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Review of s93 and s94 requirements – Crighton Properties

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Executive summary

This report examines the development of urban expansion lands at Tea Gardens that are proposed for development by Crighton Properties. It has been prepared to provide background on future human service and infrastructure provision, and to outline key works that could be provided by Crighton to cater to future demands of this urban development.

The development of these properties will take place over a number of years and will deliver a wide variety of benefits to the local area. The development will also create a range of demands for various public services and facilities for which the Great Lakes Council may be responsible.

Approval of the development concepts for the subject properties will be under the provisions of Part 3A of the *Environmental Planning and Assessment Act 1979*. The Department of Planning will be the consent authority and will consider the issues surrounding the demand through the consent process.

Crighton is a pivotal landholder in the area and moves towards developing their holdings, it is essential that there is common ground between Crighton and the Great Lakes Council in the provision of facilities. There are opportunities for the development of the subject lands to provide a range of facilities and services that will cater to the immediate demands of these land as well as the demands of external residents. As Crighton Properties development will have a major influence on expansion of the Tea Gardens/Hawks Nest, the opportunity is presented to provide a lead role in provision of facilities. The key issue is the extent to which that provision should reasonably be made in the context of the Council's longer term plans for the area.

There is an obvious benefit in providing for residents of the development, however, the question of what should be provided and when needs to be investigated and discussed with key authorities. It is envisaged that a Planning Agreement will provide the foundation for the provision of human services and other urban infrastructure in the Tea Gardens/Hawks Nest Area. This report is intended to initiate that process.

The purpose of this report is to therefore identify the issues surrounding the development of the Crighton lands and to identify the manner in which the demands of the future population of these sites can be satisfied. This has necessarily required an assessment of the Council's current strategic planning processes as well as the existing Development Contributions Plans ("CPs") that have been prepared under section 94 of the EP&A Act. An examination of the options that are available to Crighton for provision of facilities and their possible costs are also highlighted.

The concluding sections of this report outline the principles upon which a Planning Agreement might be based. It is considered that such an agreement will be the optimum method of delivery of the services and facilities.

1. Introduction

1.1 Purpose and structure of report

This report has been prepared on behalf of Crighton Properties ("Crighton") to assess human services and infrastructure provision in the Tea Gardens/Hawks Nest area. The Crighton holdings are extensive and there will be a need to provide a range of services and facilities to service the future population of these lands. While some of these are likely to be provided by the Great Lakes Shire Council, ("the Council") there is wide scope for Crighton to provide those services in conjunction with, or in the place of, the Council. This will have the benefit of allowing the facilities to be provided in a timely fashion and to mesh with the Council's intended of facilities. The report specifically addresses the facilities that may be provided via sections 93 and 94 of the *Environmental Planning and Assessment Act* ("*EP&A Act"*).

Delivery of required human services and infrastructure can be undertaken by various means including direct provision, joint development, land dedication or monetary contributions. The purpose of this report is to examine typical levels of provision of such infrastructure services in a greenfield situation to inform decision-making on provision and staging. This will provide the basis for the preparation of a Planning Agreement.

The structure of this report is as follows:

- ***Section 1*** (this section) provides an introduction to the review and sets out the context of the Crighton holdings
- ***Section 2*** outlines the legislative background to the NSW development contributions system including the requirements for planning agreements and section 94 contributions
- ***Section 3*** assesses the existing Council policies with respect to the long term development of the Tea Gardens/Hawks Nest area and details the extent to which the Crighton lands will contribute to that development. It specifically reviews population forecasts for the area as this will be the fundamental basis upon which human services and infrastructure provision should be measured
- ***Section 4*** provides an outline of the likely extent of demand for the human services and infrastructure outlined in Section 3. This includes a review of typical levels of provision in greenfield and urban situations that are applied across NSW.
- ***Section 5*** details the potential options for Crighton in delivering facilities to service the future population of the holdings as well as that of Tea Gardens/Hawks Nest. This includes the legal mechanisms that might be used to facilitate such provision including the principles that may be used in negotiating a planning agreement.
- ***Section 6*** outlines potential "commitments" for human services and infrastructure provision that might be used as part of the 3A process. This is intended as a draft outline that could be used to facilitate dialogue with relevant authorities.

1.2 Local government context

The Great Lakes Shire Council is the relevant planning authority for the area and the key provider of some baseline human services and infrastructure. The Great Lakes local government area ("LGA") stretches from Port Stephens in the south to Hallidays Point in the north. It is geographically diverse with a dispersed population. While development occurred gradually up to the 1980's, there has been a population surge with a large influx of retirees as well as the ubiquitous "seachangers". The outcome is a significantly older population profile than the rest of the state.

The trend for the future is likely to continue in a similar vein although housing affordability in Sydney and, to a lesser extent, Newcastle may drive families to areas such as Great Lakes. The key influence in those trends will be the availability of both housing and employment.

The ability of the Council's to respond to change will be a function of their financial position and planning approach to provision of land for housing and employment. It is often difficult for local government to react quickly to change as there are many political and financial implications in taking action. However, there is opportunity for Crighton to assist in the process of facility provision that may assist in "filling the gap". Flexibility in provision of facilities that will be delivered over the 20 year life of the Crighton development must be a key consideration to allow both Crighton and the Council to reconsider facility planning in light of possible changes to demand and the funding of facilities.

1.3 Context of Crighton Holdings

Crighton Properties landholdings include the Myall River Downs and Riverside at Tea Gardens Development. The extent of the development sites is such that future expansion in Tea Gardens will primarily occur within these sites and will have a significant influence on the development of Tea Gardens/Hawks Nest.

The Riverside at Tea Gardens Estate ("Riverside") is currently being developed and comprises a range of residential, retail/commercial, recreation and tourist development including over 240 completed residential lots. In 2002 Crighton Properties began the process of seeking approval to develop a substantial portion of Riverside for residential and tourist purposes. Following the introduction of State Environmental Planning Policy (SEPP) 71 – Coastal Protection the process of developing a master plan began. The Riverside at Tea Gardens site is currently zoned 2(f) Mixed Commercial Residential (ERM, 2006c).

The Myall River Downs site ("Myall River") is currently zoned 1(a) Rural, 7(a) Wetlands and Littoral Rainforests and 7(a1) Environment Protection. A Local Environmental Study has been prepared recommending a substantial portion of the Myall River Downs site be zoned 1(a) Rural to enable urban/residential development. Formal adoption by Great Lakes Council of the LES findings has been delayed pending the outcome of the Tea Gardens/Hawks Nest Housing Strategy and preparation of a concept plan for the site.

Given the role of the Crighton development in expansion of the Tea Gardens/Hawks Nest area, the opportunity is presented to provide a lead role in provision of facilities. The key issue is the extent to which that provision should reasonably be made in the context of the Council's longer term plans for the area. There is an obvious benefit in providing for residents of the development, however, the question of the type of facilities and their timing should be considered carefully. This report is intended to initiate that process.

2. Legislative background

2.1 The NSW contributions system

Legislation requiring a contribution towards the provision of public infrastructure was first codified as Section 94 (s94) when the *EP&A Act* was introduced in 1979. Section 94 of the *EP&A Act* enables consent authorities to levy contributions on developers towards the cost of providing local public infrastructure and facilities required as a result of development. Contributions can only be sought by councils where there is an adopted contributions plan in place.

Recent planning reforms have widened the ambit of the contributions system to include new provisions under Section 93 and Section 94A of the *EP&A Act,* which provide greater flexibility as to the means of levying a contribution. The amendments provide for the following methods of funding local infrastructure by a consent authority through:

- Section 94 contributions
- Section 94A levy
- Planning Agreements

The various methods of funding local infrastructure are collectively known as the development contributions system. Each component of the system has its own regulations and approaches which bears on any possible option for provision of facilities (either by direct provision, monetary contributions or through planning agreements). The important considerations in relation to the development of the Crighton properties are briefly discussed below.

This discussion draws on the Department of Planning *Development Contribution Practice Notes* ("the *Practice Notes*") which have been prepared pursuant to clause 25B(2) and clause 26(1) of the *EP&A Regulation*.

2.2 Providing facilities for growth

The funding of public infrastructure has changed substantially over the last 40 years, moving from traditional sources such as Commonwealth, State and local government budget allocations to a mix of sources ranging from public private partnerships (PPP) to developer charges and user pays charges.

Section 94 of the EP&A Act has traditionally been the principal method enabling councils to levy contributions for public amenities and services required as a consequence of development. The widening of the contributions system allows for a range of innovative approaches to the provision of facilities and negotiation of planning agreements.

Providing facilities to cater to growth is bound by a relatively strict set of regulations concerning the methods that a Council must employ. Traditionally, the process is undertaken under the provision of Section 94 which involves the identification of the relationship between expected development and demand which typically have required an assessment of:

- The make-up, spatial distribution and timing of growth that will be encountered in the catchment area(s) in the planning horizon (**growth and development**)
- The current levels of provision of public amenities and services in the catchment, and the needs of the future residents in this catchment (**nexus/demand identification**)

However, these approaches are largely now confined to Section 94 contributions plans as flat rate levies and planning agreements do not need to have the same close bond to nexus as a Section 94 contribution. Growth and development and nexus/demand identification are important considerations as they can limit the power that the Council has in imposing contributions.

The Minister, when determining an application under Part 3A of the *EP&A Act*, must have regard to any contributions plan that is in place pursuant to section 94D. He may also have regard to any planning agreement that is being negotiated.

2.3 Section 94

Section 94 is the exclusive source of power for a Council to impose a condition requiring land dedication or monetary contributions, and this power must be specifically authorised by a duly adopted section 94 contributions plan ("CP"). This is an important consideration since a Council wishing to impose such conditions outside section 94 is acting out of power unless these are done under the auspices of a planning agreement.

Section 94 contributions are based on two key concepts:

- *Reasonableness* in terms of nexus (the connection between development and demand created) and apportionment (the share borne by future development)
- *Accountability* both public and financial

A Section 94 contribution can be satisfied by:

- Dedication of land
- A monetary contribution
- Material public benefit
- A combination of some or all of the above

In the case of the Minister being the consent authority, the provisions of any section 94 CP must be taken into account but the Minister is not bound by the CP.

2.4 Planning agreements

Provisions for planning agreements have been codified under section 93 of the *EP&A Act*. Planning agreements are intended to be voluntary and can be entered into as part of the rezoning or development approval process. A consent authority cannot coerce an applicant into a planning agreement nor can it require a planning agreement to be entered into as a condition of consent (unless an offer to enter into an agreement is made by an applicant).

Planning agreements may be directed towards achieving the following:

- Meeting the demands created by development for new public infrastructure, amenities and services
- Securing off-site planning benefits for the wider community
- Compensating for loss of or damage to a public amenity, service, resource or asset by development through replacement, substitution, repair or regeneration
- Meeting the recurrent costs of facilities and services

A planning agreement may provide for a monetary contribution, land dedication, or material public benefit towards a public purpose (which is widely defined). A planning agreement may also wholly or partly exclude the application of Section 94 or Section 94A of the *EP&A Act*. There are specific requirements and steps that are codified under the *EP&A Act* for the negotiation and execution of planning agreements. Further details are provided in the DoP Practice Notes presented in Appendix A.

