



MOSMAN PLANNING AGREEMENTS POLICY

Corporate Document

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Purpose

The purpose of this Policy is to establish a framework to guide the preparation of Planning Agreements under s7.4 of the *Environmental Planning and Assessment Act 1979* (“the Act”) in connection with the development of land in Mosman.

Objectives of this Policy

The objectives of this Policy are to:

- (a) Establish a fair, transparent and accountable framework governing the use of Planning Agreements by Council.
- (b) Expand the range and extent of development contributions that may be made by Developers towards public facilities and other public benefits in Mosman;
- (c) Ensure public participation in the Planning Agreement process.

Scope

This Policy applies to any and all requests made by Developers to enter into a Planning Agreement with Council, and to all Planning Agreements entered into in Mosman.

Terminology

In this Policy the following terminology is used:

Act means the *Environmental Planning and Assessment Act 1979*.

Council means Mosman Council.

Developer is a person who has sought a change to an environmental planning instrument (that includes the making, amendment or repeal of an instrument i.e. a Planning Proposal), 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.

Development Application has the same meaning as in the Act. (Means - an application for consent under Part 4 of the Act to carry out development but does not include an application for a complying development certificate).

Development consent has the same meaning as in the Act. (Means - consent under Part 4 of the Act to carry out development and includes, unless expressly excluded, a complying development certificate).

Development contribution means the kind of provision made by a Developer under a Planning Agreement, being a monetary contribution, the dedication of land free of cost, or the provision of any other material public benefit.

Environmental planning instrument has the same meaning as in the Act. (Means - an environmental planning instrument (including a state environmental planning policy or local environmental plan but not including a development control plan) made, or taken to have been made, under Part 3 of the Act and in force). In this Policy it generally means Mosman Local Environmental Plan 2012, as amended.

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Explanatory Note means a written statement that summarises the objectives, nature and effect of, and contains an assessment of the merits of, a Planning Agreement, or an amendment to or revocation of a Planning Agreement.

Instrument change means a change to an environmental planning instrument (that is, Mosman Local Environmental Plan 2012) whether it be for the amendment or repeal of that instrument.

Mosman means Mosman Local Government Area.

Planning Agreement means a voluntary agreement between one or more planning authorities and a Developer who seeks to change an environmental planning instrument (which may be for rezoning or other purpose i.e. a Planning Proposal), or who has made, or who proposes to make, a Development Application.

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

Planning obligation means an obligation imposed by a Planning Agreement on a Developer requiring the Developer to make a development contribution.

Planning Proposal means a document that explains the intended effect of a proposed environmental planning instrument (or change to an existing environmental planning instrument) and sets out the justification for making the proposed instrument (or change).

Public includes the community as a whole, or when context requires, a section of the community.

Public benefit is the benefit enjoyed by the public as a consequence of a development contribution.

Public facilities means infrastructure, facilities, amenities and/or services that serve a public purpose.

Public purpose includes the purposes listed in s7.4 (2) of the Act.

Regulation means the *Environmental Planning and Assessment Regulation 2021*.

This Policy means the Mosman Planning Agreements Policy.

Legal and Procedural Framework

The current legal and procedural framework for Planning Agreements is set by:

- Part 7, Division 7.1, Subdivision 2 of the *Environmental Planning and Assessment Act 1979*, and
- Part 9, Division 1 of the *Environmental Planning and Assessment Regulation 2021*.

These parts of the Act and Regulation should be read in conjunction with this Policy.

The Planning Agreements Practice Note (NSW Government, February 2021) and the Infrastructure Contributions Practice Notes (NSW Government) should be read in conjunction with this Policy. If there is any inconsistency between the legislative provisions, the Practice Notes issued by NSW Government and this Policy, the legislative provisions and NSW Government Practice Notes prevail.

What is a Planning Agreement?

A Planning Agreement is a voluntary agreement or other arrangement between one or more planning authorities (i.e. Council) and a person (i.e. Developer) under which the Developer agrees to make a development contribution(s) towards a public purpose.

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The contribution may be the dedication of land, payment of a monetary contribution, provision of a material public benefit, or any combination of these.

A public purpose includes:

1. the provision of (or the recoupment of the cost of providing, or the funding of recurrent expenditure relating to the provision of):
 - a. public amenities or public services (not water supply or sewerage services),
 - b. affordable housing,
 - c. transport or other infrastructure relating to land,
2. the monitoring of the planning impacts of development,
3. the conservation or enhancement of the natural environment.

