



**BYRON SHIRE COUNCIL**

**DRAFT POLICY NO**

**PLANNING AGREEMENTS POLICY**

**INFORMATION ABOUT THIS DOCUMENT  
(INTERNAL USE ONLY)**

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<b>Related Legislation</b>	Environmental Planning and Assessment Act 1979 Environmental Planning and Assessment Amendment Act 2008
<b>Related Policies</b>	
<b>Related Procedures/ Protocols, Statements, documents</b>	Planning Agreement Procedure #770771 Planning Agreement Template #869401 Department of Planning Practice Note 19 July 2005 #775090 for Template Condition of Development Consent and Template Explanatory Note

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## **Editorial Comment**

Note that this Policy has been prepared with alternative clauses due to the assent of the Environmental Planning and Assessment Act 2008 on 18 June 2008. However, as there is no date for gazettal, this Policy has been framed to take into account the existing legislative regime as well as that which will apply when the Act is gazetted.

Alternative clauses are noted as following:

- 'BLUE' script shows clauses that would apply under the current legislative regime (as at 9 July 2008). These will be superseded when the Amendment act is gazetted, and replaced with alternative provision shown in 'RED'.
- ['RED'] (marked up and bracketed changes) show provision that would apply in the event that the Amendment Act is gazetted.
- 'BLACK' text shows non-contentious provisions



- [Community Infrastructure] Has the same meaning as in section 116C of the Act, being public amenities and public services as prescribed in cl 31A of the Regulation, but does not include water supply and sewerage services].
- Development application Has the same meaning as in the Act
- Development contribution Means the kind of provision made by a developer pursuant to section 94 [Part 5B, Division 2 section 116G and 116H] of the Act or under a Planning Agreement [pursuant to Part 5B, Division 4 section 116T of the Act], being a monetary contribution, the dedication of land free of charge or the provision of a material public benefit
- [Developer Contributions Plan] Means an adopted plan of Council made in accordance with [Part 5B, Division 2 section 116G and 116H] section 94 of the Act
- LEP Amendment Means a change to a local environmental planning instrument to enable a development application to be made to carry out development (rezoning)
- 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. Benefit to the community greater than the steps taken to mitigate the impact of the development
- [Public Infrastructure] Has the same meaning as in section 116C of the Act, being public amenities and public services, affordable housing and transport infrastructure including related

capital, recurrent, research and monitoring costs, but does include water supply or sewerage services].

- [Planning Agreement] Has the same meaning as in section 116T(1) of the Act, being a voluntary agreement between one or more planning authorities and the developer under which the developer is required to provide land free of cost, pay a monetary contribution, or provide any other material public benefit, or any combination of them, to be used for or applied toward the provision of public infrastructure or another public purpose].
- Planning obligation Means an obligation imposed by a Planning Agreement on a developer requiring the developer to make a development contribution
- Practice note Means the Practice Note on Planning Agreements published by the then Department of Infrastructure, Planning and Natural resources (July 2005). [Insert new Practice Note when produced].
- Public Includes sections of the public
- Public benefit Is the benefit enjoyed by the public as a consequence of a development contribution
- Public purpose Includes but is not limited to those items listed in section 93F(2) [section 116C] of the Act.
- Regulation Means the *Environmental Planning and Assessment Regulation 2000* [Amendment of the *Environmental Planning and Assessment Regulation 2000*]

#### **4 POLICY STATEMENT**

This policy is made in accordance with the *Environmental Planning and Assessment Amendment (Development Contributions) Act 2005*, which introduced a statutory framework through which developers can voluntarily offer to enter a contract with Council (a 'Planning Agreement'). Under a Planning Agreement, a developer may be required to dedicate land free of cost, pay a monetary contribution or provide any other material benefit or any combination of them toward [public infrastructure or another] public purpose under section 93 F(2) [Part 5B Division 4] of the Act.

Planning Agreements will operate in addition to Section 94 contributions, though such an Agreement may be taken into account in the calculation of a Section 94 contribution. Any reduction or replacement of Section 94 contributions ordinarily payable will be entirely at Council's discretion. [Planning Agreements will operate in addition to developer contributions required under section 116G and section 116H of the Act, though such an Agreement may be taken into account in any limitations to or exclusions of contributions payable under section 116G. Any such limitation or exclusion of Section 116G contributions ordinarily payable will be entirely at Council's discretion]. Any contribution under a Planning Agreement will be in addition to contributions required under Section 64 of the Act.

Byron Shire Council's Planning Agreement framework consists of the following:

- a) The provisions of Subdivision 2 of Division 6 of Part 4 [Part 5B, Division 4] of the Act;
- b) The provisions of Division 1A of Part 4 [Schedule 1 Part 3] of the Regulation, and
- c) This Policy

This Policy sets out Council's preferred position in relation to the development and implementation of Planning Agreements as to ensure an efficient, fair, transparent and accountable process. Although the Policy is not legally binding, it is intended that all persons dealing with Council in relation to Planning Agreements will follow this Policy to the fullest extent.

This Policy will be periodically reviewed and/or updated as appropriate. Any updates may cover additional matters to those covered in this Policy or provide more detailed information or guidance on specific matters covered in this Policy.

## 5 POLICY PROVISIONS

### 5.1 Circumstances in which Byron Shire Council may consider entering or not entering into a Planning Agreement.

Planning Agreements may be used in a wide variety of planning circumstances to achieve many different planning outcomes. Planning Agreements may be proposed in connection with an LEP amendment or a development application. However, in accordance with the legislation, Council has complete discretion whether to enter into a Planning Agreement [in relation to 'key community infrastructure' as set out at cl 31A of the Regulation. Planning Agreements made in relation to a public benefit other than for key community infrastructure also require the approval of the Minister in accordance with section 116V(1) of the Act.]

