

Attachment B:
Draft
Planning Agreement Template
Byron Shire Council

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Notes (do not include first three pages)

OVERVIEW

This Draft Planning Agreement Template in accordance with s 93F and 93G of the Act [Part 5B Division 4 of the Act]. Whilst the Department of Planning's Planning Agreement Template has been used as a guide to the development of Byron Shire Council's Draft Template, it has been modified according to what the author understands to be legal best practice in the drafting of such contracts.

GENERAL NOTES

In the Draft Byron Planning Agreement Template, the following should be noted.

- Black text – original text of planning agreement templates;
- Strikethrough text (BLACK) – original text of PA Template deleted by JSA;
- Blue text – text added by JSA;
- Strikethrough text (BLUE) – alternative provision (Council will select one option);
- *Italics* indicates a defined term;
- Red text – added by JSA - indicates that text should be treated with caution due to drafting and/or legal issues. Whilst all care has been taken with drafting, a second legal opinion should be sought by Council.
- [Brown bracketed text] – having regard to provision on the Environmental Planning and Assessment Amendment Act 2008. This will need to be substituted upon gazettal of the Amendment Act.

CHECKLIST:

1. The planning agreement is made in the circumstances referred to in paragraphs (a) to (c) of s 93F(1) [reg 23 of the Regulation] and requires the developer to dedicate land free of cost, pay a monetary contribution, provide a material public benefit, or any combination of these, towards [public infrastructure or another] **public purpose**: s 93F(1) [s 116T(1)].

Note: see s 93F(2) for a non-exclusive list of matters taken to be a public purpose [see s 116C for a list of what includes 'public infrastructure', that is, public amenities and public services ('community infrastructure'), affordable housing and transport infrastructure. Note also that 'key community infrastructure' is defined at reg 31A. Council may make a planning agreement for such key community infrastructure without reference to the Minister, in accordance with s 116V of the Act. However, Ministerial approval must also be sought for Planning Agreements made in relation to other forms of public

- infrastructure and for additional community infrastructure not list as key community infrastructure].
2. The planning agreement **does not** require or allow anything to be done that, when done, would breach a provision in the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**): s 93F(10) [reg 22 (2)].
 3. The planning agreement provides whether it excludes (wholly or in part) or does not exclude the application of ss 94, 94A or 94EF [Part 5 B Divisions 2 and 3] to the development: s 93F(3)(d) [s 116W of the Act].
 4. Where the planning agreement does not exclude the application of s 94 [Part 5 B Divisions 2 and 3] to the development – the agreement provides whether benefits under the agreement **are or are not** to be taken into consideration in determining a development contribution under s 94: s 93F(3)(e) [s 116W of the Act].
 5. The planning agreement provides for a mechanism for the resolution of disputes: s 93F(3)(f) [reg 23 (1)(f) of the Regulation].
 6. The planning agreement provides for the enforcement of the agreement by suitable means, such as the provision of a bond or guarantee, in the event of a breach of the agreement by the developer: s 93F(3)(g) [reg 23 (1)(f) of the Regulation].
 7. If the planning agreement excludes the application of s 94 or 94A [Part 5 B Divisions 2 and 3] in respect of the development – has the consent authority for the development or the Minister been made a party to the agreement: s 93F(3A) [s 116W(1)]?
 8. If the planning agreement excludes s 94EF [Part 5 B Divisions 2 and 3] – has approval been obtained from the Minister or a development corporation designated by the Minister to give approvals under the subsection: s 93F(5A) [Part 5 B Divisions 2 and 3]?
 9. Where it intended that the planning agreement is to be registered under s 93H [reg 24 (1) of the regulations] -
 - a. If agreement relates to land under the *Real Property Act 1900* (NSW) (**RPA**) – each person who has a registered estate or interest in the land has agreed to the registration;
 - b. If the agreement relates to land not under the RPA – each person who is seised or possessed of an estate or interest in land has agreed to the registration.
 10. The planning agreement **does not** impose an obligation on a planning authority to grant development consent or exercise any function under the EP&A Act in relation to a change to an environmental planning instrument: s 93F(9) [reg 22 (1) of the Regulation].
 11. The notice requirements in s 93G [reg 25D of the Regulation] have been complied with.
 12. Planning Agreements should not require compliance with or restate obligations imposed by conditions of development consent (*Refer to DoP Practice Note P9*) [Not known if this will be obsolete if new PN is issued].