A Planning Agreement may be considered in connection with the development of land when a Development Application or a Planning Proposal has been, or is intended to be, lodged.

Mandatory requirements, restrictions and limitations to Planning Agreements apply under the Act and Regulation. A Planning Agreement is voluntary and cannot be required to be entered into. Before being entered into, amended or revoked, a Planning Agreement must be publicly notified.

A template Planning Agreement and Explanatory Note (which must accompany a Planning Agreement) are included in **Appendix A and B** of this Policy.

Form of Development Contributions

The form of a development contribution that can be made under a Planning Agreement will be determined by the particulars of the Planning Proposal or Development Application to which it relates.

A range of infrastructure is identified in **Appendix C** of this Policy which may be considered as a material public benefit in the negotiation of a Planning Agreement in Mosman. This list is not exhaustive and does not prevent public benefits being negotiated on a case by case basis

Planning Agreements form one part of Council's development contributions system. The *Mosman Contributions Plan 2022* also applies. Restrictions apply under the Act in respect of Planning Agreements and the exclusion of s7.11 or s7.12 contributions.

Principles Governing Council's Use of Planning Agreements

The following principles will govern Council's use of Planning Agreements in Mosman:

1. Council will assess the public benefit of the development contribution in the context of delivering key outcomes in MOSPLAN (Mosman's Community Strategic Plan), the Mosman Local Strategic Planning Statement or other Council strategic plan or policy, when deciding whether to proceed with the Planning Agreement;
2. Council will not allow Planning Agreements to improperly fetter the exercise of its functions under the Act, Regulation or any other act or law, nor will Council use Planning Agreements for any purpose other than a proper planning purpose.

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3. Development that is unacceptable on planning grounds will not be permitted because of planning benefits offered by a Developer in a Planning Agreement that do not mitigate the impacts of development, and nor will Council give undue weight to a Planning Agreement when considering a Planning Proposal or Development Application. *
4. Council will consider input from the community on the public benefits offered by a Planning Agreement, however Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a Planning Agreement.
5. Council will ensure that all parties involved in the Planning Agreement process are dealt with fairly.
6. If Council has a financial interest in a development the subject of Planning Agreement, it will take appropriate steps to ensure that it manages any potential conflict of interest it has between its role as a planning authority and its interest in the development.

*Note that where a Planning Agreement accompanies a Development Application, any exceptions to relevant development standards (such as building height or floor space ratio) will be assessed in accordance with the provisions set out in clause 4.6 of Mosman Local Environmental Plan 2012. In circumstances where significant variation of applicable development standards is proposed, a Planning Proposal will be required to amend Mosman Local Environmental Plan 2012.

Acceptability Test to be Applied

Council will apply the following test in order to assess the desirability of a Planning Agreement:

- Is the Planning Agreement directed towards a proper and legitimate planning purpose having regard to the statutory planning controls, other adopted planning policies and the circumstances of the case?
- Does the Planning Agreement provide for a reasonable means of achieving the relevant purpose and securing the relevant public benefit?
- Will the Planning Agreement produce outcomes that meet the general values and expectations of the community and protect the overall public interest?
- Does the Planning Agreement conform to the principles governing Council's use of Planning Agreements?
- Are there any relevant circumstances that may operate to preclude Council from entering into the proposed Planning Agreement?
- Will the Planning Agreement provide benefits that advance the delivery of services and infrastructure within Mosman?
- Is the quantum of the public benefit commensurate with the value of the development contribution?

Public Notice

Before entering into a Planning Agreement (or amending or revoking an existing agreement), the agreement and any supporting material will be publicly notified and available for inspection for a minimum period of 28 days. It will generally be exhibited at the same time as the Development

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Application or Planning Proposal to which it relates, or if not practicable, then as soon as possible after.

Council will encourage the community to make submissions on Planning Agreements to facilitate a better understanding of local needs and permit fine tuning of the planning obligations set out in any Planning Agreement. Submissions will be assessed by Council when it considers whether it should enter into a Planning Agreement.

Council may publicly re-notify a revised Planning Agreement and the application to which it relates if, in Council's opinion, a material change is made to the terms of the agreement or the application. Such a change may arise as a consequence of public submissions made in respect of the previous public notification, or their formal consideration by Council, or for any other reason.

