



26 June 2020

Executive Director Planning Policy  
Department of Planning, Industry and Environment  
Locked Bag 5022  
PARRAMATTA NSW 2124

Dear Sir or Madam

## **Re: Submission to the draft planning agreements policy framework**

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Thank you for the opportunity to make a submission and provide feedback on the draft planning agreements policy framework.

In particular, we want to note our thanks for agreeing to our request for an extension to 26 June 2020, for SSROC to make this submission.

The Southern Sydney Regional Organisation of Councils Inc (SSROC) is an association of eleven local councils in the area south of Sydney Harbour, covering central, inner west, eastern and southern Sydney. SSROC provides a forum for the exchange of ideas between our member councils, and an interface between governments, other councils and key bodies on issues of common interest. Together, our member councils cover a population of about 1.7 million, one third of the population of Sydney. SSROC seeks to advocate for the needs of our member councils and bring a regional perspective to the issues raised.

SSROC welcomes the opportunity to provide comment on the draft planning agreements policy framework, the draft Practice Note and the draft Ministerial Direction on Planning Agreements to help provide a clearer and more transparent contributions system. However, some elements are considered to unnecessarily limit council's ability to enhance the liveability of neighbourhoods and meet the needs of future communities.

The draft Practice Note explicitly connects to a number of fundamental policy issues, like value capture, that may be better addressed within the NSW Productivity Commissioner's review of developers' contributions.

## **Overview of proposed reforms**

An updated planning agreements policy framework has been developed by the Department. Although the framework was first exhibited in 2017, the policy has been reviewed in response to the diverse mix and complexity of the submissions received, to address the recommendations of the Kaldas Review and to align with current planning policies and practices.

The updated draft planning agreements policy includes:

- Draft Secretary's Practice Note on Planning Agreements – the Practice Note provides updated and additional guidance material to councils and developers in order to enhance the transparency of planning agreement processes. The Practice Note also emphasises the objective underpinning planning agreements, which is to provide a mechanism that enables the funding of creative and practical solutions to delivering infrastructure in response to the community's needs.
- Ministerial Direction on Planning Agreements – the Ministerial Direction aims to identify standard requirements for negotiating or preparing a planning agreement and is to be given to all local councils.

Planning Agreements are currently voluntary and are proposed to remain so.

## General Comments

SSROC welcomes the opportunity to make a constructive contribution to the planning agreements policy framework and has the following comments and feedback.

While SSROC is supportive of many of the proposed changes, SSROC objects to the position that Voluntary Planning Agreements (VPAs) should not explicitly be used for value capture. Arguably this is a proposed policy change that has not been driven by legislative change by Parliament nor is it recommended by the Kaldas review.

Accordingly, our submission focusses on the topic of value capture. SSROC considers that the draft Practice Note does not provide a sufficiently balanced and meaningful discussion on value capture.

Rather than seeking to exclude value capture because of perceived risks, the Department should be looking at this issue more constructively, and providing guidelines which address a fair and transparent methodology for its consideration as part of a planning agreement. Clearly value capture has been a permissible and useful part of delivering public benefit outcomes with planning proposals and development applications in the past under the *Environmental Planning and Assessment Amendment (Development Contributions) Act 2005*, as noted in the draft Practice Note paper<sup>1</sup>. If there are aberrant examples these should be avoided, however none are cited.

Value uplift associated with changes to planning controls is the value of the new property rights that allow for that development to take place which are, until then, conceptually community property owned by the community. The uplift is not earned by the proponent alone and frequently the rezoning is enabled by public infrastructure investment.

The proposed changes will result in more of the costs of growth being borne by existing residents, while the benefits accrue to a few landowners in the form of a windfall gain. This is clearly unsustainable, and the community has a legitimate claim to the benefits created by planning decisions.

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<sup>1</sup> Department of Planning, Industry and Environment, Planning agreements practice note, Exhibition draft April 2020, page 2

## Key Strategic Directions

SSROC supports a clear policy framework for planning agreements that:

- Incorporates probity measures that respond to the Kaldas Review
- Increases clarity and transparency for all stakeholders
- Promotes the importance of strategic land use and infrastructure planning
- Offers clear guidance about desired infrastructure outcomes
- **Makes use of value capture** in the public interest.

As the planning system reforms and develops it is important that planning agreements should operate within a systematic, ordered and predictable context.

Importantly all contribution requirements in relation to development, including SICs and affordable housing contributions, should be in place at the same time as land is rezoned for urban purposes or is up-zoned for more intense development. The alignment of determination of all the contribution requirements at or around rezoning gazettal should be a core commitment of government – in order to transparently guide and manage proponent expectations and speculation.

Lobbying for an upzoning is noted in the Kaldas report as one of the most pervasive corruption risks.

## Detailed Comments about Value Capture

### Policy Position on Value Capture

As noted, the proposed Planning Agreements Practice Note generally does not support the use of planning agreements for value capture, and so this proposed policy change of narrowing the treatment of value capture is not supported.

It is important that the planning agreements guidance is well situated within and aligned to the NSW planning system's objectives and wider evolving strategic planning conversations. Hence treating the issue of value capture in isolation from the other planning instruments and levers and policy developments is fraught.

Value uplift generated by infrastructure investment and changes to land use controls should be shared (via Planning Agreements) between the landowner managing development risks and the wider community who risk the impacts to their living, working or business conditions.

Regrettably the draft Practice Note does not attempt to discuss value capture and different practices using its own fundamental principles of 'transparency, fairness and flexibility'.

An explicit discussion of value capture is likely to have designated value capture as a mechanism of fairness within the planning system located in the public interest. It would also have situated it as means-to-an-end and one pathway to making trade-offs to meet strategic objectives endorsed by the community and not as a primary purpose of planning authorities to take advantage of a power imbalance.

The grounds for value capture are primarily about fairness and equity for communities.

The draft Practice Note states that “In general, the use of planning agreements for the primary purpose of value capture is not supported as it leads to the perception that planning decisions can be bought and sold and that planning authorities may leverage their bargaining power based on their statutory powers.<sup>2</sup>” The draft Practice Note unreasonably makes these conclusions without evidence being provided or discussion about which members of the public might hold these perceptions. This is a disputable generalised statement which is not supported by evidence in the draft Practice Note or material accompanying the exhibition.

Value capture is an important and well recognised approach to the delivery of public benefits. Value capture has been used widely across Australia at all levels of government and has also been employed by governments internationally. It is a justified mechanism which can be used to provide funding for the delivery of a variety of public infrastructure projects. Value capture is one of several funding mechanisms available to NSW councils to provide public amenities and services.

Recent research<sup>3</sup> has highlighted the potential \$8 billion a year in revenue that a betterment levy, similar to that used in the ACT on rezoned land, could produce in NSW. The report noted that the tax system failed to capture value from land rezoning. The levy could be applied on the increase in land value when it is rezoned for more lucrative use or benefits from new public infrastructure, such as a metro trainline or airport.<sup>4</sup>

In response to this research, the NSW Treasurer said that the NSW Government “already used value sharing for projects where it made sense to do so, such a Sydney Metro. For example, the government raised more than \$1 billion by selling air rights above stations at Martin Place, North Sydney, Waterloo and Pitt Street”. According to a DPIE spokesperson the Western Sydney Growth Area SIC is expected to raise \$278 million over the next four years.<sup>5</sup>

There are current examples of where value capture (via planning agreement) is encouraged:

- Department’s Developing an Affordable Housing Contribution Scheme for affordable housing.
- Randwick Council’s Community Infrastructure Contribution (or value sharing).

## Planning Agreements Practice Note

### Fundamental Principles

The proposal to have a set of fundamental principles to guide the development of Planning Agreements is welcomed and supported. Some important principles are mentioned in this section but are not expressed within the proposed list of principles.

Arguably some elements of the Fundamental Principles (section 2.1) are not principles but rather are objectives, decision-making guidelines and criteria. Of the seven dot points listed two and half are positive and four and half are actions aimed at avoiding certain outcomes. Many of the ‘principles’ appear to have embedded assumptions to manage inappropriate motivations.

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<sup>2</sup> Department of Planning, Industry and Environment, Planning agreements practice note, Exhibition draft April 2020, page 4

<sup>3</sup> Submission to the NSW Productivity Commission from Sydney University academic Cameron Murray

<sup>4</sup> Sydney Morning Herald, *NSW missing out on \$8 billion a year from failure to tax land -rezoning, inquiry told*, Michael Koziol, 7 June 2020.

<sup>5</sup> Ibid

An alternative set of policy principles for Planning Agreements for guiding councils and other stakeholders could be framed more constructively as:

- Meeting the needs of a growing population with infrastructure that improves local public amenity and liveability
- Acting in the public interest
- Entering a Planning Agreement is voluntary for the parties with no sense of coercion, inequity, or abuse of power by one party over another
- Supporting economically viable development
- Linking the planning agreement process and the delivery of public benefits
- Fairness for all parties with decisions based on merit and ensuring the agreement is actionable
- Independent performance of statutory functions and commitment to published planning strategies and the application of gazetted planning controls
- Transparency in decision-making and reporting where flexibility and trade-offs are involved
- Acting to dampen speculation in land and enhance housing affordability
- Testing decisions using public exhibition of planning proposals and development applications and public consultation
- Adherence to published policies, practices and accountabilities that maintain probity and ensure conflicts of interest are mitigated.

Please note that under this suggested revised set of principles, the use of value capture that adheres to these principles would be acceptable and meritorious. On the other hand, if it contravenes these principles it could be inappropriate.

Such a set of governing principles would enable councils and proponents to safely navigate a potentially complex issue to a desired outcome that is in the public interest. As public policy they would assist with countering perceptions about planning decisions being bought and sold.

### **Mitigating risks with Value Capture**

The draft Practice Note lists a range of practices and considerations which should be provided in a council's planning agreement policy. The draft Practice Note should be clearer about the content of a planning agreement policy in regard to the separation of key planning processes, decision-making roles and opportunities for public involvement.

These are important matters which can improve the understanding of planning and show the transparency in decisions making. They are matters which will assist with countering perceptions about planning decisions being bought and sold.

Planning Agreements should be undertaken in the context of a Council's adopted Planning Agreement Policy.

This should include guidelines setting out:

- how stakeholder engagement has demonstrated the need for the scheme;
- its role in the funding mix adopted to deliver infrastructure in the affected area;
- the benefits to the wider community that will be achieved by the scheme;

- clearly showing how proponents can participate in the value sharing scheme (noting that such schemes are usually tied to voluntary incentive floor space provisions in an environmental planning instrument);
- a consistently applied methodology for determining residual land value uplift and the value sharing rates; and
- how monies will be collected, accounted for and spent.

### Other Operational Matters

In line with this paper's recommended principles, Planning Agreements should only be made in the context of a Planning Agreement Policy adopted by council which sets a high standard of probity.

Using a planning agreement to capture a portion of the land value uplift resulting from a rezoning application should be a viable option to allow funding where the resulting infrastructure demand was not anticipated in the existing contribution plans.

To assist all parties, the template Planning Agreements and Explanatory notes should be made mandatory (with additional (not substitute) provisions allowed). Not only would this reduce parties' costs, but also their use would add to the transparent, consistency and predictable nature of an agreement, and minimise opportunities for the addition of clause, conditions and outcomes that may be inconsistent with the approach advocated in the template documents.

### Draft Ministerial Direction on Planning Agreements

The objective of this direction is clear 'to identify standard requirements for negotiating or preparing a planning agreement'.

**The proposed draft is supported, albeit with a revised Practice Note that permits the use of value capture consistent with the public interest.**

### Linkages to further broader contribution reforms

The NSW Productivity Commission's review of the infrastructure contributions system (Part 7 of the Act) is welcomed. The outcomes of this review should have informed the current contributions reforms. This thorough review would have occurred before individual elements of contribution settings were amended.

A holistic review of the infrastructure contributions system will be valuable to coordinate how the regional and local infrastructure should be funded.

Unlike other planning frameworks around the world, the NSW planning system has very few mechanisms to consistently capture the increased value delivered to owners when a site directly benefits from changes to planning controls. Planning Agreements are currently one of the few mechanisms in which the community at large may in some way benefit. The potential of value capture needs to be addressed as part of the current review of funding mechanisms for community infrastructure.

The draft Practice Note itself acknowledges that it does not attempt to discuss value captures uses thoroughly, the public interest case behind value capture nor does it explore opportunities to mitigate detrimental impacts or potential risks that it identifies<sup>6</sup>.

The NSW Productivity Commission's 'root and branch' review should look to proposing a statewide value capture policy related to development uplift, additional to the existing development contributions system.

Until the Government introduces a scheme which returns to the community a fair share of any unearned land value uplift resulting from planning decisions, which currently flows fully to landowners, it is reasonable and valid for Planning Agreements to be a mechanism to achieve this purpose.

In the meantime, and for reasons outlined previously, proposed changes to the Practice Note around value capture need to be deferred until this review considers a holistic, consistent and systemic response to this issue. In the interim, SSROC proposes revision of Section 2.2 of the Planning Agreement Practice Note. Accordingly, Section 2.3 should be removed and replaced by statements that maintain support for the use value capture in planning agreements.

## Conclusion

SSROC member councils cover a large part of Greater Sydney and have a direct interest in supporting and advocating for changes to improve the planning agreements policy framework. We welcome the consultation and recommend that the issues raised, and recommendations proposed in this submission be given further consideration.

In order to make this submission within the timeframe for receiving comments, it has not been possible for it to be reviewed by councils or to be endorsed by the SSROC. I will contact you further if any issues arise as it is reviewed. If you have any queries please do not hesitate to contact me or Mark Nutting, SSROC's Strategic Planning Manager on 8396 3800.

Again, thank you for the opportunity to comment on the draft planning agreements policy framework and we are keen to participate in any further stages of the reform process, in particular consultations about changes that will particularly impact on local councils.

Yours faithfully



Helen Sloan  
**Acting General Manager**  
**Southern Sydney Regional Organisation of Council**

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<sup>6</sup> Department of Planning, Industry and Environment, Planning agreements practice note, Exhibition draft April 2020, page 4