ADDITIONAL STEPS TO BE TAKEN:

1. Establish the capacity of the developer to enter into a planning agreement in respect of the land to which the agreement applies.

2. Obtain suitable means of enforcing the agreement, for example, by obtaining a bond or a guarantee in respect of the developer's obligations under the agreement (whether from the developer or another suitable person).
3. Make execution of the planning agreement a condition of consent.

ADDITIONAL DOCUMENTS TO INCLUDE WITH A PLANNING AGREEMENT:

NOTE: the following documents may be required in addition to the planning agreement:

1. Consents from all persons with estates or interests in land (by deed or annexed to the agreement)
2. Guarantee (by separate deed or incorporated in the agreement)
3. Special conditions
4. Explanatory note as per EP&A Regulation accompanies the DA (*Refer to DoP Practice Note P11*) [reg 25D(1)(b)of the Regulation]

SCHEDULE

A Land burdened by this Agreement Lot [INSERT] in Deposited Plan [INSERT] known as [INSERT]

B Development to which this Agreement applies Development described in DA [INSERT]

OR

~~**Change to environmental planning instrument to which this Agreement applies** Application 77/777~~

C Development contribution \$ [INSERT]

D Development contribution date dd/mm/yy

OR

E ~~Development contribution table (periodic payments)~~

Column 1	Column 2
\$ [INSERT]	dd/mm/yy
\$ [INSERT]	dd/mm/yy
\$ [INSERT]	dd/mm/yy
\$ [INSERT]	dd/mm/yy
\$ [INSERT]	dd/mm/yy
\$ [INSERT]	dd/mm/yy

OR

F ~~Development contribution table (completion of milestone event)~~

Column 1 – Nature of Public Infrastructure Contribution [Note: must be described with precision]	Column 2 – Contribution Due [Note: “completion” must be defined with precision and in a manner that does not permit evasion (e.g., occupancy certificate)]	Estimated Value
[INSERT] units each with a value of ...	Prior to issuing Occupation Certificate for Stage xx	
Land described as Lot XX of DP YYYY	Prior to issuing Construction Certificate for Stage yy	
\$ [INSERT]	Prior to issuing Construction Certificate for Stage zz	

G Application of development contribution

[describe the [public infrastructure or other] public purpose that will provided for by the development contribution that is the subject of this planning agreement: s 93F(2) [s 116T]]

PLANNING AGREEMENT

Parties

of ##, New South Wales (**Council**)

and

of ##, New South Wales (**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 towards the specified public infrastructure or other public purpose if that Development consent was granted.

[For Changes to Environmental Planning Instruments]

- A. On, ##, the Developer 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 Developer to enter into this Agreement to make Development Contributions towards the specified public infrastructure or other public purpose if that Development Consent was granted.
- C. The Instrument Change was published in NSW Government Gazette No. ## on ## and took effect on ##.
- D. On, ##, the Developer 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
 - 1.1 The Parties agree that this Agreement is a planning agreement governed by Subdivision 2 of Division 6 of Part 4 of the Act **[Part 5B Division 4 of the Act]**.
- 2 Application of this Agreement

~~[Drafting Note 2: Specify the land to which the Agreement applies and the development to which it applies]~~

2.1 This Agreement applies to the land described in Item A of the Schedule and the ~~change of environmental planning agreement or development application~~ described in Item B of the Schedule.

3 Operation of this Agreement

~~[Drafting Note 3: Specify when the Agreement takes effect and when the Parties must execute the Agreement]~~

3.1 This Agreement is made and takes effect on the date that it is executed by the *parties*.

3.2 Execution of the Agreement forms a condition of development consent.

4 Definitions and interpretation

4.1 In this Agreement the following definitions apply:

Act means the *Environmental Planning and Assessment Act 1979 (NSW)* [*Environmental Planning and Assessment Amendment Act 2008 (NSW)*].

Bank means a bank as defined in the Banking Act 1959, the Reserve Bank or a State bank.

Cheque means a cheque that is not post-dated or stale.

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

Development means the development described in Item B of the Schedule.

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 made pursuant to this Agreement.