Probity

Council will ensure that the negotiation of all Planning Agreements is fair, transparent and is directed at achieving public benefits in an appropriate manner. In this regard, Council will:

- Inform any applicant about Council's values and business ethics – specifically, about ethical behaviour appropriate to business dealings.
- Ensure that the Mosman community is informed about the Planning Agreement process and Council's role.
- Publicly exhibit proposed Planning Agreements to ensure they are open and transparent.
- Ensure appropriate delegations and separation of responsibilities in considering Planning Proposals and Development Applications that involve Planning Agreements, to ensure processes are appropriate to the likely level of risk.
- Ensure that modifications to approved development should be subject to the same scrutiny as the original Development Application.
- Ensure that Councillors and Council staff understand their varied roles, some of which have potential to conflict.
- Ensure that conflicts of interest are ameliorated to the greatest extent possible, including but not limited to the engagement of independent assessment by third parties where Council has an interest and not entering into any contractual arrangement which purports to guarantee outcomes that are subject to separate regulatory processes.

Council may appoint an independent third person or parties to facilitate the negotiation of a Planning Agreement, or aspects of it – particularly where this will lead to a better planning outcome. The cost of the independent person will be borne by the Developer, unless otherwise agreed by the Council prior to the independent person being engaged.

Responsibility and Accountability

Councillors will not be involved in the face-to-face negotiation of the agreement, however will initially consider an application for a Planning Agreement and ultimately determine the proposed Planning Agreement as part of their duties as Councillors.

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If Council has a commercial interest in the subject matter of a Planning Agreement as a landowner, Developer or financier, Council will ensure that the application to which a Planning Agreement relates is assessed independently.

Council will ensure that all negotiations with a Developer and their consultants are sufficiently separated and documented.

Steps in Negotiation

Council aims to be efficient, transparent and accountable in the negotiation of Planning Agreements. Council will seek to ensure that negotiations run in parallel with Planning Proposals or Development Applications so as not to unduly delay ordinary planning processes.

The Director Environment and Planning will consider all requests for Planning Agreements in connection with the development of land in Mosman, prior to being reported to a Council Meeting.

Council's preferred method for negotiation of a Planning Agreement is as follows:

1. All requests to enter into a Planning Agreement with Council will be reported to a Council Meeting.
2. If Council resolves to proceed with negotiating a Planning Agreement, the Council (represented by an authorised delegate) and Developer will then:
 - a. appoint a person to represent them in the negotiations and also appoint a third person to attend and take minutes of all negotiations;
 - b. decide whether to appoint an independent third person or parties to facilitate or otherwise participate in the negotiations, and appoint such a person;
 - c. agree on a timetable for negotiations and the protocols and work practices governing their negotiations;
 - d. identify the key issues for negotiation and undertake the negotiations, including any negotiations or consultations with relevant public authorities;
3. Once agreement is reached, the Developer will prepare the proposed Planning Agreement and Explanatory Note, provide a copy to Council, and lodge the relevant Planning Proposal or Development Application.
4. The proposed Planning Agreement and Explanatory Note will be publicly notified together with the Planning Proposal or Development Application (where possible), and submissions will be considered.
5. Following notification, the proposed Planning Agreement and any submissions received will be reported to a Council Meeting.

It is important to note that negotiations with Council staff are aimed at producing the terms of a proposed Planning Agreement that can be exhibited and formally considered by Council at the time the relevant application is considered. A preliminary agreement with Council staff about the terms of the proposed Planning Agreement does not mean that the Council will ultimately agree to enter into the proposed agreement in the terms offered, or that the relevant application will be approved.

Parties may be required to undertake further negotiations and a number of the above steps may need to be repeated as a result of the public notification process or its formal consideration by the Council in connection with the relevant application.

Conditions and Implementation of Planning Agreements

Form

Council uses a standard form of Planning Agreement which reflects the Act, Regulation and this Policy. The Planning Agreement must be accompanied by an Explanatory Note. See **Appendix A and B**.

Registration

Council will generally require a Planning Agreement to be registered on the title of the land to which it applies in accordance with s7.6 of the Act.

Costs

Council will require a Planning Agreement to make provision for payment by the Developer of the Councils costs of and incidental to negotiating, preparing and entering into the agreement as well as administering and enforcing the agreement.

Implementation agreements

Council may require an implementation agreement that provides for matters such as:

- the timetable for provision of planning obligations 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
- the manner in which a material public benefit is to be made available for its public purpose in accordance with the Planning Agreement
- a warranty period for materials and buildings that form part of any public benefit

Recurrent charges

A Planning Agreement may require a Developer to make contributions towards the recurrent costs of public facilities. Details regarding charges will need to be negotiated between the Developer and Council and documented within the draft agreement. Where the public facility or public benefit is intended to serve the wider community, the Planning Agreement may require the Developer to make contributions towards the recurrent costs of the facility for a specified period after establishment of the facility.

