

Planning agreements practice note

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Preface

Planning agreements

This practice note provides guidance on matters relating to planning agreements, often referred to as voluntary planning agreements. It sets out the statutory framework for planning agreements and deals with issues such as the fundamental principles governing their use.

Legislative and regulatory framework

Part 7 Division 7.1 Subdivision 2 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) provides the legislative framework for planning agreements.

Part 4 Division 1A of the *Environmental Planning and Assessment Regulation 2000* (the EP&A Regulation) has further requirements relating to the making, amending and revocation of planning agreements, giving public notice and other procedural arrangements relating to planning agreements.

About this practice note

This practice note is made for the purposes of clause 25B (2) of the EP&A Regulation to assist parties in the preparation of planning agreements.

This practice note applies in accordance with the draft *Environmental Planning Assessment (Local Infrastructure Contributions) Direction 2020*.

Parties to proposed planning agreements which were publicly notified under section 7.5 (1) of the EP&A Act, but not finalised before the issue of this practice note, are not required to have regard to it. However, planning authorities may choose to consider parts of the practice note when finalising these planning agreements.

This practice note replaces the previous 'Practice Note – Planning Agreements' issued by the Director General of the then Department of Infrastructure, Planning, and Natural Resources in July 2005.

How to use this practice note

The practice note is structured as follows:

Part 1 provides the rationale for planning agreements.

Part 2 identifies and provides fundamental principles and policy considerations.

Part 3 sets out strategic considerations for when and how planning agreements can be used.

Part 4 provides guidance on the procedures and decision-making for application, negotiation and administration of planning agreements.

Part 5 provides examples of the use of planning agreements.

Affordable Housing Contributions

State Environmental Planning Policy No. 70 - Affordable Housing (Revised Schemes) (SEPP 70) is the enabling mechanism for securing affordable housing contributions. The preferred pathway for a council to secure contributions in relation to SEPP - Affordable Housing (Revised Schemes) is through preparing an affordable housing contribution scheme and amending the relevant local environmental plan. *Environmental Planning Assessment (Planning Agreements) Direction 2019* sets out the matters to be considered by council if negotiating a planning agreement which includes provision for affordable housing.

Mining Projects

This practice note does not apply to planning agreements for mining projects. However, councils and proponents can refer to Parts 1, 4 and 5, for guidance on use, process and governance, which is appropriate for all planning agreements.

Terminology

The following terminology is used to convey key concepts in relation to planning agreements:

- **development application** has the same meaning as in the EP&A Act
- **development consent** has the same meaning as in the EP&A Act
- **development contribution** means the 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 to be used for or applied towards a public purpose
- **planning authority** has the same meaning as in Division 7.1 of Part 7 of the EP&A Act, and means:
 - a council, or
 - the Minister for Planning, or
 - the Planning Ministerial Corporation, or
 - a development corporation (within the meaning of the *Growth Centres (Development Corporations) Act 1974*), or
 - a public authority
- **planning obligation** means an obligation imposed by a planning agreement on a developer requiring the developer to make a development contribution
- **planning proposal** has the same meaning as in the EP&A Act
- **public benefit** is the benefit enjoyed by the public as a consequence of a development contribution
- **public facilities** means public infrastructure, amenities and services

Updates to this practice note

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 1 Introduction

1.1 Purpose of planning agreements

Planning agreements are used widely in the planning system as a tool for delivering innovative or complex infrastructure and public benefit outcomes in connection with planning proposals and development applications.

They provide a way for planning authorities and developers to negotiate flexible outcomes in respect of development contributions and enable the NSW planning system to deliver sustainable development while achieving key economic, social and environmental objectives.

Planning agreements authorise development contributions for a variety of public purposes, some of which extend beyond the scope of section 7.11 and 7.12 (local infrastructure contributions), or section 7.24 (special infrastructure contributions) of the EP&A Act. For example, these additional purposes could include the recurrent funding of public facilities provided by councils, the capital and recurrent funding of transport, the protection and enhancement of the natural environment, and the monitoring of the planning impacts of development.

Planning agreements are negotiated between planning authorities and developers in the context of applications for changes to environmental planning instruments (planning proposals) or for consent to carry out development (development applications).

In many cases, the planning authority negotiating a planning agreement is also responsible for the exercise of statutory functions relating to the agreement, such as the Minister or a council having functions relating to the making of an instrument or the determination of a development application.

1.2 Rationale for planning agreements

Since the commencement of the *Environmental Planning and Assessment Amendment (Development Contributions) Act 2005*, the use of planning agreements has steadily grown across NSW. There is a range of reasons why the use of planning agreements has become widespread.

