



WAVERLEY COUNCIL

Planning Agreement Policy

2014 Amendment 6



WAVERLEY
COUNCIL

CONTENTS

TERMS AND DEFINITIONS USED IN THIS POLICY	4
PART 1 – POLICY FRAMEWORK	5
1.1 Name of this Policy	5
1.2 Application of the Policy and commencement	5
1.3 Objectives of this Policy	5
1.4 What does the Policy set out?	5
1.5 Statutory framework	6
1.6 Land use and strategic infrastructure planning	6
1.7 What are the mandatory requirements of a Planning Agreement?	7
1.8 Guiding principles	8
PART 2 – PRINCIPLES FOR PLANNING AGREEMENTS	9
2.1 Purposes of Planning Agreements	9
2.2 Principles underlying the use of Planning Agreements	10
2.3 What matters will the Council consider?	10
2.4 Strategic planning context	11
2.5 Types of public benefits to be delivered under Planning Agreements	11
2.6 Recurrent charges	12
2.7 Pooling of development contributions	12
2.8 Do other development contributions apply?	13
PART 3 – NEGOTIATION PROCEDURES AND PROBITY	14
3.1 Introduction	14
3.2 Steps in the negotiation process	14
3.3 Probity	15
PART 4 – NOTIFICATION AND EXHIBITION	17
4.1 Public notification of Planning Agreements	17
4.2 Re-notification	17
4.3 Public comment on Planning Agreements	17
PART 5 – IMPLEMENTATION AND CONDITIONS	18
5.1 Preparation of the Planning Agreement	18
5.2 When is a Planning Agreement required to be entered into?	18
5.3 When will planning obligations arise?	18
5.4 Implementation agreements	19
5.5 Monitoring and review of a Planning Agreement	19
5.6 Modification or discharge of obligations	19
5.7 Assignment and dealings by the developer/proponent	20
5.8 Provision of security under a Planning Agreement	20
5.9 Registration of Planning Agreements	20
5.10 Dispute resolution	20
5.11 Methodology for valuing public benefits under a Planning Agreement	20
5.12 How will the Council seek to determine the amount of Monetary Contribution that may be payable for Developments with FSR above clause 4.4 of WLEP (the WLEP Provisions)	21
5.13 How will the Council seek to determine the amount of Monetary Contribution that may be payable for an amendment to the Waverley Local Environmental Plan 2012	21
APPENDIX 1 – VPA PAYABLE RATES	22
APPENDIX 2 – VALUATION METHODOLOGY FOR PLANNING PROPOSALS	27
APPENDIX 3 – (CLAUSE 1.6) PLANNING AGREEMENT TEMPLATE	29
APPENDIX 5 – TYPES OF PUBLIC BENEFITS DELIVERED BY PLANNING AGREEMENTS	43
APPENDIX 6 – LETTER OF OFFER TEMPLATE	44

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TERMS AND DEFINITIONS USED IN THIS POLICY

In this Policy, the following terminology is used:

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

Council means Waverley Council.

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

development application has the same meaning as in the Act.

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.

explanatory note means a written statement that provides details of the objectives, nature, effect and 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 to facilitate a development the subject of a Planning Agreement.

planning benefit means a development contribution that confers a net public benefit.

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

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

planning proposal means an application to amend the Waverley Local Environmental Plan 2012

proponent means the party that is responsible for lodging a planning proposal with Council.

Practice Note means the *Planning Agreement Practice Note* (February 2021) published by the Department of Planning, Industry and Environment.

public includes a section of the public.

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

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

WLEP means the *Waverley Local Environmental Plan 2012*.

PART 1 – POLICY FRAMEWORK

1.1 Name of this Policy

This Policy is known as the *Waverley Council Planning Agreement Policy 2014* (“**the Policy**”). It sets out Waverley Council’s policy and procedures relating to Planning Agreements under the *Environmental Planning and Assessment Act 1979*.

1.2 Application of the Policy and commencement

This Policy applies to development applications lodged pursuant to the *Waverley Local Environmental Plan* (WLEP) and planning proposals seeking a change to WLEP for land and development within the local government area of Waverley Council (“Council”). This policy generally applies to all forms of development with the exception of dwelling houses (a building containing only one dwelling), employment generating development only (i.e. retail and commercial floorspace) and alterations and additions to a single strata subdivided property. A VPA can be provided to offset the loss of affordable housing in lieu of a payment under Part 3 ‘Retention of existing affordable rental housing’ of the Housing SEPP.

This Policy was adopted by resolution of the Council on 12 November 2024. The Policy is effective from 27 November 2024.

1.3 Objectives of this Policy

The objectives of this Policy are:

- (a) to establish a fair, transparent and accountable framework governing the use of Planning Agreements by the Council;
- (b) to explore the range and extent of development contributions made by development towards public facilities and other public benefits in the Council’s area;
- (c) to set out the Council’s specific policies and procedures relating to the use of Planning Agreements;
- (d) to give all stakeholders in development greater involvement in determining the type, standard and location of public facilities and other public benefits;
- (e) to facilitate public participation and to allow the community to gain an understanding of the benefits of appropriate Planning Agreements for the provision of public benefits; and
- (f) to enhance the understanding as to possibilities for development and associated public benefits and planning benefits facilitated by Planning Agreements.

1.4 What does the Policy set out?

This Policy sets out the Council’s approach to the use of Planning Agreements through negotiation when considering development applications and planning proposals associated with changes to the *Waverley Local Environmental Plan* in the Waverley area. Council is guided by the policy approach set out in the Department of Planning’s Practice Note titled *Planning Agreements* (19 July 2005) (“the Practice Note”) and considers the *Planning Agreement Practice Note* (February 2021). It should be noted Council must give regard to the Practice Note but is not bound by it.

In particular, this Policy sets out

- timing considerations in respect to Planning Agreements and procedures for negotiating and entering into Planning Agreements;
- the circumstances in which the Council may consider entering into a Planning

Agreement;

- the matters ordinarily covered by a Planning Agreement, the form of development contributions which may be sought under a Planning Agreement. Unless otherwise agreed in a particular case, development contributions negotiated as part of a development application or as part of a planning proposal will be valued or calculated as set out in in Appendix 1 and Appendix 2;
- examples of the kinds of public benefits which may be sought and, in relation to each kind of benefit, whether it involves a planning benefit;
- the method for determining the value of public benefits;
- whether money paid under different Planning Agreements is to be pooled and progressively applied towards the provision of public benefits to which the different agreements relate;
- when, how and where public benefits may be provided in line with strategic priorities as identified in Council’s strategies and plans probity measures; and
- the Council’s policies on other matters relating to Planning Agreements, such as their review and modification, the discharging of the developer’s obligations under agreements, the circumstances, if any, in which refunds may be given, dispute resolution and enforcement mechanisms, and the payment of costs relating to the preparation, negotiation, execution, monitoring and other administration of agreements.

1.5 Statutory framework

The current legal and procedural framework for Planning Agreements is set in Subdivision 2 of Division 7.1 of the *Environmental Planning and Assessment Act 1979*. Council is also bound by the provisions of Division 1A of Part 4 of the *Environmental Planning and Assessment Regulation 2021*.

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

- a) who has sought a change to an environment planning instrument (such as a rezoning application); or
- b) who has made or proposes to make a development application; or
- c) who has entered into an agreement with or is otherwise associated with a person in one of the above two categories.

1.6 Land use and strategic infrastructure planning

Land use planning should occur concurrently with strategic infrastructure planning to ensure that built form provisions and infrastructure contributions deliver both appropriate urban forms and contributions related to the development. Strategic infrastructure planning should be undertaken regularly and address expected growth, infrastructure demand resulting from this growth, and the apportioned cost of these infrastructure provisions. Planning Agreements should be used towards public benefits that are in accordance with the council’s infrastructure planning and funding policies and strategies, including this Policy.