[In seeking ministerial approval, Planning Agreements that include the provision of contributions toward additional community infrastructure and public infrastructure (excluding 'key community infrastructure') will provide information to the Minister in accordance with cl 31B of the Regulation. This includes a business plan demonstrating the feasibility of funding and timing, and an independent report that assesses the Planning Agreement against key considerations, set out in section 116D of the Act (see cl 5.3.2 below)].

Council may consider negotiating a Planning Agreement with a developer to secure a contribution toward [public infrastructure or another} a public purpose [in accordance with section 116C(2)]. This includes but is not limited to any of the following:

- (a) the provision of (or the recoupment of the cost of providing) public amenities or public services (as defined in Clause 5.4 below), affordable housing, and transport or other infrastructure relating to land; [the provision, extension and augmentation of (or the recoupment of the cost of providing, extending or augmenting) public infrastructure including but not limited to public amenities and public services, affordable housing and transport infrastructure per section 116C of the Act]; and
- (b) the funding of recurrent expenditure (refer to 5.10) relating to the provision of public amenities or public services, affordable housing or transport or other infrastructure, [the funding of recurrent expenditure relating to the provision, extension and augmentation of public infrastructure]; and

- (c) the monitoring of the planning impacts of development, [the conservation or enhancement of the natural environment]; and
- (d) the conservation or enhancement of the natural environment. [any action of a planning authority in connection with the exercise of any statutory function under the Act, including the carrying out of any research or investigation and the preparation of any report, study or submission].

Council will consider contributions toward the following:

- a) Compensation for the loss of, or damage to, a public amenity or service (as defined in Clause 5.4 below), resource or asset caused by the development through its replacement, substitution, repair or regeneration;
- b) Meeting the demands created by the development for new public infrastructure, amenities and services, not otherwise identified in Council's Developer Contributions Plan;
- c) Addressing a deficiency in the existing provision of public facilities in the Byron Shire;
- d) Achieving recurrent funding in respect of public facilities;
- e) Prescribing inclusions in the development that meet specific planning objectives of Council;
- f) Securing planning benefits for the wider community.

Whilst a wide range of public purposes will be considered, Byron Shire Council would be most likely to consider Planning Agreements that include the following benefits:

- a) Infrastructure listed in the Works Programs of Council's adopted Development Contributions Plan, provided there are no resulting adverse impacts on Council's adopted Development Contributions Plan or its implementation;
- b) Affordable housing; and
- c) Environmental repair and enhancement.

Planning Agreements may be used in a wide range of circumstances, however, it is important to identify situations that may prohibit Council from considering entering a Planning Agreement and/or make a proposed Planning Agreement undesirable.

It is noted that any contribution under a Planning Agreement will be in addition to contributions required under Section 64 of the Act.

Council will not consider entering a Planning Agreement in the following circumstances:

- a) Where the suspicion may arise that an LEP amendment or development consent can be bought by the highest bidder via a Planning Agreement;
- b) When the Planning Agreement incorporates or suggests an obligation for Council to grant consent to the application relating to the Planning Agreement;
- c) Where a breach of the EP&A Act or any other Act may result from the provisions of a Planning Agreement;
- d) Where Council has a direct stake in the development;
- e) When a development is unacceptable on planning grounds, that is, the contribution toward the public purpose offered by the developer in a Planning Agreement will not make an unacceptable development acceptable;
- f) When in Council's assessment the interests of individuals or interest groups outweigh the public interest;
- g) When it could be considered that Council is improperly relying on its statutory position to extract unreasonable public benefits from a developer via a Planning Agreement;
- h) When a proposed Planning Agreement will prejudice the timing or manner of the provision of any particular facility or service identified in Council's adopted Developer Contributions Plan;
- i) When a proposed public benefit would be a matter which would be required pursuant to a condition imposed under s80A of the Act in any event.

## **5.2 Council's strategic objectives for the use of Planning Agreements**

Byron Council strategic objectives with respect to the use of Planning Agreements are as follows::

- a) To provide an additional and more flexible development contributions system for Council toward a public purpose in accordance with [section 93F \[Part 5B Division 4\]](#) of the Act,
- b) To supplement, but not replace, the application of [Section 94 and Section 94A \[section 116G and section 116H\]](#) of the Act to the development, except where this is limited or reduced at the discretion of Council;
- c) To give all stakeholders in the development process greater involvement in determining the type, standard and location of contributions made toward a public purpose including public facilities and other public benefits;
- d) To allow the community to participate in measures that affect the redistribution of the costs and benefits of development in order to realise community preferences for the provision of public benefits;

- e) To adopt innovative and flexible approaches to the provision of infrastructure in a manner that is consistent with Council's Management Plan and adopted Developer Contributions Plan;
- f) To provide or upgrade infrastructure to appropriate levels that reflect and balance environmental standards, community expectations and funding priorities;
- g) To provide certainty for the community, developers, and Council in respect to infrastructure and development outcomes; and
- h) To apply sustainability principles in relation to all forms of development including the precautionary principle, intergenerational equity principle and principles of ecologically sustainable development.