- Developers recognise that their own developments benefit from the provision of public facilities and are seeking greater involvement in determining the type, standard and location of these facilities.
- Planning agreements provide a flexible means of achieving tailored development outcomes and focused public benefits, including agreement by communities to the redistribution of the costs and benefits of development.
- Planning agreements can provide enhanced and more flexible infrastructure funding opportunities and better planning implementation.
- Planning agreements allow for the flexible delivery of infrastructure for a development proposal which may have good planning merit but be out of sequence with broader strategic planning processes.

Planning agreements provide a flexible framework under which the planning authorities can share responsibility for the provision of infrastructure in new release areas or in major urban renewal projects. They permit tailored governance arrangements and the provision of infrastructure in an efficient, co-operative and coordinated way.

Part 2 Principles and policy for planning agreements

2.1 Fundamental principles

Planning agreements must be governed by a set of policy principles that ensure transparency, fairness and flexibility of planning decisions. A planning agreement cannot and should not purport to fetter a planning authority's exercise of statutory functions, in particular the function of a relevant planning authority in relation to a planning proposal or as the consent authority for a development application.

A planning agreement related to a development application is one of several matters for consideration identified by the EP&A Act when a consent authority is determining a development application. Public benefits offered by developers do not make unacceptable development acceptable.

Planning authorities and developers that are parties to planning agreements should adhere to the following fundamental principles.

- Planning authorities should always consider a proposal on its merits, not on the basis of a planning agreement.
- Planning agreements must be underpinned by proper strategic land use and infrastructure planning carried out on a regular basis and must address expected growth and the associated infrastructure demand.
- Strategic planning should ensure that development is supported by the infrastructure needed to meet the needs of the growing population.
- The progression of a planning proposal or the approval of a development application should never be contingent on entering into a planning agreement.
- Planning agreements should not be used as a means of general revenue raising or to overcome revenue shortfalls.
- Planning agreements must not include public benefits wholly unrelated to the particular development.
- Value capture should not be the primary purpose of a planning agreement.

2.2 Public interest and probity considerations

It is critical to consider whether a planning agreement is in the public interest. Generally speaking, the public interest is directed towards ensuring planning controls are imposed fairly for the benefit of the community. In some cases, the public interest may be directed towards the need to mitigate adverse impacts of development on the public domain or towards providing a benefit to the wider community.

Planning agreements are matters of public interest and this is a relevant consideration in negotiating outcomes. The negotiation of planning agreements involves the use of discretion on both sides, giving planning authorities and developers room to accommodate subjective values and varying concepts of the public and private interests.

The ability for a planning agreement to wholly or partly exclude the application of other infrastructure contributions gives a planning authority scope for tradeoffs under an agreement. This means that the financial, social and environmental costs and benefits of development can be redistributed through a planning agreement.

However, there is no guarantee that these costs and benefits will be equitably distributed within the community and 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. As such, best practice principles, policies and procedures should be implemented as safeguards to protect the public interest and the integrity of the planning process. These are discussed in *2.6 Policies and procedures for planning agreements*.

If probity and public interest are not considered, planning agreements may produce undesirable outcomes, including where:

- A planning authority seeks inappropriate benefits through a planning agreement because of opportunism or to overcome revenue-raising or spending limitations that exist elsewhere.
- A planning authority has not undertaken appropriate infrastructure planning as part of strategic land use planning, resulting in growth being poorly aligned with infrastructure planning and funding, infrastructure demand and costs relating to infrastructure operation.
- There is insufficient analysis of the likely planning impacts of a proposed development because a planning authority is determined to enter into, or to give effect, to a planning agreement.
- A planning authority allows the interests of individuals or small groups to demand benefits, which otherwise outweigh the public interest.
- A planning authority takes advantage of an imbalance of bargaining power between the planning authority and developer, for example by improperly relying on its statutory position in order to extract unreasonable public benefits under a planning agreement.
- A planning authority's bargaining power is compromised, or its decision-making freedom appears to be fettered by a planning agreement.

The potential for misuse also exists where a planning authority, acting as consent authority or in another regulatory capacity for development, is both party to a planning agreement and a development joint venture partner under the agreement, for example as a landowner. Special safeguards, such as the use of an independent third party in the development assessment process, would be appropriate in such circumstances.

Considerations for public participation

Public participation in the planning agreement process is important to ensure the community has an opportunity to provide input into decisions being made relating to public benefit and development. Planning agreements redistribute the costs and benefits of a development, and it is critical the public can comment on whether they think the balance between development and public benefit is achieved successfully. Public participation processes are discussed in *4.5 Public participation and notification*.

2.3 Value capture

The term value capture is widely used and covers several different practices; this practice note does not attempt to define or discuss them all. 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 position based on their statutory powers.

Planning agreements should not be used explicitly for value capture in connection with the making of planning decisions. For example, they should not be used to capture land value uplift resulting from rezoning or variations to planning controls. Such agreements often express value capture as a monetary contribution per square metre of increased floor area or as a percentage of the increased value of the land. Usually the planning agreement would only commence operation as a result of the rezoning proposal or increased development potential being applied.

