and disbursements on an indemnity basis, for the registration of this Agreement.

9 Review of this Agreement

[Specify whether, and in what circumstances, the Agreement can or will be reviewed and how the process and implementation of the review is to occur]

10 Dispute Resolution

10.1 Notice of Dispute

If a party claims that a dispute has arisen under this Agreement (Claimant), it must give written notice to the other party (Respondent) stating the matters in dispute and designating as its representative a person to negotiate the dispute (Dispute Notice).

No party may start court proceedings (except for proceedings seeking interlocutory relief) in respect of a dispute unless it has first complied with this clause 10.

10.2 Response to Notice

Within 10 business days of receiving the Dispute Notice, the Respondent must notify the Claimant of its representative to negotiate the dispute.

10.3 Negotiation

The nominated representatives must:

- (1) meet to discuss the dispute in good faith within 5 business days after service by the Respondent of notice of its representative;
- (2) use reasonable endeavours to settle or resolve the dispute within 15 business days after they have met.

10.4 Further Notice if Not Settled

If the dispute is not resolved within 15 business days after the nominated representatives have met, either party may give to the other a written notice calling for determination of the dispute (Mediation Notice) by mediation under clause 10.5 or by expert determination under clause 10.6.

10.5 Mediation

If a party gives a Mediation Notice calling for the dispute to be mediated:

- (1) the Mediator will be agreed between the parties, or failing agreement within 5 business days of receipt of the Mediation Notice, either party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator;
- (2) the Mediator appointed pursuant to this clause 10.5 must:
 - (a) have reasonable qualifications and practical experience in the area of the dispute; and
 - (b) have no interest or duty which conflicts or may conflict with his function as mediator, he being required to fully disclose any such interest or duty before his appointment;
 - (c) conduct the mediation, including all preliminary steps and the giving of directions, in accordance with the mediation rules of the Institute of Arbitrators and Mediators Australia (NSW Chapter); and
 - (d) keep confidential all matters coming to his knowledge by reason of his appointment and performance of his duties;

- (3) the parties must within 5 business days of receipt of the Mediation Notice notify each other of their representatives who will be involved in the mediation;
- (4) the parties must:
 - (a) use reasonable endeavours to settle the dispute through mediation;
 - (b) cooperate in good faith with the Mediator and each other in the conduct of the mediation; and
 - (c) use reasonable endeavours to comply with all requests and directions reasonably given by the Mediator;
- (5) in relation to costs and expenses:
 - (a) each party will bear their own professional and expert costs incurred in connection with the mediation; and
 - (b) the costs of the Mediator will be shared equally by the parties unless the Mediator determines a party has engaged in vexatious or unconscionable behaviour in which case the Mediator may require the full costs of the mediation to be borne by that party.
- (6) the mediation will terminate on the earlier of:
 - (a) on [insert Business Days] after the date that the Mediation Notice was given; or
 - (b) on the date determined by the Mediator if the Mediator determines that the parties are unable to reach an agreement through mediation.

10.6 Expert Determination

If the dispute is not resolved under clause 10.3 or 10.5, the dispute may, by agreement between the parties, both acting reasonably having regard to the nature of the dispute, be resolved by expert determination, in which event:

- (1) the dispute must be determined by an independent expert in the relevant field:
 - (a) agreed upon and appointed jointly by Council and the Proponent; or
 - (b) in the event that no agreement is reached or appointment made within 30 business days, appointed on application of a party by the then current President of the Law Society of New South Wales;
- (2) the expert must be appointed in writing and the terms of appointment must not be inconsistent with this clause;
- (3) the determination of the dispute by such expert will be made as an expert and not as an arbitrator and will be in writing and contain the reasons for the determination;
- (4) the expert will determine the rules for the conduct of the process but must conduct the process in accordance with the rules of natural justice;
- (5) each party will bear its own costs in connection with the process and the determination by the expert together with an equal proportion of the expert's fees and costs; and
- (6) any determination made by an expert pursuant to this clause is final and binding upon the parties except where the determination is in respect of, or relates to, termination or purported termination of this agreement by any party, in which event the expert is deemed to be giving a non-binding appraisal and any party may commence litigation in relation to the dispute if it has not been resolved within 20 business days of the expert giving his or her decision.