2.5 Fixed levies

The final plank in the contributions system is the "fixed rate" levy plan. A Council can impose a fixed levy of 1% if a s94A contributions plan is in place. In most cases, these plans are not used as they do not raise significant funds. They are unlikely to be an issue for the Crighton holdings.

2.6 Works in kind and material public benefit

An applicant can satisfy development obligations by various means. These include:

- Undertaking "works in kind" (WIK). WIK is where a work that is identified in a section 94 or 94A plan is constructed/completed by the applicant
- Providing a "material public benefit" (MPB). MPB may include a wide variety of things but it cannot be the dedication of land or a monetary contribution (unless these are part of a planning agreement)

Planning agreements can be structured such that MPBs are provided by the applicant over a number of stages and in various locations. However, they must have some relationship to the subject development.

2.7 Great Lakes Section 94 Policies

The Council has in place a "LGA wide" section 94 CP (*Great Lakes Wide Section 94 Contributions Plan*) and a specific CP for the Tea Gardens/Hawks Nest area (*Tea Gardens & Hawks Nest Section 94 Contributions Plan*). These provide details of the various facilities that the Council intends to provide to cater for population growth.

The LGA wide CP includes provision for the following public facilities:

- Library facilities
- Rural Fire Fighting facilities
- Administrative building

This CP has an effective life to 2009/2010.

The Tea Gardens/Hawks Nest Plan includes provision for the following:

- Open space, such as parks, playing fields and courts
- Cycleways
- Community facilities such as libraries and community centres
- Surf life saving facilities
- Upgrading the road network to accommodate increases in traffic

This CP has an effective life 2010/2011.

The development of the Crighton holdings will occur over a period of around 20 years and, consequently, the CP's as they currently stand do not provide an adequate basis for delivery of the facilities required to cater to the demand generated by the future growth of the Tea Gardens/Hawks Nest. However, they do provide some relevant benchmarks for future planning of facilities.

Whilst the Council will doubtless amend the CP's, the key issue for the approval process of the Crighton lands is defining the facilities that will be required so that the Minister, when approving the 3A applications, can be confident that any project commitments by Crighton are appropriate and reasonable.

3. Urban development analysis

3.1 Introduction

An assessment of the likely scale and type of population growth is a key first step in defining the likely future requirements for human services and infrastructure. An analysis of the nature, staging and demographics of urban development will allow definition of facility needs over a defined period of growth.

A comparison of existing and required facility types will allow for identification of facilities required due to urban expansion and types of facilities that may be needed to fill any "gaps". The expected population growth can be linked to particular developments, or development types, such that the appropriate site for facilities may be linked to development scenarios and funding can be sought from specific developers to fund all facilities.

3.2 Council strategic planning initiatives

In 2003 the Great Lakes Council adopted the *Tea Gardens/Hawks Nest Conservation and Development Strategy* ("the *Conservation and Development Strategy*"). This identified opportunities for conservation and development based on the existing condition of the study area, biophysical features and planning policies.

In 2006, the Council placed on exhibition an initial draft *Tea Gardens/Hawks Nest Housing Strategy* ("the *Housing Strategy*"). That draft *Housing Strategy* addresses issues such as dwelling types, dwelling densities and lot yields. A second draft of the *Housing Strategy* is currently on exhibition and it is likely that adoption of this will occur some time in 2007. This largely builds on the *Conservation and Development Strategy*.

Council has also identified that the area beyond the Tea Gardens ridge (known as the "North Shearwater Precinct") to the north-west of Tea Gardens is capable of urban development, subject to further investigations. Council has identified that the North Shearwater precinct has potential for rural residential, urban and tourist uses subject to road and infrastructure links being provided through the adjoining Riverside and capacity being available at the North Hawks Nest wastewater treatment plant for the disposal of effluent from this area (Parsons Brinckerhoff, 2003).

3.3 Potential growth and development

3.3.1 Great Lakes Local Government Area

The Great Lakes LGA had a total population in 2001 of 31,384 persons. The Estimated Resident Population (ERP) based on "Enumerated Population" for the Great Lakes LGA in 2005 (preliminary) is 34,695 (Great Lakes Council, 2007).

According to the Department of Planning (Transport and Data Centre, 2004) projections, the population of the Great Lakes LGA will grow by 18,000 persons by 2031 an increase of over 50%. By 2031, the LGA population will be one of the oldest in NSW with a median age of 58 years.

However, the Department's figures appear somewhat at odds with those in the Council's planning strategies (see below). Nevertheless, the LGA will experience substantial growth which will require a significant investment in provision of human services and infrastructure.

3.3.2 Tea Gardens/Hawks Nest growth and development

The total population of the Tea Gardens/Hawks Nest area in 2001 was 2,545 persons (Great Lakes Council, 2007). The ERM report (2006b) provide an estimated population for Tea

Gardens and Hawks Nest of around 3,200 persons (April 2006) based on Great Lakes Census Summary Information and analysis of sales and Council records.

Table 3.1 Estimated existing population: Tea Gardens and Hawks Nest

Location		Persons	Total
Existing 2001 Population[1]	Tea Gardens	1,372[3]	2,545[3]
	Hawks Nest	1,173[3]	
Estimated Population Growth (2001-2006)[2]	Tea Gardens	500	1,872
	Hawks Nest	155	1,328
Estimated 2006 population[4]			3,200

Notes:

1. *Based on Great Lakes Population 2001 Census Summary Information, produced by the Community Services Branch Great Lakes Council.*
2. *Based on analysis of sales and Council records.*
3. *Estimate different to summary information provided on Council's web site accessed 6 July 2006 by Connell Wagner.*

The population of Tea Gardens/Hawks Nest is generally older than other centres in the Great Lakes area. A large proportion of residents in the Tea Gardens/Hawks Nest area are over 50.

The Council made population forecasts in 2003 and 2005 for the Tea Gardens/Hawks Nest area which estimated the total population in 2011 of 4,123 and 2016 of 4,755 a growth rate of around 4%. The projected population of Tea Gardens/Hawks Nest under the draft housing strategy was between 7,450 (low), 8,600 (medium) and 9,750 (high) by 2031. This represents between 41% and 54% of the Department of Planning forecast for the entire LGA.

3.3.3 Crighton development

Myall River Downs has the potential to create approximately 1,500 dwelling sites with the potential to house around 3,228 persons while the Riverside site has potential for creation of approximately 990 dwellings with the potential to house around 2,142 persons. Together with other approvals, the total population that could be housed in the Crighton holdings is approximately 5,782 persons (refer Table 3.2). The net residential densities used in this table are based on the Housing Strategy rate of 13 dwellings per hectare.

Table 3.2 Predicted population: Crighton Holdings

Location	Development Type	Dwellings	Occupancy Rate	Total Persons
Riverside	Residential (medium density)	40	1.3	52
	Residential (standard residential)	759	2.2	1670
	Moorings Precinct – lodges	51	2.2	112
	Moorings Precinct – houses	140	2.2	308
	Sub Total	990		2,142

Location	Development Type	Dwellings	Occupancy Rate	Total Persons
Myall River Downs (Proposed Rezoning)	Residential (medium density)	63	1.3	82
	Residential (low density)	1204	2.2	2,649
	Residential north-west (medium density)	6	1.3	8
	Residential north-west (low density)	108	2.2	238
	Transition – west (units)	75	1.3	98
	Transition – west (lodges)	104	1.3	135
	8 lot residential subdivision	8	2.2	18
	Sub Total	1,568		3,228
The Hermitage		281	1.3	365
Tea Gardens Grange		36	1.3	47
Total		**2,875**		**5,782**

Source: ERM, 2006b

3.3.4 Other development

Other growth will occur in Tea Gardens within the North Shearwater Estate and as infill development within existing residential estates. Estimates taken from ERM (2006b) are provided in Table 3.3.

Table 3.3 Other population growth in Tea Gardens/Hawks Nest

Location	Dwellings	Rate	Persons	Total Persons
North Shearwater	300	2.2	660	660
Infill Tea Gardens				
Houses	100	2.2	220	
Units	140	1.3	182	402
Total Additional Sundry				1,062

Note: these figures do not include proposed "Myall Way" Precinct.

3.4 Population share

3.4.1 Crighton population share

If the total population represented in Tables 3.2 and 3.3 are added to the 2006 population (3,200), the total population capacity represented would total 10,044 persons which marginally exceeds the Housing Strategy high forecast figures (9,750). For the purposes of this report, the total population capacity of the Tea Gardens/Hawks Nest area is assumed to be 10,000.

The Crighton holdings would represent around 85% of the future population growth while it would represent around 57% of the total population at capacity (ie existing plus future population).

4. Assessment of facility demand

4.1 Introduction

Demand for human services and other urban infrastructure is a function of population growth. As Crighton is a pivotal landholder in the area and moves towards developing their holdings, it is essential that there is common ground between Crighton and the Great Lakes Council in the provision of facilities. It is envisaged that a Planning Agreement will provide the foundation for the provision of human services and other urban infrastructure in the Tea Gardens/Hawks Nest Area as a section 94 contributions plan will be complicated by the possible provision of facilities by Crighton.

This section explores the issues concerned with identifying the facilities required to cater to population demand identified in the previous section.

4.2 Planning standards for facility provision

4.2.1 Background issues

The population thresholds or numerical standards that are used by local government and human service agencies in their planning of services often nominate the threshold at which the population requires and can sustain the provision of a service. These are usually expressed as a ratio between population numbers and facility/service provision. However, only some agencies use standards or thresholds in their planning, and then only to provide an initial guide to potential facilities for further investigation.

Standards or thresholds are only ever seen as a starting point for planning, and must be supplemented by reference to the characteristics of the population and particular circumstances of need. Many agencies do not use standards at all, but rely instead on a range of practical measures and assessment of needs in the local area.

Some general principles for the development of human services and facilities have been defined in new release areas in the Sydney region such as the North West and South West Sectors (Elton, 2003). The key issues raised in this work include:

- There is a need to plan for flexibility in facilities to enable responsiveness to needs and life cycle changes as they emerge. Facilities should be multi-purpose and capable of delivering a range of services, rather than designated for single uses or specific target groups that may quickly become outdated.
- Human services need to be provided in more innovative and integrated ways that address the gaps and overlaps among facility types when they are provided as separate facilities
- Facilities need to be provided in a resource efficient manner which encourages joint, shared or multiple use of resources
- Human services are commonly considered in two categories: baseline or core services and district or threshold services:
  - Core services are those which are required by most new residents from the outset of settlement to meet their local everyday neighbourhood needs and include neighbourhood shops and community centres, childcare centre, facilities for various ages, parks and playgrounds
  - District level services are more specialist services for specific segments of the population which operate on a broader district catchment. They will vary according to the particular characteristics and needs of the population.

These principles can be used as the basis for the assessment of the required facilities in the area.

4.2.2 Defining demand

The Department of Planning *Development Contribution Practice Notes* indicate that the demand for facilities may be determined by:

- Estimating the future population
- Estimating demographics of the population
- Assessing the possible staging of development
- Identifying existing human services and facilities used by the current population
- Predicting the future needs based on an evaluation of the above
- Apportioning demand between existing and future development (DIPNR, 2005)

The assessment of facility demand in this way permits a clear understanding of facility requirements that may then be used to identify the level of provision of facilities and their timing.