2.4 Relationship with development applications and planning proposals

Development applications

When determining a development application, the consent authority is required by the EP&A Act to take into consideration any relevant planning agreement or draft agreement that has been entered into. The consent authority is also required to take into consideration any public submissions made in respect of the development application, which may include submissions relating to a planning agreement.

Planning proposals

The EP&A Act requires a planning authority to state the objectives and outcomes of a planning proposal, and to describe and justify the process by which they will be achieved. The role of a planning agreement in facilitating these objectives or outcomes should be clearly set out in the planning proposal documentation.

Nexus

Development contributions provided for in a planning agreement are not required to bear the same nexus with development as required for section 7.11 local contributions. Because planning agreements are voluntary and facilitate public benefits, they can allow for a wider consideration of the costs and benefits of development, subject to the fundamental principles discussed in Part 2.1. However, planning agreements should provide for public benefits that are not wholly unrelated to development.

Varying development standards

Benefits provided under a planning agreement must not be exchanged for a variation from a development standard under any circumstances. Variations to development standards under Clause 4.6 of the Standard Instrument LEP or SEPP1 must be justified on planning grounds, and the benefit under the agreement should contribute to achieving the planning objective of the development standard.

Conditions of development consent

Planning authorities and developers must make a judgement in each case about whether negotiation of a planning agreement is beneficial and otherwise appropriate. However, planning agreements should not be used to require compliance with or restate obligations imposed by conditions of development consent.

2.5 Acceptability test

Planning agreements should be assessed against the test below which is a generally applicable test for determining the acceptability of a planning agreement.

The acceptability test requires that planning agreements:

- Are directed towards legitimate planning purposes, that can be identified in the statutory planning controls and other adopted planning strategies and policies applying to development.
- Provide for the delivery of infrastructure or public benefits not wholly unrelated to the 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 desired outcomes and securing the benefits.
- Protect the community against adverse planning decisions.

2.6 Policies and procedures for planning agreements

Councils are strongly encouraged to publish policies and procedures concerning their use of planning agreements. Best practice principles, policies and procedures should be implemented as safeguards to protect the public interest and the integrity of the planning process.

These safeguards are to protect against the misuse of planning discretions and processes, which may seriously undermine good planning outcomes and public confidence in the planning system. They should ensure that planning decisions are exercised openly, honestly and freely in any given case and fairly and consistently across the board.

Policies applying to the use of planning agreements should:

- Provide a generally applicable test for determining the acceptability of a planning agreement (see 2.5 Acceptability Test).
- Contain specific measures to protect the public interest and prevent misuse of planning agreements.
- Have published and accessible rules and procedures.
- Provide for effective formalised public participation.
- Extend fairness to all parties affected by a planning agreement.
- Guarantee regulatory independence of the planning authority.

Policies and procedures prepared by planning authorities should incorporate the contents of this practice note and the following considerations:

- How the use of planning agreements aligns with any relevant district and regional strategic plans and policies.
- How the use of planning agreements fits within the context of the planning authorities' broader organisational strategic planning and land use planning policies, goals, and strategies.
- The circumstances in which the planning authority would consider entering into a planning agreement.
- The land use planning and development objectives that are sought to be promoted or addressed by the use of planning agreements.
- The role served by planning agreements in the development contributions and infrastructure funding systems of the planning authority.
- The types of development to which planning agreements will ordinarily apply, and how their use may be differentiated between different types of development.
- Whether any thresholds apply to the use of planning agreements in relation to particular types of development or in particular circumstances.
- The matters ordinarily covered by a planning agreement.
- The form of development contributions ordinarily sought under a planning agreement.
- The kinds of public benefits sought.
- The method for determining the value of public benefits.
- Whether money paid under different planning agreements is to be pooled and progressively applied towards the provision of public benefits to which the different agreements relate.
- When, how and where public benefits 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 review and modification, discharging of the developer's obligations under agreements, dispute resolution and enforcement mechanisms, and payment of costs relating to the preparation, negotiation, execution, monitoring and other administration of agreements.

Part 3 Strategic considerations when using planning agreements

3.1 When to use planning agreements

This section provides guidance and strategic considerations on when to use planning agreements. Planning agreements should meet the considerations set out in *2.1 Fundamental principles and 2.5 Acceptability test* and should comply with the specific requirements in this section to the fullest extent possible. Whether a planning agreement is acceptable and reasonable can only be judged in the circumstances of the case and considering State, regional or local planning policies.