10.7 Litigation

If the dispute is not finally resolved in accordance with this clause 10, either party is at liberty to litigate the dispute.

10.8 Continue to perform obligations

Each party must continue to perform its obligations under this Agreement, notwithstanding the existence of a dispute.

11 Security

(insert details of the security which the Proponent will provide for its Development Contributions, as required by s7.4(3)(g) – i.e. provision of bond or guarantee)

(insert circumstances when Council can call on the security)

12 Enforcement

12.1 Nothing in this Agreement prevents Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Agreement (including the breach of this Agreement by the Proponent) or any matter to which this Agreement relates.

12.2 Until such time as the Development Contribution has been paid in full the Proponent must:

- a) notify Council in writing of the name and contact details of any Certifying Authority to which it has applied for a Construction Certificate at the same time that such application is made;
- b) at the time it lodges any application for a construction certificate notify the Certifying Authority in writing of the existence and terms of this Agreement;
- c) procure and provide to Council a written acknowledgement from the Certifying Authority addressed to Council confirming that the Certifying Authority will not issue a Construction Certificate until Council provides written confirmation that the Development Contribution has been paid.

12.3 The Proponent acknowledges and agrees that Council has a caveatable interest in the Land from the date of Development Consent and shall be entitled to lodge and maintain a caveat on the title to the Land notifying Council's interest created by this Agreement.

12.4 The Proponent will upon execution of this Agreement deliver to Council a caveat in registrable form with the consent to caveat signed by the Proponent notifying Council's interest created by this Agreement together with a cheque in favour of Land & Property Information, NSW for the registration fee on the caveat.

12.5 Council will provide such written consents and registrable documents to the Proponent to enable the Land to be mortgaged provided that the mortgagee acknowledges Council's interest in the Land under this Agreement and agrees to the registration of this Agreement in accordance with its terms.

12.6 Upon registration of the Agreement on the title to the Land in accordance with clause 8 or payment of the Development Contribution to Council or surrender of the Development Consent, the Proponent will be entitled to withdrawal of the caveat.

13 Notices

- 13.1 Any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:
- Delivered or posted to that Party at its address set out below.
 - Faxed to that Party at its fax number set out below.
 - Emailed to that Party at its email address set out below.

Council

Attention: General Manager

Address: Cr Coffs and Castle Street, Coffs Harbour, New South Wales, 2450

Email: coffs.council@chcc.nsw.gov.au

Proponent

Attention:

Address:

Email:

- 13.2 If a Party gives the other Party 3 business days' notice of a change of its address or fax number, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.
- 13.3 Any notice, consent, information, application or request is to be treated as given or made at the following time:
- If it is delivered, when it is left at the relevant address.
 - If it is sent by post, 2 business days after it is posted.
 - If it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number
- 13.4 If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

14 Approvals and Consent

Except as otherwise set out in this Agreement, and subject to any statutory obligations, a Party may give or withhold an approval or consent to be given under this Agreement in that Party's absolute discretion and subject to any conditions determined by the Party. A Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.

15 Assignment and Dealings

Until the Development Contribution is paid in full, the Proponent cannot sell, transfer, assign, novate, charge, encumber or otherwise deal with the Land or attempt or purport to do so unless the Proponent:

- a) gives Council no less than ten (10) Business Days' notice in writing of the proposed sale, transfer, assignment, novation, charge, encumbrance or other dealing with its rights in respect of the Land;
- b) procures that any buyer, transferee, assignee or novatee promptly executes an Agreement in favour of Council whereby the buyer, transferee, assignee or novatee becomes contractually bound with Council to perform the Proponent's obligations under this Agreement;
- c) in the event of a proposed charge, mortgage, encumbrance or other dealing with the Land, provides to Council a bank guarantee unlimited in time from a bank and on terms acceptable to Council to secure the payment of the Development Contribution.

15 Costs

Council's costs of and incidental to the preparation and execution of this Agreement and any related documents and registration of same shall be borne by the Proponent.

16 Entire Agreement

This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with. No Party can rely on an earlier document, or anything said or done by another Party, or by a director, officer, agent or employee of that Party, before this Agreement was executed, except as permitted by law.

17 Further Acts

Each Party must promptly execute all documents and do all things that another Party from time to time reasonably requests to affect, perfect or complete this Agreement and all transactions incidental to it.

