12 June 2020

Mr Luke Walton
Executive Director, Planning Policy
Department of Planning, Industry and Environment

via online upload

Dear Mr Walton,

UDIA NSW Response to Draft Secretary's Practice Note on Planning Agreements

The Urban Development Institute of Australia (UDIA) NSW is the peak body representing the interests of the urban development industry in New South Wales. We represent over 500 member companies that are directly involved in the industry including developers, strata and community managers, planners, and lawyers.

The Department of Planning, Industry and Environment (DPIE) is proposing to release a revised Secretary's Practice Note on Planning Agreements to replace the current Practice Note issued in July 2005. We note DPIE issued a Draft Practice Note in 2016 and we consider the current draft addresses many of the industry's major concerns with the 2016 draft.

Planning Agreements (commonly referred to as Voluntary Planning Agreements or VPAs) are established in Section 7.4 of the Environmental Planning and Assessment Act (EP&A Act) to provide opportunities for innovative and efficient delivery of public benefits, particularly public infrastructure, by the private sector. UDIA supports the use of VPAs in the assessment and approval of large development proposals and the ability for developers, at their discretion, to voluntarily offer to enter a VPA with a Planning Authority. We also support the use of VPAs concurrent with (but not prior to) adopted Contributions Plans.

At the outset there are several important principles and guidelines in the Draft document that we wholeheartedly support and commend the Minister for their inclusion. These comprise:

1. **Part 2.1 – Fundamental Principles**.
   UDIA strongly agrees with the new "Fundamental Principles" that:

   - *Agreements should not be used as a means of general revenue raising or to overcome revenue shortfalls.*
   - *Agreements must not include public benefits wholly unrelated to the particular development.*
   - *Value capture should not be the primary purpose of a planning agreement.*

   In recent years we have seen a growing trend for Agreements (VPAs and supporting policies) being pursued by Planning Authorities (Councils) to secure additional

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sources of funding for new infrastructure unrelated to subject development projects and most significantly an incorporation of 'value capture' or 'betterment levy' mechanisms / terms that go well beyond the intent and objectives for the legislative change that enabled the introduction of such agreements.

These policies and positions on Agreements in effect monetise the planning system. Not only is it fundamentally inappropriate to co-opt the planning process into a convenient revenue generating mechanism by Councils, it questions the very basis upon which the role of planning in NSW is founded. This undermines public confidence that the rigorous planning processes in place are focussed on the appropriate use of land and not any other unconnected surreptitious agenda.

UDIA has a long-held position that value capture has a place and should occur in the following circumstances:

- When government is creating significant value through regional infrastructure investment.
- It is collected via a mechanism that is not connected to the planning process; and
- It is charged to the primary beneficiary of the value windfall – the passive landowner - and not a party that:
  (i). Has capitalised on that decision to add wealth to the community and income to Government via the application of risk, endeavour or entrepreneurial skill and has subsequently added to Government income through construction employment, payment of taxes/charges/ duties and realisation of economic multiplier benefits; or
  (ii). A party such as a home purchaser or business who, by virtue of being simply at the end of the development process is subject to the charge in lieu of the passive landowner.

2. **Part 2.3 – Value Capture**.
Again, UDIA supports the re-emphasis in this principle that agreements should not be used explicitly for value capture. We note that the examples used in the guideline, (highlighting monetary contributions per square metre of increased floor area, or as a percentage of the increased value of the land) illustrates the inappropriateness of using the planning process as, essentially, a tax collecting mechanism; exposing the process to criticisms that planning decisions were being 'bought and sold'.

3. **Part 2.5 Acceptability Test.**
We support the criteria in this guideline. It will form an effective "check measure" against which the objectives and terms of an Agreement can be tested.

4. **Part 3.1 Agreements cannot replace (become de facto) Contribution Plans**.
We support this position. In simple terms any agreement entered into by parties without the guidance of a contributions plan that identifies and quantifies the need for the appropriate augmentation of infrastructure in the host area of a development application or rezoning to inform the agreement must be ultimately flawed. However,

the significance of the presence of a contributions plan goes further than this. A contributions plan provides the transparency and certainty that the offer being made has a logical and transparent basis, free from potential claims of coercion, gouging, unfairness and / or uncertainty.

5. **Part 3.2 – Land use and strategic infrastructure planning.**
UDIA welcomes guidance that where a developer lodges a planning proposal unanticipated by a local strategic planning statement, that planning authorities must ensure that unreasonable contributions are not extracted.

UDIA reiterates the importance of fairness, transparency, and the voluntary nature of Agreements. With that in mind we make the following additional suggestions for inclusion in the Practice Note:

6. **Status of the Guidelines**.
The proposed Ministerial Direction that gives effect to the Practice Note only requires that the Council have regard to the Practice Note. This means there is no mandate to follow the Practice Note.

Our experience suggests that there are positions Planning Authorities may take that are contrary to the Practice Note. This is often driven by individual personalities of the negotiating staff of the Planning Authority. Negotiating officers are directed by the elected representatives of the Planning Authority to take positions in the negotiation of an agreement with a proponent. We note that Government's instigation of this review and preparation of revised guidelines has been driven primary by the lack of adherence to the 2005 Practice Note by many Planning Authorities.

We recommend the Ministerial Direction is amended to Direct Councils to apply the fundamental principles and acceptability test to all VPAs.

7. **Affordable Housing**.
The Practice Note in the introduction outlines that the Environmental Planning Assessment (Planning Agreements) Direction 2019 sets out the matters to be considered by a Council if negotiating a planning agreement which includes provision for affordable housing. With the expansion of SEPP 70, we suggest that there needs to be additional legislative reform before an Agreement can accommodate provision for affordable housing.

Section 7.3 of the EP&A Act enables an agreement to exclude or modify the operation of Section 7.11, Section 7.12, and Section 7.24 (SIC) contributions. However, it does not include Section 7.32 (Affordable Housing Contributions). We request that direction is given in the Guidelines against Affordable Housing being incorporated into an Agreement. There is no certainty that a proponent cannot be levied twice for affordable housing contributions if this were to occur.

8. **Expand Guidance to State Planning Agreements.**
The Planning Agreements that are the subject to the Practice Note refer only to local agreements with a local planning authority (primarily a Council). There is a need to expand the guidance to include Agreements negotiated with State Planning Authorities and associated agencies. Alternatively, a separate, bespoke practice note should be prepared for State planning agreements. This will provide the same measures of fairness, certainty, transparency, and guidance for parties involved in the negotiation of local planning agreements.

Our members find there is negligible guidance on the actions of State Authorities. The demands some agencies impose on proponents of a Planning Agreement could be considered by a reasonable person as tantamount to an abuse of power.

9. **Provide Guidance on Concurrent State and Local Agreements**.
In many instances such as complex development applications for large sites / projects or greenfield and brownfield rezoning the making of offers for, and negotiating, State and local agreements run concurrently and the elements of each offer may have a strong relationship (albeit they are ultimately independent). In these circumstances both agreements and offers must be read together for a true measure of their value and cost to the proponent to be measured. This in turn enables a genuine understanding of the impact of the costs imposed upon the project on housing affordability and development feasibility.

10. **Part 2.1 – Fundamental Principles**.
This Part does not emphasise that planning agreements are “voluntary” (in terms of the making of an offer by a proponent without duress or expectation of a planning outcome). The voluntary nature of an Agreement underpins the flexibility (that is the opportunity) that an Agreement provides to all parties in terms of benefits and positive outcomes.

11. **Part 2.1 – Fundamental Principles**.
The draft Practice Note replaces the current text - “*wholly unrelated public benefits offered by developers do not make unacceptable*” with “*public benefits offered by developers do not make unacceptable development acceptable*”. UDIA is concerned that, as an Agreement can be used to resolve previously unanticipated infrastructure pressures created by development, (thereby mitigating otherwise unacceptable impacts from the development) the public benefit is closely related to the development, and thus makes development acceptable.

However, where the benefit has no relation to the development, such as a monetary contribution for general revenue raising, then we consider the Agreement does not influence planning merit. We recommend that more guidance be given on this matter.

12. **Part 2.5 Acceptability Test.**
While we note in Part 4.1 that the Practice Note suggests that Draft Agreements should be assessed against the criteria, the role of the criteria in the Acceptability test will only be effective if it is enshrined in the EP&A Regulation.

A new Part in the Regulation should require Councils, as a matter of procedure, to assess any draft Agreement against the Criteria and place the assessment on exhibition as part of the Explanatory note alongside the exhibition of the Agreement.

13. **Part 4.1 – Basic procedures for entering into a planning agreement**.
We note the indicative steps related to a planning proposal are not consistent with general practice. It is common that Councils will not engage in the details of an Agreement prior to lodgement. While indicative offers are usual at this stage of the process, a Planning Authority often does not want to expend resources in advancing negotiation until a commitment is made by formally loading the application (and paying assessment fees). Greater clarification is requested to reflect existing best practice.

14. **Part 4.2 Cannot Refuse Consent.**
UDIA supports this note. However, we recognise that Clause 7.7(2) of the EP&A Act already makes provision for this situation. The issue, however, is one of presupposition. What is the difference between a genuine offer made by a party prior to the granting of a development consent or EPI change, and an offer made on part under perceived duress to facilitate the rezoning process and how can this nuance be distinguished?

Unfortunately, this situation is one of the primary concerns of the development industry in its' dealing with Planning Authorities. The distinction between an offer made "voluntarily" and an offer made "involuntarily" is both subjective and difficult to police.

15. **Part 4.2 – Offer and negotiation**.
Without limiting the flexibility for proponents to determine the best pathway for their projects, we request additional guidance as to when to offer to enter into a planning agreement, or when to negotiate an agreement in a rezoning process needs to be considered. For example, where site amalgamation is still underway, there may be complications in this process.

16. **Part 4.2 – Offer and Negotiation**.
We recommend including additional guidance that in circumstances where changes are negotiated either post exhibition, or to an expected Agreement, that where the extent of changes or modifications are minor the agreement need not be re-exhibited to make these changes.

17. **Part 4.3: Costs.**
This part of the Note needs to provide more definitive guidance. Ideally both parties should be instructed to meet their own costs if the true spirit of a Planning Agreement as a negotiated "win – win" outcome is to be achieved. We request that the Note explicitly requires each party to pay their own costs.

18. **Part 4.4 – Registration and Administration**.
UDIA requests that there is specific guidance on security by way of bank guarantees.

Bank guarantees are a sensible security measure in certain circumstances. However, the timing of provision of such guarantees should be the subject of guidance.

A bank guarantee generally needs to be supported by cash in the bank. Consequently, from a development cash flow perspective, a bank guarantee is essentially cash. Therefore, if a large bank guarantee is required up front, well before works are to commence (which can be months or years in the case of planning proposals), then it could significantly impact the feasibility of a project.

There is no reasonable basis for a bank guarantee where the agreement is registered on the title or subject to a caveat and no "benefit" has yet been taken from the planning decision. This is usually assured through the restrictions on the issue of construction, subdivision, and occupation certificates.

We recommend there is specific guidance that insurance bonds could be accepted in lieu of a bank guarantee.

19. **Part 5 – Examples**. The examples provide some useful context for the use of Agreements. However, we make the following comments for consideration:

    a. Compensation for loss or damage caused by development – UDIA does not support this guidance. The increased impacts on demands for services should usually be covered by contribution plans. However, the guidance could relate more to unanticipated impacts.

    b. Meeting demand created by development – This guidance applies to most developments which create a demand, but do not require a VPA. This should deal with unanticipated demand.

    c. Prescribing inclusions in development – This guidance could act as an invitation for ad hoc policies to be adopted to justify the agreement inclusions. We request that the guidance be amended to refer to policies, as reflected in development control plans and instruments.

    d. Recurrent funding – Consistent with guidance in Part 4.4, planning agreements should not operate in perpetuity and should have an end point. We request that this section be amended to give guidance that the recurrent

funding should be reflected in an upfront payment (pro-rated as appropriate), dedication of land or instruments registered on the title.

e. Biodiversity offsetting – Given that the Biodiversity Conservation Act has its own provisions for stewardship agreements and offsets, we request that the guidance should make clear that an agreement should not double-up on those obligations. However, it could anticipate those where they have not yet been formalised or where the agreement is only entered into to ensure there is a precondition to the issue of a certificate.

f. Other examples – Examples of planning agreements not shown in Part 5 could include a regime for maintenance of an asset protection zone, buffer, or riparian corridor. Or where draft contributions plans are contemplated in anticipation of a new regime, the agreement pre-empts the future regime.

Currently, Agreements provide a flexible mechanism to secure public benefits in the planning system. Creating a robust framework for Agreements to operate within is essential to building trust and confidence within the NSW Planning System.

UDIA is pleased to discuss this matter further, please contact Mr Sam Stone, Manager, State Policy and Government Relations on 0401 213 899 or sstone@udiansw.com.au to arrange.

Yours sincerely,

Steve Mann
Chief Executive