Development Contribution Cheque means an unendorsed *cheque* made payable to the council and drawn on its own funds by –

- a *bank*; or

- a building society, credit union or other FCA institution as defined in the Cheques Act 1986;

that carries on business in Australia, or, if authorised by council, some other *cheque*.

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 ##.~~ the site described in Item A of the Schedule.

Normally means subject to any other provision of this agreement.

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

Public Facilities means ##.

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

Unconditional bank guarantee means a guarantee by a *bank* whereby the bank unconditionally undertakes to pay to council on demand any sum or sums in connection with this Agreement which may from time to time be demanded by council.

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.
- (o) If this Agreement requires any act, matter or thing is to be done but does not specify a time in which to do it, that act, matter or thing must be done within a reasonable time.

~~[Drafting Note 5: 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]~~

Manner of making development contributions

[Note: strikethrough the options that do not apply]

5.1 The Developer must pay Council the amount in Item C of the Schedule on or before the date in Item D of the Schedule and time is essential.

5.2 The Developer can pay Council in accordance with clause 5.1 only by giving a *development contribution cheque* to Council.

OR

5.3 The Developer must pay Council the amounts in Column 1 of Item E of the Schedule on or before the dates in Column 2 of Item E of the Schedule and time is essential.

5.4 The Developer can pay Council in accordance with clause 5.3 only by giving a *development contribution cheque* to Council.

OR

5.5 The Developer must *contribute* the thing described in Column 1 of Item F of the Schedule not more than 28 days after the occurrence of the event described in Column 2 of Item F of the Schedule.

5.6 For the purpose of clause 5.5, **contribute** means do all things necessary to cause legal and equitable title to pass to council free of any other interest whatsoever.

5.7 Council will be given proper and unburdened transfer of property where the development contribution is the form of public infrastructure or other public benefit other than a cash contribution.

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]~~

6.1 The *development contribution* is to be applied in accordance with Item G of the Schedule.

7 Application of s94 and s94A [Part 5B Divisions 2 and 3] of the Act to the Development

~~[Drafting Note 7: Specify whether and to what extent s94 and s94A apply to development the subject of this Agreement]~~

[Note: Example of total exclusion]

7.1 Section 94 and 94A [Part 5B Divisions 2 and 3] of the Act to not apply to the *land* and the *development*.

[Note: Example of part exclusion]

7.2 Section 94 and 94A [Part 5B Divisions 2 and 3] of the Act will be limited in their application to the *land* and the *development*, with contributions be provided under Part 5B Divisions 2 and/or 3] as specified in Schedule 1 of this Agreement.

[Note: Example of full application]

7.3 Section 94 and 94A [Part 5B Divisions 2 and 3] of the Act apply to the *land* and the *development* to the full extent of those sections.

8 Registration of this Agreement

~~[Drafting Note 8: Specify whether the Agreement is to be registered as provided for in s93H of the Act]~~

8.1 The *parties* agree that this Agreement is to be registered as provided for by s 93H [reg 24 (1) of the Regulations] of the Act.

8.2 The developer promises that it has done *all things necessary* to enable this Agreement to be registered under s 93H [reg 24 (1) of the Regulation] of the Act.

8.3 For the purpose of clause 8.2, **all things necessary** includes, but is not limited to, obtaining the express written consent to the registration of the Agreement from:

8.3.1 if the agreement relates to land under the Real Property Act 1900 – each person (including a *party* to this Agreement) who has an estate or interest in the land registered under that Act, or

8.3.2 if the agreement relates to land not under the Real Property Act 1900 – each person (including a *party* to this Agreement) who is seised or possessed of an estate or interest in the land, and

providing these to Council in appropriate form on the making of this Agreement.

8.4 The developer must not do any act, matter or thing after the making of this Agreement that would prevent the Agreement being registered under section 93H [reg 24 (1) of the Regulation] of the Act unless the developer obtains Council's express written consent to that act, matter or thing.

8.5 If, after the making of this Agreement, the developer becomes aware of any matter that would or might reasonably be expected to prevent Council from registering this Agreement under section 93H [reg 24 (1) of the Regulation] of the Act, it must

8.5.1 notify Council of the matter as soon as practicable, and

8.5.2 take all necessary steps to enable Council to register the Agreement as soon as practicable, including (but not limited to) obtaining and providing to council further express written consent to the registration of the Agreement from persons described in clauses 8.3.1 and 8.3.2.