Timing of use of monetary contributions and land dedication

Council is required to hold any monetary contribution or levy 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. A similar requirement applies in respect of land dedicated in accordance with a Planning Agreement.

Pooling of development contributions

Where a 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 and applied progressively for the different purposes under those agreements. Pooling may be appropriate to allow public benefits to be provided in a fair, equitable and timely way.

Public use of privately-owned facilities

If a Planning Agreement provides for the Developer to make a privately-owned facility available for public use, Council may require clauses to be inserted into the Planning Agreement to specify the arrangement or particular outcomes of objectives for the arrangement. Leases, licences or access agreements may be entered into separately to formalise the arrangement if required.

Entering into a Planning Agreement

If a Planning Agreement in relation to a development application has not been entered prior to the determination of that development application Council will require that Planning Agreement to be entered into as a condition of the development consent to which the agreement relates.

Where a Planning Agreement relates to a Planning Proposal, the agreement will need to be entered into prior to the change to the environmental planning instrument being made, however the agreement will only become operational when a later event occurs, such as when the instrument change is effected. This will depend on the circumstances in each case and can be negotiated between the parties.

If a Developer declines to execute a Planning Agreement after it has been exhibited with a Planning Proposal, the Council will consider that event to be a significant change to the Planning Proposal and will request the Minister not to proceed with the proposed amendment under s3.35(4) of the Act.

A Planning Agreement is entered into when it is executed by all of the parties. It can be entered into at any time after the agreement is publicly notified in accordance with the Act and Regulation.

Monitoring and Review

Council will continuously monitor the performance of the Developer's obligations under a Planning Agreement. This may include Council requiring the Developer (at their cost) to report periodically to Council on its compliance with obligations under the Planning Agreement.

Council will require the Planning Agreement to contain a provision establishing a mechanism and relevant criteria for periodic review of the Planning Agreement with the involvement of all parties. This will include a review of the Developer's performance under the agreement.

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

Modification or Discharge of Obligations

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

- the Developer's obligations have been fully carried out in accordance with the agreement, or
- the development consent to which the agreement relates has lapsed or been modified to such an extent that the planning obligations may not be appropriate, or
- the performance of the Planning Agreement has been frustrated by an event or events beyond the reasonable control of the parties, or

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- the Developer has fully and completely assigned the Developer's interest under the agreement in accordance with its terms, or
- other material changes affecting the operation of the Planning Agreement have occurred, or
- Council and the Developer otherwise agree to the modification or discharge of the agreement.

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

Dispute Resolution

Council will require a Planning Agreement to provide for mediation of disputes between the parties to the agreement before the parties may exercise any other legal rights in relation to the dispute. Standard mediation clauses are included in the template Planning Agreement in **Appendix A**.

Methodology for Valuing Public Benefits under a Planning Agreement

Unless otherwise agreed in a particular case, public benefits will be valued as follows:

- Provision of land for a public purpose* - Where the benefit under a Planning Agreement is the provision of land for a public purpose, the value of the benefit will be determined by an independent valuer with a minimum of 10 years' experience in valuing land in New South Wales (and who is acceptable to Council), on the basis of a scope of work which is prepared by Council. All costs of the independent valuer in carrying out such a valuation will be borne by the Developer.
- Carrying out of works for a public purpose* - Where the benefit under a Planning Agreement is the carrying out of works for a public purpose, the value of the benefit will be determined by an independent quantity surveyor with a minimum of 10 years' experience (and who is acceptable to Council), on the basis of the estimated value of the completed works being determined using the method that would ordinarily be adopted by a quantity surveyor. Council will prepare the scope of work for the independent quantity surveyor. All costs of the independent quantity surveyor in carrying out the work will be borne by the Developer.
- Other public benefit* - Where the benefit under a Planning Agreement is the provision of public benefit other than under (a) or (b) above, Council and the Developer will negotiate the manner in which the benefit is to be valued for the purposes of the agreement.

Generally the value of the public benefits under a Planning Agreement will be determined prior to notification of that agreement.

Hand-over of Works

Council will generally not accept the hand-over of a public work carried out under a Planning Agreement unless the Developer furnishes to Council a certificate to the effect that the work has been carried out and completed in accordance with the agreement and any applicable development consents (which certificate may, at Council's discretion, be a final occupation certificate, compliance certificate or a subdivision certificate) and, following the issue of such a certificate to Council, the work is also certified as complete by a Council building surveyor or engineer.

Council will also require the Planning Agreement to provide for a defects liability period during which any defects must be rectified at the Developer's expense.

Management of Land or Works after Hand-over

If a Planning Agreement provides for the Developer (at the Developer’s cost) to manage or maintain land that has been dedicated to Council or works that have been handed over to Council, Council may require the management and maintenance of the land or works to be carried out to the satisfaction of Council or to achieve particular outcomes or objectives.

Any dispute regarding Council’s specifications for the management and maintenance of the land or works may be dealt with under the dispute resolution provisions of the Planning Agreement.

Assignment and Dealings by the Developer

Council will not permit the assignment of any or all of the Developer’s rights or obligations under the Planning Agreement, nor will Council permit any dealing in relation to any part or the whole of the land the subject of the Planning Agreement, unless:

- the Developer 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 Planning Agreement as if they were a party to the original agreement, and
- 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 an agreement 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
- the party is not in breach of this agreement, and
- the Council agrees to the proposed assignment in writing.

This does not affect the operation of any of other requirements of the Planning Agreement.

Contact

Enquiries should be directed to the Director Environment and Planning on 9978 4000.

Amendments

Date	Amendment	Reference
5 April 2022	Minor administrative changes	CM 05APR2022 EP/15
3 October 2023	Administrative changes	CM 03OCT2023 EP/40

Appendix A – Template Planning Agreement

PLANNING AGREEMENT

PARTIES

Mosman Council of Mosman Square, Spit Junction, New South Wales 2088 (**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 Public Facilities if that Development consent was granted.

(For Planning Proposals)

- A. On, ##, the Developer made an application to the Council for the Instrument Change to facilitate 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 Public Facilities if that instrument change was effected.
- C. The Instrument Change was published in NSW Government Gazette No. ## on ## and took effect on ##.

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 has the same meaning as in the Act

Development Application has the same meaning as in the Act.

Development Consent has the same meaning as in the Act.

Development Contribution means the monetary contribution, the dedication of land free of cost or the provision of a material public benefit described in Schedule # of this Agreement.

Environmental Planning Instrument has the same meaning as in the Act

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 ##.

LEP means Mosman Local Environmental Plan 2012, as amended.

Occupation Certificate has the same meaning as in the Act.

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

Public Facilities means the public facilities described in Schedule # of this Agreement.

Regulation means the Environmental Planning and Assessment Regulation 2021.

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

[Specify whether and to what extent s7.11 and s7.12 apply to development the subject of this Agreement as required by s7.4 of the Act]

8 Registration of this Agreement

[Specify whether the Agreement is to be registered as provided for in s7.6 of the Act]

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 If a dispute arises from this Agreement, a party to the Agreement must not commence court or arbitration proceedings relating to the dispute unless that party has participated in a mediation in accordance with 10.2 and 10.3 of this clause. This paragraph does not apply to an application for urgent interlocutory relief.

10.2 A party to this Agreement claiming that a dispute has arisen from the Agreement ("**the Dispute**") must give written notice specifying the nature of the Dispute ("**the Notice**") to the other party or parties to the Agreement. The parties must then participate in mediation in accordance with this clause.

10.3 If the parties do not agree, within seven days of receipt of the Notice (or within a longer period agreed to in writing by them) on:

- (a) the procedures to be adopted in a mediation of the Dispute; and
- (b) the timetable for all the steps in those procedures; and
- (c) the identity and fees of the mediator;

then:

(d) the President of The Law Society of New South Wales will appoint the mediator and determine the mediator's fees and determine the proportion of those fees to be paid by each party (to be in equal shares unless otherwise agreed by the parties);

(e) the parties must mediate the Dispute:

- i) with the mediator appointed under 10.3(d) of this clause;

ii) with a genuine commitment to participate; and

iii) in accordance with the Mediation Guidelines of The Law Society of New South Wales.

10.4 If a party commences proceedings relating to the Dispute other than for urgent interlocutory relief, that party must consent to orders under s26 of the *Civil Procedure Act 2005* that the proceedings relating to the Dispute be referred to mediation by a mediator.

10.5 If the parties do not agree on a mediator within seven days of the order referred to in 10.4, the mediator appointed by the President of the Law Society of New South Wales will be deemed to have been appointed by the Court.

10.6 If a party:

(a) refuses to participate in a mediation of the Dispute to which it earlier agreed; or

(b) refuses to comply with 10.3(e) of this clause, a notice having been served in accordance with 10.2;

Then:

(c) that party is not entitled to recover its costs in any court proceedings or arbitration relating to the Dispute, even if that party is successful; and

(d) that party is deemed to have consented to a decree of the Supreme Court of New South Wales that it will specifically perform and carry into execution paragraph 10.3(e) of this clause.

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

11 Enforcement

[Specify the means of enforcing the 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: General Manager

Address: PO Box 211, Spit Junction NSW 2088

Fax Number: 02 9978 4132

Email: council@mosman.nsw.gov.au

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.

13 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.

14 Assignment and Dealings

Until the Development Contribution and/or Public Facilities required by this Agreement have been provided in full, the Developer cannot sell, transfer, assign, novate, charge, encumber or otherwise deal with the Land or attempt or purport to do so unless the Developer:

- 14.1 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;
- 14.2 Procures that any buyer, transferee, assignee or novatee promptly executes a Planning Agreement in the same terms as this Agreement in favour of Council whereby the buyer, transferee, assignee or novatee becomes contractually bound with Council to perform the Developer's obligations under this Deed.

15 Costs

Council's costs incidental to the preparation and execution of this Agreement and any related documents are to be borne by the Developer.

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

Mosman Planning Agreements Policy

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

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**Dated: ##****Executed as an Agreement: ##**

Appendix B – Template Explanatory Note

Explanatory Note

DRAFT PLANNING AGREEMENT

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

1. Parties

(Planning Authority)

(Developer)

2. Description of Subject Land

3. Description of Planning Proposal/Development Application

4. Summary of Objectives, Nature and Effect of the Draft Planning Agreement

5. Assessment of the Merits of the Draft Planning Agreement

The Planning Purposes Served by the Draft Planning Agreement

How the Draft Planning Agreement Promotes the Objects of the Environmental Planning and Assessment Act 1979

How the Draft Planning Agreement Promotes the Public Interest

For Planning Authorities:

(a) Development Corporations - How the Draft Planning Agreement Promotes its Statutory Responsibilities

(b) Other Public Authorities - How the Draft Planning Agreement Promotes the Objects (if any) of the Act under which it is Constituted

(c) Councils – How the Draft Planning Agreement Promotes the Elements of the Council's Charter

(d) All Planning Authorities – Whether the Draft Planning Agreement Conforms with the Authority's Capital Works Program

The Impact of the Draft Planning Agreement on the Public or Any Section of the Public

How the 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

Other Matters

Signed and Dated by All Parties

Appendix C – Potential Public Benefits in Mosman

Council has identified a range of infrastructure which may be considered as a material public benefit in the negotiation of a Planning Agreement. This list does not prevent public benefits being negotiated on a case by case basis. Developers are encouraged to discuss with Council these or other requirements that may be included in a Planning Agreement.

Infrastructure

- Accessibility improvements – accessible parking, kerb ramps, and modifications to public buildings or areas
- Roads – design and construction
- Open space – parks, public places, embellishment
- Drainage and storm water controls
- Traffic measures
- Public and “green” transport outcomes
- Pedestrian and cycleway linkages and footpaths
- Communications and information technology such as WIFI in a public space
- Bridges (vehicular and pedestrian)

Facilities

- Community services – eg meeting rooms, halls, libraries, art gallery
- Child care and family health care centres
- Public toilets, including accessible toilets
- Youth spaces
- Public leisure facilities
- Performance spaces
- Civic spaces
- Public car parking areas
- Bus shelters
- Family care facilities
- Sport, recreation and activity centres
- Business, research and creative industries incubator space and ancillary uses

Public domain improvements

- Paving – paths, streets and open space areas
- Plantings – streets and open space areas
- Furniture – seats, bins
- Banners
- Public art in streets, open space and other public domain space
- Kerbs and gutters
- Treatment and/or features in public places
- Facilities such as kiosk in parks and open spaces
- Turf
- Public leisure, sport and recreation facilities
- Environmental management improvements such as water and energy minimising devices
- Water quality devices
- Water bubblers, lockers and other amenities
- Signage including suburb identification, way finding, parking, interpretation and information signs for pedestrians, cyclists and vehicular users

Other contributions

- Cash contributions
- Land dedicated for use as parks, facilities, pedestrian connectivity and new roads
- Contributions for the development of community facilities plans and cultural facilities plans
- Other benefits in line with Council plans and strategies - including plans of management, traffic and transport plans, masterplans, development controls plans and local environmental plan studies
- Other public benefits that provide a positive planning outcome for the people of Mosman and meet the objectives of the Act