18 Governing Law and Jurisdiction

This Agreement is governed by the law of New South Wales. The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them. The Parties will not object to the exercise of jurisdiction by those courts on any basis.

19 Joint and Individual Liability and Benefits

Except as otherwise set out in this Agreement, any agreement, covenant, representation or warranty under this Agreement by 2 or more persons binds them jointly and each of them individually, and any benefit in favour of 2 or more persons is for the benefit of them jointly and each of them individually.

20 No Fetter

Nothing in this Agreement shall be construed as requiring Council to do anything that would cause it to be in breach of any of its obligations at law, and without limitation, nothing shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

21 Representations and warranties

The Parties represent and warrant that they have power to enter into this Agreement and comply with their obligations under the Agreement and that entry into this Agreement will not result in the breach of any law.

22 Severability

If a clause or part of a clause of this Agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Agreement, but the rest of this Agreement is not affected.

23 Modification

No modification of this Agreement will be of any force or effect unless it is in writing and signed by the Parties to this Agreement.

24 Waiver

The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another Party. A waiver by a Party is only effective if it is in writing. A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

25 GST

- 25.1 Unless otherwise indicated, all amounts payable by one party to the other party in relation to a supply under this Agreement have been calculated exclusive of any GST which may be imposed on the supply.
- 25.2 If any supply made under this Agreement is, or becomes, subject to GST, the party to whom the supply is made ("Recipient") must pay to the party making the supply ("Supplier"), as consideration, in addition to any consideration payable or to be provided elsewhere in this Agreement, subject to issuing a Valid Tax Invoice, an additional amount on account of GST, such amount to be calculated by multiplying the consideration by the applicable rate of GST.
- 25.3 Any amount in respect of GST payable under clause 25.2 must be paid to the Supplier immediately on receipt of the Valid Tax Invoice.
- 25.4 If any party is required to reimburse or indemnify the other party for a cost or expense ("Cost") incurred by the other party, the amount of that Cost for the purpose of this Agreement is the amount of the Cost incurred, less the amount of any credit for, or refund of, GST, which the party incurring the Cost is entitled to claim in respect of the Cost.
- 25.5 If GST is linked with the abolition or reduction of other taxes and charges, all amounts payable by the Recipient to the Supplier under this Agreement (excluding GST) must be reduced by the same proportion as the actual total costs of the Supplier (excluding GST) are reduced either directly as a result of the abolition or reduction of other taxes and charges payable by the Supplier or indirectly by way of any reduction in prices (excluding GST) charged to the Supplier. Both parties must also comply with Part VB of the Trade Practices Act 1974 (Cth).

Execution

Dated:

Executed as an Agreement:

Note: this explanatory note providing details on this Agreement may not be used to assist in construing this Agreement.

7.3 Attachment C - Explanatory Note Template

Clause 25E(1) of the Regulation requires that an explanatory note must accompany a VPA that:

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

Note: This template has been drafted for a proposed draft planning agreement, but applies equally to a proposed amendment or revocation of a VPA

Environmental Planning and Assessment Regulation 2000

(Clause 25E)

Explanatory Note

Proposed draft Planning Agreement

Under s7.4 of the Environmental Planning and Assessment Act 1979

- 1 Parties

Coffs Harbour City Council (Planning Authority)
(Planning Authority)
(Proponent)
- 2 Description of subject land
- 3 Description of proposed change to environmental planning instrument/development application
- 4 Summary of objectives, nature and effect of the proposed draft Planning Agreement
- 5 Timing of delivery of the public community benefit.

Note: Information is to be provided on the timing of delivery of the proposed benefits in relation to the issuing of construction, occupation or subdivision certificates.

- 6 The planning purposes served by the proposed draft Planning Agreement
- 7 How the proposed draft Planning Agreement promotes the objects of the Environmental Planning and Assessment Act 1979
8. How the proposed draft Planning Agreement promotes the public Interest
9. How the proposed draft Planning Agreement complies with and promotes guiding principles for Councils under Chapter 3 of the Local Government Act 1993
10. Whether the proposed draft Planning Agreement conforms with Council's capital works program
11. Whether the proposed draft Planning Agreement specifies that certain requirements of the agreement must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued.
12. Other Matters

Signed and Dated by All Parties