8.6 For the purpose of clauses 8.3 and 8.5, time is essential.

8.7 [Guarantee]

9 Review of this Agreement

9.1 Periodic review of this Planning Agreement will occur as agreed between the parties to the Agreement and will involve the parties to the Agreement.

9.2 In respect of this Planning Agreement, review will be conducted [insert timeframe/dates/number of reviews as appropriate], with the review conducted and/or convened by Council, with appropriate notification to all parties.

10 Dispute Resolution

~~[Drafting Note 10: Specify an appropriate dispute resolution process]~~

10.1 In the event of a dispute between the parties to this Agreement, the following dispute resolution process will apply in accordance with the provisions of the *Commercial Arbitration Act 1984* (NSW):

- The Law Society of New South Wales Rules for the Conduct of Commercial Arbitrations; or

- The Law Society of New South Wales Expedited Commercial Arbitration Rules.

10.2 The Rules to be applied are set out at Schedule 2.

11 Enforcement

~~[Drafting Note 11: Specify the means of enforcing the Agreement]~~

11.1 The *parties* agree that the developer must execute an *appropriate guarantee* in favour of council on the making of this Agreement.

11.2 Clause 11.1 is an essential term.

11.3 For the purpose of clause 11.1, a guarantee is an **appropriate guarantee** if:

11.3.1 It is an *unconditional bank guarantee*, or

11.3.2 It is some other guarantee and council attaches to this Agreement its express written consent to that other guarantee, and

11.3.3 It secures in full the performance of the developer's obligations, promises and warranties under this Agreement.

12 Notices

12.1 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:

- (a) Delivered or posted to that Party at its address set out below.
- (b) Faxed to that Party at its fax number set out below.
- (c) Emailed to that Party at its email address set out below.

Council

Attention: ##

Address: ##

Fax Number: ##

Email: ##

Developer

Attention: ##

Address: ##

Fax Number: ##

Email: ##

- 12.2 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.
- 12.3 Any notice, consent, information, application or request is to be treated as given or made at the following time:
- (a) If it is delivered, when it is left at the relevant address.
 - (b) If it is sent by post, 2 business days after it is posted.
 - (c) 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.
- 12.4 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.
- 12.5 [This Agreement will be publicly notified in accordance with s 93G of the Act \[reg 25D of the Regulation\].](#)

13 Approvals and consent

- 13.1 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.
- 13.2 A Party is not obliged to give its reasons for giving or withholding consent or for giving consent subject to conditions.
- 13.3 [For the avoidance of doubt, this Agreement does not require or allow anything to be done that, when done, would breach a provision of the Act, and in construing any provision of this Agreement a construction that is consistent with the Act is to be preferred to one that is inconsistent: s 93F\(10\) \[reg 22 \(2\) of the Regulation\].](#)

14 Assignment and Dealings

[*Drafting Note 14*: Specify any restrictions on the Developer's dealings in the land to which the Agreement applies and the period during which those restrictions apply]

15 Costs

15.1 Unless otherwise specified, the costs of negotiating, preparing, executing, stamping and registering the Agreement will be shared equally between the parties to the Agreement.

15.2 Cost recovery will be based on reasonable charges in accordance with the industry standard for such charges, and will be agreed as far as practicable in the initial stages of negotiation.

16 Entire agreement

16.1 This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with.

16.2 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

17.1 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

18.1 This Agreement is governed by the law of New South Wales.

18.2 The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them.

18.3 The Parties will not object to the exercise of jurisdiction by those courts on any basis.

19 Joint and individual liability and benefits

19.1 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

20.1 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

21.1 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

22.1 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.

22.2 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

23.1 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

24.1 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.

24.2 A waiver by a Party is only effective if it is in writing.

24.3 A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given.

24.4 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 If any Party reasonably decides that it is liable to pay GST on a supply made to the other Party under this Agreement and the supply was not priced to include GST, then recipient of the supply must pay an additional amount equal to the GST on that supply.

Execution of Planning Agreement No XXXXXX of 200X

Dated: ##

Executed as an Agreement: ##

On behalf of the Council:

The seal of Byron Shire Council was affixed in accordance with a resolution passed at a duly convened meeting held on ## in the presence of:

General Manager

Mayor

On behalf of the Developer:
