THE LAW SOCIETY
OF NEW SOUTH WALES

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The Director
Levies and Operational Policy
Department of Planning and Environment
GPO Box 39
SYDNEY NSW 2001

By email: michael.bishop@planning.nsw.gov.au

Dear Director,

Improving voluntary planning agreements

Thank you for the opportunity to comment on the draft policy framework for voluntary planning agreements. The Law Society's Environmental Planning and Development Committee has contributed to this submission.

Principles and policy for planning agreements

The Draft Practice Note is generally consistent with the current Practice Note on Planning Agreements (which forms part of the general Development Contributions Practice Note issued on 19 July 2005). In particular, the fundamental principles governing planning agreements set out in part 2.1 of the Draft Practice Note are the same as those in the current Practice Note.

The fundamental principles are focused on ensuring that planning agreements are not subject to misuse by planning authorities and that wholly unrelated contributions are not taken into account when making decisions about development applications or planning proposals. Although this is expressed as a "principle" in the Draft Practice Note, it is important to note that there is a legal requirement for decision makers to consider only "relevant" matters. This arises out of administrative law principles as well as, for development applications, section 79C of the *Environmental Planning and Assessment Act 1979* ("Act").

The last of the principles provides that "planning authorities should avoid, wherever possible, being party to planning agreements where they also have a stake in the development covered by the agreements." Local councils are increasingly becoming involved in land development projects and legal practitioners are often asked to advise about the best mechanism that will allow councils to work with developers to achieve outcomes that will benefit both parties and the community. The interaction

between the public-private partnership provisions and tendering provisions under the *Local Government Act 1993*, and planning agreement provisions under the Act, can be a source of concern for councils. For example, the council and a developer may agree to both contribute to the construction of a community facility that will form part of a proposed development. Questions arise about whether the arrangement should be a public-private partnership, or the subject of a planning agreement. Factors considered by proponents include consideration of the complexity of the processes involved in having a public-private partnership approved; that planning agreements are not excluded from the requirement to invite tenders and other procedural considerations.

Although some legislative change may be required to resolve these issues, it would be useful for the Practice Note to provide some guidance about the circumstances where councils and proponents should consider public-private partnerships instead of planning agreements.

Part 2.2 Public interest and probity considerations

The Draft Practice Note provides on page 10 that "material changes" to a proposed planning agreement should be re-notified. Some guidance is provided as to the types of amendments that would be "material" in nature. In the circumstances, case law on requirements to re-exhibit planning instruments may provide some further guidance. In *Friends of Turramurra Inc v Minister for Planning* [2011] NSWLEC 128 Justice Craig held (at [158]) (bold emphasis added):

> "...I also accept that it cannot have been a purpose of the legislation to require re-exhibition of a draft local environmental plan following each and every alteration made to that draft in response to a consideration of public submissions. There is a balance to be achieved between a response to submissions received by exercising the power of amendment and the need to ensure that the end product in the form of the statutory instrument is **not so different "in important respects" from the draft instrument that has been exhibited**. The determination as to where this balance lies involves a **consideration of the amendments and their significance in the context of the instrument as a whole"**.

Part 2.3 Using planning agreements and Part 4 Examples of the use of planning agreements

The Draft Practice Note sets out on page 11, the general objectives that planning agreements should be designed to achieve. Part 4 of the Draft Practice Note provides some examples of the way planning agreements can be used to achieve these objectives. A reference to these examples in Part 2.3 should be included.

The examples provided in Part 4 are useful, however some further clarification about the use of planning agreements to provide off-site benefits for the wider community is required. How can such wider off-site benefits that are not "strictly required to make the development acceptable in planning terms" be said to be "not wholly unrelated" to the development (see page 24)? This proposed use of planning agreements does appear to be inconsistent with the fundamental principle "that planning authorities should not be party to planning agreements in order to seek public benefits that are unrelated to particular development."

Planning agreements are often proposed where the design for the development incorporates community facilities or benefits, such as a public plaza or thoroughfare

within a building. We suggest that these circumstances should be added to the table on page 13.

Planning agreements and strategic infrastructure planning

Many councils are now seeking to capture a share of the land value increase obtained by developers when changes to planning instruments occur. Most of the current schemes for "value sharing" are based on planning incentives, such as bonus floor space, and are justified by reference to the likely increased need for public amenities and services as a consequence of intensification of development. We agree that such schemes should be established under local environmental plans or development control plans, however planning agreement policies or other polices adopted by a council can support those instruments and provide further guidance. In our committee members' experience, disputes are less likely to arise when all parties have a clear understanding of what is expected.