### **5.3 Considerations for Planning Agreements**

#### **[5.3.1 Key Considerations for Planning Agreements under section 116D of the Act**

Council will apply the following key considerations in the development of Planning Agreements in accordance with section 116D and section 116U of the Act:

- a) Can the public infrastructure that is proposed be provided within a reasonable timeframe?
- b) What will be the impact on the affordability of the proposed development?
- c) Is the proposed development contribution based on a reasonable apportionment between existing demand and new demand for public infrastructure to be created by the proposed development to which the contribution relates?
- d) Is the proposed development contribution based on a reasonable estimate of the cost of the proposed public infrastructure?
- e) Are the estimates of demand for each item of public infrastructure reasonable?]

#### **5.3.2 Desirability Test to be applied to all Planning Agreements**

Council will also apply the following test to all proposed Planning Agreements in order to assess the desirability of a given Agreement:

- a) Is the proposed Planning Agreement directed towards an identified [public infrastructure or other] public purpose including those identified in section 93F(2) [section 116C] of the Act having regard to its statutory planning controls and other adopted planning policies and the circumstances of the case?
- b) Does the proposed Planning Agreement provide for a reasonable means of achieving the relevant [public infrastructure or] public purpose?
- c) Does the Planning Agreement provide for public benefits that are not wholly unrelated to development?

- d) Will the Planning Agreement produce outcomes that meet the general values and expectations of the community and protect the overall public interest?
- e) Does the proposed Planning Agreement promote Council's strategic objectives in relation to the use of Planning Agreements set out in Clause 4 above, and in relation to the provision of contributions toward a public purpose identified as of strategic importance set out in section 5.1 above?
- f) Does the proposed Planning Agreement conform with this Policy?
- g) Does the proposed Planning Agreement conform to the fundamental principles set out in 5.2 above governing Council's use of Planning Agreements?
- h) Are there any relevant circumstances that may operate to preclude the Council from entering the proposed Planning Agreement?
- i) Does the proposed Planning Agreement promote sustainability in terms of all key elements being ecology, society, economy, governance and human habitat?
- j) It is proposed that the Planning Agreement be registered pursuant to [section 93H of the Act \[cl 24 of the Regulation\]](#) and is it able to be registered?
- k) Does the Planning Agreement contribute toward protecting the community against planning harm?

**5.4 Application of [Section 94 and Section 94A \[section 116 G and 116H\]](#) to a development to which a Planning Agreement relates**

Council's adopted Development Contribution Plan is an important tool of Council to fund vital infrastructure in response to development. Established over a number of years, it identifies the infrastructure funding priorities in Byron Shire. Contributions made by developers under the Plan are used to fund Council infrastructure and facilities including the following [\[key community infrastructure per cl 31A of the Regulation\]](#):

- a) Local roads;
- b) Local bus facilities;
- c) Local parks;
- d) Local sporting, recreational or cultural facilities and local social facilities (being community and child care centres and volunteer rescue and volunteer emergency services facilities);
- e) Local car parking facilities;
- f) Drainage and stormwater management works;
- g) Land for any community infrastructure (except land for riparian corridors);

- h) District infrastructure of the kind referred to in paragraphs a) to e) above but only if there is a direct connection with the development to which the contribution relates.

Planning Agreements can offer more flexibility in the nature and timing of the contributions a developer can make, and include contributions toward [public infrastructure and other] public purposes not normally required as section 94 contributions, [identified as key community infrastructure in cl 31A of the Regulation] e.g. Affordable Housing; recurrent funding related to [public infrastructure of other] public purposes. Planning Agreements thus act in addition to contributions requirements under Council's Developer Contributions Plan and not as a replacement. In particular, they will be used to augment Council's adopted Developer Contributions Plan as appropriate, and/or operate in relation to developments not included under Council's adopted Contributions Plan (e.g. in the case of larger rezonings).

As such, Council's section 94 [section 116 G] program will continue to operate in the usual way. However, Byron Shire Council may agree to take into account the provision of a Planning Agreement in determining development contributions under section 94 [section 116 G]. Whether, and the extent to which, this occurs will be at the discretion of Council. It is noted that contributions under a Planning Agreement will be in addition to contributions required under Section 64 of the Act.

However, it is noted that the base position of Council in relation to developer contributions is set out in its Developer Contributions Plan, and it will not normally negotiate a Planning Agreement that replaces or reduces the contributions required under this Plan. Planning Agreements would normally provide for contributions to public infrastructure that are **in addition to** the contribution required under Council's Developer Contributions Plan. In cases where Council is willing to negotiate replacement of a contribution ordinarily required under its Contributions Plan, equivalency of the contribution proposed under the Planning Agreement will be required, and its value assessed by Council using an appropriate method of valuation as set out in the Planning Agreement Template.

## **5.5 Form of development contributions under a Planning Agreement**

Development contributions to be used for or applied towards a [public infrastructure or another] public purpose under a Planning Agreement can be:

- a) Monetary contributions,
- b) The dedication of land free of cost,

- c) Any other material public benefit, or
- d) Any combination of the above

Whilst the nature of the [public infrastructure or other] public purpose and the form of contributions provided will be the subject of negotiations between Council and the developer, the ultimate decision is at the discretion of Council.

#### **5.6 Time when a developer's obligations arise under a Planning Agreement**

Council will generally 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 the development that is the subject of the agreement. However, where the [public infrastructure or other] public benefit provided under a Planning Agreement is for a limited time, Council may require the Planning Agreement to operate from the first day on which the public benefit arises.

#### **5.7 Timing of Specific Contributions**

The dedication of land or payment of a monetary contribution is payable at the time that the Construction Certificate is issued.

Dedication of a material public benefit including dwellings units in the case of Affordable Housing Payment will be dedicated to Council at the time of issuing the Occupation Certificate.

#### **5.8 Ownership of In-Kind Contributions**

Where specified by this Policy or otherwise negotiated, title to land, dwellings or other material benefits dedicated will generally be vested in Council in perpetuity, for example, in the case of Affordable Housing as set out in Clause 6 below.

Before accepting title to in-kind contributions, Council will ensure that the it is of a standard and quality acceptable to Council including any requirements or standards set out in the Planning Agreement between the two parties.

## **5.9 Standard Charges**

Wherever possible, Byron Shire Council will seek to standardise development contributions offered under Planning Agreements in order to streamline negotiations and provide fairness, transparency and certainty for developers, and a high standard of accountability to the public. This does not however prevent [public infrastructure and other] public purposes contributions from being negotiated on a case-by-case basis, particularly where planning benefits are involved. An example of such standardised contributions is provided in relation to contributions toward Affordable Housing as an identified public purpose at Clause 6 of this Policy.

## **5.10 Recurrent Charges**

Council may request developers, through a Planning Agreement, to make development contributions towards the recurrent costs of public facilities. Wherever possible, this will be calculated as a fixed payment to provide certainty as to the total cost of such a contribution, and to ensure there is an end point to the contribution. Upfront payment will be preferred, though in certain cases periodic payment may be negotiated at Council's discretion.

## **5.11 Pooling of Development Contributions**

Where a proposed Planning Agreement provides for a monetary contribution by the developer, Council may seek to include a provision permitting money paid under the agreement to be pooled with money paid under other Planning Agreements [in accordance with [section 116F\(2\) of the Act](#)] and applied progressively for the different purposes under those agreements, subject to the specific requirements of the relevant agreements (for example, toward Council's Affordable Housing Program [\[or other public infrastructure\]](#)). Pooling may be appropriate to allow [\[public infrastructure or other\]](#) public purposes, particularly essential infrastructure, to be provided in a fair and equitable way. However, pooling may not be practicable or necessarily appropriate where few Planning Agreements are enacted, particularly if these are not geographically proximate. The pooling of contributions in a Planning Agreement will be at the discretion of Council.

## **5.12 Method for valuing a public purpose under a Planning Agreement**

Contributions toward a public purpose will be negotiated for inclusion in a Planning Agreement on a case-by-case basis, however there is value in standardised development contributions so as to

provide equity, transparency and certainty for developers and a high standard of public accountability. Each circumstance is however unique and standardised contributions may not suit all developments.

Unless otherwise agreed, where the nominated public purpose under a Planning Agreement is the provision of land, the Council will value the benefit on the basis of a valuation provided by a registered valuer. Where Council and the developer cannot reach agreement on the valuation, an independent third party valuation will be sought by Council at the developer's cost.

Unless otherwise agreed, where the nominated public purpose under a Planning Agreement is a material public benefit such as the carrying out of works, the work will be valued by a qualified quantity surveyor. Where Council and the developer cannot reach agreement on the valuation, an independent third party valuation will be sought by council at the developer's cost.

Where the benefit under a Planning Agreement is the provision of a material public benefit in the form of Affordable Housing dwellings, specific provisions of the Policy set out below at Clause 6 apply.

In cases where the public purpose proposed is provided in lieu of to augment a particular public facility that would ordinarily be provided under Council's [section 94](#) [[section 116G](#)] program and/or is nominated in its adopted Contributions Plan, and the value of the contribution proposed under a Planning Agreement is of a lesser value than the contribution ordinarily payable under Council's Development Contribution Plan, the applicant will generally be required to pay the difference between the contributions.

As noted, any variation to developer contributions ordinarily payable will be at Council's discretion.

In addition, if the proposed benefit does not address all of the 'heads of developer contributions' identified in Council's adopted Contribution Plan, contributions will remain payable for the other 'heads of developer contributions'.

### **5.13 Implementation Agreements**

Where appropriate, Council will require the Planning Agreement to include provision that before the development that is the subject of the Planning Agreement is commenced, the parties are to enter an Implementation Agreement. The Implementation Agreement must provide for matters such as:

- The times at which and if relevant, the period during which, the developer is to make provision under the Planning Agreement,
- The design, technical specification and standard of any work required by the Planning Agreement to be undertaken by the developer,
- The manner in which a work is to be handed over to Council,
- If the Planning Agreement requires the developer to manage or maintain land that has been dedicated to Council or works that have been handed over to Council, the manner in which this will take place, and
- The manner in which a material public benefit is to be made available for its public purpose in accordance with the Planning Agreement.

#### **5.14 Monitoring and Review of a Planning Agreement**

Council will continuously monitor the performance of the developer's obligations under a Planning Agreement.

Council will require the Planning Agreement to contain a provision establishing a mechanism under which the Planning Agreement is periodically reviewed with the involvement of all parties. This will include a review of the developer's performance of the agreement.

Council will require the Planning Agreement to contain a provision requiring the parties to use their best endeavours to agree on a modification to the agreement, having regard to the outcomes of the review.

#### **5.15 Modification or Discharge of the Developer's Obligations under a Planning Agreement**

Planning Agreements should not impose obligations on developers indefinitely. Fulfilment of the developer's obligations will generally bring about the conclusion of the Planning Agreement, however this may not always be possible. Planning Agreements should set out the circumstances in which the parties agree to modify or discharge the developer's obligations under the agreement.

The circumstances that may require a modification or discharge of a Planning Agreement may include:

- a) Material changes to the planning controls applying to the land to which the Planning Agreement applies,
- b) A material modification to the development consent to which a Planning Agreement relates,
- c) The revocation or modification of a development consent to which a Planning Agreement relates by the Minister, and
- d) Other material changes in the overall planning circumstances of an area affecting the operation of the Planning Agreement.

Planning Agreements should set out the circumstances in which the parties agree to modify the developer's obligations under the Planning Agreements, and any modifications will ultimately be at Council's discretion. Council will generally only agree to a provision in a Planning Agreement permitting the developer's obligations under the agreement to be modified or discharged where the modification or discharge is linked to the following circumstances:

- a) The developer's obligations have been fully carried out in accordance with the Planning Agreement,
- b) The developer has assigned the developer's interest (in accordance with 5.16) under the Planning Agreement in accordance with its terms and the assignee has become bound to Council to perform the developer's obligations under the Planning Agreement,
- c) A Court has issued Orders declaring that the development consent to which the Planning Agreement related has lapsed, provided that the modification or discharge will not adversely impact on third parties, including the Council and the community, or on the locality of the development,
- d) A development consent to which the Planning Agreement relates has been voluntarily surrendered and that voluntary surrender has been accepted by Council pursuant to s104A of the Act and Clause 97 of the Regulations (note a voluntary surrender will not be effective if the surrender will have adverse impacts on third parties, including the Council or the community, or on the locality of the development),
- e) The performance of the Planning Agreement has been frustrated by an event beyond the control of the parties, and
- f) The Council and the developer otherwise agree to the modification or discharge of the agreement.

The provision in the Planning Agreement relating to modification or revocation of the Planning Agreement must be in accordance with the Act and the Regulation.

#### **5.16 Assignment by the Developer**

Council will require every Planning Agreement to provide that the Developer can not assign its rights or obligations under the agreement nor have any dealing in relation to the land that is the subject of the agreement unless, in addition to other requirements of the agreement:

- a. The developer has, at no cost to the Council, produced information and documentation sufficient to satisfy the Council that the person or entity the obligations would be assigned to has sufficient experience and/or resources to meet the obligations;
- b. Provided the assignee is acceptable to the Council, the developer has, at no cost to Council, first procured the execution by the person or entity with whom it is dealing of all necessary documents in favour of Byron Shire Council by which that person agrees to be bound by the agreements as if they were a party to the original agreement;
- c. Any guarantees, securities or bonds required by the Council are provided; and
- d. The developer is not in breach of the agreement.

#### **5.17 Provision of Security under a Planning Agreement**

Council will require the developer to execute an appropriate Deed of Guarantee, securing the developer's obligations under the Planning Agreement, including the development contribution and any ancillary warranties made by the developer. The type of security preferred by Council is the unconditional bank guarantee from an Australian Bank in favour of Byron Council. The bank guarantee must be equivalent to the full value of the developer obligation under the Planning Agreement and on terms that are acceptable to Council.

#### **5.18 Preparation and Form of the Planning Agreement**

The General Manager of Byron Shire Council and the Director of Planning of Byron Shire Council are responsible for negotiating any agreement in relation to this clause. Any such negotiation and proposed agreement shall be submitted to council for approval.

In each case, Council and the developer will decide who will prepare the Planning Agreement.

Council will require the Planning Agreement to be in accordance with Council's Planning Agreement Template. [The Template will contain those items set out in cl 23 of Schedule 1 of the Act].

#### **5.19 Payment of Costs incurred in the negotiation, preparation, execution, monitoring and administration of agreements**

Council will require the Planning Agreement to make provision for payment by the developer of all of Council's costs of:

- Negotiating, preparing and entering the agreement, and
- Enforcing the agreement.

There is no comprehensive policy that can be applied relating to cost recovery and cost sharing, due to the unique circumstances associated with each Planning Agreement. However as a general rule, Council considers that the following approach is fair and reasonable:

- If the Planning Agreement relates to an application by a developer for an instrument change, the developer will pay the whole of Council's costs,
- If the Planning Agreement relates to a development application, then the developer will pay the whole of Council's costs, and
- In certain circumstances, Council may require the Planning Agreement to make provision for a development contribution by the developer towards the on-going administration of the agreement.

Costs should be based on reasonable charges. The reasonableness of charges may be established by the use of published Council charges, industry standard charges, independent third party quotations or other means. Costs will include all staff resources expended on negotiating, preparing, entering and enforcing any agreement as well as all costs incurred by the Council, for example but not limited to legal costs, surveying costs, legal fees, consultants fees, registration fees, agents fees, production fees, advertising costs, photocopy fees, GST liability etc.

## **5.20 GST Considerations**

A Planning Agreement potentially involves taxable supplies from Council and/or the developer. Consequently both parties may have a potential GST liability. Council and the developer must obtain legal/financial advice in every case as to whether a potential GST liability attaches to a particular agreement.

## **5.21 Notations on certificates under Section 149(5) of the Act**

Council will make a notation under Section 149(5) of the Act about a Planning Agreement, relating to the land the subject of the agreement. The Planning Agreement must contain an acknowledgment by the developer of the potential for such a notation.

## **5.22 Registration of Planning Agreements with the Registrar-General**

A Planning Agreement will be registered under [Section 93H of the Act \[cl 24 of Schedule 1 of the Act\]](#), unless Council agrees to its not being so registered. If a Planning Agreement has been registered with the Registrar-General under this section, the Agreement is binding on, and is enforceable against the owner of the land from time to time as if each owner for the time being had entered into the agreement. Unregistered Planning Agreements will generally be undesirable to Council.

## **5.23 Dispute Resolution**

The Planning Agreement must provide for mediation of disputes between the parties of the agreement, at their own cost, as a first step, before the parties may exercise any other legal rights in relation to the dispute.

## **5.24 Public use of Privately-owned facilities**

If the Planning Agreement provides for the developer to make a privately-owned facility available for public use, Council will generally require the parties to enter into an implementation agreement.

The agreement may, subject to Council's agreement, provide for payment to the developer of a reasonable fee by a member of the public who desires to use the relevant facility.

### **5.25 Administration and Accountability**

In accordance with sections 93E(1) and (4) [section 116F] of the Act, Council will hold any monetary contribution paid in accordance with a Planning Agreement, together with any additional amount earned from its investment, for the purpose for which the payment was required and apply it towards that purpose within a reasonable time. Contributions in-kind will also be used for the purpose to which they are dedicated in accordance with a planning agreement, and in compliance with 93E(3) of the Act

Cash, land or material public benefits contributed under section 93F(1) [section 116T] will be separately accounted for by Council, and will be the subject of annual public reporting as to the status of all contributions received by Council under Planning Agreements. Likewise, the public purpose to which all contributions have been made will be the subject to a separate accounting and reporting process [in accordance with section 116E of the Act].

Similar, to Council's section 94 [section 116G] program, Council will develop a rolling plan for the use of contributions made to its Section 93 [section 116T] Public Purpose Fund, reviewed annually, which will identify priorities for the development identified public purposes and ensure that contributions collected are applied against these public purposes within a reasonable time. Again, the status of works and regular review of this Plan will be the subject of annual public reporting by Council.

### **5.26 Public Notification of Planning Agreements**

[A planning agreement will not be entered into, amended or revoked unless public notice has been given in accordance with section 93G of the Act [cl 25D of the Regulation. Where the planning agreement is made in relation to a development application or to an amendment to an LEP, the planning agreement will, where practicable, be given in the same manner and at the same time as notice is given in relation to the development application or proposed LEP amendment].

## **6 PLANNING AGREEMENTS MADE WITH RESPECT TO AFFORDABLE HOUSING**

### **6.1 Overview**

The provision of (or recoupment of the cost of providing) Affordable Housing is expressly identified as a public purpose under section 93F (2) of the Act [‘public infrastructure’ under section 116C(1) of the Act]. Likewise, the funding of recurrent expenditure relating to the provision of Affordable Housing, and the monitoring of planning impacts, are identified public purposes [set out under section 116C(2) of the Act]. In addition to the overarching Planning Agreement Policy set out above, Council has specific objectives related to Planning Agreements that provide for a contribution to Affordable Housing as a public purpose. [Section 116V(1) of the Act requires that a Planning Agreement entered into by Council in respect of Affordable Housing also have the approval of the Minister].

The following sets out additional policy provisions related specifically to Affordable Housing within the context of the general policy statements above. Basic provisions are set out here. However, for greater detail, this Planning Agreement Policy should be read in conjunction with Council’s *Affordable Housing Options Paper 2009*, including **Maps 3.1, 3.2, .3.3 and 3.4** in Part A of the *Options Paper*.

### **6.2 Affordable Housing Objectives**

Council’s aims in relation to Affordable Housing are:

- To protect and increase the supply of Affordable Housing stock for very low, low and moderate-income households including target groups identified as having particular housing needs in Byron LGA;
- To promote the development of a broader, more appropriate range of Affordable Housing by the private sector for rent or purchase;
- To build and sustain community resilience by providing accommodation to support a diverse residential population inclusive of all income groups within the Byron local government area;
- To strongly encourage the development of Affordable Housing in localities which provide access to transport, employment, health, community and recreational services, and enhanced social and physical integration with existing communities;
- To ensure that Affordable Housing is constructed to a standard that is consistent with other dwellings within the Byron local government area.

### **6.3 Affordable Housing Provisions**

There are three main affordable housing provisions of relevance to this Policy. Whilst Council may consider other proposals put forward by developers, in the interests of fairness, transparency, consistency and public accountability, the following sets out Council's preferred position. Each of the main provisions is set out below.

#### **6.3.1 Developer Incentives (Density Bonuses) in Existing Areas**

##### **6.3.1.1 Provisions**

- In accordance with strategies adopted by Council as part of its *Affordable Housing Options Paper 2009*, Council has provided for developer incentives in the form of a density bonus (additional FSR) in identified precincts and sites that meet relevant criteria.

Specific precincts and sites where such developer incentives apply are shown in Council's *Affordable Housing Options Paper 2009*, and specifically in Maps 3.1, 3.2, .3.3 and 3.4. Other precincts or sites may be considered appropriate for a Planning Agreement where they comply with criteria for precinct or site selection, however their inclusion as part of an Agreement will be at the discretion of Council.

Density bonuses that apply are also identified in Maps 3.1, 3.2, .3.3 and 3.4 of the *Options Paper*, and include variations to maximum FSRs that ordinarily apply in cases where a developer agrees to provide a contribution to Affordable Housing. It is noted that contributions under a Planning Agreement will be in addition to contributions required under Section 64 of the Act.

Council will also take into account the need to protect amenity, environmental and cultural values, desired future character and other matters that would normally be considered as part of a s79C assessment. It will also discourage over-capitalisation in a single dwelling when taking up a density bonus (i.e. building an overly large principle dwelling rather than smaller multi-unit dwellings with the additional FSR negotiated).

In summary, Council through the strategies contained in its *Affordable Housing Options Paper 2009* seeks to encourage an increase in the stock of smaller, well-located and well-designed multi-unit development (villas, dual occupancies, apartments, shop-top housing and townhouses) whilst also contributing to its Affordable Housing Program.

A density bonus (additional FSR) will be permitted where an applicant offers to contribute 50% of **additional** private benefit created through taking up the planning incentive to Council's Affordable Housing Program through a Planning Agreement under [section 93F \[Part 5B Division 4\]](#) of the Act.

The Planning Agreement will form part of the conditions of consent for the development. The Agreement will be registered under section 93H of the Act [cl 24 of Schedule 1 of the Act], unless otherwise decided by Council.

A contribution for this purpose may in the form of land dedicated free of cost, payment of a monetary contribution, the provision of any other material public benefit, or any combination of these, to be used for or applied towards a public purpose in accordance with section 93F(1) [Part 5B Division 4] of the Act. The form of the contribution is negotiable but will ultimately be at the discretion of Council.

Stringent and transparent accountability mechanisms have been put in place regarding the continued use of these contributions for the purpose of Affordable Housing, including separate accounting procedures and annual monitoring and public reporting processes, included in Clause 5.25.

Title to land, dwellings or other material benefits so dedicated will be vested in Council in perpetuity for use as Affordable Housing under its Affordable Housing Program.

#### **6.3.1.2 Calculation of Contributions**

The appropriate contribution toward Affordable Housing will be calculated on the **additional** private benefit created should the developer choose to take up the planning incentive (density bonus).

Council will seek 50% of additional 'private benefit' created when an applicant chooses to take up this opportunity. Council will allow additional floor space in response to a dedication by the developer toward the provision of Affordable Housing under Council's Affordable Housing Program. For example, in a precinct where Council has decided that it is appropriate to encourage the provision of affordable housing, it will allow for floor space additional to the maximum that ordinarily applies in this precinct provided the developer agrees to make a contribution in accordance with Council's Affordable Housing Program (set out in its *Affordable Housing Options Paper 2009*). Generally speaking, the additional floor space if the developer chooses to take up the FSR incentive will allow for the construction of an additional dwelling. This can be developed for the cost of construction only (i.e. the land cost is already included in the maximum floor space normally permissible). Council will share the additional profit on the additional dwelling or dwellings created in accordance with the formula set out below.

The calculation of additional private benefit created takes into account a realistic if somewhat conservative assessment of sale price within different Byron local markets analysed at the level of

urban centres and precincts within these urban centres, a relatively generous development/building cost, and an appropriate method of indexation to account for market variation over time. Note that in order to avoid complex and protracted negotiations with developers and to provide certainty, generic and defensible rates for sale price and for construction will be developed and used in the calculation of benefit.

The formulae applied in the calculations are:

$$\text{Additional Private Benefit (APB) per m}^2 = \text{Sell Rate (SR)} - \text{Build Rate (BR)}$$

$$\text{Dedication (DR) per m}^2 = \text{APB} \times 50\%$$

In each case the Total Dedication will be calculated by the formula:

$$\text{Total Dedication (TD)} = \text{Site Area (SA) in m}^2 \times \text{Dedication Rate (DR) per m}^2 \text{ for Precinct} \times \text{variation to FSR proposed}$$

The Sell Rate (SR) will be determined by a valuer or similar professional based on an analysis of actual sale prices for new strata dwellings in a particular precinct and divided by the area of a typical dwelling with an appropriate deduction for agents fees and legal fees.

The Build Rate (BR) will be determined based on published rates such as “*Rawlinsons Construction Cost Guide*”. The rate will be based on an appropriate form of construction and standard of fitout, and will include GST, an appropriate proportion of Council charges (where those vary with construction cost) and an allowance for provision of parking. Cost of financing at commercial interest rates for six months will also be included. The principle is that construction of the additional area will not increase professional, preliminary, landscaping and elevator costs by comparison with a development that does not take up the density bonus, with those costs considered as fixed costs. By the same principle, any other fixed costs are excluded. Taxes other than GST, such as income tax and capital gains tax, are not part of the cost of construction and so will not be considered in the calculation.

The Dedication Rates (DR) will be indexed every quarter. The Build Rate (BR) will be adjusted using the Housing Construction Index (4111) published by the Australian Bureau of Statistics in its publication *Producer Price Indexes-6427.0* and using the index for the most recent quarter at the time of initial calculation of the BR as the reference quarter. The adjusted rate will be the

published BR multiplied by the index for the most recent quarter and divided by the index for the reference quarter.

The Sell Rate (SR) will be adjusted every quarter. The SR will be adjusted using the Median Sale Price for Byron LGA published by the NSW Department of Housing in its publication *Rent and Sales Report (Table 12)* and using the value for the most recent quarter at the time of determination of the SR as the reference quarter. The adjusted SR will be the published sell rate multiplied by the Median Sale Price for the most recent quarter and divided by the Median Sale Price for the reference quarter.

The DR will be adjusted by subtracting the adjusted BR from the adjusted SR and multiplying by 50%. The following provides a worked example:

$$\text{Additional Private Benefit (APB) per m}^2 = \text{Sell Rate (SR)} - \text{Build Rate (BR)}$$

$$\text{Dedication (DR) per m}^2 = \text{APB} \times 50\%$$

In each case the Total Dedication will be calculated by the formula:

$$\text{Total Dedication (TD)} = \text{Site Area (SA) in m}^2 \times \text{Dedication Rate (DR) per m}^2 \text{ for Precinct} \times \text{variation to FSR proposed}$$

An example has been calculated for a development in Byron Bay precinct B using data from page 55 of the *Affordable Housing Options Paper 2009*.

The build price is \$3,000 per square metre of building.