Predicted facility demand requires an assessment of the make-up, spatial distribution and timing of growth and the current levels of provision. The existing level of facility provision is an important consideration in the estimation of the demand for future facility provision since augmentation or embellishment of existing facilities and provision of new facilities can cater for additional demand.

Importantly, the *Practice Notes* make the point that the imposition of any section 94 must be reasonable and should not be used to make up for past deficiencies. Thus, any estimation of demand must consider the existing level of provision and future demand must be tempered by what might reasonably be required based upon that consideration.

This is not to suggest that a planning agreement cannot make up for past deficiencies. However, should such an approach be adopted there must be other trade offs to ensure that, overall, the contribution to local facilities is reasonable.

In relation to the future demand for facilities that might reasonably be considered for the Tea Gardens/Hawks Nest area, the following facility types are considered relevant:

- Community and cultural facilities
- Open space (structured and unstructured)
- Roads and traffic management facilities
- Cycleways/walkways
- Bushfire fighting facilities

Issues associated with the future provision for these facilities are outlined below.

4.3 Community facilities

4.3.1 Planning for community facilities

Various planning standards have been used by agencies to make provision for baseline community facility needs. Table 4.1 outlines standards used by a variety of agencies including local government.

Key issues associated with planning for community facilities include:

- Human services and community facilities should be clustered together or co-located to provide opportunities for shared and efficient use of resources

- They should be located in places where people already have cause to congregate, rather than on stand alone sites, for reasons of safety, accessibility and convenience. Shopping centres and schools are recognised as the key places where people tend to congregate within a neighbourhood
- The trend in local government is that fewer but larger community facilities are now being built as larger facilities have been found to be more versatile
- The planning of childcare services has become more complex in recent years with the increasing role of the private sector in childcare

Population thresholds outlined in Table 4.1 are unlikely to be exceeded in the Tea Gardens/Hawks Nest area in the immediate future, however, it is noted that the current level of provision in the area is relatively high compared with these standards albeit there may be some capacity issues with the existing facilities. The facilities have also been traditionally provided in Hawks Nest which will have little population growth in the future.

Table 4.1 Community facilities: provision standards [1.]

Facility/Target Population	Standard	Floorspace Requirements[2.]	Existing Provision Levels
Long day care	1 place per 11 children 0-4 years[3.]	3,000 sq m site with building of 300-400 sq metres for 60 place facility	Existing 29 person centre
Youth and Community Centre	1 per 20,000 persons or 1 per 3,000 13-19 year olds	300-400 sq m	Nil
Community Centre	1 per7,000-10,000 persons[4.]	600-800 sq m	Existing
Library[5.]	District: 1 per 30,000 persons Branch: 1 per 5,000 persons Resources: 1 item per 2.5 person[6.]	1000 sq m 600-700 sq m	Existing
Seniors	1 per 30,000 persons	1000-2000 sq m	Existing community centre

Notes:

1. *Standards derived from Blacktown, Baulkham, Campbelltown City Councils, Department of Planning, and various other statutory authorities*
2. *Floorspace requirements based on modest facility only.*
3. *Where private facilities are provided this may be relaxed to 1:20. Typically, 60 place centre required for population of 7,000.*
4. *Current Department of Community Service standard.*
5. *Library standards typically predicated on persons including workers.*
6. *State Library Current standard*

There are no set standards for shopping facilities although a standard of 2 square metres per person for retail is often used as a guide for centre planning. The day to day shopping and service needs of the Tea Gardens and Hawks Nest population are currently serviced by local neighbourhood shopping centres in each of the centres. For more specialist commercial services and shopping, residents currently travel to. According to Ibecon (2000) there is a significant level of net escape spending out of Tea Gardens and Great Lakes in all retail categories to Raymond Terrace, Newcastle and other fringe areas. Population projections

indicate a substantial deficiency of shop floorspace and long-term planning should consider a large-scale retail facility of up to 11-14,000m^2, depending on the take up rate of population.

4.3.2 Future facility provision and timing

Planning for a population of around 10,000 persons will clearly require a range of facilities for various target groups as identified in Table 4.1. The key issue is the timing of the provision and the type of facility that is required as various thresholds are met.

The demographic profile of the area is likely to be older although there is also likely to be a proportion of younger families. It is also likely that Tea Gardens will have a proportionally "younger" population; although, there will also be substantial growth in older age categories in this area as well (Parsons Brinckerhoff, 2006).

The existing preschool is able to accommodate growth until at least approximately 2011 due to the higher than average component of aged people although provision of additional child care services may need to be considered given that Tea Gardens is beginning to attract young families. A child care has been approved by Council within the site that will attribute valuable child care places for parents with young children.

The existing community centre and library in Hawks Nest are not considered to be of adequate capacity. As most population growth will occur in Tea Gardens Council considers it desirable to provide a new community centre to cater for the existing and future residents (Great Lakes Council, 2003). According to Great Lakes Council (2003) all community facilities at Tea Gardens/Hawks Nest are expected to be used to capacity by 2011. Notwithstanding the foregoing, four clubhouses are proposed as part of the Masterplan for Riverside at Tea Gardens. The clubhouses will contain function/meeting rooms that may be utilised by the community for their purposes.

The need to provide for a variety of needs and the extent of population growth argues for a facility that can function as multi-use. The growing population of Tea Gardens is creating the need for additional facilities and the expansion of facilities in Hawks Nest is clearly not the intention of the Council.

Consequently, the future development of the Tea Gardens area is likely to create demand for another community facility within this area that ideally should be multi use. There will also be demand created for library services and, to a lesser extent, child care facilities.

The proposed centre in the Riverside development presents an opportunity to make provision for the population of the Crighton development as well as cater to the needs of the wider Tea Gardens area. Crighton Properties have proposed a number of facilities for use by residents of Riverside at Tea Gardens and Myall River Downs as well as facilities provided within The Hermitage and Tea Gardens Grange Retirement Village specifically aimed towards seniors. While some of the facilities can be used by the wider community, the nature of the retirement villages is that they are essentially self-contained and residents will not have a significant impact on facilities required by the broader community.

4.4 Open space

4.4.1 Open space planning standards

Standards for open space represent community expectations in terms of provision of open space and the recreation demands arising from growth. An assessment of previous research on recreation demand indicates the following trends:

- Of structured activities, the national data suggests that the highest participation growth is expected in swimming, aerobics and golf
- Informal and unstructured use of parks and reserves will assume greater importance with a wider sector of the community
- Organised sports will continue to be important although only for a proportion of the community
- Swimming will be a primary activity participated in by those using developed facilities
- Indoor activities (aerobics, gym based-training, basketball, indoor cricket) are estimated to have lower participation rates although these sports are popular

However, the aging of the population will suppress demand for more active pastimes that are traditionally associated with young participants. Informal activities, particularly walking and driving for pleasure, walking the dog, fishing and picnics/bbq's are expected to be more popular than more structured activities such as organised sports.

A variety of facilities are necessary to satisfy needs and demands of the community as recreation preferences (thus, demand) are a function of age and the ability to pay. The typical range of facilities required by various age groups is presented in Table 4.2.

Increasing residential densities and the cost of land require open space to respond to the needs of individual communities by providing varied recreational opportunities or settings (Commonwealth Government Department of Housing and Regional Development, 1995).

Table 4.3 indicates open space planning standards that have previously been used by government organisations in NSW. Whilst the standards are not intended to be prescriptive, they are based on a substantial based of research into optimum levels of provision to permit a reasonable level of access to open space facilities by a new population.

Table 4.2 Major needs of target groups (baseline facilities)

Group	Major Needs	Typical Facilities	Leisure Activities
Children (0-12 years)	Small parks within walking distance of home with play equipment. Formal playing fields. Areas for informal sporting activities. Corridors linking open spaces. Large natural and parkland areas.	Parks/playgrounds; Cricket/football ground; Tennis; Bicycle paths; Swimming facilities.	Walking for pleasure; Visiting friends; Going to movies; Going to beach.
Youth (13-19 years)	Formal playing fields. Areas for informal sporting and leisure activities. Large natural and parkland areas.	Cricket/football; Tennis; Swimming facilities; Skateboard park; Indoor facilities.	Walking for pleasure; Jogging; Visiting friends; Going to beach; Going to clubs/movies.

Group	Major Needs	Typical Facilities	Leisure Activities
Adults (20-60 years)	Formal playing fields. Areas for informal sporting activities. Large natural and parkland areas.	Cricket/football; Tennis; Swimming facilities; Indoor facilities; Golf facilities.	Walking for pleasure; Playing active sports; Jogging; Going to gym.
Seniors (60+)	Walking paths. Areas for informal sporting activities. Large natural and parkland areas.	Tennis; Swimming facilities; Bowling greens; Golf facilities.	Walking for pleasure; Playing tennis/golf.

Source: Connell Wagner, 2006

Table 4.3 Comparison of normative provision of structured recreation facilities

Facility	AWDC	NCDC	DOP
Football (all codes)	1:2,500-3,000	1:1,000	1:1,000
Soccer	Combined football	Combined football	Combined football 1:2,500
Hockey	1:3,500	1:3,000	Combined football
Cricket	1:2,200-3,000	2:2,200	1:4,000
Tennis courts	1:1,000	1:1,500	1:1,000
Netball courts	1:1,000	1:1,000	1:2,000
Golf course	1:25,000	N/A	1:25,000
Swimming pool	1:25,000	N/A	1:50,000

Source: Albury Wodonga Development Corporation (AWDC), National Capital Development Corporation (NCDC) and Department of Planning (DoP)

4.4.2 Future facility provision and timing

Great Lakes Council has not necessarily followed the above standards in the current CP. In the past the Council has adopted a ratio of 28.3m^2 per person (or 2.83 hectares per thousand people) as a planning standard. While this is a dated planning standard, the Council has typically applied that standard ratio in the following ratios:

- Small parks at about 25% (around 7 square metres per person)
- Large parks without structured facilities at about 30% (around 8.5 square metres per person)
- Structured facilities such as courts (eg tennis, basketball, netball) at about 15% (about 4.25 square metres per person)
- Structured facilities such as playing fields at about 30% (around 8.5 square metres per person)

The Council standards equate to a provision rate of around 1.53 hectares of unstructured open space and 1.3 hectares of structured open space per thousand population. This is not typically the ratio used by planning authorities as structured open space requires more land. However, it

is noted that the higher rate of provision of local parklands may be more appropriate for the ageing population.

According to Great Lakes Council (2003) Tea Gardens/Hawks Nest offer good opportunities for cycleways for recreation and road access. The current lack of cycleways in the area provides an opportunity to consider proposed cycleways within Crighton Properties development as a facility available to the wider community. There is the potential for paths within Crighton Properties land to be extended to provide access to the CBD. In recognising the need for cycleways Council has developed a policy on cycleways in the LGA.

Council considers that existing open space areas met community needs in 1996. The Council appears to have the view that there is sufficient space in the large parks, courts and fields to expand facilities. Further, the Council's position appears to be that future open space requirements will be met by acquiring land for small parks in newly developing areas and embellishing all open space facilities (Great Lakes Council, 2003).

Open space facilities at Tea Gardens/Hawks Nest are presented in the tables in Appendix B. There is an existing structured sports facility at Hawks Nest which includes a number of sports fields. Although this caters to existing demand for such facilities, there is likely to be longer term demand to another such facility. It would appear that making provision within the Crighton lands would offer the opportunity to cater to this longer term needs.