The Draft Practice Note provides at page 14 that planning authorities should ensure that:

- planning agreements are evidence based and preferably independently peer reviewed ... and

- proper investigation and consideration of development feasibility and capacity to pay is carried out, preferably on an "open-book" basis, if raised as an issue by the developer.

If this means that councils must engage external planning or financial consultants to carry out feasibility studies and conduct peer reviews of a planning proposal and related planning agreement, that will result in delays, disputes about the appropriate independent consultant and increased costs for councils and developers. It is unreasonable to expect councils to investigate the feasibility of development and have each proposal and planning agreement independently reviewed. This is particularly the case where external consultation will normally have been undertaken when establishing a "value sharing" scheme. These provisions should be removed from the Draft Practice Note.

2.4 Planning agreements policies and procedures

Part 2.4 of the Draft Practice Note sets out a list of matters on pages 15 and 16 that should be included in planning agreement policies. The following matters in that list are not normally determined at the time a policy is adopted and should be qualified by the addition of the words "if known":

- the kinds of public benefits sought and, in relation to each kind of benefit, whether it involves a planning benefit
- when, how and where public benefits will be provided.

These are matters that may be more appropriately included in a Contributions Plan, which identifies the public amenities and facilities that the council seeks to provide. In addition, the information about making registers of planning agreements publicly available on page 16 should be included in Part 3 of the Practice Note. A section about accountability could be included in that part.

The last bullet point on page 16 provides that a planning authority's policy should address the circumstances "if any" in which refunds may be given. Please see our comments on refunds below.

Part 3.1 Offer and negotiation

The Draft Practice Note on page 17 focuses on planning authorities implementing measures for efficient negotiation systems. While councils can do their best to resolve matters efficiently, it is important to note that the progression of matters can be constrained by procedural requirements. Council officers rarely have delegated authority to formally agree to the terms, and a council resolution is generally required before planning agreements are exhibited and executed. The Draft Practice Note should be amended to ensure that developers are aware of these constraints.

Part 3.2 Costs and Charges

GST

The requirement to pay GST inevitably becomes an issue in planning agreements. We understand that GST is not payable on development contributions under section 94 or section 94A of the Act.

We understand that, in accordance with Class Ruling CR 2013/13, contributions required to be made under a planning agreement are exempt from GST. We request that the Department provide reference in the Practice Note to this ruling, rather than simply stating that the parties have a "potential GST liability".

Recurrent costs and maintenance payments

The Draft Practice Note provides, on page 19, that planning agreements should only require the developer to make contributions towards the recurrent costs of a facility until a public revenue stream is established to support the on-going costs of the facility.

This requirement is inconsistent with many planning agreements, which require the developer to maintain works provided under the agreement for a period of time after handover to the council. Such works may include for example, playground equipment, landscaping, conservation works or other open space embellishments. The maintenance period can include a defects liability period as well as an ongoing maintenance period. The maintenance work forms part of the public benefit that is offered by the developer and ensures that infrastructure and works are established before the public authority takes control.

The maintenance period is not determined by the availability of a public revenue stream, but is usually a set period of time that will allow the parties to confirm that the works have been properly and completely established. We suggest that the Draft Practice Note should be amended accordingly.

Refunds

The Draft Practice Note provides at page 19 that planning agreements may provide for refunds of monetary contributions. This reference to "refunds" may give developers an unreasonable expectation that development contributions under planning agreements will be readily refunded by councils. Development contributions under sections 94 and 94A of the Act are rarely (never, in our committee members'

experience) refunded by councils, and the Court has been reluctant to require refund of contributions in the past. There may be unique circumstances where the parties will agree to a refund and appropriate provisions will be inserted into a particular planning agreement, but this does not occur frequently. In those circumstances, the Practice Note should not indicate that refunds will be offered by councils as a matter of course. The reference to refunds in Parts 2.3 and 3.2 should be removed.

Security

The security that is required under a planning agreement is a matter that should be open to negotiation between council and the developer. Under section 93F(3)(g) of the Act, a planning agreement must provide for "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".