Planning agreements have the potential to be used in a wide variety of circumstances. For example, they may be an appropriate contribution mechanism:

- In major development sites or precincts that are owned by a single land owner or a consortium of land owners.
- Where the developer has a direct incentive, such as bringing forward potential development, to be involved in the delivery of community infrastructure.
- Where the developer wants to provide community infrastructure in addition to, or at a higher standard than, what has been specified under the contributions plan.
- Where a council and the developer negotiate a different and better or more innovative outcome than can be achieved through imposing direct or indirect contributions.
- Where a proposed development has not been anticipated by local council and thus works and facilities to cater for this development have not been identified. A planning agreement can be prepared to specifically target the needs of the development.

Objectives of planning agreements

The objectives of planning agreements will be dictated by the circumstances of each case 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 the development for new or augmented public infrastructure, amenities and services.
- Securing off-site benefits for the 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.

Relationship to other contributions mechanisms

Planning agreements should complement other contribution mechanisms. They can be used to deliver infrastructure outcomes for which these contributions are required, or additional public benefit. Planning agreements should not be used as de facto substitutes for contributions plans.

There is a clear legislative, regulatory and policy framework supporting contributions plans which does not apply to planning agreements. Where there is need for public infrastructure across a development area with a range of land owners, a contributions plan is likely to be more appropriate because it simplifies transactions and is underpinned by clear strategic planning.

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

3.2 Land use and strategic infrastructure planning

This section provides advice on how planning agreements can support broader strategic infrastructure planning, particularly in areas where there is significant growth, and where a planning agreement may be associated with a planning proposal.

Land use planning should occur concurrently with strategic infrastructure planning to ensure that built form provisions and infrastructure contributions deliver both appropriate urban forms and contributions related to the development.

Strategic infrastructure planning should be undertaken regularly and address expected growth, infrastructure demand resulting from this growth, and the apportioned cost of these infrastructure provisions. Planning agreements should be used towards public benefits that are in accordance with the council's infrastructure planning and funding policies and strategies. Planning agreements should not be used as a substitute to proper strategic infrastructure planning.

Local Strategic Planning Statements

Local strategic planning statements set out the 20-year vision for land use in the local area, including how change will be managed into the future. These statements need to align with the regional and district plans, and council's own priorities in the community strategic plan it prepares under the *Local Government Act 1993*. The statements identify the planning priorities for an area and explain how these are to be delivered.

In this regard, local strategic planning statements will identify upfront the strategic planning priorities and infrastructure needs for an area, which should be reflected in planning agreements that demonstrate a comprehensive approach to infrastructure planning and funding.

Impact of planning proposals

There may be circumstances where a developer lodges a planning proposal that was not anticipated at the time the local strategic planning statement was prepared. It is common site-specific planning proposals in locations where development had not been anticipated to be accompanied by offers to enter into planning agreements. While it is appropriate that applications for more intensive development also consider opportunities for public benefit associated with development, this must be in a way that is mutually agreeable between the planning authority and the developer.

Planning authorities must ensure that adequate infrastructure is available to support the development, that the community can be confident in the integrity of the planning decision and that the planning authority is not improperly relying on its statutory role to extract unreasonable contributions.

Site specific planning proposals must not be prioritised on the basis they provide an opportunity for public benefits. Public benefits to be delivered by development should not be wholly unrelated to the development and the costs should be clearly set out and justified in the planning agreement. It is important that planning agreements in relation to planning proposals complement a comprehensive approach to infrastructure planning and funding.

Part 4 Procedures and decision making

4.1 Basic procedures for entering into a planning agreement

Planning agreements may be negotiated between planning authorities and developers in relation to development applications or changes sought by developers to environmental planning instruments. Where possible, planning agreements should be negotiated between planning authorities and developers before a related development application or planning proposal is made so that it may be accompanied by the draft agreement. The steps below are provided for general guidance and are indicative only. The actual steps taken in negotiating each specific planning agreement may differ.

Indicative steps for planning agreements

Step 1 Commencement. Before making a development application or submitting a planning proposal, the planning authority and developer decide whether to negotiate a planning agreement. In making this decision consideration should be given to this practice note, relevant legislation and any relevant policies. The parties consider whether other planning authorities and other persons associated with the development should be additional parties to the agreement, such as the landowner if the landowner is a different person to the developer.

Step 2 Negotiation. If an agreement is negotiated, it is documented as a draft planning agreement with an accompanying explanatory note. The draft planning agreement should be assessed against the acceptability test outlined in this practice note. The parties should consider how the planning agreement will be enforced and when the planning agreement will be executed, as this will inform the security provisions and conditions of the agreement. Legal advice should be sought in each case to ensure that the appropriate conditions are imposed on the planning agreement.