Based on the current Council levels of open space provision, the future population growth of around 6,800 persons in the Tea Gardens/Hawks Nest area will create demand for around 8 hectares of structured open space and 10 hectares of unstructured open space. A portion of the demand will be met by the provision of facilities such as tennis courts and recreation areas throughout the development.

ERM (2006) recommend that Crighton Properties provide 6.4 hectares of land for structured open space, as the proposed Myall River Downs Sporting Complex site is ideally located to serve the needs of the majority of the future population. However, it is considered inappropriate for North Shearwater, Tea Gardens Infill and Hawks Nest to provide their allocation on site as this would result in scattering of recreation facilities that would be more costly and inefficient to use and maintain. Cash in lieu of land dedication therefore recommended for these sites. These monies could be used embellishment of existing facilities and the proposed Sporting Complex.

Structured open space in the form of the recreation fields proposed by Crighton Properties is consistent with the intention of Council in establishing structured open space areas and would provide almost 6 hectares. The recreation fields will provide for some residents external to the locality as people visit the area for retail/commercial/medical reasons. Inclusion of small (<0.5 ha) unstructured parks within 500m of all new houses in Crighton Properties development will meet the general objectives of Council.

4.5 Traffic management facilities

Population and employment growth creates the need for various improvements to roads including intersection upgrades to permit greater movements, improved road signage and traffic control as well as traffic management measures especially in and around main centres.

The population likely to occur in the future will be spread spatially across the LGA. Where road improvements are required for a development consideration is typically given to the following:

- Developers are to contribute to the cost of road improvements which arise from the development
- The level of contribution required is proportional to the need for improvements which are a direct result of the development
- The minimum level of contribution is assessed on the basis of maintaining the existing level of service on the adjacent road network
- Where road improvements have already been planned, the contribution is adjusted in order to advance the works schedule and coincide with the completion of the development (RTA, 2002)

The Council has indicated that a substantial portion of the population in Tea Gardens/Hawks Nest leaves the catchment on a daily basis, presumably for travel to work, shopping or other destinations accessible via the Pacific Highway (Great Lakes Council, 2003). According to Great Lakes Council (2003) Myall Way will have insufficient carriageway width to accommodate the expected increase in traffic and Myall Street may need to be upgraded.

In determining contributions for traffic management the existing flow of vehicular traffic and nature of daily commuting from the LGA must be considered. Many of the residents that relocate to the area will be seniors and will be less likely to commute on a daily basis. Additionally the home office area provided in Myall River Downs and Riverside at Tea Gardens will not result in an increase in commuter traffic as the intention is that the residents will operate home businesses which would travel demand.

Therefore, demand for traffic management facilities and the consequent requirements for facilities needs to consider the potential population profile and particularly identify traffic generation rates that is appropriate to the future distribution of travel demand. In particular, travel demand at peak period should be taken into account in setting the parameters for addressing traffic management needs.

An assessment of the proposed internal traffic network (in accordance with acceptable standards) will be necessary (ERM, 2006c). A traffic impact study for the future expansion of Tea Gardens/Hawks Nest will provide consideration of future network requirements to allow for reasonable contributions to be levied in respect of the proposed development.

The purpose of the traffic impact study is to determine an appropriate apportionment of growth in vehicle movement to Crighton Properties development. Key issues in relation to a traffic assessment of Tea Gardens/Hawks Nest include:

- Capacity of the road network generally and intersections specifically to cope with additional demand
- Existing traffic volume and nature
- Background traffic growth
- Expected increase in traffic as a result of future development
- Portion of demand on road network attributable to Crighton Properties development

This will enable various facilities to be identified and costed.

4.6 Other facilities

There will be a range of other facilities for which demand will be created including:

- Bushfire management
- Surf lifesaving
- Police and Emergency Services
- Cultural, entertainment and leisure facilities

- Health Services
- Welfare and Support Services
- Public Transport
- Places of Worship

These will be provided by the Council, other levels of government or the private sector. It is envisaged that appropriate investigations will be carried out before they are proposed and there may be opportunity for space or facilities to be provided within the Crighton development. Such facilities would be subject to separate negotiation and potential exists for inclusion of the facilities in a planning agreement.

5. Options for facility provision

5.1 Introduction

Crighton will be providing a range of facilities to cater to future demand. While The Hermitage and Grange Retirement Village are essentially "self-contained" facilities (as are the proposed tourist developments), other demand will need to be addressed.

Given the scale of the development of the Crighton holdings this demand can be met by a combination of methods that will be subject to later agreement. The purpose of this section is to outline the options for such provision.

5.2 Methods of facility provision

As noted previously, a Section 94 contribution can be satisfied by:

- Dedication of land
- A monetary contribution
- Material public benefit (MPB)
- A combination of some or all of the above

In the assessment of demand, consideration also must be made to the facilities that may be provided within a development that may satisfy demand such that external demand is reduced. This is an important consideration in terms of whether any contribution sought is reasonable.

The following briefly sets out the facilities currently proposed by Crighton.

5.3 Facilities proposed by Crighton Properties

The proposed Hermitage retirement village is expected to be completed by 2011 and will include the following:

- Indoor swimming pool
- Four link bowling green
- 2 tennis courts
- several community buildings for the use of its residents
- Generous parks and open space

Facilities provided within The Hermitage retirement village will cater for the needs of the residents of the village. As facility provision will generally be sufficient for residents within the village the potential exists for recognition of reduced facility demand on the wider community created by the development.

5.4 Land dedication and embellishment

Land is typically required to provide for open space as well as relevant community facilities. The Crighton development has potential to provide a range of open space facilities including:

- ***Local open space*** – typically local parks providing for low key recreation needs
- ***District open space*** – a large facility that could include sports grounds and similar structured facilities
- ***Environmental open space*** – areas of land that are zoned for conservation and/or environmental protection

There is also the potential to embellish this open space to provide for demand on an immediate and ongoing basis (especially where demand may be incremental). The Council has indicated in the CP that additional sports facilities are not required for some time and it would appear they are concerned

to be maintaining a large facility where there is low demand. However, as noted previously, the opportunity to provide this facility while early planning for the development of the holdings are under way should not be missed. There may be potential for either maintenance payments to be made or, alternatively, for the maintenance to be undertaken on the Council's behalf for a set period. This process could include immediate dedication to the Council or dedication after a set period.

The local open space can be planned, embellished and dedicated on an ongoing basis and it would be surprising if the Council would have trouble with this proposition.

The environmental open space could provide for demand for walking trails and interpretive facilities subject to agreement with the relevant authorities. Consideration must be given to the ongoing maintenance and management of environmental space.

5.5 Material public benefits

A MPB may be offered as a means of partial or full settlement of a section 94 contribution. A MPB could be:

- A work in kind (WIK). This is undertaking a work that is specifically listed in the works schedule of a CP for which a monetary contribution would normally be sought
- The provision of other public amenities or services that may or may not exist in the area and that is not included in a development contributions plan

The list of facilities that may be offered as a MPB is not limited and would be subject to agreement. Such facilities would include:

- Street lighting and planting not otherwise required by the development
- Footpath and footbridges in open space or other areas
- Road pavement, kerb and gutter and kerb ramp construction in existing streets
- Construction of cycleways (both in Crighton properties holdings and in the wider locality)
- Stormwater management facilities beyond Crighton properties holdings
- Construction of community facilities such as a multi-purpose facility, library or child care centre
- Streetscape embellishment such as paving, seats and information boards
- Road network improvements (including traffic calming)
- Access to community facilities in Crighton development for the wider community (including community buildings and structured and unstructured recreation)
- Ongoing management of environmentally sensitive land, such as wetland areas
- Ongoing bushfire management
- Ongoing management of recreational fields and community facilities
- Proposed structured multi-use sports field may be amended/expanded to provide for walking path or senior activities (such as bowls, croquet or similar)
- Proposed structured multi-use sports field may be amended/expanded to provide for younger residents in the form of baseball and hockey fields and tennis courts
- Embellishment of existing council open space areas
- Design advice to council in terms of providing facilities to satisfy existing demand

These may include partial funding by the Council where an existing deficiency exists, where the Council may wish to have another work completed in the area or where the facility is funded partly or wholly by section 94 contributions.

5.6 Principles for establishment of a planning agreement

Given the Council's section 94 plan does not contemplate the longer term development of the Tea Gardens and Hawks Nest area, there is a need to establish a framework for the provision of facilities that will serve future development particularly of the Crighton holdings.

A planning agreement provides the opportunity to identify those facilities and the timing/thresholds for their provision. The planning agreement may also include the payment of monetary contributions to address certain facilities already addressed in the Tea Gardens /Hawks Nest CP. The amount of such contributions and their timing would be subject to negotiation.

The proposed principles for a Planning Agreement are broadly:

- That the agreement must provide a degree of flexibility whilst ensuring the delivery of services from both parties
- The planning agreement will not include benefits that are wholly unrelated to the development
- The parties will appoint a person to represent them in the negotiations and also appoint a third person to attend and take minutes of all negotiations
- 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
- A timetable for negotiations and the protocols and work practices governing their negotiations would be agreed between the parties
- The key issues for negotiation should be identified by the parties, and the negotiations over these issues should take place
- The parties could undertake further negotiation on the specific terms of the proposed planning agreement as necessary
- If agreement is reached, the proposed planning agreement including the explanatory statement will be prepared and distributed to all parties
- The consent authority will publicly exhibit the application and planning agreement in accordance with the Act
- If the benefit under a planning agreement is the provision of land for a public purpose, the value the benefit will be on the basis of the estimated amount of compensation would be due under the *Land Acquisition (Just Terms Compensation) Act 1991* upon the compulsory acquisition of the land
- If the benefit under a planning agreement is the carrying out of works for a public purpose, the benefit will be valued on the basis of the estimated value of the completed works on the basis of a cost estimate prepared by a registered quantity surveyor
- The agreement will be binding but will not be registered on the title (as the title position will change over time)

6. Potential project commitments

6.1 Introduction

Section 6 has been purposefully left blank as it is dependent on negotiations carried out with the Great Lakes Council to lead to a proposed list of project commitments.

6.2 Discussions with Great Lakes Council

6.3 Preferred planning agreement conditions

6.4 Summary of potential project commitments

Summary of possible project commitments

Item	Section 94 Plan	Works	Value of Works	Cash	Comment	Timing
Open Space						
Environmental lands						
Community Facilities						
Traffic facilities						
Bushfire						
Administration facilities						
Surf lifesaving						

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Appendix A

Execution of planning agreements

Development Contributions – Practice Note

Planning agreements

The purpose of this practice note is to provide advice on the matters surrounding voluntary planning agreements. It provides an overview of current trends and practices, sets out the statutory framework for planning agreements and deals with issues such as the fundamental principles governing the use of planning agreements, as well as public interest and probity considerations. Some examples of the use of planning agreements are also provided, along with a template planning agreement and explanatory note.

Part 1 - Introduction

About planning agreements

The *Environmental Planning and Assessment Amendment (Development Contributions) Act 2005* introduced Subdivision 2 of Division 4 of Part 6 providing for a statutory system of planning agreements.