Whether or not an enforcement mechanism is "suitable" will require consideration of whether it is likely to "eliminate or reduce to a commercially acceptable level the risk that the obligation created by the planning agreement will not be performed and that the planning authority or the community will not receive the intended benefits" (*Huntlee Pty Ltd v Sweetwater Action Group Inc; Minister for Planning and Infrastructure v Sweetwater Action Group Inc* [2011] NSWCA 378).

It is useful for the Draft Practice Note to give some examples of security mechanisms that are used, for example, restrictions on the issue of Part 4A certificates, compulsory acquisition agreements and bonds or bank guarantees. However, the references to what is "ordinarily" required in certain circumstances is problematic for two reasons.

First, this terminology is likely to raise expectations that the mechanisms referred to will be used for all planning agreements without reference to the individual circumstances, which is inconsistent with the current authority in *Huntlee v Sweetwater Action Group*, referred to above.

Second, the Draft Practice Note does not relate what "ordinarily" occurs in practice. In our committee members' experience, most planning agreements that require monetary contributions restrict both the issue of Part 4A certificates and bank guarantees or bonds to secure the payment of the contribution. This is because clients have experienced situations where accredited certifiers will issue a construction certificate or occupation certificate without requiring the payment of the monetary contribution. In those circumstances, the council is left to chase money from a developer who may no longer be involved with the development. The best option for councils is to require a bank guarantee or bond as security against such default.

In many cases, planning agreements that require dedication of land include compulsory acquisition procedures to be used in the event of default, together with the ability for the planning authority to call on a bond or bank guarantee for the payment of costs associated with the acquisition.

The security options for each agreement should be determined by the parties at the time, taking into account the circumstances of the case at the stage of drafting. References in the Practice Note about what security mechanisms are "ordinarily" used should be removed.

3.4 Basic statutory procedure for entering into a planning agreement

The Draft Practice Note on page 21 provides that planning agreements and public submissions "should" be considered when determining related planning applications. Arguably planning agreements related to proposed instrument changes or development applications "must" be considered as relevant matters. If a relevant planning agreement is not properly considered, the decision about the instrument change or proposed development could be invalidated because the decision maker has failed to consider a relevant matter.

The procedure for negotiating and entering into a planning agreement on pages 21 and 22 of the Draft Practice Note requires some editing. It is rare to see the terms of a draft agreement being finalised prior to an application being lodged with council. The proposed contributions are usually negotiated at the application stage, with terms dealing with security and enforcement, registration, and other matters once the application has progressed and the parties are in a position to draft a document. Generally, developers are reluctant to invest time and money in drafting documents until the application has progressed to a point where it is likely to be recommended for approval.

As stated above, council resolutions may also be required prior to exhibition and prior to execution of the final agreement.

The use of template documents and clear council policies on planning agreements will reduce the time and cost of drafting and negotiating the final terms of an agreement. We expect, however, that there will still be many circumstances where negotiations about the key terms of a planning agreement are continuing after the application has been made to council. The procedure in the Draft Practice Note should be amended to accommodate this likelihood.

Attachment A – Template Planning Agreement

We recommend the following amendments to the Template Planning Agreement:

(a) In Recital C the reference to "NSW Government Gazette No" should be amended to refer to the date on which the Instrument Change was published on the NSW Legislation Website in accordance with section 34 of the Act.

(b) Recital D should be deleted. A proposed Instrument Change is not always immediately followed by a Development Application.

(c) Most councils, in our committee members' experience, prefer the "No fetter" clause (20) to be more specific. For example:

> Nothing in this Deed is to be construed as requiring an Authority (including the Council) to do anything that would cause it to be in breach of any of its obligations at Law, and without limitation:
>
> (a) nothing in this Agreement is to be construed as limiting or fettering in any way the exercise of any statutory discretion or duty; and

(b) nothing in this Agreement imposes any obligation on an Authority to:

(i) grant any Development Consent; or

(ii) exercise any function or power under the Act in relation to a change, or a proposed change, in an environmental planning instrument.

(d) The GST clause, clause 25, should be amended consistent with the Department's guidance on the exemption under the Class Ruling (see our comments above).

Please do not hesitate to contact Liza Booth, Principal Policy Lawyer, on (02) 9926 0202 or by email at liza.booth@lawsociety.com.au if you would like to discuss this in more detail.

Yours sincerely,

Pauline Wright
President