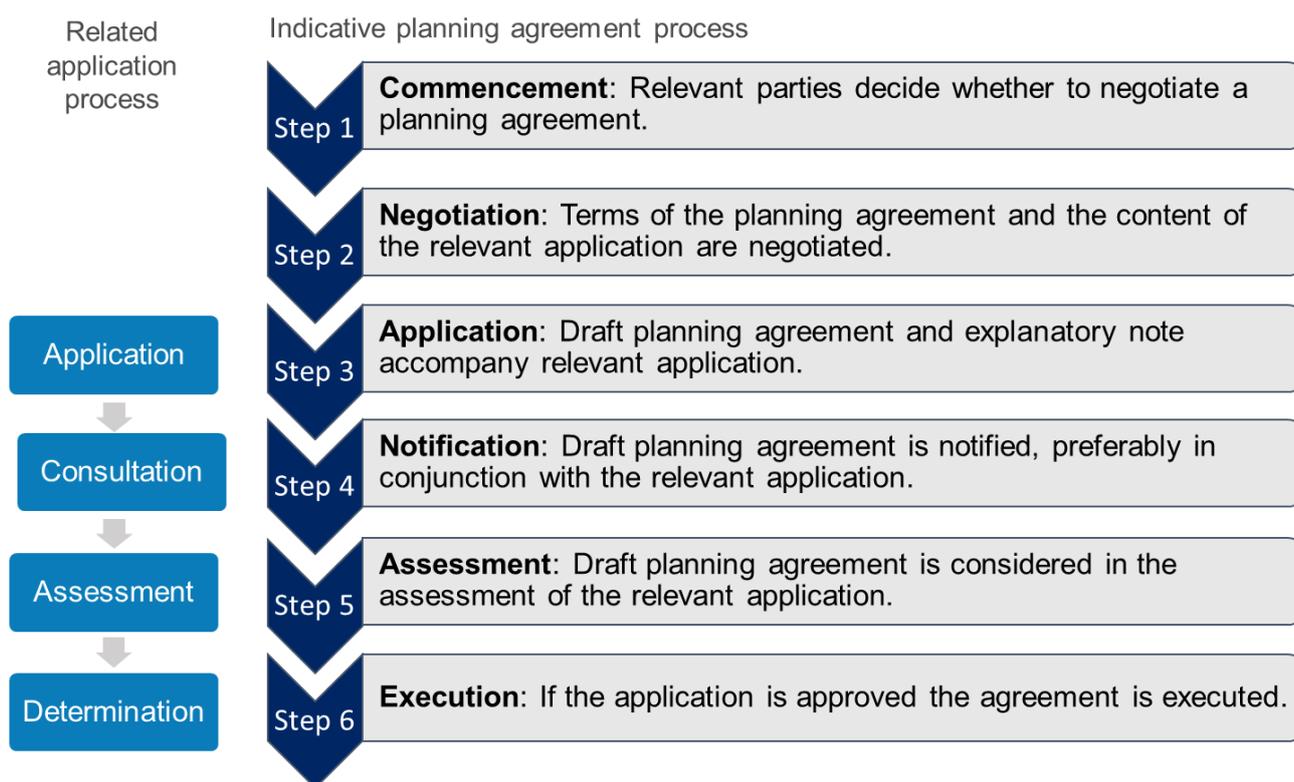
Step 3 Application. When the developer makes the application to the relevant authority, it should be accompanied by the draft planning agreement that has been signed by the developer and the explanatory note.

Step 4 Notification. Relevant public authorities are consulted and the application, draft planning agreement and explanatory note are publicly notified in accordance with the EP&A Act and EP&A Regulation. Any amendments required to the application and draft agreement as a result of submissions received are made. If necessary, the amended application, draft planning agreement and explanatory note are renotified.

Step 5 Assessment. The draft planning agreement and public submissions are considered in the determination of the related application. The weight given to the draft agreement and public submissions is a matter for the relevant authority acting reasonably.

Step 6 Execution. The development application or planning proposal is determined by the approval authority. The planning agreement is generally executed at this stage.

Figure 1 – Indicative planning agreement process and related application process



4.2 Offer and negotiation

Offer to enter into a planning agreement

The EP&A Act does not define what constitutes an 'offer' for the purpose of section 7.7(3) of the EP&A Act. However, an offer should:

- Be in writing.
- Be addressed to the planning authority to whom it is made.
- Be signed by or on behalf of all parties to the proposed planning agreement other than the planning authority to whom the offer is made.
- Outline in sufficient detail the matters required to be included in a planning agreement as specified in s7.4 (3) of the EP&A Act to allow proper consideration of the offer by the planning authority.
- Address in sufficient detail any relevant matters required to be included in an offer as specified in any applicable planning agreements policy published by the planning authority to whom the offer is made to allow proper consideration by the planning authority.
- Outline in sufficient detail all other key terms and conditions proposed to be contained in the planning agreement to allow proper consideration by the planning authority.

A consent authority cannot refuse to grant development consent on the grounds 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.

However, if a developer has offered to enter into a planning agreement in connection with the development application or a change to an environmental planning instrument, then a consent

authority is authorised to require a planning agreement to be entered into in the terms of the offer as a condition of development consent.