It was not intended that the new system preclude other kinds of agreements in the planning process. For this reason, no transitional arrangements have been included in the new legislation. However, other kinds of agreements, whether made before or after the new system comes into force, must comply with the general law.

It was largely because of uncertainty surrounding the application of the general law to agreements in the planning process that the new system of planning agreements was enacted.

Furthermore there is uncertainty about the application of the Goods and Services Tax (GST) to other kinds of agreements. The intention of the planning agreements legislation was to overcome that uncertainty and remove the application of the GST to planning agreements as far as possible. However, independent advice should be sought on the GST implications of entering into any sort of agreement in the planning process and on a case specific basis.

About this practice note

This practice note is made for the purposes of clause 25B(2) of the *Environmental Planning and Assessment Regulation 2000*.

The purpose of this practice note is to assist planning authorities, developers, and others in the preparation of planning agreements under s93F of the *Environmental Planning and Assessment Act 1979*, and to understand the role of planning agreements in the planning process.

Section 93F and other provisions in Subdivision 2 of Division 6 of Part 4 of the *EP&A Act* relating to planning agreements were inserted by the *Environmental Planning and Assessment Amendment (Development Contributions) Act 2005*. Related provisions were inserted into the *Regulation* by the *Environmental Planning and Assessment Amendment (Development Contributions) Regulation 2005.* The amendments to the *EP&A Act* and *Regulation* took effect on 8 July 2005. Those amendments, together with this practice note, form the broad planning agreements framework for NSW.

This practice note is not legally binding. In some cases it may advocate greater restrictions on the content and use of planning agreements than is provided for in the *EP&A Act* and *Regulation.* However, the *EP&A Act* and *Regulation* provide only a broad legislative framework for planning agreements, whereas this practice note seeks to provide best practice guidance in relation to their use. It also sets out various templates designed to standardise planning agreements documentation in order to foster efficient systems. It is intended, therefore, that planning authorities, developers, and others will follow this practice note to the fullest extent possible.

The remainder of this practice note is structured as follows:

- **Part 2** provides a brief overview of current practices relating to the use of agreements in the planning process in NSW and the recommendations of the Ministerial Taskforce that lead to amendments to the *EP&A Act* and *Regulation* to provide for a statutory system of planning agreements for the State,
- **Part 3** summarises the legislative framework for planning agreements established by the *EP&A Act* and *Regulation,*
- **Part 4** provides best practice guidelines in relation to planning agreements by identifying and explaining key public interest and probity considerations and fundamental principles relating to the use of planning agreements, and setting out a broad policy framework and basic statutory procedures for negotiating, entering into and administering planning agreements.
- **Part 5** provides examples of the possible use of planning agreements.

- **Attachments A to C** set out several template documents, including a template planning agreement for use in agreements between councils and developers.

Terminology

The introduction of new statutory processes, such as the new statutory system of planning agreements under Division 6 of Part 4 of the *EP&A Act*, invariably lead to the introduction of new terminology that can assist clear and efficient communication.

In this practice note, the following terminology is used to convey several key concepts in relation to planning agreements:

- **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 a material public benefit
- **planning benefit** means a development contribution that confers a net public benefit, that is, a benefit that exceeds the benefit derived from measures that would address the impacts of particular development on surrounding land or the wider community
- **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
- **public** includes a section of the public
- **public benefit** is the benefit enjoyed by the public as a consequence of a development contribution.

Up-dates to this practice note
It is intended that this practice note will be periodically updated. More detailed information or guidance on specific matters in this practice note may also be the subject of future separate practice notes.

Part 2 - Overview of current trends and practices[1]

Negotiation and agreement between planning authorities and developers to exact public benefits from the planning process are now widespread. However, practices are largely unregulated. The negotiation process often occurs without the involvement of all interested stakeholders, and agreements are entered into without effective public participation.

The levying of s94 contributions and the imposition of conditions of development consent requiring works-in-kind also frequently involve significant negotiation between consent authorities and developers, despite the public impression that such contributions are obtained through strict adherence to the formal processes under the *EP&A Act* and *Regulation*.

There are a number of apparent reasons why the use of agreements in the planning process to exact public benefits has become widespread. These include:

- planning authorities are under increasing pressure from local communities to ensure that development produces targeted public benefits over and above measures to address the impact of development on the public domain,
- development consent conditions, including s94, are ill-equipped to produce such benefits as they are primarily designed to mitigate the external impacts of development on surrounding land and communities,
- as developers increasingly appreciate how their own developments benefit from the provision of targeted public facilities, they are seeking greater involvement in determining the type, standard and location of such facilities,
- negotiation tends to promote co-operation and compromise over conflict and can provide a more effective means for public participation in planning decisions,
- agreements provide a flexible means of achieving tailored development outcomes and targeted public benefits, including a means by which communities can agree to the redistribution of the costs and benefits of development in order to realise their specific preferences for the provision of public benefits,
- agreements can provide enhanced and more flexible infrastructure funding opportunities for planning authorities, subject always to good planning implementation.

Further, planning agreements provide a flexible framework under which the State and local government can share responsibility for the provision of infrastructure in new release areas or in major urban redevelopment projects. Planning agreements permit particular governance arrangements that suit particular cases and foster the provision of infrastructure by the different levels of government in an efficient, co-operative and co-ordinated way.

[1] This Part is taken from Taylor, L., *Bargaining for Developer Contributions in NSW*, A Research Thesis for the Degree of Doctor of Philosophy, Macquarie University 2000.

Part 3 - Outline of statutory framework

Nature of planning agreements

Subdivision 2 of Division 6 of Part 4 of the *EP&A Act* sets out a statutory system of planning agreements in NSW.

Section 93F(1) 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*.

Who is a planning authority?

Section 93C defines a *planning authority* to mean a council, the Minister, the Ministerial corporation constituted under s8(1) of the *EP&A Act*, a development corporation within the meaning of the *Growth Centres (Development Corporations) Act 1974* or a public authority declared by the regulations to be a planning authority.

Clause 25A of the *EP&A Regulation* declares all public authorities to be planning authorities for this purpose.

Who is a developer?

A *developer* is a person who has sought a change to an environmental planning instrument (which includes the making, amendment or repeal of an instrument (s93F(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.

Additional parties to a planning agreement

Section 93F(7) provides that any Minister or public authority or other person approved by the Minister for Infrastructure and Planning is entitled to be an additional party to a planning agreement and to receive a benefit on behalf of the State.

Joint planning agreements

Planning authorities may enter into joint planning agreements.

Section 93F(8) provides that a council is not precluded from entering into joint planning agreements with another council or other planning authority merely because it applies to land not within, or any purposes not related to, the area of the council.

Types of development contributions authorised by planning agreements

Development contributions under a planning agreement can be monetary contributions, the dedication of land free of cost, any other material public benefit, or any combination of them, to be used for or applied towards a public purpose.

Section 93F(4) provides that a provision of a planning agreement is not invalid by reason only that there is no connection between the development and the object of expenditure of any money required to be paid under the provision.

Definition of *public purpose*

Public purpose is defined in s93F(2) to include the provision of, or the recoupment of the cost of providing public amenities and public services (as defined in s93C), affordable housing, transport or other infrastructure. It also includes the funding of recurrent expenditure relating to such things as the monitoring of the planning impacts of development and the conservation or enhancement of the natural environment.

Mandatory contents of planning agreements

Section 93F requires planning agreements to include provisions specifying:

(a) a description of the land to which the agreement applies,
(b) a description of the change to the environmental planning instrument, or the development, to which the agreement applies,
(c) the nature and extent of the development contributions to be made by the developer under the agreement, and when and how the contributions are to be made,
(d) whether the agreement excludes (wholly or in part) the application of s94 or s94A to particular development,
(e) if the agreement does not exclude the application of s94 to a development, whether benefits under the agreement may or may not be considered by the consent authority in determining a contribution in relation to that development under s94,
(f) a dispute resolution mechanism, and
(g) the enforcement of the agreement by a suitable means, such as the provision of a bond or bank guarantee, in the event of a breach by the developer. (Consideration should be given to the type of security which is appropriate to the circumstances of the particular development).

The *EP&A Act* does not preclude a planning agreement containing other provisions that may be necessary or desirable in particular cases, except those provisions mentioned immediately below.

Limitations on the contents of planning agreements

Section 93F(9) precludes a planning agreement from imposing an obligation on a planning authority to grant development consent or to exercise a function under the *EP&A Act* in relation to a change to an environmental planning instrument.

Section 93F(10) provides that a planning agreement is void to the extent, if any, to which it authorises anything to be done in breach of the *EP&A Act*, or an environmental planning instrument or a development consent applying to the land to which the agreement applies.

Provisions of planning agreements relating to s94 or s94A

A planning agreement may wholly or partly exclude the application of s94 or s94A to development that is the subject of the agreement.

Section 93F(5) provides that, in such a case, a consent authority is precluded from imposing a condition of development consent in respect of that development under s94 or s94A except to the extent that any part of those sections are not excluded by the agreement.

A planning agreement may exclude the benefits under the agreement from being considered under s94 in its application to development.

Section 93F(6) provides that in such a case, s94(6) does not apply to any such benefit. Section 94(6) provides that if a consent authority proposes to impose a condition under s94 in respect of development, it must take into consideration any land, money or other material public benefit that the applicant for development consent has elsewhere dedicated free of cost to the consent authority or previously paid to the consent authority, other than a benefit provided as a condition of development consent granted under the *EP&A Act,* or a benefit excluded from consideration under s93F(6).

Application of development contributions obtained under a planning agreement

Sections 93E(1) and (4) require that a planning authority is to hold any monetary contribution paid in accordance with a planning agreement, together with any additional amount earned from its investment, for the purpose for which the payment was required and apply it towards that purpose within a reasonable time.

Section 93E(3) contains a similar requirement in respect of land dedicated in accordance with a planning agreement.

Limitation on provisions of environmental planning instruments

Section 93I(1) invalidates any provision of an environmental planning instrument made after the commencement of that section that *expressly* requires a planning agreement to be entered into before a development application can be made, considered or determined, or that expressly prevents a development consent from being granted or having effect unless or until a planning agreement is entered into.

However, s93D provides that Division 6 of Part 4 of the *EP&A Act* (other than s93I) does not derogate from or otherwise affect any provision of an environmental planning instrument, whether made before or after the commencement of the section, that requires satisfactory arrangements to be made for the provision of particular kinds of public infrastructure, facilities or services before development is carried out.

Determination of development applications

Section79C(1)(a)(iiia) of the *EP&A Act* requires a consent authority, when determining a development application, to take into consideration, so far as is relevant to the proposed development, any planning agreement that has been entered into under s94F or any such draft agreement offered by a developer. Section 79C(1)(d) requires the consent authority to take into consideration any public submissions made in respect of the planning agreement or draft planning agreement.

Section 93I(2) precludes a consent authority from refusing to grant development consent on the ground that a planning agreement has not been entered into in relation to the proposed development or that the developer has not offered to enter into such an agreement.

Section 93I(3) authorises a consent authority to require a planning agreement to be entered into as a condition of a development consent but only if it requires an agreement that is in the terms of an offer made by the developer in connection with the development application or a change to an environmental planning instrument sought by the developer for the purposes of making the development application.

Public notice of planning agreements

Section 93G(1) precludes a planning agreement from being entered into, amended or revoked unless public notice is given of the proposed agreement, amendment or revocation.

Clause 25D of the *EP&A Regulation* makes provision for public notice to be given of an agreement to enter, amend or revoke a planning agreement together with any public notice required under the *EP&A Act* for the relevant proposed change to a local or regional environmental plan or development application.

Clause 25E(1) of the *EP&A Regulation* requires the preparation of an explanatory note by a planning authority which proposes to enter into a planning agreement or an agreement to amend or revoke a planning agreement.

Clause 25E(3) provides that the explanatory note must be prepared jointly with the other parties proposing to enter into the planning agreement.

Clause 25E(4) makes provision for separate explanatory notes in certain circumstances if there are two or more planning authorities involved in the agreement.

Clause 25E(7) provides that a planning agreement may provide that the explanatory note may not be used to assist in construing the agreement.

Provision of information about planning agreements

Sections 93G(3) and (4) apply where the Minister and a council, respectively, are not party to a planning agreement and require the relevant planning authority that is party to the agreement to give certain information to the Minister or the council as relevant within 14 days after the agreement is entered into, amended or revoked.

Clause 25D(6) of the *EP&A Regulation* provides that if a council is not a party to a planning agreement that applies to its area, a copy of the explanatory note must be provided to the Council at the same time as the material under s93G(4) is provided.

Section 93G(5) requires a planning authority that has entered into a planning agreement, while the agreement is in force, to include in its annual report certain particulars relating to the planning agreement during the year to which the report relates.

Clauses 25F and 25G of the *EP&A Regulation* make provision for the keeping and public inspection of planning agreement registers. A council must keep a planning agreement register of any planning agreements that apply to the area of the council. The Director-General must keep a planning agreement register of any planning agreements entered into by the Minister.

Clause 25H of the *EP&A Regulation* makes provision for planning authorities other than the Minister or a council to make planning agreements to which those authorities are party available for public inspection.

Registration of planning agreements

Sections 93H(1) and (4) permit a planning agreement or any amendment or revocation of a planning agreement to be registered if each person with an estate or interest in the land agrees to its registration.

Section 93H(2) requires the Registrar-General to register a planning agreement on its lodgement by a planning authority in a form approved by the Registrar-General.

Section 93H(3) provides that a planning agreement that has been registered under s93H is binding on and enforceable against the owner of the land from time to time as if each owner for the time being had entered into the agreement.

No appeals to the Land and Environment Court

Section 93J(1) expressly excludes a person from appealing to the Land and Environment Court against the failure of a planning authority to enter into a planning agreement or against the terms of a planning agreement.

Jurisdiction of the Land and Environment Court to enforce planning agreements

Section 93J(2) provides that the removal by s93J(1) of an appeal to the Land and Environment Court does not affect the jurisdiction of the Court under section 123 of the *EP&A Act*. Section 123(1) provides that any person may bring proceedings in the Court for an order to remedy or restrain a breach of '*this Act*', whether or not any right of that person has been or may be infringed by or as a consequence of that breach. Section 122(b)(v) provides that in s123 a reference to *this Act* includes a reference to a planning agreement referred to in s93F.

Determinations or directions by the Minister

Section 93K authorises the Minister for Infrastructure and Planning, generally or in any particular case or class of cases, to determine or direct any other planning authority as to the procedures to be followed in negotiating a planning agreement, the publication of those procedures, or any standard requirements with respect to planning agreements.

Commencement and amendment

A planning agreement will take effect in accordance with its terms. Ordinarily, the obligation to perform an agreement will arise, in accordance with the terms of the agreement, when the development to which it relates is commenced.

Clause 25C(2) of the *EP&A Regulation* authorises a planning agreement to specify that a planning agreement does not take effect until the happening of certain particular events.

Clause 25C(3) of the *EP&A Regulation* provides that a planning agreement can be amended or revoked by further agreement in writing signed by the parties (including by a subsequent planning agreement).

Form of planning agreements

A planning agreement must be in writing and signed by all of the parties to the agreement. A planning agreement is not entered into until it is so signed.

Part 4 - Best practice guidelines

Public interest and probity considerations[2]

This section discusses the public interest and probity issues that arise in connection with the use of planning agreements. It aims to lift the general level of awareness of these issues, and to inform the principles, policies and procedures contained in the best practice guidelines relating to planning agreements discussed later in this Part.

Problems inherent in the use of development agreements concern whether an agreement is in the public interest. Generally speaking, the public interest is directed towards securing the fair imposition of planning control for the benefit of the community and as between one developer and another. For this reason, the parties to a planning agreement do not enjoy the same bargaining freedom as do the parties to a commercial contract.

In particular cases, the public interest implicated by a planning agreement may be measured in terms of the need to mitigate any adverse impacts of development on the public domain or the desirability of providing a planning benefit to the wider community. Benefit to the developer is not a primary consideration.

The statutory bargaining framework for planning agreements raises the fundamental issue of what is an appropriate planning agreement. The bargaining process involves the exercise of discretion on both sides, giving planning authorities and developers room to accommodate subjective values and varying concepts of the public interest, private interests and other standards.

The ability for a planning agreement to wholly or partly exclude the application of s94 or s94A to development gives a planning authority scope for limited trade-offs under an agreement. This means that the financial, social and environmental costs and benefits of development can be redistributed through an agreement. However, there is no guarantee that the costs and benefits of development will be equitably distributed within the community. Planning agreements may facilitate the provision of public benefits that do not relate to development. Further, what may be a specific benefit to one group in the community may be a loss to another group or the remainder of the community.

Safeguards in the form of a system of principles, policies and procedures relating to planning agreements are needed to protect the public interest and the integrity of the process, and to guard against misuse of planning discretions and processes. Such misuse has the potential to seriously undermine good comprehensive planning, and public confidence in the planning system.

A system that ensures that planning discretions are exercised openly, honestly, freely and fairly in any given case and fairly and consistently across the board will serve to protect planning agreements from the natural suspicion that changes to environmental planning instruments and development consents can be bought by the highest bidder through planning agreements.

Misuse of planning agreements can occur for a variety of reasons and produce a variety of unwelcome results. Some examples are:

- where a planning authority seeks inappropriate public benefits because of opportunism or to overcome revenue-raising or spending limitations that exist elsewhere.
- where insufficient analysis of the likely planning impacts of proposed development by a planning authority determined to enter into, or to give effect, to a planning agreement.
- where a planning authority allows the interests of individuals or small groups to outweigh the public interest.
- because of an imbalance of bargaining power between the planning authority and developer. For example, abuse would occur if a planning authority sought to improperly rely on its peculiar statutory position in order to extract unreasonable public benefits under a planning agreement.

On the other hand, misuse can also occur if the planning authority's bargaining power is compromised or its decision-making freedom is somehow fettered through a planning agreement.

The potential for misuse also exists where a planning authority, acting as consent authority or in another regulatory capacity in respect of development, is both party to a planning agreement and also a development joint venture partner under the agreement. Special safeguards, such as the

[2] This section is taken from Taylor, L., *Bargaining for Developer Contributions in NSW*, A Research Thesis for the Degree of Doctor of Philosophy, Macquarie University 2000.

intervention of a disinterested third party in the development assessment process, would be needed in such circumstances.

For these reasons, the safeguards applying to the use of planning agreements should:

- provide for a generally applicable test for determining the acceptability of a planning agreement, which embraces amongst other things concepts of reasonableness,
- contain specific measures to protect the public interest and prevent misuse of planning agreements and,
- be open with published rules and accessible procedures,
- provide for effective formalised public participation,
- extend fairness to all parties affected by a planning agreement,
- guarantee regulatory independence of the planning authority.

The generally applicable *acceptability test* referred to above should require that planning agreements:

- are directed towards proper or legitimate planning purposes, ordinarily ascertainable from the statutory planning controls and other adopted planning policies applying to development,
- provide for public benefits that bear a relationship to development that is not *de minimis* (that is benefits that are not wholly unrelated to development),
- produce outcomes that meet the general values and expectations of the public and protect the overall public interest,
- provide for a reasonable means of achieving the relevant purposes and outcomes and securing the benefits, and
- protect the community against planning harm.

Formal public participation in a planning agreements system as referred to above is fundamental as it is the tool which legitimates the redistribution of the costs and benefits of development through planning agreements. That is, it is the means by which the community can express its preference to bear some of the costs of particular development on the public domain in order to share in wider community benefits provided under an agreement.

Fundamental principles

Planning agreements provide a facility for planning authorities and developers to negotiate flexible outcomes in respect of development contributions. They are a means to enable the NSW planning system to deliver sustainable development, through which key economic, social and environmental objectives of the State and local government can be achieved.

Planning agreements authorise development contributions for a variety of public purposes, some of which extend beyond the scope of s94 or s94A of the *EP&A Act*. These additional purposes include the recurrent funding of public facilities provided by councils, the capital and recurrent funding of transport and other State infrastructure and affordable housing, the protection and enhancement of the natural environment, and the monitoring of the planning impacts of development.

As such, the objective of planning agreements is not limited to internalising the potential costs of development on the public domain. Rather, they facilitate the provision of planning benefits by developers. A planning agreement that provides for a planning benefit involves an agreement by the developer to contribute part of the development profit for a public purpose.

Planning agreements are negotiated between planning authorities and developers in the context of applications by developers for changes to environmental planning instruments or for consent to carry out development. In many cases, the planning authority will be a person charged with the exercise of statutory functions in respect of the subject-matter of the agreement, such as the Minister or a council having functions relating to the making, amendment or repeal of an instrument or the determination of a development application.

Accordingly, planning agreements must be governed by the fundamental principle that planning decisions may not be bought or sold. This means that contributions made by developers towards public purposes that are wholly unrelated to their development should be discouraged, and that unacceptable development should not be permitted because of planning benefits offered by developers that do not make the development acceptable in planning terms.

That is not to say that development contributions provided for in a planning agreement must bear the same nexus with development as required by s94. The nexus principle applies to s94 because development contributions can be compulsorily exacted under that section. Because planning agreements, by contrast, are voluntary and facilitate planning benefits, they can allow for a redistribution of the costs and benefits of development subject to the above fundamental principles.

Agreements between planning authorities and developers should not be put in place outside the planning system to secure development contributions that are wholly unrelated to development or that do not make development acceptable.

Fundamental principles governing the participation by planning authorities in planning agreements include:

- planning agreements must be governed by the fundamental principle that planning decisions may not be bought or sold,
- planning authorities should never allow planning agreements to improperly fetter the exercise of statutory functions with which they are charged,
- planning authorities should not use planning agreements as a means to overcome revenue-raising or spending limitations to which they are subject or for other improper purposes,
- planning authorities should not be party to planning agreements in order to seek public benefits that are unrelated to particular development,
- planning authorities should not, when considering applications to change environmental planning instruments or development applications, take into consideration planning agreements that are wholly unrelated to the subject-matter of the application, nor should they attribute disproportionate weight to a planning agreement[3],
- planning authorities should not allow the interests of individuals or interest group to outweigh the public interest when considering planning agreements,
- planning authorities should not improperly rely on their peculiar statutory position in order to extract unreasonable public benefits from developers under planning agreements,
- planning authorities should ensure that their bargaining power is not compromised or their decision-making freedom is not fettered through a planning agreement, and
- planning authorities should avoid, wherever possible, being party to planning agreements where they also have a stake in the development the subject of the agreements.