1.7 What are the mandatory requirements of a Planning Agreement?

Section 7.4(3) of the Act requires Planning Agreements to include provisions specifying:

- (a) a description of the land to which the agreement applies,
- (b) a description of:
 - (i) the change to the environmental planning instrument to which the agreement applies, or
 - (ii) the development to which the agreement applies,
- (c) the nature and extent of the provision to be made by the developer under the agreement, the time or times by which the provision is to be made and the manner by which the provision is to be made,
- (d) in the case of development, whether the agreement excludes (wholly or in part) or does not exclude the application of section 7.11 or 7.12 to the development,
- (e) if the agreement does not exclude the application of section 7.11 to the development, whether benefits under the agreement are or are not to be taken into consideration in determining a development contribution under section 7.11,
- (f) a mechanism for the resolution of disputes under the agreement,
- (g) the enforcement of the agreement by a suitable means, such as the provision of a bond or guarantee, in the event of a breach of the agreement by the developer

The Act does not preclude a Planning Agreement containing other provisions that may be necessary or desirable in particular cases, except as provided by law. However, Council has prepared a template agreement that will form the basis for a Planning Agreement and this may be used as the basis for any agreement. This is attached as Appendix 3.

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

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

1.8 Guiding principles

The Practice Note sets out guidelines and safeguards in the application of Planning Agreements. These include determining the Planning Agreements acceptability and reasonableness. As such attention will be directed towards:

- a) proper or legitimate planning purposes, ordinarily ascertainable from the statutory planning controls and other adopted planning policies applying to development;
- b) providing for public benefits that bear a relationship to development that are not wholly unrelated to the development and are located in the vicinity of where the development is located;
- c) producing outcomes that meet the general values and expectations of the public and protect the overall public interest;
- d) providing for a reasonable means of achieving the relevant purposes and outcomes and securing the benefits; and
- e) protecting the community against planning harm.

Generally, negotiations of a Planning Agreement should commence before lodgment of a development application/submission of a planning proposal to the Gateway so as to ensure a practical outcome for public notification. In most cases, by way of safeguard, a Planning Agreement should be entered into before a planning proposal is submitted to the Gateway.

In addition, by way of safeguard, Council will seek to ensure probity of its processes involving Planning Agreements by ensuring applications involving Planning Agreements which involve Council land, or development applications made by or on behalf of Council, are independently assessed by an external planning consultant.

PART 2 – PRINCIPLES FOR PLANNING AGREEMENTS

2.1 Purposes of Planning Agreements

Section 7.4(1) of the Act provides that a Planning Agreement is a voluntary agreement or other arrangement between one or more planning authorities and a developer under which the developer agrees to make development contributions towards a public purpose. Planning Agreements are negotiated between planning authorities and developers in the context of applications for changes to environmental planning instruments (planning proposals) or for consent to carry out development (development applications).

The Council's approach to the negotiation of Planning Agreements is based on the planning purpose of furthering the Council's planning vision as set out in the Waverley Community Strategic Plan (CSP), Local Strategic Planning Statement (LSPS) and supporting environmental strategies (as amended from time to time). It is also informed by the mission and values of the Corporate Plan.

When negotiating planning obligations the Council will generally take into account Council's vision and mission statement, the Community Strategic Plan's general priorities set out in the programs to that Plan, the site circumstances and also the obligation preferences of the developer.

As an incentive towards the provision of development contributions to be applied towards public benefits and planning benefits, Council may consider, subject to its statutory obligations and other matters set out in this Policy or any other relevant Council policies, plans or procedures:

- a) **applications for development exceeding the maximum gross floor area permitted under clause 4.4 of WLEP 2012.**

In circumstances where significant variation of applicable development standards is proposed consideration should be given to the preparation of a planning proposal to amend the Waverley Local Environmental Plan.

The Council may negotiate a Planning Agreement with a developer/proponent in connection with any proposed application by the developer/proponent for an instrument change (e.g. rezoning application) or for development consent relating to any land in the Council's area. The Council may also negotiate a Planning Agreement in association with another Council or another authority where relevant. The negotiation of a Planning Agreement is at the absolute discretion of the Council.

Council will not enter a Planning Agreement unless it is satisfied that the proposed development is acceptable on planning grounds having regard to the general heads of consideration set out in Section 4.15 of the Act. Development that is unacceptable on planning grounds will not be given consent because of benefits offered by a developer. It is noted that any exceptions to relevant development standards will be assessed in accordance with the provisions set out in cl.4.6 of WLEP 2012

2.2 Principles underlying the use of Planning Agreements

The Council's use of Planning Agreements will be governed by the following principles:

- a) Planning decisions will not be bought or sold through Planning Agreements.
- b) The Council will not allow Planning Agreements to improperly fetter the exercise of its functions under the act, regulation or any other act or law.
- c) The Council will not use Planning Agreements for any purpose other than a proper planning purpose.
- d) Development that is unacceptable on planning grounds will not be permitted because of planning benefits offered by developers that do not make the development acceptable in planning terms.
- e) The Council will not seek benefits under a Planning Agreement that are wholly unrelated to a particular development.
- f) Monetary contributions obtained from planning agreements may be spent within the vicinity of the development they relate to but must be spent within the Waverley local government area.
- g) the Council will not give undue weight to a Planning Agreement.
- h) The Council will not allow the interests of individuals or interest groups to outweigh the public interest when considering a proposed Planning Agreement.
- i) The Council will not improperly rely on its position in order to extract unreasonable public benefits from developers under Planning Agreements.
- j) Planning Agreements should not be used as a means of general revenue raising or to overcome revenue shortfalls.
- k) Planning Agreements must be underpinned by proper strategic land use and infrastructure planning carried out on a regular basis and must address expected growth and the associated infrastructure demand.
- l) Strategic planning should ensure that development is supported by the infrastructure needed to meet the needs of the growing population.

The progression of a planning proposal or the approval of a development application should never be contingent on entering into a Planning Agreement.

2.3 What matters will the Council consider?

The matters that the Council may consider in any such negotiation may include, but not be limited to, the following:

- (a) Whether the Planning Agreement(s) meets the demands created by the development for new public infrastructure, amenities and services.
- (b) If inclusions in the development meet specific planning objectives of the Council.
- (c) If compensation is required for the loss of, or damage to, a public amenity, service, resource or asset caused by the development through its replacement, substitution, repair or regeneration.

- (d) Rectification of an existing deficiency in the existing provision of public facilities in the Council's area is made.
- (e) Whether recurrent funding of public facilities and/or public benefit is required or provided.
- (f) The extent to which the Council needs to monitor the planning impacts of development.
- (g) Whether planning benefits for the wider community accrue from the Planning Agreement.

The most important factor in deciding what planning obligations might be required as part of a Planning Agreement is the size of the development or resulting increase in land value from an amendment to the Waverley Local Environmental Plan. However, other factors such as the location or the resulting type of development may be relevant. These will establish core information such as likely increases in population and demand for particular public services.

This information will help Council with the determination of the development application/planning proposal and to prepare the Planning Agreement.

2.4 Strategic planning context

An important role for Planning Agreements is achieving specific land use planning outcomes with strategic and/or site-specific merit. A Planning Agreement should facilitate the provision of public facilities and amenity outcomes that advance the delivery of Council's corporate and strategic planning objectives and deliver valuable community benefits where appropriate. Long-term strategies including Waverley's Local Strategic Planning Statement (LSPS) and Community Strategic Plan (CSP) and delivery program are based on the outcomes of engagement with the community. The implementation of key aspects of some of these goals, the broader strategic directions and the delivery of key infrastructure areas can be directly or indirectly achieved through Planning Agreements.

The vision and goals established within Council's long-term strategic plans such as the CSP and LSPS flow through to supporting plans that guide Council's medium and short-term priorities:

- Long Term Financial Plan (10 years)
- Delivery Program (4 years)
- Operational Plan (Annual)

Council's LSPS considers planning for growth in Waverley and is supported by environmental strategies which seek to identify the community's needs for infrastructure such as community facilities, transport, open space, public domain and recreation infrastructure, capital works and infrastructure.

2.5 Types of public benefits to be delivered under Planning Agreements

Public benefits received through Planning Agreements contribute to Council's ability to deliver:

- a) infrastructure identified within existing development contributions plans (s7.12 contributions plan);
- b) infrastructure identified within NSW State Government and Council's strategic plans, e.g. commercial floor space in village centres, affordable housing, and open space acquisition;
- c) infrastructure required directly as a result of density increases experienced or expected from the redevelopment of a site. e.g. due to changes in development controls arising from a Planning Proposal; and

- d) land identified in a strategic plan, policy, planning instrument, development control plan or contributions plan for a public purpose, dedication or acquisition.

Examples of public benefits described above are provided at Appendix 5. It is recognised that development contributions that facilitate works in addition to the works listed in Appendix 5 may be appropriate because negotiations for each proposed development will reflect the circumstances of each case and the needs created by the scale of proposed change. Consequently, Appendix 5 does not prevent development contributions being negotiated on a case by case basis, particularly where planning benefits are also involved.

In some instances, a particular public benefit may be considered most suitable and supported by the community during public exhibition, however, it may not have been adequately investigated or designed yet due to issues with resourcing and/or preliminary funding by Council. Generally, VPA contribution money cannot be dedicated towards preliminary investigative and design processes because these processes may find that the particular process cannot be delivered after all, and therefore would not actually deliver a public benefit. Despite this, there is opportunity for Council to dedicate funding from elsewhere for the preliminary and feasibility works. The VPA contribution can be held aside and quarantined for a specified period of time and used for the construction of that project if found to be suitable for delivery. If found to be unsuitable/unfeasible, the VPA contribution can be used towards a different project that has been adequately investigated and designed, determined at the same as the first idea is supported as a backup.

This policy allows for in-kind contributions to be made to Council in lieu of monetary contributions provided that these are consistent with the calculation methods outlined in Appendix 1 and 2. In-kind contributions could include for example affordable housing, commercial floor space dedicated in perpetuity to Council or public domain upgrades.

Allocation of VPA to affordable housing

It is expected that 100% of the VPA contribution amount will be dedicated to a public benefit described above, except for where a VPA is offered in lieu of a contribution charged under chapter 2 part 3 of the State Environmental Planning Policy (Housing) 2021, in which case, 100% of the funds will be dedicated towards Waverley's Affordable Housing Contributions Reserve fund.

2.6 Recurrent charges

The Council may request developers/proponents, through a Planning Agreement, to make development contributions towards the recurrent costs of public facilities. Where the public facility primarily serves the development to which the Planning Agreement relates or neighbouring development, the arrangement for recurrent funding may be in perpetuity.

Where the public facility or public benefit is intended to serve the wider community, the Planning Agreement may, where appropriate, only require the developer/proponent to make contributions towards the recurrent costs of the facility for a set period which will be negotiated according to the impact of the development.

2.7 Pooling of development contributions

Where a proposed Planning Agreement provides for a monetary contribution by the developer/proponent, the 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, particularly essential infrastructure, to be provided in a fair and equitable way.

2.8 Do other development contributions apply?

Generally, the Council will not enter a Planning Agreement that excludes the application of s7.11 or s7.12 of the Act to development to which the agreement relates. This, however, is a matter for negotiation between the Council and a developer having regard to the particular circumstances of the case.

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

PART 3 – NEGOTIATION PROCEDURES AND PROBITY

3.1 Introduction

The Council's negotiation system for Planning Agreements aims to be efficient, predictable, transparent and accountable. Council will seek to ensure that the final negotiation of Planning Agreements runs in parallel with applications for instrument changes or development applications so as not to unduly delay the approval.

Where possible Council will publicly notify a Planning Agreement in the same manner and at the same time as the application for the instrument change or the development application to which it relates.

Council's preference is therefore to have the Planning Agreement negotiated and documented before it is publicly notified as required by the Act and Regulation. It is also preferable that a Planning Agreement is negotiated before lodgement of the relevant application and that it accompanies the application on lodgement.

3.2 Steps in the negotiation process

The negotiation of a Planning Agreement will generally involve the following key steps which are outlined in Appendix 1 and 2:

Planning Proposals

1. Prior to the lodgement of the relevant planning proposal, the Council and proponent (and any other relevant person) will decide whether to negotiate a Planning Agreement.
2. The parties will decide whether to appoint an independent person to facilitate or otherwise participate in the negotiations or aspects of it, and appoint such person.
3. A timetable for negotiations and the protocols and work practices governing their negotiations will be agreed between the parties.
4. The key issues for negotiation will be identified by the parties, and the negotiations over these issues will take place.
5. If agreement is reached, the Council (and any other relevant party) will prepare the proposed Planning Agreement including the explanatory note, and provide a copy of it to the proponent.
6. The parties may undertake further negotiation on the specific terms of the proposed Planning Agreement as necessary.
7. Once agreement is reached on the terms of the proposed Planning Agreement, the proponent may then make the development application/planning proposal to the Council accompanied by an offer to enter into such an agreement with specifics of the agreement set out in detail.
8. The Council will publicly exhibit the planning proposal and Planning Agreement in accordance with the Act. The Council may approve the planning proposal and set out the conditions for the agreement or, if an agreement has been executed, set out in the consent/determination the terms of the agreement.

Development applications

1. Prior to the lodgement of the relevant development application, the applicant will decide whether to offer a Planning Agreement. The applicant should contact Council about how the benchmark rates (Appendix 1) apply to the subject development.
2. The applicant submits the development application with a letter of offer to enter into a Planning Agreement.
3. Development assessment staff independently undertake their assessment of the application.
4. Should the development application be approved, Council officers will prepare the Planning Agreement for notification, reporting to Council and execution.

The parties may be required to undertake further negotiations and, hence, a number of the abovementioned steps mentioned 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.

Note that all costs associated with the negotiation of a Planning Agreement, including the appointment of an independent person, are to be borne by the developer.

It is also noted that where the value of the development exceeds \$20 million the development application will be dealt with by the independent Sydney Planning Panel (SPP) or any other relevant planning authority.

3.3 Probity

Public probity is important to Waverley Council and it will ensure that the negotiation of any Planning Agreements is fair, transparent and is directed at achieving public benefits in an appropriate manner free of corruption.

In this regard, Council will:

- a) Inform any applicant about Council values and business ethics - specifically, about ethical behaviour appropriate to business dealings. A copy of Council's Statement of Business Ethics Policy (as amended from time to time and available on Council's website).
- b) Ensure that its communities understand the system and the Council's role – specifically, how the Planning Agreements system operates and how Council will deal with developments/ planning proposals objectively.
- c) Notify Planning Agreements to ensure they are open and transparent – specifically, achieving maximum public awareness of the matters contained in a Planning Agreement(s) and the potential benefits of an agreement.
- d) Ensure appropriate delegations and separation of responsibilities in considering development applications/planning proposals that involve Planning Agreements – specifically, the need to ensure processes adequately

address the level of risk of corruption of a process while at the same time being appropriate to the likely level of risk.

- e) Ensure that modifications to approved development should be subject to the same scrutiny as the original development application.
- f) Ensure that Councillors and Council staff understand their varied roles, some of which have potential to conflict.
- g) Complete negotiations via written correspondence, rather than face-to-face meetings, to ensure that all discussions are clearly documented to ensure the highest level of transparency, accountability and record-keeping. This also allows timely consideration and resolution of any issues raised and facilitates carefully considered decision making by all parties.
- h) Take every step to ensure that conflicts of interest are ameliorated to the greatest extent possible – specifically, independent assessment by third parties where Council has an interest and not entering into any contractual arrangement which purport to guarantee outcomes that are subject to separate regulatory processes.

Apart from the above procedures, further procedures that will be implemented to address these matters may also include, but not be limited by, the following procedures:

- a) The Councillors will not be involved in the face-to-face negotiation of the agreement but will ultimately execute the Planning Agreement as part of their duties as Councillors.
- b) A Council officer with appropriate delegated authority will negotiate a Planning Agreement on behalf of the Council in accordance with this Policy.
- c) The Council will, in all cases, ensure that Council staff with key responsibility for providing advice on approvals, approving applications or ensuring compliance, do not have a role in the assessment of the commercial aspects of the agreement nor on the conditions of the Planning Agreement except where advice is required on matters relating to the conditions of consent for a particular proposal.
- d) The Council may involve an independent person(s) to facilitate or otherwise participate in the negotiations or aspects of it, particularly where this will lead to a better planning outcome.
- e) The Council will ensure that all negotiations with a developer/proponent and their consultants are sufficiently separated and documented.
- f) Where the Council has a commercial stake in development the subject of an agreement, it will take appropriate steps to ensure that it avoids a conflict of interest between its role as a planning authority and its commercial interest in the development.
- g) Where Council is the consent authority and an applicant has proposed to enter into a Planning Agreement, the development application must be determined by the Waverley Local Planning Panel (WLPP), the Sydney Planning Panel, or any other relevant planning authority.

PART 4 – NOTIFICATION AND EXHIBITION

4.1 Public notification of Planning Agreements

In accordance with the Act, a Planning Agreement must be publicly notified and available for public inspection for a minimum period of 28 days. Notification generally involves a public notice in the Wentworth Courier, online at <https://haveyoursay.waverley.nsw.gov.au/> and directly to the relevant precinct committee. The Council may decide to notify a Planning Agreement for a longer period or shorter period as permitted by the Act.

The Council will also notify the application to which a Planning Agreement relates in accordance with the Act.

4.2 Re-notification

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

4.3 Public comment on Planning Agreements

The Council encourages the public to make submissions on Planning Agreements. This will allow the Council to better understand local needs and permit fine tuning of the planning obligations set out in any Planning Agreement.

In the case of development applications, whilst Council aims to advertise the Planning Agreement at the same time as the development application it may be advertised separately to the development application depending upon when an outcome is reached following negotiation.

In the case of planning proposals, it would be expected that the proponent would provide a detailed offer which would incorporate specifics as to the public benefit and an undertaking to pursue and enter into a negotiated Planning Agreement prior to gazettal notification.

PART 5 – IMPLEMENTATION AND CONDITIONS

5.1 Preparation of the Planning Agreement

The Council will prepare a Planning Agreement relating to a particular application for an instrument change or development application. The Council uses a standard form of Planning Agreement on which every Planning Agreement is based which reflects the policies and procedures set out in this document (refer Appendix 3). This Planning Agreement will include an explanatory note (refer Appendix 4).

The 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.

5.2 When is a Planning Agreement required to be entered into?

A Planning Agreement is entered into when it is signed by all of the parties. The Council will usually require a Planning Agreement to be entered into as a condition of granting development consent to the development to which the agreement relates or as part of the Gateway process for a planning proposal. However, a Planning Agreement can be entered into at any time after the agreement is publicly notified in accordance with the Act and Regulation.

5.3 When will planning obligations arise?

5.3.1 Development Applications

The Council will generally require a Planning Agreement to provide that the developer's obligations in relation to securing the delivery of development contributions must be met prior to the issuing of any construction certificate related to the subject development application. Delivery of the development contribution may be prior to occupation certificate.

5.3.2 Planning Proposals

There are a number of possible scenarios which are to be detailed in the terms of the Planning Agreement to ensure that the obligations of the agreement are fulfilled by the proponent of the planning proposal.

- a) Generally, the developer's obligations in relation to the execution of a Planning Agreement must be met as soon as possible after gateway determination and prior to gazettal notice. A clause is to be included within the Planning Agreement indicating that the obligations under the Planning Agreement are only required to be met in the event of the associated Planning Proposal being successfully gazetted. The delivery of the contribution (e.g. payment of any monetary contribution) must be paid at gazettal. The Letter of Offer issued by the developer in relation to a Planning Proposal should reflect the above process.
- b) Generally, the developer's obligations in relation to the execution of a Planning Agreement associated with a Planning Proposal should not be linked to any current or future Development Application for the site.
- c) If the proponent of the planning proposal intends to sell the site it must immediately notify Council in writing. Generally, the proponent must meet the obligations of the Planning Agreement, particularly the delivery of developer contributions (e.g. payment of any monetary contribution), on or before settlement of the sale of the land. Generally, this is to be secured through

registration of the Planning Agreement, caveat against the title of the land and provision of bank guarantee as required under (a).

5.4 Implementation agreements

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

- (a) The timetable for provision of planning obligations under the Planning Agreement.
- (b) The design, technical specification and standard of any work required by the Planning Agreement to be undertaken by the developer.
- (c) The manner in which a work is to be handed over to the council. The manner in which a material public benefit is to be made available for its public purpose in accordance with the Planning Agreement.

5.5 Monitoring and review of a Planning Agreement

The Council will continuously monitor the performance of the developer's/proponent's obligations under a Planning Agreement and report them in accordance with the Act.

5.6 Modification or discharge of obligations

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

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

5.7 Assignment and dealings by the developer/proponent

The Council will not generally permit the assignment of any or all of the developer's/proponent's rights or obligations under the agreement, nor will the Council permit any dealing in relation to any part or the whole of the land the subject of the agreement. However the Council may agree to an assignment when:

- a) The developer/proponent has, at no cost to the Council, first procured the execution by the person with whom it is dealing of all necessary documents in favour of the Council by which that person agrees to be bound by the agreement as if they were a party to the original agreement, and
- b) If the proposed dealing involves a mortgage, charge or other encumbrance in relation to the party's right, title and interest in the land, such documents provide for 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
- c) The party is not in breach of the Agreement.

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

5.8 Provision of security under a Planning Agreement

The Council will generally require a Planning Agreement to make provision for security to cover the developer's/proponent's obligations under the agreement. A form of security will generally be an unconditional bank guarantee from an Australian Bank in favour of the Council to the full value of the developer's/proponent's obligations under the Agreement and on terms otherwise acceptable to the Council. An insurance bond may also be deemed acceptable. Other security will generally be required.

5.9 Registration of Planning Agreements

The Council may require a Planning Agreement to contain a provision requiring the developer/proponent to agree to registration of the agreement pursuant to s93H of the Act if the requirements of that section are satisfied.

5.10 Dispute resolution

The 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.

5.11 Methodology for valuing public benefits under a Planning Agreement

Subject to section 2.4, unless otherwise agreed in a particular case, public benefits will be valued as follows:

5.11.1 Provision of land or units for a public purpose

Where the benefit under a Planning Agreement is the provision of land for a public purpose, or units given to Council in perpetuity, the value of the benefit will be determined by an independent valuer who is experienced 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/proponent.

5.11.2 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 (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/proponent.

5.11.3 Other public benefit

Where the benefit under a Planning Agreement is the provision of public benefit other than under 5.11.1 or 5.11.2, Council and the Developer/proponent will negotiate the manner in which the benefit is to be valued for the purposes of the agreement.

5.12 How will the Council seek to determine the amount of Monetary Contribution that may be payable for Developments with FSR above clause 4.4 of WLEP (the WLEP Provisions)

Generally, the value of 50% of the increase in net value to the development arising from an increase in FSR beyond WLEP 2012 provisions in clause 4.4 may be considered an appropriate contribution. A series of standardised development contribution rates have been developed to streamline negotiations and provide fairness, predictability and certainty to the community, Council and developers. These pre-scheduled development contribution rates apply to different suburbs in the Waverley LGA. These rates are located in Appendix 1 and will be applied to Development Applications. These rates will be updated annually.

5.13 How will the Council seek to determine the amount of Monetary Contribution that may be payable for an amendment to the Waverley Local Environmental Plan 2012

Generally, the value of 50% of the net value from the planning proposal may be considered an appropriate contribution. The net value will be determined by an independent valuer who is experienced in valuing land in New South Wales (and who is acceptable to Council). All costs of the independent valuer in carrying out such a valuation will be borne by the proponent. The methodology used to determine the net value will generally be calculated by determining the Residual Land Value resulting from the planning proposal less the Base Case.

APPENDIX 1 – VPA PAYABLE RATES

The VPA payable rates per square metre for residential floor space are outlined in the following table. VPA payable rates have not been calculated for Bronte, Tamarama, Waverley or Queens Park as there have been few VPAs offered in these areas. If a VPA is offered in these suburbs, then it should be calculated based on the 'Average LGA' rate.


If the existing building already exceeds the maximum FSR permitted on the site, the VPA will be calculated using the additional GFA above the existing non-compliance. For example, for a site with a max FSR of 0.9:1, an existing FSR of 1:1 and a proposed FSR of 1.2:1, the VPA will only be calculated on the GFA between 1:1 and 1.2:1.

Note: These rates will be updated on an annual basis based on sales prices.

BENCHMARK RATES FOR RESIDENTIAL

Area and type	Rate \$/sqm
<i>Bondi Junction</i>	\$4,100
<i>Bondi</i>	\$4,200
<i>Bondi Beach</i>	\$5,200
<i>North Bondi</i>	\$5,100
<i>Dover Heights</i>	\$3,400
<i>Rose Bay</i>	\$4,100
<i>Vaucluse</i>	\$3,800
<i>Other Suburbs (Average)</i>	\$4,200

BENCHMARK RATES FOR NON-RESIDENTIAL

Area and type	Rate \$/sqm	Location it applies
Bondi Road Centre	\$2,400	
Bondi Junction retail core	\$2,800	

Bondi Junction retail fringe	\$2,600	
Bondi Junction office	\$2,600	
Campbell Pde, Bondi	\$4,100	
Hall Street, Bondi	\$3,600	
Fringe	\$3,000	All other areas for non-residential development not specified in this table.

PRO RATA BENCHMARKS

Where a Development Application including any modification or amendment offering a Voluntary Planning Agreement contains both residential and non-residential floor space, generally a pro rata approach is to be taken and both benchmark rates should be used proportionately to their percentage of gross floor area within the entire development.

For example, if 20% of the total gross floor area of a development is non-residential and 80% of a total gross floor area of a development is residential, then the non-residential benchmark rate should be used for 20% of the gross floor area exceedance above the maximum permitted under the maximum Floor Space Ratio, and the residential benchmark rate for 80%. If the gross floor area exceedance were 50 square metres, then 40sqm would be multiplied by the residential rate and 10sqm against the non-residential rate.

This approach may be varied where additions to an existing building (which contains both residential and non-residential uses) are proposed, and the new works only add gross floor area of one of the uses. For example, an additional floor containing residential floor space only is being added above a shop top housing development and the ground floor commercial space is not being reduced or increased. In this instance it would be appropriate to use only the residential benchmark rate.

ALTERNATE VALUATION METHODOLOGY

There are two components that will make up the valuation. These are:

1. The valuation (end sale value) of the bonus (marginal) floor space; and
2. Assessment of the marginal costs (to be deducted from the marginal revenue in order to calculate marginal profit);

Component 1 must be done by fully qualified Valuers. It is recommended that two Valuers are appointed, one on behalf of Council and the other on behalf of the applicant. The adopted valuation figures is to be the average of the two valuations, where these valuations are reasonably close.

Component 2 must be done by fully qualified quantity surveyors (QS). It is recommended that two consultants are appointed, one on behalf of Council and the other on behalf of the applicant. The adopted cost estimates is to be the average of the two QS estimates, where these valuations are reasonably close.

The principles of valuation of the two components are detailed below:

1. Component 1 – Value of Floor Space Bonus

- 1.1. The Valuer is to provide the end sale value of the bonus floor space. This refers to the additional apartments plus their ancillary car parking spaces.
- 1.2. Where there was a bonus on the height of the building then the bonus apartments will be on the upper most levels of the building. Alternatively it may be on the levels immediately below the penthouse and sub-penthouse levels (given that a premium may be attached to the penthouse and sub-penthouse levels – refer to example in Paragraph 1.6 below).
- 1.3. The marginal value (or value of the bonus floor space measured in dollars per square metre) should not be less than average value (the building's total value divided by total floor area).
- 1.4. The bonus floor space does not necessarily have to be identified in "whole" apartments. It can be identified in fractions of apartments or even in square metres.
- 1.5. The valuation is to take into consideration the specification and quality of finish of the bonus apartments.
- 1.6. An acceptable method of measure is the difference between the total value of the apartments without the bonus floor space and the total value of the apartments with the bonus floor space.

In the example below a bonus floor space provides an additional increase in the internal leasable area of 14.9% through an increase of building height (one additional floor) plus a slight widening of the building. The result is an increase in the end value by 15.8%.

Building Without Bonus Floor Space

Level	Sqm	\$/sqm	\$m	
11			300	12,000
10			400	11,000
9			500	10,000
8			500	9,800
7			500	9,600
6			500	9,400
5			500	9,200
4			500	9,000
3			500	8,500
2			500	8,000
1			500	7,500
TOTAL			5,200	48.5

Building With Bonus Floor Space

Level	Sqm	\$/sqm	\$m	
12			300	12,000
11			425	11,000
10			525	10,200
9			525	10,000
8			525	9,800
7			525	9,600
6			525	9,400
5			525	9,200
4			525	9,000
3			525	8,500
2			525	8,000
1			525	7,500
TOTAL			5,975	56.2
Margin			775	7.7
% Increase			14.9%	15.8%

- 1.7. The marginal value shall be the actual price exchanged. Where the apartments have not been exchanged then the market value should be the listed or asking price. If there are no listed or asking prices then the value shall be estimated by the Valuer based on market evidence.
- 1.8. Market evidence should include any pre-sales in the building and/or recent sales and pre-sales of comparable apartments in other buildings in the locality.
- 1.9. The Valuer shall deduct (from the end value of the bonus floor space) GST at one eleventh of the gross end sale value and any other costs on sale such as sales commission and legal costs. Generally these costs will be no more than 3.0% of gross end sale value.
- 1.10. The result is the expected marginal net sale proceeds from the bonus floor space.

2. Component 2 – Marginal Cost to Design and Construct

- 2.1. The QS shall provide an estimate of the marginal cost of construction relating to the bonus floor space and bonus car parking spaces. Generally, Council will not accept exaggerated costs that are significantly higher than the development cost indicated on the submitted DA.
- 2.2. This simplest method to calculate marginal cost is the pro-rata of the total building cost based on bonus floor space divided by total GFA plus a pro-rata of the car parking cost based on number of parking spaces allocated to the bonus units divided by total car parking spaces.
- 2.3. Various site costs including, but not limited to, landscaping, driveways, fencing and external works shall be excluded since these costs are not marginal.
- 2.4. The QS and/or Valuer shall then add the marginal design costs, application fees, marketing and advertising costs and other ancillary costs. Again this would be a pro-rata of total costs. Evidence of these costs should be provided.

- 2.5. The QS and/or Valuer shall then add the monetary contributions under Section 94A in relation to the bonus floorspace (if paid or is to be paid).
- 2.6. The QS and/or Valuer can then add finance and interest costs again using the pro-rata method. The method for showing interest calculation must be provided using cash flow or other appropriate method of calculation.
- 2.7. Land cost and profit margins are not to be included as these are not marginal costs.
- 2.8. GST on costs is to be excluded since this will be returned to the developer in the form of input credits.
- 2.9. The result is the total estimated cost in delivering the marginal floor space.

The formula for calculating the profit from the bonus floor space is:

Marginal net sale proceeds less Marginal cost to Construct

50% of the profit from the bonus floor space is to be provided as a negotiated form of public benefit through a Planning Agreement.

APPENDIX 2 – VALUATION METHODOLOGY FOR PLANNING PROPOSALS

There are two components that will make up the valuation. These are:

1. The Base Case; and
2. Residual Land Value.

Both components must be done by suitably qualified Valuers. It is recommended that two Valuers are appointed, one on behalf of Council and the other on behalf of the applicant. The costs of commissioning the Valuers should be shared between Council and the applicant. The adopted valuation figure is to be the average of the two valuations.

The principles of valuation of the two components are detailed below:

1. Component 1 – Base Case

- 1.1. The Base Case is the value of the land under the current zoning (assuming in perpetuity). The value under the base case should be assessed on the site's highest and best use permissible under the current zoning. The highest and best use may, or may not be, the current use of the land.
- 1.2. The Valuer is required to test and determine the highest and best use of the land. The base case is to assume that the current zoning on the land and the development standards under the current instruments will remain in perpetuity. The planning proposal itself must not affect the base case.
- 1.3. Standard valuation practices shall apply and at least two methods of valuation should be used. Comparable sales should be one of the methods applied unless there is insufficient evidence. When using comparable sales evidence the Valuer must ensure that the sale prices are not affected by planning proposals or draft instruments that are not related to the base case – or at least make reasonable allowances / adjustments.
- 1.4. If the subject site was sold recently then the purchase price can be adopted provided that the price was not inflated as a result of the planning proposal.

2. Component 2 – Residual Land Value

- 2.1. The Valuer shall estimate the value of the land under the planning proposal using the residual land valuation (RLV) method. The preferred method for calculating the RLV is discounted cash flow modelling using proprietary software like Estate Master DF or similar. A simple developer's profit model may be acceptable for small-scale single-staged developments.
- 2.2. The assumptions in the RLV calculations must be reasonable and based on industry averages.
- 2.3. If there are no listed or asking prices then the end sale values shall be estimated by the Valuer based on comparable market evidence.

- 2.4. Market evidence should include any recent pre-sales in the building and/or recent sales and pre-sales of comparable apartments in other buildings in the locality.
- 2.5. Estimated construction costs must be supported by a Quantity Surveyor’s report. Construction contingency should be no greater than 5%. Soft costs may be included such as design costs, application fees, authority fees, development management, marketing and advertising and finance establishment costs.
- 2.6. In calculating the RLV the project start date should assume the land is zoned appropriately (i.e. the zone that is being proposed).
- 2.7. The RLV should exclude any discounting during the rezoning period as the payment under the VPA will not be made until occupation certificate. A typical development program should be assumed that allows reasonable time for development approval, certification and construction. Council will not accept a program that appears conservative or pessimistic. The table below provides a suggested range of project lives for a single stage project. Any significant departure in project life requires supporting evidence.

Construction Cost	Approvals and Documentation (months)	Construction (months)
Under \$20m	8-9	10-14
\$20m to \$40m	9-11	14-17
Above \$40m	10-12	18-20

- 2.8. It is recognised that these timeframes can vary and are impacted by building height and number of basement levels.
- 2.9. For a short single staged development a developer’s profit or “back of envelope” method rather than a cash flow model may be acceptable. Using this method the RLV will be derived from the target profit/risk margin. If this method is used the interest should be calculated as follows:

$$\text{Interest Cost} = (\text{Total Project Costs excluding land \& GST}) \times (\text{Interest Rate} / 12) \times (\text{Months of Construction}) \times 50\%.$$

- 2.10. The RLV model should preferably show both the development margin and Project Internal Rate of Return (IRR) on the cash flow before interest. Reasonable industry standard hurdle rates should be applied. Generally a target margin (on project costs) of 15% to 25% and a target IRR of 16% to 20% should apply but this depends upon the levels of market risk and other project risks.

The formula for calculating the net value from the planning proposal is:
Residual Land Value minus the Base Case

50% of the net value from the planning proposal is to be provided as a negotiated form of public benefit through a Planning Agreement.

APPENDIX 3 – (CLAUSE 1.6) PLANNING AGREEMENT TEMPLATE

PLANNING AGREEMENT NO. _____

Section 7.4 of the Environmental Planning and Assessment Act, 1979

THIS AGREEMENT is made on DATE THAT AGREEMENT IS ENTERED INTO

PARTIES

WAVERLEY COUNCIL of 55 Spring Street, Bondi Junction NSW 2022 ABN 12 502 583 608
("Council")

AND

DEVELOPER NAME (ACN #) of Address ("**Developer**")

BACKGROUND/RECITALS

- A. The Developer is the registered proprietor of the Land.
- B. The Council is the local authority constituted under the Local Government Act 1993 and the planning and consent authority constituted under the Act.
- C. On DATE the Developer made (or caused to be made) the Development Application to Council for Development Consent to carry out the Development on the Land.
- D. The Development Application was accompanied by an offer dated DATE by the Developer to enter into this Agreement to make the Development Contribution to be applied towards a public purpose in accordance with Council's Planning Agreement Policy if development consent was granted.
- E. The Development Consent was granted on DATE.
- F. This Agreement is consistent with the Developer's offer referred to in Recital D.

OPERATIVE PROVISIONS:

1 PLANNING AGREEMENT UNDER THE ACT

The parties agree that this Agreement is a Planning Agreement governed by Section 7.4 and Subdivision 2 of Division 7.1 of Part 7 of the Act.

2 APPLICATION OF THIS AGREEMENT

This Agreement applies to the Land and to the Development proposed in the Development Application, as may be modified.

3 OPERATION OF THIS AGREEMENT

This Agreement shall take effect on and from the date of this Agreement. The parties must execute and enter into this Agreement as soon as possible after the Development Consent is grant and prior to any Construction Certificate issuing for the Development.

4 DEFINITIONS AND INTERPRETATION

4.1 Definitions

In this Agreement unless the context otherwise requires:

“Act” means the *Environmental Planning and Assessment Act 1979* (NSW);

“Agreement” means this agreement;

“Bank Guarantee” means an irrevocable and unconditional undertaking by a trading bank approved by the Council to pay the Development Contribution amount on demand without an expiry or end date and containing terms and conditions acceptable to Council and in accordance with clause 9 of this Agreement;

“Business Day” means a day that is not a Saturday, Sunday or public holiday, on which banks are open for general services in Sydney, New South Wales;

“Caveat Form” means an irrevocable authority to Waverley Council to register and maintain a caveat on the Land, in a form acceptable to Council and executed by the owner of the Land, or such other form of owner’s consent to caveat as may be required by Council; **“Certifying Authority”** means any accredited private certifier including where appropriate, a Principal Certifying Authority (PCA) appointed or to be appointed to certify the Development or any aspect of it;

“Council” means Waverley Council and herein includes any local government authority with which that Waverley Council may merge or any other local government authority responsible for a local government area that the Land is located within; **“Construction Certificate”** means any construction certificate as referred to in s 6.4 of the Act in respect of the Development Consent;

“Development” means the development the subject of the Development Application described in item 4 of the Schedule;

“Development Application” means the development application referred to in item 3 of the Schedule;

“Development Consent” means the development consent granted in respect of the Development Application described in item 3 of the Schedule;

“Development Contribution” means the amount of money referred to in item 5 of the Schedule; [NOTE: For monetary contributions]

“Development Contribution Date” means the time the Development Contribution is to be paid as specified to in item 7 of the Schedule; [NOTE: For monetary contributions] **“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;

“Land” means the land described in item 2 of the Schedule;

“Occupation Certificate” means any occupation certificate as referred to in s 6.4 of the Act in respect of the Development Consent;

“Party” means a party to this Agreement including their successors and assigns;

“Public Purpose” for the purpose of this Agreement means the public purpose described in item 6 of the Schedule;

“Registration Application” means an application for registration of this Agreement as a Planning Agreement on the title of the Land pursuant to Section 7.6 of the Act in a form approved by the Registrar General;

“Schedule” means the schedule to this Agreement.

4.2 Interpretation

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, New South Wales;
- (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, Agreement or document is to that agreement, Agreement 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; and
- (n) Any schedules and attachments form part of this Agreement.

5 DEVELOPMENT CONTRIBUTION TO BE MADE UNDER THIS AGREEMENT

- 5.1 The Developer agrees to make, and the Council agrees to accept, the Development Contribution to be applied for the Public Purpose.
- 5.2 The Developer must pay the Development Contribution to the Council by bank cheque on or before the Development Contribution Date and time is essential in this respect. [NOTE: For monetary contributions]

6 APPLICATION OF THE DEVELOPMENT CONTRIBUTION

- 6.1 The Council will apply the Development Contribution towards the Public Purpose as soon as practicable.

7 APPLICATION OF S7.11 AND S7.12 OF THE ACT TO THE DEVELOPMENT

- 7.1 This Agreement does not exclude the application of Sections 7.11, 7.12 or 7.24 of the Act to the

Development.

- 7.2 The Development Contribution provided by the Developer will not be taken into consideration in determining any development contribution under Section 7.11 or 7.12 of the Act.

8 REGISTRATION OF THIS AGREEMENT

- 8.1 The Parties agree this Agreement is to be registered by the Registrar-Generals provided for in section 7.6 of the Act.
- 8.2 The Developer warrants that they have done everything necessary to enable this Agreement to be registered under section 7.6 of the Act.
- 8.3 Without limiting clause 8.2, the Developer warrants that they have obtained the express written consent to the registration of this Agreement under section 7.6 of the Act from:
- (a) If this Agreement relates to land under the *Real Property Act 1900*, each person who has an estate or interest in the Land registered under that Act; or
 - (b) If this Agreement relates to land not under the *Real Property Act 1900*, each person who is seized or in possession of an estate or interest in the Land.
- 8.4 As soon as possible after entering into this Agreement and in any event prior to the issue of a Construction Certificate, the Developer will at their cost arrange and effect registration of this Agreement under s7.6 upon the title to the Land and as soon as possible will:
- (a) deliver to the Council the Registration Application in registrable form noting the Council as applicant and executed by the owner of the Land and any other person the subject of the warranty in clause 8.3;
 - (b) produce or cause to be produced the title deed with NSW Land Registry Services and advise Council of the production number or provide a copy of the CoRD Holder Consent as may be applicable;
 - (c) provide the Council with a cheque in favour of NSW Land Registry Services, NSW for the registration fees for registration of this Agreement, or deliver funds electronically as Council may direct; and
 - (d) provide the Council with a cheque in favour of the Council for its reasonable costs, expenses and fees incurred or to be incurred in connection with the preparation of this Agreement and any documents, form or instrument created or to be created in accordance with the provisions of this Agreement.
 - (e) and take any other necessary action so as to ensure this Agreement is registered on the title to the Land prior to the issue of any Construction Certificate.
- 8.5 Upon compliance with clause 8.4 by the Developer the Council will promptly lodge the Registration Application with the Registrar General.
- 8.6 The Parties will co-operate with each other to ensure that the Agreement is registered by the Registrar General.
- 8.7 Upon payment of the Development Contribution or surrender of the Development Consent, the Developer may request in writing the removal of the dealing created by registration of the Agreement from the title to the Land. The Council will not withhold its consent to such removal, provided the Developer pays all reasonable costs, expenses and fees of the Council relating to such removal.
- 8.8 Should payment of the Development Contribution or surrender of the Development Consent occur upon the date of this Agreement and prior to issue of a Construction Certificate, then there will be no obligation to register this Agreement in accordance with this clause nor provide the Bank Guarantee in accordance with clause 9.1.

8.9 Upon registration of this Agreement by the Registrar General, this 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 this Agreement.

9 BANK GUARANTEE

9.1 Provision of Bank Guarantee

- (a) Subject to clause 8.8, prior to the issue of a Construction Certificate, the Developer must deliver to the Council a Bank Guarantee, which must be:
- (i) in a form and from an institution approved by the Council;
 - (ii) irrevocable and unconditional;
 - (iii) with no expiry date;
 - (iv) issued in favour of the Council;
 - (v) for an amount equivalent to the Development Contribution set out in Item 6 of the Schedule;
 - (vi) drafted to cover all of the Developer's obligations under this Agreement; and
 - (vii) on the terms otherwise satisfactory to the Council.
- (b) The Developer acknowledges that the Council enters into this Agreement in consideration of the Developer providing the Bank Guarantee as a security for the performance of all of the Developer's obligations under this Agreement, including without limitation the delivery of the Development Contribution to Council in accordance with this Agreement.

9.2 Calling on Bank Guarantee

- (a) The Council may call on the Bank Guarantee in the event that the Developer:
- (i) fails to make a payment of any part of the Development Contribution in accordance with this Agreement or any other amount payable under this Agreement by its due date for payment; or
 - (ii) breaches any other term or condition of this Agreement,

and fails to remedy the relevant failure or breach within 7 days after the Council's notice.

- (b) If the Council calls on the Bank Guarantee as a result of the Developer's failure to pay any amount due under this Agreement, then the Council will apply the amount received pursuant to its claim on the Bank Guarantee towards the Developer's obligation to pay the relevant amount and will deduct that amount from the total amount payable under this Agreement. In those circumstances, the Developer will be required to pay to the Council any outstanding balance of the Development Contribution and other amounts payable under this Agreement.

9.3 Return of Bank Guarantee

Subject to clause 9.2, provided that the Developer has complied with its obligations under this Agreement, to pay the Development Contribution or any other amount payable under this Agreement, the Council will return the Bank Guarantee to the Developer.

10 REVIEW OF THE AGREEMENT

Any amendment or review of this Agreement shall be by agreement in writing and in compliance with section 7.5 of the Act.

11 DISPUTE RESOLUTION

11.1 Notice of dispute

If a Party claims that a dispute has arisen under this Agreement (“Claimant”), it must give written notice to the other Party (“Respondent”) stating the matters in dispute and designating as its representative a person to negotiate the dispute (“Claim Notice”). No Party may start Court proceedings (except for proceedings seeking interlocutory relief) in respect of a dispute unless it has first complied with this clause.

11.2 Response to notice

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

11.3 The nominated representative must:

- (i) Meet to discuss the matter in good faith within five business days after services by the Respondent of notice of its representatives;
- (ii) Use reasonable endeavours to settle or resolve the dispute within 15 business days after they have met.

11.4 Further notice if not settled

If the dispute is not resolved within 15 business days after the nominated representatives have met, either Party may give to the other a written notice calling for determination of the dispute (“Dispute Notice”) by mediation under clause 11.5 or by expert determination under clause 11.6.

11.5 Mediation

If a Party gives a Dispute Notice calling for the dispute to be mediated:

- (i) The Parties must agree to the terms of reference of the mediation within five business days of the receipt of the Dispute Notice (the terms shall include a requirement that the mediation rules and the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply);
- (ii) The mediator will be agreed between the Parties, or failing agreement within five business days of receipt of the Dispute Notice, either Party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator;
- (iii) The mediator appointed pursuant to this Clause 11.5 must:
 - (a) Have reasonable qualifications and practical experience in the area of disputes; and
 - (b) Have no interest or duty which conflicts or may conflict with his function as mediator, he being required to fully disclose any such interest or duty before his appointment;
- (iv) The mediator shall be required to undertake to keep confidential all matters coming to his knowledge by reason of his appointment and performance of his duties;
- (v) The Parties must within five business days of receipt of the Dispute Notice notify each other of their representatives who will be involved in the mediation.
- (vi) The Parties agree to be bound by a mediation settlement and may only initiate

judicial proceedings in respect of a dispute which is the subject of a mediation settlement for the purpose of enforcing that mediation settlement.

- (vii) In relation to costs and expenses
 - (a) Each Party will bear their own professional and expert costs incurred in connection with the mediation; and
 - (b) The cost for the mediator will be shared equally by the Parties unless the mediator determines a Party has engaged in vexatious or unconscionable behaviour in which case the mediator may require the full cost of the mediation to be borne by that Party.

11.6 Expert Determination

If the dispute is not resolved under clause 11.3 or 11.5 the dispute may, by agreement between the Parties, both acting reasonably having regard to the nature of the dispute, be resolved by expert determination, in which event:

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

11.7 Litigation

If the dispute is not finally resolved in accordance with this clause 11, either Party is at liberty to litigate the dispute.

11.8 Continue to Perform Obligations

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

12 ENFORCEMENT

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

- 12.2 Until such time as the Development Contribution has been paid in full, an Occupation Certificate must not be issued and the Developer must:
- (a) notify the Council in writing of the name and contact details of any Certifying Authority to which it has applied for an Occupation Certificate at the same time that such application is made;
 - (b) at the time it lodges any application for an Occupation Certificate notify the Certifying Authority in writing of the existence and terms of this Agreement; and
 - (c) procure and provide to Council a written acknowledgement from the Certifying Authority addressed to Council confirming that the Certifying Authority will not issue an Occupation Certificate until Council provides written confirmation that the Development Contribution has been paid;
 - (d) not rely on any Occupation Certificate in respect to the Development.
- 12.3 The Developer acknowledges and agrees that:
- (a) the Land is charged with the payment to Council of the Development Contribution until the Development Contribution is paid in full to Council; [NOTE for monetary contributions]
 - (b) Council has a caveatable interest in the Land from the later of the date of the Development Consent and this Agreement until the Development Contribution and any other monies due to Council under this Agreement are paid in full to Council;
 - (c) Council has the right to lodge and maintain a caveat against the title to the Land to notify of and protect its interest created by this Agreement (including the charge in (a), until the Development Contribution and any other monies due to Council under this Agreement are paid in full to Council;
 - (d) unless the Development Contribution is paid to Council by the Developer upon entering into this Agreement, the Developer shall provide Council with the Caveat Form; and
 - (e) Upon payment of the Development Contribution or surrender of the Development Consent, the Developer may request in writing the removal of the caveat from the title to the Land. The Council will not withhold its consent to such removal, provided the Developer pays all reasonable costs, expenses and fees of the Council relating to such removal and has complied with all its obligations under this Agreement.

13 NOTICES

- 13.1 Any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:
- (a) delivered or posted to that Party at its address set out below in Item 8 of the Schedule;
 - (b) faxed to that Party at its fax number set out below in Item 8 of the Schedule;
 - (c) emailed to that Party at its email address set out below in Item 8 of the Schedule.
- 13.2 If a Party gives the other Party 3 business days' notice of a change of its address or fax number, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.
- 13.3 Any notice, consent, information, application or request is to be treated as given or made at the following time:
- (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 faxnumber.

13.4 If any notice, consent, information, application or request is delivered, or an error free transmission report in relation to it is received, on a day that is not a business day, or if on a business day, after 5pm on that day in the place of the Party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day.

14 APPROVALS AND CONSENT

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

15 ASSIGNMENT AND DEALINGS

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

16 COSTS

Council's costs of and incidental to the preparation and execution of this Agreement and any related documents and registration of same shall be borne by the Developer. The Developer shall be responsible to pay its own costs and any stamp duty arising from this Agreement or its preparation.

17 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.

18 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.

19 GOVERNING LAW AND JURISDICTION

This Agreement is governed by the law of New South Wales. The Parties submit to the nonexclusive 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.

20 JOINT AND INDIVIDUAL LIABILITY AND BENEFITS

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

21 NON FETTER

The Developer acknowledges and agrees that:

- (a) in addition to its obligations under this Agreement the Council is also responsible for the conduct and administration of local government in the Waverley Local Government Area;
- (b) this Agreement in no way affects Council's statutory obligations, functions or powers, including without limitation, its obligations, functions or powers in respect of the Development Application, Development Consent and any other approvals required in respect of the works to be carried out under the Development Consent;
- (c) nothing which the Council does or fails to do under this Agreement will limit or otherwise affect the Developer's obligations under the Development Consent; and
- (d) nothing which the Council does, fails to do or purports to do in performing the Council's statutory functions or powers will constitute or amount to a breach of this Agreement.

22 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.

23 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.

24 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.

25 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.

26 GOODS & SERVICES TAX

- 26.1 The Parties agree and acknowledge, all amounts payable by one party to the other party in relation to a supply under this Agreement have been calculated exclusive of GST which may be imposed on the supply.
- 26.2 If any supply made under this Agreement is, or becomes, subject to GST, the party to whom the supply is made ("**Recipient**") must pay to the party making the supply ("**Supplier**"), as consideration, in addition to any consideration payable or to be provided

elsewhere in this Agreement, subject to issuing a Valid Tax Invoice, an additional amount on account of GST, such amount to be calculated by multiplying the consideration by the applicable rate of GST.

26.3 Any amount in respect of GST payable under clause 26.2 must be paid to the Supplier immediately on receipt of the Valid Tax Invoice.

26.4 If any party is required to reimburse or indemnify the other party for a cost or expense ("**Cost**") incurred by the other party, the amount of that Cost for the purpose of this Agreement is the amount of the Cost incurred, less the amount of any credit for, or refund of, GST, which the party incurring the Cost is entitled to claim in respect of the Cost.

27 EXECUTION IN TRIPLICATE

The Parties shall execute this Agreement in triplicate so as to provide one original signed by both parties and a further copy for registration of the Agreement under s7.6 of the Act. This Agreement will be dated on the day of execution by all Parties.

SCHEDULE

<u>Item Number</u>	<u>Particulars</u>	<u>Description</u>
1	Developer	NAME (ACN #)
2	Land	Street Address (Lot & DP)
3	Development Application	DA #
4	Development (description)	
5	Development Contribution	
6	Public Purpose	
7	Development Contribution Date (Payment date for the Development Contribution)	
8	Developer Address	
	Developer Fax	
	Developer Email	
	Council Address	55 SPRING STREET, BONDI JUNCTION NSW 2022
	Council Fax	(02) 9387 1820
	Council Email	info@waverley.nsw.gov.au

EXECUTED by WAVERLEY COUNCIL pursuant to a resolution of Waverley Council on

EMILY SCOTT

General Manager

EXECUTED by

NAME

(ACN #)

In accordance with section 127 of the
Corporations Act 2001

NAME

Director/Secretary

NAME

Director

Explanatory Note

(Clause 20E of the Environmental Planning and Assessment Regulation 2021)

Draft Planning Agreement

The purpose of this explanatory note is to provide a summary of the proposed Planning Agreement (PA) prepared jointly between Waverley Council and the Developer *under s7.4 of the Environmental Planning and Assessment Act 1979* (the Act).

This explanatory note has been prepared as required by clause 25E of the *Environmental Planning and Assessment Regulation 2000*.

This explanatory note is not to be used to assist in construing the Planning Agreement

1 Parties:

Waverley Council (Council) and

Developer (ACN #) of Address (Developer)

2 Description of subject land:

3 Description of Development:

4 Background:

5 Summary of Objectives, Nature and Effect of the Draft Planning Agreement:

6 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 Public Interest

How the Draft Planning Agreement Promotes the Objects of the Environmental Planning and Assessment Act, 1979 (EP&A Act)

How the Draft Planning Agreement promotes elements of the Council's charter under section 8 of the Local Government Act, 1993

Conformity with the Council's Capital Works Program

Whether the Agreement specifies that certain requirements of the Agreement must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued

APPENDIX 5 – TYPES OF PUBLIC BENEFITS DELIVERED BY PLANNING AGREEMENTS

Public benefits delivered by Planning Agreements must be consistent with the *Planning Agreement Practice Note (February 2021)* publication and Part 2 of the *Waverley Planning Agreement Policy 2014*.

Examples of public benefits include, but are not limited to:

- Affordable housing
- Transfer of land identified on the WLEP 2012 Land Reservation Acquisition Map to Council at no cost to Council for a public purpose
- Dedicated land or floorspace for a public purpose
- Publicly accessible through site links
- Amenity upgrades in parks
- Public E-bike infrastructure (parking hubs/ev charging points)
- Publicly accessible recreation (e.g. tennis courts, indoor play, swimming) and youth facilities
- Publicly accessible play space
- Cultural Infrastructure - music performance space / gallery / exhibition space / artist run initiative (ARI) space / spaces for artist residencies
- Open space acquisition opportunities identified in the Open Space and Recreation Strategy
- Temporary or permanent creative urban interventions
- Streetscape upgrades as outlined in the Our Liveable Places Centres Strategy.
- Works funded by the 7.12 Contribution where there are no obvious infrastructure upgrades in the vicinity of the development.

APPENDIX 6 – LETTER OF OFFER TEMPLATE

[Developer letterhead]

The General Manager
Waverley Council
55 Spring Street,
Bondi Junction NSW 2022

Dear General Manager

Development Application No. _____ for
Property and full title particulars: _____

_____ Pty Limited (“Developer”) has made the above development application in respect of the above property.

This letter constitutes an offer by the Developer to enter into a voluntary Planning Agreement (VPA) with Waverley Council in connection with the above development application (“DA”) which has been made by the Developer.

The Developer offers the following to be implemented by way of voluntary Planning Agreement:

1. The parties to the VPA will be the Developer, the registered owner of the Land and the Council.
2. The VPA will apply to the above property and will be registered on title within 14 days of the VPA being executed by all parties.
3. The VPA will apply to the development the subject of any consent granted to the DA including any modification, alteration, or extension to that development whether it be via a construction certificate, a modification to the consent or consent to a further development application (“Development”).
4. The provision to be made under the VPA will be the payment of a monetary contribution to Council at the rate of \$ _____ per sqm of gross floor area proposed by the Development which exceeds the specified floor space ratio for the property under Waverley LEP 2012.
5. For the avoidance of doubt the Development proposes an additional _____ sqm of gross floor area which equates to a contribution of _____.
6. The monetary contribution would be payable prior to the issue of any occupation certificate in respect of the Development.
7. (a) In the event that the gross floor area of the Development increases from that in the DA consent via any construction certificate, then an additional monetary contribution shall be made to the Council calculated at the rate of \$ _____ per sqm of gross floor area which exceeds the gross floor area of the DA consent and such contribution will be payable on or before the issue of any occupation certificate in respect of the Development.

(b) In the event that the gross floor area of the Development increases from that in the DA consent via any modification to the DA consent or a consent to amend the DA consent, then the Developer further offers in accordance with this paragraph 7(b), to enter into a new Planning Agreement in accordance with Council's Planning Agreement Policy 2014 Amendment No. 4 and make an additional monetary contribution to the Council calculated at the rate of \$ _____ per sqm of gross floor area which exceeds the gross floor area of the DA consent. Such contribution will be payable on or before the issue of any occupation certificate in respect of the Development. The Developer will repeat the offer in accordance with this paragraph 7(b) in writing at the time it lodges any application for modification or amendment of the DA consent

which would result in an increase in the gross floor area.

8. The VPA shall not exclude the application of section 7.11, 7.12 or 7.24 of the EP&A Act.
9. The monetary contribution shall not be taken into consideration in determining a development contribution under section 7.11.
10. The monetary contribution shall be used for the provision of (or the recouping of the cost of providing) affordable housing or any other public purpose agreed by the Developer and Waverley Council.
11. The VPA will provide for security in the form of the provision to Council prior to the issue of any construction certificate for the Development of a Bank Guarantee to secure the payment of the Monetary Contribution prior to the issue of any Construction Certificate for the Development which is:
 - In a form acceptable to Council and from an institution acceptable to Council,
 - Irrevocable,
 - Unconditional, and
 - With no end date.
12. The VPA will be otherwise in accordance with Council's Planning Agreement Policy 2014 Amendment No. 6.

Yours faithfully

[Developer signature]