Efficient negotiation systems

Planning authorities, particularly councils, should implement fast, predictable, transparent and accountable negotiation systems for planning agreements. Negotiation of planning agreements should not unnecessarily delay ordinary planning processes and should run in parallel with applications to change environmental planning instruments or development applications. This includes through pre-application negotiation in appropriate cases. Negotiation should be based on principles of co-operation, full disclosure, early warning, and agreed working practices and timetables.

Involvement of independent third parties

Independent third parties can be used in a variety of situations involving planning agreements. Planning authorities and developers are encouraged to make appropriate use of them during negotiation. Including where:

- An independent assessment of a proposed change to an environmental planning instrument or development application is necessary or desirable.
- Factual information requires validation.
- Sensitive financial or other confidential information must be verified or established in the course of negotiations.
- Facilitation of complex negotiations is required for large projects or where numerous parties or stakeholders are involved.
- Dispute resolution is required.

Dispute resolution

Different kinds of dispute resolution mechanisms may suit different disputes and this should be reflected in a planning agreement. For example, mediation may be suitable to deal with disputes arising from grievances, while expert determination may be suitable to resolve disputes of a technical nature and arbitration may be suitable for resolving commercial disputes.

4.3 Costs and charges

Costs

There is no comprehensive policy on the extent to which a planning authority may recover costs for negotiating, preparing, executing, registering, monitoring, enforcing and otherwise administering planning agreements. Wherever possible, planning authorities and developers should negotiate and agree costs at the earliest opportunity.

GST considerations

Both parties to a planning agreement have a potential GST liability and they should obtain advice in every case on whether a potential GST liability attaches to the 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.

While planning agreements allow for pooling of funds, if significant pooling is required the planning authority should consider if a s7.11 infrastructure contributions plan would be appropriate.

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.

4.4 Registration and administration

Standard form planning agreements

Planning authorities are encouraged to publish and use standard form planning agreements or standard clauses for inclusion in planning agreements in the interests of process efficiency. Planning authorities are encouraged to use the template planning agreement (Attachment A).

Documentation of planning agreements

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

Councils are required to keep and make available a register of planning agreements. The register should be made available online or incorporated into the online planning register of the planning authority's website.

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.

Security for enforcement of developer's obligations

Parties should consider the means by which a planning agreement may be enforced. The most suitable means of enforcement may depend on:

- The circumstances of the planning agreement.
- The nature and extent of the developer's obligations under the planning agreement.

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- The planning authority's reasonable assessment of the risk and consequences of non-performance.

Tying the performance of the developer's obligations to the issuing of construction or subdivision certificates may provide a suitable means of enforcing planning agreement obligations in some cases. The EP&A Act and the EP&A Regulation restrict the issuing of a construction certificate or subdivision certificate by a certifier until any preconditions to the issuing of the certificate specified in a planning agreement have been complied with. Where adopting this approach, consider including provisions to allow a developer to provide a financial security, such as a bond or bank guarantee, if they subsequently seek release of a certificate before completing the required obligations. This will avoid the need to amend the planning agreement.

Some planning agreements require land to be dedicated to the planning authority. It may be suitable for the planning agreement to contain a pre-acquisition agreement for the purposes of the *Land Acquisition (Just Terms Compensation) Act 1991* enabling the planning authority to compulsorily acquire the land to be dedicated for nominal or an agreed value in the event of default by the developer.

Financial security, such as a bond or bank guarantee, can be a suitable means of enforcement where a planning agreement requires the carrying out of works by the developer. Financial security can be called on by the planning authority in the event of default, coupled with step-in rights by the planning authority. The value of the financial security should relate to the potential costs that may be incurred by the planning authority in carrying out the relevant works obligations of the developer in the event of default by the developer.

Financial security or additional financial security may also be appropriate where the developer seeks to postpone obligations under a planning agreement to a time later than the time originally specified for performance. An amendment to the planning agreement would ordinarily be required in such circumstances unless the planning agreement already makes provision for such an arrangement.

Registration on title

Registration is important to inform people of the existence of a planning agreement affecting the land and for the enforcement of a planning agreement. Registration on title may bind future owners of the land to the agreement. There is no requirement that a planning agreement must be registered over the whole of the land covered by the agreement.

To ensure that the intention of the parties to register the planning agreement is not defeated, the developer should get written agreement to the registration from each person with an estate or interest in the land to which the planning agreement applies. This should be provided to the planning authority as a precondition to the execution of the planning agreement.

Provision should be made in a registered planning agreement about when the notation of the planning agreement on the title to land can be removed. For example, when:

- The developer has complied with all obligations under the planning agreement relating to the land and is discharged from the planning agreement.
- The developer has complied with all relevant obligations under the planning agreement relating to a stage of development and the notation about that stage in the planning agreement on the title to the land is removed.