[3] See *Tesco Stores v Secretary of State for the Environment & Ors*. [1995] 1 WLR 759, where the House of Lords held in relation to planning agreements under s106 of the *Town and Country Planning Act 1991* (UK) that if a planning obligation is completely unrelated to the development, it could not be a material consideration in the determination of an application and could be regarded only as an attempt to buy development consent. But if it has some connection with the proposed development which is not *de minimis*, then regard must be had to it. But the extent, if any, to which it should affect the decision is a matter entirely within the discretion of the decision-maker, who, in exercising that discretion, was entitled to have regard to established planning policy.

Policy and practice framework

This section sets out a best practice policy and practice framework on the use of planning agreements. Planning agreements should comply with the specific requirements in this section to the fullest extent possible.

Acceptability test. It is of paramount importance that all planning agreements should meet the acceptability test set out in the previous Part. Whether a particular planning agreement is acceptable and reasonable is a matter of planning judgement to be exercised in the circumstances of the case in the light of particular State, regional or local planning considerations, as appropriate.

Efficient negotiation systems. Planning authorities, particularly councils, should implement measures that aim to create fast, predictable, transparent and accountable negotiation systems of planning agreements. Such systems should ensure that the negotiation of planning agreements do not unnecessarily delay ordinary planning processes. The systems should contain measures to ensure that the negotiation of planning agreements run in parallel with applications to change environmental planning instruments or development applications, including through pre-application negotiation in appropriate cases. Negotiation systems should be based on principles of co-operation, full disclosure, early warning, and agreed working practices and timetables.

Planning agreements policies and procedures. Planning authorities, particularly councils, should publish policies and procedures concerning their use of planning agreements. These should set out:

- the circumstances in which the planning authority would ordinarily consider entering into a planning agreement,
- the matters ordinarily covered by a planning agreement,
- the form of development contributions ordinarily sought under a planning agreement,
- the kinds of public benefits ordinarily sought and, in relation to each kind of benefit, whether it involves a planning benefit,
- the method for determining the value of public benefits and whether that method involves standard charging,
- 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 will be provided,
- the procedures for negotiating and entering into planning agreements,
- the planning authority'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.

More detailed policies and procedures can be prepared by planning authorities to supplement the high level policies and procedures.

Planning agreements or conditions of development consent? There are no general policy restrictions on the circumstances in which planning agreements may be used, including whether they may be used instead of conditions of development consent. Planning authorities and developers must make a judgement in each particular case about whether the use of a planning agreement is beneficial and otherwise appropriate. However, planning agreements should never be used to require compliance with or re-state obligations imposed by conditions of development consent. This entails unnecessary duplication and could frustrate the developer's right of appeal to the Land and Environment Court against the conditions.

GST considerations. The parties to planning agreements should obtain advice in every case on whether a potential GST liability attaches to the agreement. An agreement potentially involves two taxable supplies: the supply of development rights from the planning authority to the developer and the supply of public benefits by the developer to the planning authority. In other words, both parties may have a GST liability. The imposition of a condition under s93I requiring a planning agreement to be entered into may overcome the potential GST liability attaching to a planning agreement, but legal advice should still be obtained in every case.

Objectives of planning agreements. The objectives of planning agreements will be dictated by the circumstances of individual cases and the policies of planning authorities in relation to their use. However, as a general indication, planning agreements may be directed towards achieving the following broad objectives:

- meeting the demands created by development for new public infrastructure, amenities and services,
- prescribing the nature of development to achieve specific planning objectives,
- securing off-site planning benefits for the wider community so that development delivers a net community benefit,
- compensating for the loss of or damage to a public amenity, service, resource or asset by development through replacement, substitution, repair or regeneration.

Planning benefits. The provision of planning benefits for the wider community through planning agreements necessarily involves capturing part of development profit for that purpose. The value of planning benefits should always be restricted to a reasonable share of development profit. Planning benefits should never be obtained through planning agreements as a form of taxation on development. Accordingly, planning benefits, though primarily directed to the wider community, must never be wholly un-related to development contributing the benefit.

Competing proposals to provide planning benefits. Situations may arise where planning authorities are faced with competing applications each accompanied by offers to enter into planning agreements providing planning benefits. In such cases, provided the planning benefits offered are not wholly unrelated to development, they may be considered in connection with the applications and it may be perfectly rational for the planning authority to approve the proposal which offers the greatest planning benefit in terms of both the development itself and related external public benefits[4].

Relationship between planning agreements and SEPP No.1. The benefits provided under planning agreements should never be used to justify a dispensation with applicable development standards under *State Environmental Planning Policy No.1 – Development Standards* in relation to development.

Past deficiencies in infrastructure provision. Planning agreements may be used to overcome past deficiencies in infrastructure provision that would otherwise prevent development from occurring. This may frequently involve the conferring of a planning benefit under the agreement.

Standard charges. Planning authorities are encouraged to standardise development contributions sought under planning agreements in order to streamline negotiations and provide predictability and certainty for developers. This, however, does not prevent public benefits being negotiated on a case by case basis, particularly where planning benefits are also involved.

Standard-form planning agreements. Planning authorities are also encouraged to publish and use standard forms of planning agreements or standard clauses for inclusion in planning agreements in the interests of process efficiency. Councils are encouraged to use the template planning agreement at Attachment A, wherever suitable.

[4] See the decision of the House of Lords in *Tesco Stores v Secretary of State for the Environment & Ors*. [1995] 1 WLR 759.

Involvement of independent third parties. Independent third parties can be potentially used in a variety of situations involving planning agreements. Planning authorities and developers are encouraged to make appropriate use of them. The situations include:

- where an independent assessment of a proposed change to an environmental planning instrument or development application is necessary or desirable,
- where factual information requires validation in the course of negotiations,
- where sensitive financial or other confidential information must be verified or established in the course of negotiations,
- where facilitation of complex negotiations are required in relation to large projects or where numerous parties or stakeholders are involved,
- where dispute resolution is required under a planning agreement.

Recurrent costs and maintenance payments. Planning agreements may require developers to make contributions towards the recurrent costs of facilities that primarily serve the development to which the planning agreement applies or neighbouring development in perpetuity. However, where the facilities are intended to serve the wider community, planning agreements should only require the developer to make contributions towards the recurrent costs of the facility until a public revenue stream is established to support the on-going costs of the facility.

Pooling of monetary contributions. Planning authorities should disclose to developers, and planning agreements should specifically provide, that monetary contributions paid under different planning agreements are to be pooled and progressively applied towards the provision of public benefits that relate to the various agreements. Pooling may be appropriate to allow public benefits, particularly essential infrastructure, to be provided in a fair and equitable way.

Refunds. Planning agreements may provide that refunds of monetary development contributions made under the agreement are available if public benefits are not provided in accordance with the agreement.

Documentation of planning agreements. The parties to a planning agreement should agree on which party is to draft the agreement so as to avoid duplication of resources and costs.

Monitoring and review of planning agreements. Planning authorities should use standardised systems to monitor the implementation of planning agreements in a systematic and transparent way. This may involve co-operation by different parts of planning authorities. Monitoring systems should enable information about the implementation of planning agreements to be made readily available to public agencies, developers and the community. Planning agreements should contain a mechanism for their periodic review that should involve the participation of all parties.

Modification and discharge of developer's obligations. Planning agreements should not impose obligations on developers indefinitely. Planning agreements should set out the circumstances in which the parties agree to modify or discharge the developer's obligations under the agreement. The modification or discharge should be effected by an amendment to the agreement. The circumstances that may require planning agreements to be modified or discharged may include the following:

- material changes to the planning controls applying to the land to which the agreement applies,
- a material modification to the development consent to which an agreement relates,
- the lapsing of the development consent to which an agreement relates,
- the revocation or modification of a development consent to which an agreement relates by the Minister,
- other material changes in the overall planning circumstances of an area affecting the operation of the planning agreement.

Costs. There is no comprehensive policy on the extent to which planning authorities may recover their costs of preparing, negotiating, executing, monitoring and otherwise administering planning agreements. However, cost recovery should be based on reasonable charges and generally should be shared equally with the developer.

Basic statutory procedure for entering into a planning agreement

The nature of planning agreements and requirements for their public notification and consideration in determining applications dictate the basic procedures for entering into planning agreements.

Planning agreements may be entered into between planning authorities and developers (and associated persons) in relation to changes sought by developers to environmental planning instruments (includes the making, amendment or repeal of instruments), or development applications or proposed development applications.

Planning agreements must be publicly notified and made available for public inspection before they can be entered into.

Planning agreements and public submissions relating to them must be considered, so far as relevant, when deciding to make changes to environmental planning instruments to which they

relate or when determining development applications to which planning agreements relate.

Planning agreements should be negotiated between planning authorities and developers before applications are made so that applications may be accompanied by copies of draft agreements. The basic procedures relating to planning agreements are therefore as follows:

Step 1. Before the making of an application, the planning authority and developer decide whether to negotiate a planning agreement. The parties consider whether other planning authorities and other persons associated with the developer should be additional parties to the agreement. If the developer is not the owner of the relevant land, the landowner should be an additional party to the agreement.

Step 2. If an agreement is negotiated, it is documented as a draft planning agreement and the parties agree on the terms of the accompanying explanatory note required by the *EP&A Regulation*. The parties also agree on the content of the application to which the draft agreement relates.

Step 3. The developer makes the application to the relevant authority, accompanied by the draft planning agreement and the explanatory note. The application must clearly record the developer's offer to enter into the planning agreement if the application is approved. Preferably, the draft agreement should be executed by the developer to indicate the developer's commitment to enter into the agreement if the application is approved. In the case of an application to change an environmental planning instrument, the application may record the developer's offer as being to enter into the planning agreement if consent is subsequently granted to a development application relating to the change to the instrument.

Step 4. Relevant public authorities are consulted in relation to the application and draft planning agreement and any consequential amendments required to the application and draft agreement are made.

Step 5. The application, draft planning agreement and explanatory note are publicly notified and exhibited in accordance with the *EP&A Act* and *Regulation.* Any consequential amendments required to the application and draft agreement are made and, if necessary, the amended application, draft planning agreement and explanatory note are re-exhibited.

Step 6. The draft planning agreement and public submissions are considered in the determination of the application so far as relevant to the application. The weight given to the draft agreement and public submissions is a matter for the relevant authority acting reasonably.

Step 7. If the application, being a change to an environmental planning instrument, is approved, the agreement may be entered into immediately. Alternatively, it can be entered into if consent is subsequently granted to a development application relating to the change to the instrument. If the application, being a development application, is granted consent, a condition may be imposed requiring the planning agreement to be entered into but only in terms of the developer's offer made in connection with the application. The planning authority would resolve to execute the agreement when approving the application. If the application is approved on terms different to the developer's offer, the agreement could not be required to be entered.

Part 5 - Examples of the use of planning agreements

Planning agreements have the potential to be used in a wide variety of planning circumstances and to achieve many different planning outcomes. Their use will be dictated by the circumstances of individual cases and the policies of planning authorities in relation to their use. Accordingly, it is not possible to prescribe their use, nor would this be appropriate.

The examples given in this section serve only to provide an indication of the potential breadth of their scope and application.