The sale price is \$11,000 per square metre of building based on a typical dwelling of 100 square metres.

Additional FSR is 0.1

A 1,000 square metre site is assumed.

$$\begin{aligned} \text{APB} &= \$11,000 - (\$3,000) \\ &= \$8,000 \text{ per square metre} \end{aligned}$$

$$\begin{aligned} \text{DR} &= \$8,000 \times 50\% \\ &= \$4,000 \text{ per square metre} \end{aligned}$$

$$\begin{aligned} \text{TD} &= 1,000 \text{ square metres} \times \$4,000 \times 0.1 \\ &= \$400,000 \end{aligned}$$

### **6.3.2. Provisions for Greenfield Sites, Brownfield Sites and Larger Development Sites**

#### **6.3.2.1 Provisions**

Greenfield and Brownfield sites currently under investigation for rezoning or where a rezoning is proposed by a developer may also be the subject of a Planning Agreement that can be used to capture a reasonable proportion of **additional** private benefit ('windfall' profit) created through the rezoning process for a public purpose (Affordable Housing). A larger site that is already zoned for urban purposes may also be the subject of a Planning Agreement where this is the subject of a development application. A 'Greenfield' site refers principally to a site that is not currently zoned for residential uses, but may include a larger site that is zoned for urban purposes and where there is currently no approval for residential development (vacant land zoned). A 'Brownfield' site is a site that is currently used or has previously been used for a purpose other than residential development but is now or is to become redundant for its current use, and where a rezoning to residential uses is or is likely to be proposed (e.g. a school, hospital or quarry site). It is noted that contributions under a Planning Agreement will be in addition to contributions required under Section 64 of the Act.

Zones within which this will generally apply in Byron Shire include principally R2 Low Density Residential, R3 Medium Density Residential zones and B4 Mixed Use. Other zones may be considered appropriate at Council's discretion.

Larger sites (with a yield of 20 or more dwellings or an area of at least 4,000 m<sup>2</sup>, already zoned for urban purposes or in zones where multi-unit housing is permitted may also be the subject of a Planning Agreement negotiated during pre-lodgement meetings for development applications. Zones within which this will generally apply in Byron Shire are R2 Low Density Residential, R3 Medium Density Residential, B2 Local Centre and B4 Mixed Use.

#### **6.3.2.2 Calculation of Contributions**

In the case of the former (those which require an amendment to the LEP), a reasonable contribution to Council's Affordable Housing Program will be negotiated such that commercial viability is not compromised. A reasonable contribution is assessed as one block for each ten blocks created within each subdivision stage with the area of the block being no less than 95% of the average area of blocks within the subdivision stage, and with a sale price of at least the median for blocks within the subdivision stage. Alternately, an equivalent monetary contribution may be contributed toward the development of Affordable Housing as part of Council's Affordable Housing Program for larger sites. This will be assessed on the basis of independently assessed market

value (sale price for serviced land). Dedication of dwellings units assessed as of equivalent market value will also be considered.

In the case of the latter (land already zoned for residential development or where residential development is permissible), a reasonable contribution is assessed as one block for each twenty blocks or part thereof created within each subdivision stage, with the area of the block being no less than 95% of the average area of blocks within the subdivision stage, and with a sale price of at least the median for blocks within the subdivision stage. Alternately, an equivalent monetary contribution may be contributed toward the development of Affordable Housing as part of Council's Affordable Housing Program. This may be more appropriate where the size of the site is at least 4,000 m<sup>2</sup> but where a 20 lot yield will not be achieved or is not proposed. This will be assessed on the basis of independently assessed market value (sale price for serviced land). Dedication of dwellings units assessed as of equivalent market value will also be considered.

### **6.3.3 Developer Incentives (Density Bonuses) in Greenfield, Brownfield Sites and Larger Sites**

#### **6.3.3.1 Provisions**

Greenfield and Brownfield sites currently under investigation for rezoning or where a rezoning is proposed by a developer or larger zoned sites as described in Clause 6.2.2 above may also be considered for a density bonus (additional FSR) in addition to any other contribution agreed to under Clause 6.2.2.2. Appropriate sites or portions of sites where this may apply are also identified in Maps 3.1, 3.2, 3.3 and 3.4 of Council's *Affordable Housing Options Paper 2009*.

Again, a rigorous assessment has been undertaken in the identification of those sites or portions of sites that may be appropriate for density bonuses. Other sites may be considered by Council as appropriate for a Planning Agreement with these provisions, but again their inclusion as part of an Agreement will be at the discretion of Council. It is noted that contributions under a Planning Agreement will be in addition to contributions required under Section 64 of the Act.

Density bonuses that apply are identified in Maps 3.1, 3.2, 3.3 and 3.4 in the *Affordable Housing Options Paper 2009*, and include variations to maximum FSRs that ordinarily apply.

#### **6.3.3.2 Calculation of Contributions**

Council will seek 50% of additional 'private benefit' (additional profit) created when an applicant chooses to take up this opportunity. Council will allow additional floor space in response to a

dedication by the developer toward the provision of Affordable Housing under Council's Affordable Housing Program.

Similar calculations to those set out in Clause 6.2.1.2 will be applied to areas within such sites where developer incentives for additional FSR are proposed to be taken up.

#### **6.4 Timing of Affordable Housing Contributions**

The dedication of land or payment of a monetary contribution is payable at the issuing of a Construction Certificate.

Dedication of a material public benefit including dwellings units in the case of Affordable Housing Payment will be dedicated to Council at the time of issuing the Occupation Certificate.