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- Land the subject of the planning agreement is subdivided and titles for new lots are created and the developer has complied with all relevant planning agreement obligations relating to the subdivision.
 - Additional valuable security for performance of the planning agreement acceptable to the planning authority is provided by the developer in exchange for removal of the registration of the planning agreement from the title to land.

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 discharge the developer's obligations under the agreement.

4.5 Public participation and notification

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

The EP&A Regulation requires that the notification of a proposed planning agreement occurs at the same time as the planning proposal or development application, or if this is not practicable, as soon as possible after.

The terms of the planning agreement and its proposed public benefits should be clearly shown as part of consultation material. This will help the community make a fully informed decision on the overall proposal.

Planning agreements must be accompanied by an explanatory note to assist the public in understanding the agreement. Other types of consultation material are encouraged in addition to the explanatory note. This might include additional written material, diagrams or plans.

Amendment to proposed planning agreement after public notification

Any material changes that are proposed to be made to a planning agreement after a public notice has been given should be subject to renotification if the changes would materially affect:

- How any of the matters specified in section 7.4 of the EP&A Act are dealt with by the planning agreement.
- Other key terms and conditions of the planning agreement.
- The planning authority's interests or the public interest under the planning agreement.
- Whether a non-involved member of the community would have made a submission objecting to the change if it had been publicly notified.

4.6 Explanatory notes

Planning agreements are legal documents and may not be easily understood by the public. An explanatory note can help the public understand a planning agreement and facilitate informed discussion. The EP&A Regulation requires that an explanatory note is provided with the public notice of a planning agreement and it is to be prepared having regard to this practice note.

The explanatory note is to be prepared jointly with the other parties proposing to enter into the planning agreement. However, if two or more planning authorities propose to enter into a planning agreement, an explanatory note may include separate assessments prepared by the planning

authorities in relation to matters affecting only one of the planning authorities or affecting those planning authorities in a different manner.

In practice, the explanatory note can be prepared by one of the parties but should be reviewed and agreed on by any other party to the agreement.

The explanatory note must help the broader community to simply and clearly understand what a planning agreement is proposing, how it delivers public benefit, and why it is acceptable and in the public interest. It should be easy to understand, written in plain English and address all considerations outlined in this practice note.

The explanatory note must:

- Identify how the agreement promotes the public interest.
- Identify whether the agreement conforms with the planning authority's capital works program, if any.
- State whether the agreement specifies that certain requirements of the agreement must be complied with before a construction certificate, occupation certificate or subdivision certificate is issued.

It should be possible for a person to be able to readily understand the nature of the development proposed and the public benefits to be provided. The explanatory note should indicate timing of delivery and should include maps, diagrams and other material to help explain what is proposed.

A template is also attached to guide councils in the preparation of explanatory notes (Attachment B). It includes model content to be adopted and adapted by councils in accordance with related guidance in this practice note.

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. Accordingly, it is not possible to set out all the circumstances in which a planning agreement may be appropriately entered into.

Below are some examples of the potential scope and application of planning agreements.

Compensation for loss or damage caused by development

Planning agreements can provide for development contributions that compensate for increased demand on the use of a public amenity, service, resource or asset that will or is likely to result from the carrying out the development.

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

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 offset 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. 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.

The public benefit provided under the agreement could be the provision, extension or improvement of public infrastructure, amenities and services to meet the additional demand created by the development. An agreement may be used to meet the requirements set out in a contributions plan in relation to certain land, or, potentially in the case of a large development area being delivered by one or a small number of developers, provide public amenities and services in lieu of preparing a contributions plan.

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 public facilities, open space or the retention of urban bushland. Agreements may also require development, in the public interest, to meet aesthetic standards, such as design excellence.

Providing benefits to the wider community

Planning agreements can also be used to secure the provision of broader benefits for the wider community. Broader benefits provided through planning agreements involve an agreement between a developer and a planning authority to allow the wider community to share in benefits resulting from the development. The benefit may be provided in conjunction with planning

obligations or other measures that address the impacts of the development on surrounding land or the wider community.

Alternatively, the 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 in order to allow the wider community, the planning authority and the developer to realise their specific preferences for the provision of public benefits.

Broader benefits may take the form of additional or better-quality public facilities than is required for a particular development. Alternatively, 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.

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.

For example, 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.

Broader 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.

Biodiversity offsetting

A planning agreement may fund the recurrent costs of habitat protection where development will trigger the Biodiversity Offsets Scheme under the *Biodiversity Conservation Act 2016*. Where planning agreements are used in this manner, they must adhere to the processes identified in Part 6 of the *Biodiversity Conservation Regulation 2017*.