Compensation for loss or damage caused by development
Planning agreements can provide for development contributions that compensate for the loss of or damage to a public amenity, service, resource or asset that will or is likely to result from the carrying out of development the subject of the agreement.

For example, development may result in the loss of or adversely affect public open space, public car parking, public access, water and air quality, bushland, wildlife habitat and other natural areas and the like.

The planning agreement could impose planning obligations directed towards replacing, substituting, or restoring the public amenity, service, resource or asset to an equivalent standard to that existing before the development is carried out.

In this way, planning agreements can assist in ameliorating development impacts that may otherwise be unacceptable.

Meeting demand created by development
Planning agreements can also provide for development contributions that meet the demand for new public infrastructure, amenities and services created by development the subject of the agreement. For example, development may create a demand for public transport, drainage services, public roads, public open space, streetscape and

other public domain improvements, community and recreational facilities and the like.
The public benefit provided under the agreement could be the provision, extension or augmentation of public infrastructure, amenities and services to meet the additional demand created by the development.

Prescribing inclusions in development
Planning agreements can be used to secure the implementation of particular planning policies by requiring development to incorporate particular elements that confer a public benefit.

Examples include agreements that require the provision of open space, community or recreational facilities or the retention of urban bushland, or agreements that require development, in the public interest, to meet aesthetic standards, such as design excellence.

Providing planning benefits to the wider community
Planning agreements can be used to secure the provision of planning benefits from development. That is, through a planning agreement, development may provide an overall net benefit to the wider community rather than merely address the more direct impacts of the development on surrounding land or the wider community.

The provision of planning benefits through planning agreements necessarily involves an agreement between a developer and a planning authority to allow the wider community to share in part of the development profit to achieve specified public benefits.

The planning benefit may be provided in conjunction with planning obligations or other measures that address the impacts of particular development on surrounding land or the wider community.

Alternatively, the planning benefit could wholly or partly replace such measures if the developer and the planning authority agree to a redistribution of the costs and benefits of development the subject of a planning agreement in order to allow the wider community, the planning authority and the developer to realise their specific preferences for the provision of public benefits in connection with the development.

Planning benefits may take the form of additional or better quality public facilities than is required to meet particular development. Alternatively, planning benefits may involve the provision of public facilities that, although not strictly required to make the development acceptable in planning terms, are not wholly unrelated to the development. An example of the latter might be development contributions towards the provision or retention of off-site affordable housing.

Recurrent funding
Planning agreements may provide for public benefits that take the form of development contributions towards the recurrent costs of infrastructure, facilities and services.
Such benefits may relate to the recurrent costs of items that primarily serve the development to which the planning agreement applies or neighbouring development. In such cases, the planning agreement may establish an endowment fund managed by a trust, to pay for the recurrent costs of the relevant item in perpetuity. In addition, it may bind future owners in a development to make periodic payment to the fund or otherwise in respect of the recurrent costs of the item.

For example, a planning agreement may fund the recurrent costs of habitat protection in respect of development that will have a demonstrated impact on sensitive habitat which is nearby to the development. Further, a planning agreement may fund the recurrent costs of water quality management in respect of development that will have a demonstrated impact on a natural watercourse that flows through or nearby to the development.

Planning benefits may also take the form of interim funding of the recurrent costs of infrastructure, facilities and services that will ultimately serve the wider community. The planning agreement would only require the developer to make such contributions until a public revenue stream is established to support the on-going costs of the facility.

Attachment A

Template planning agreement

(Between Council and Developer)

PLANNING AGREEMENT

Parties

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

and

of ##, New South Wales (**Developer**).

Background

(For Development Applications)

A. On, ##, the Developer made a Development Application to the Council for Development Consent to carry out the Development on the Land.

B. That Development Application was accompanied by an offer by the Developer to enter into this Agreement to make Development Contributions towards the Public Facilities if that Development consent was granted.

(For Changes to Environmental Planning Instruments)

A. On, ##, the Developer made an application to the Council for the Instrument Change for the purpose of making a Development Application to the Council for Development Consent to carry out the Development on the Land.

B. The Instrument Change application was accompanied by an offer by the Developer to enter into this Agreement to make Development Contributions towards the Public Facilities that Development Consent was granted.

C. The Instrument Change was published in NSW Government Gazette No. ## on ## and took effect on ##.

D. On, ##, the Developer made a Development Application to the Council for Development Consent to carry out the Development on the Land.

Operative provisions

1 Planning agreement under the Act

The Parties agree that this Agreement is a planning agreement governed by Subdivision 2 of Division 6 of Part 4 of the Act.

2 Application of this Agreement

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

3 Operation of this Agreement

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

4 Definitions and interpretation

4.1 In this Agreement the following definitions apply:

Act means the *Environmental Planning and Assessment Act 1979* (NSW).

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

Development means ##

Development Application has the same meaning as in the Act.

Development Consent has the same meaning as in the Act.

Development Contribution means a monetary contribution, the dedication of land free of cost or the provision of a material public benefit.

GST has the same meaning as in the GST Law.

GST Law has the meaning given to that term in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any other Act or regulation relating to the imposition or administration of the GST.

Instrument Change means ## Local Environmental Plan ##.

Land means Lot ## DP ##, known as ##.

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

Public Facilities means ##.

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

4.2 In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:

(a) Headings are inserted for convenience only and do not affect the interpretation of this Agreement.

(b) A reference in this Agreement to a business day means a day other than a Saturday or Sunday on which banks are open for business generally in Sydney.

(c) If the day on which any act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next business day.

(d) A reference in this Agreement to dollars or $ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars.

(e) A reference in this Agreement to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision.

(f) A reference in this Agreement to any agreement, deed or document is to that agreement, deed or document as amended, novated, supplemented or replaced.

(g) A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Agreement.

(h) An expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency.

(i) Where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.

(j) A word which denotes the singular denotes the plural, a word which denotes the plural denotes the singular, and a reference to any gender denotes the other genders.

(k) References to the word 'include' or 'including are to be construed without limitation.

(l) A reference to this Agreement includes the agreement recorded in this Agreement.

(m) A reference to a party to this Agreement includes a reference to the servants, agents and contractors of the party, and the party's successors and assigns.

(n) Any schedules and attachments form part of this Agreement.

5 Development Contributions to be made under this Agreement

[*Drafting Note* 5: Specify the development contributions to be made under the agreement; when they are to be made; and the manner in which they are to be made]

6 Application of the Development Contributions

6.1 [Specify the times at which, the manner in which and the public purposes for which development contributions are to be applied]

7 Application of s94 and s94A of the Act to the Development

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

8 Registration of this Agreement

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

9 Review of this Agreement

[*Drafting Note* 9: Specify whether, and in what circumstances, the Agreement can or will be reviewed and how the process and implementation of the review is to occur].

10 Dispute Resolution

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

11 Enforcement

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

12 Notices

12.1 Any notice, consent, information, application or request that must or may be given or made to a Party under this Agreement is only given or made if it is in writing and sent in one of the following ways:

(a) Delivered or posted to that Party at its address set out below.

(b) Faxed to that Party at its fax number set out below.

(c) Emailed to that Party at its email address set out below.

Council

Attention: ##

Address: ##

Fax Number: ##

Email: ##

Developer

Attention: ##

Address: ##

Fax Number: ##

Email: ##

12.2 If a Party gives the other Party 3 business days notice of a change of its address or fax number, any notice, consent, information, application or request is only given or made by that other Party if it is delivered, posted or faxed to the latest address or fax number.

12.3 Any notice, consent, information, application or request is to be treated as given or made at the following time:

(a) If it is delivered, when it is left at the relevant address.

(b) If it is sent by post, 2 business days after it is posted.

(c) If it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.

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

13 Approvals and consent

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

14 Assignment and Dealings

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

15 Costs

[*Drafting Note* 15: Specify how the costs of negotiating, preparing, executing, stamping and registering the Agreement are to be borne by the Parties]

16 Entire agreement

This Agreement contains everything to which the Parties have agreed in relation to the matters it deals with. No Party can rely on an earlier document, or anything said or done by another Party, or by a director, officer, agent or employee of that Party, before this Agreement was executed, except as permitted by law.

17 Further acts

Each Party must promptly execute all documents and do all things that another Party from time to time reasonably requests to affect, perfect or complete this Agreement and all transactions incidental to it.

18 Governing law and jurisdiction

This Agreement is governed by the law of New South Wales. The Parties submit to the non-exclusive jurisdiction of its courts and courts of appeal from them. The Parties will not object to the exercise of jurisdiction by those courts on any basis.

19 Joint and individual liability and benefits

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

20 No fetter

Nothing in this Agreement shall be construed as requiring Council to do anything that would cause it to be in breach of any of its obligations at law, and without limitation, nothing shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

21 Representations and warranties

The Parties represent and warrant that they have power to enter into this Agreement and comply with their obligations under the Agreement and that entry into this Agreement will not result in the breach of any law.

22 Severability

If a clause or part of a clause of this Agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Agreement, but the rest of this Agreement is not affected.

23 Modification

No modification of this Agreement will be of any force or effect unless it is in writing and signed by the Parties to this Agreement.

24 Waiver

The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another Party. A waiver by a Party is only effective if it is in writing. A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

25 GST

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

Execution

Dated: ##

Executed as an Agreement: ##

Attachment B

Template explanatory note

Environmental Planning and Assessment Regulation 2000

(Clause 25E)

Explanatory Note

Draft Planning Agreement

Under s93F of the Environmental Planning and Assessment Act 1979

1. Parties

(Planning Authority)

(Developer)

2. Description of Subject Land

3. Description of Proposed Change to Environmental Planning Instrument/Development Application

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

5. Assessment of the Merits of the Draft Planning Agreement

The Planning Purposes Served by the Draft Planning Agreement

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

How the Draft Planning Agreement Promotes the Public Interest

For Planning Authorities:

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

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

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

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

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

Other Matters

Signed and Dated by All Parties

Attachment C

Template condition of development consent

(Where planning agreement accompanied a development application)

##. Pursuant to section 80A(1) of the *Environmental Planning and Assessment Act 1979*, the planning agreement that relates to the development application the subject of this consent must be entered into before [*Insert Requirement*].

(Where planning agreement accompanied an application to change an environmental planning instrument)

##. Pursuant to section 80A(1) of the *Environmental Planning and Assessment Act 1979*, the planning agreement that accompanied the application made by [*Insert Name of Developer*] to [*Insert Name of Planning Authority*] dated [*Insert Date*] relating to [*Specify Name of Environmental Planning Instrument*] for the purpose of the making of the development application the subject of this consent.

Appendix B

Open space facilities at Tea Gardens/Hawks Nest

Existing Facilities – Tea Gardens/Hawks Nest

Structure Open Space	Open Space
- Courts and fields including the Memorial Park Public Reserve (lot 6) in Tea Gardens and the Myall Sports Reserve (R86322) at Hawks Nest - Tea Gardens Reserve (1.2 hectares) – a large district field comprising four small multi-use fields, toilets and storage facilities - Reserve in Hawks Nest (4 hectares) classified as large district courts and field consisting of a multi-use field, two tennis courts, one croquet court, swings, toilet facilities and a park (ERM, 2006b).	- Open space in the area has typically been provided in the following ratios: - small parks at about 25% - large parks without structured facilities at about 30% - courts at about 15% - playing fields at about 30% (ERM, 2006b).