This includes the implementation of a biodiversity stewardship agreement on the land that has been identified, which will include identifying the status on title and create a traceable alignment of obligations on all parties. A condition of the planning agreement must include fully funding the required total fund deposit value relevant for the biodiversity stewardship agreement and site, as a monetary contribution indexed accordingly.

The total fund deposit pays for the management actions identified in the biodiversity stewardship agreement to be undertaken in-perpetuity. The value of the total fund deposit is determined when the biodiversity stewardship agreement is entered into.

Attachment A – Template planning agreement

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 7.1 of Part 4 of the Act.

Application of this Agreement

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

Operation of this Agreement

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

Definitions and interpretation

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*.

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

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

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.

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.

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

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.

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

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

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

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.

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.

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

A reference to this Agreement includes the agreement recorded in this Agreement.

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.

Any schedules and attachments form part of this Agreement.

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]

Application of the Development Contributions

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

Application of s7.11 and s7.12 of the Act to the Development

[Drafting Note 7: Specify whether and to what extent s7.11 and s7.12 apply to development the subject of this Agreement]

Registration of this Agreement

[Drafting Note 8: Specify whether the Agreement is to be registered as provided for in s7.6 of the Act]

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].

Dispute Resolution

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

Enforcement

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

Notices

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:

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

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

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

Council

Attention: ##

Address: ##

Fax Number: ##

Email: ##

Developer

Attention: ##

Address: ##

Fax Number: ##

▪ Email: ##

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.

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

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

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

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.

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.

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.

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*]

Costs

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

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.

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.

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.

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.

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.

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.

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.

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.

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.

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

Explanatory Note Template

Environmental Planning and Assessment Regulation 2000 (Clause 25E)

Explanatory note for planning agreements under section 7.4 of the Environmental Planning and Assessment Act 1979

1. Introduction

The purpose of this explanatory note is to provide a plain English summary to support the notification of the draft planning agreement (the **planning agreement**). This explanatory note explains what the planning agreement is proposing, how it delivers public benefit and whether it is an acceptable means of achieving the proposed planning outcomes.

2. The parties to this planning agreement are:

[Planning authority name] as the planning authority

[Developer name] as the developer

3. The land subject to the planning agreement is:

Lot and deposited plan	Address or description of location

A map of the subject land is attached to this explanatory note.

Will the planning agreement be registered on the subject land titles? Yes / No

4. Description of the proposed [development application/application for complying development certificate / change to the environmental planning instrument] *(delete as appropriate)*

The developer is seeking approval for subdivision of the subject land into approximately [xx] residential lots / approval for development of approximately [xx] dwellings in accordance with Development Application [DA reference] and has made an offer to enter into the planning agreement in connection with the proposed development.

OR

The developer is seeking an amendment to the planning controls for the subject land in accordance with Planning Proposal [PP reference] and has made an offer to enter into a planning agreement in connection with the planning proposal. The amendments outlined in the related planning proposal are:

	Current	Proposed
Zone		
Floor space ratio		
Max height		
Dwelling yield		
Non-residential floor space		
(add others as appropriate)		

Note: Provide new tables for separate lot/DP where appropriate (e.g. if the existing zones, or proposed planning controls are different between each lot.)

5. Description of the planning agreement (delete as appropriate)

The objectives of the planning agreement are **[describe]**. The effect of the planning agreement will be **[describe]**.

Will the contributions be in the form of land, works or a monetary contribution?

The contributions required by the planning agreement will be provided in the form of a monetary contribution paid to **[describe]**. The contribution is for approximately **[\$xxx per lot / \$xxxx for the subject land]**.

OR

The contributions required by the planning agreement will be provided in the form of works undertaken by the Developer. The scope of works is **[describe works]**.

OR

The contributions required by the planning agreement will be provided in the form of dedication of land **[describe land]**. A map of the proposed land to be dedicated is attached to this explanatory note.

Will the contributions be provided in addition to or in lieu of other contributions?

The contributions required by the planning agreement will be provided in addition to contributions under **[relevant contributions plan]**.

OR

The contributions required by the planning agreement will be provided in lieu of the contributions under **[relevant contributions plan]**, which would have required the development to contribute **[\$xxx]**.

OR

The contributions required by the planning agreement will be provided partially in lieu of the contributions under **[relevant contributions plan]**, which would have required the development to contribute **[\$xxx]**. The planning agreement will reduce the payment under the local contributions plan to **[\$xxx]**.

When will the contributions be provided?

The contributions required by the planning agreement will be provided before **[describe timeframe for provision, whether the provision will be linked to the release of subdivision/construction certificates etc]**.

6. Assessment of the merits of the planning agreement

How is the planning agreement in the public interest?

What is the impact, positive or negative, of the planning agreement on the public or any section of the public?

How does the planning agreement conform with the planning authority's capital works program, if any?

Are there any other matters which a reasonable member of the public would wish to know in understanding this planning agreement?

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