PIA Policy Paper:
Voluntary Planning Agreements (VPAs)

PIA are seeking a VPA best practice direction

To ensure that Voluntary Planning Agreements (VPAs) are neither abused nor overregulated, the Planning Institute of Australia (PIA) advocates principles of “best practice” for the continued application of this important source of funding for public infrastructure and services.

PIA urges the NSW Department of Planning and Environment (the Department) to draft an updated direction or practice note dealing with principles of probity and practice for VPAs to make it absolutely clear that there is no perception that development rights are ‘for sale’.

What are VPAs

Voluntary Planning Agreements are legal documents created under the Environmental Planning and Assessment Act 1979 (EP&A Act) between developers and government agencies (including councils) for the provision of funds or works by the developer for infrastructure, services or other public amenities typically negotiated at the time of rezoning (Section 93F EP&A Act). The funds or works are not required to have a direct nexus with the proposal but should be related. They must achieve an outcome other than the facilitation of a development and deliver a planning benefit. This means that the proposed development, when considered as a package within the VPA, results in a positive planning outcome.

Prior to the amendments of 2008, s94 had been increasingly viewed by both councils and the development industry as rigid and unable to adequately deal with the uncertainties of development. Section 94 Contributions Plans (CPs) were viewed as being onerous and inflexible. Developers could not negotiate outcomes consistent with their desired outcomes in terms of the supply and location of facilities and infrastructure to adequately meet the needs of their individual proposals. In addition, s94 could only be applied via conditions of development consent. VPAs became more common as a substitute for or in conjunction with CPs.

When instigated at the rezoning stage, VPAs can be used to fund early infrastructure which creates the capacity for new development. This was considered beneficial to councils who did not have the funds or infrastructure required at that period to support new development. In addition to developers negotiating outcomes, it gives councils an opportunity to negotiate much needed community facilities and infrastructure (and their timing) that couldn’t be obtained through traditional CPs.

The introduction of the VPA framework was initially aimed at ‘infill’ development and at sites in the vicinity of which there was limited opportunity to provide community infrastructure and meet the required nexus test.
However, VPAs have also proven effective on greenfield development sites when essential lead in infrastructure is required, particularly earlier than would have been provided if council had to do so. In these cases, developers have a lot more autonomy to deliver a complete master plan. This offered developers the opportunity of providing the infrastructure with the expectation of returns via earlier land sales.

Since their introduction to the EP&A Act in 2005, VPAs have delivered numerous public benefits in the form of open space, affordable housing, sports fields and their embellishment, community centres, libraries and many of the facilities that s94 was originally designed to provide.

### Background to the problem

#### Planning History of VPAs

The introduction of amendments to the manner in which developer contributions could be levied came as a result of recommendations from the Section 94 Contributions and Development Levies Taskforce established in 2003. The 'Funding Local Infrastructure', report prepared for Minister for Infrastructure and Planning and Minister for Natural Resources, dated February 2004 included 21 recommendations and provided the framework for change. VPAs were introduced to the NSW Planning System in 2005 (via S93F EP&A Act) to extend the means by which planning authorities may obtain monetary or other contributions for the provision of public amenities and services and for other public purposes. It arguably legitimised a practice of negotiating agreements with developers during the development and rezoning process which had been a long standing practice without any statutory basis.

At the same time, legislative amendments to the Environmental Planning and Assessment Act (S94A EP&A Act) also introduced a fixed rate levy. The levy, which had been a tool already in use by the

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City of Sydney was considered an alternative opportunity to levy development contributions for “infill” areas where traditional S94 was ineffective. In 2008, the Minister for Planning introduced a maximum cap on S94 contributions of $20,000. That cap has remained in place without any modification including CPI adjustment to the current day.

The relative value of s94 contributions has decreased progressively over the last 8 years as a result of inflation, and land price escalation coupled with increasing development costs. At the same time the s94A levy has remained at 1% with no review over 11 years and VPAs have become more commonly used as a means of funding essential public infrastructure. A review of the scale and targeting of s94A levies is needed to ensure that this mechanism continues to offer value. This should be part of a broader review of how infrastructure is funded in NSW and the role of development contributions. PIA propose to offer policy input on this issue in a future submission.

Reasons for Reform

PIA is concerned that despite the apparent transparency and checks and balances prescribed in legislation, VPAs may be used in a manner which is contrary to good and transparent planning practice. This could lead to a general discrediting of planning and possibly lead to more onerous restrictions being imposed by State Government as has been the reaction previously (viz S94 caps) and placing at risk this essential source of funding for public infrastructure.

The VPA mechanism has been part of the development process now for over ten years. While the government appears to have no immediate plans to amend this part of the planning legislation, it is timely that the system, process, application and outcomes are reviewed to ensure they are delivering community benefits consistent with the original intention. In addition, it is considered necessary and prudent that a direction or practice note be published by the Minister declaring that non-transparent practice is not supported.

Current Perception of VPAs

In infill areas, where outdated planning controls are in place and/ or land values are higher, VPAs are being applied to obtain “floor space or height uplifts”, through the application of Clause 4.6 of the Standard Instrument Local Environmental Plan. The increasing use of VPAs in association with Clause 4.6 is seeking to deliver public benefits without following a clear and transparent planning pathway. VPAs are also negotiated at the planning proposal stage of projects, with the perception that floor space uplifts can be bought legally using the VPA as a mechanism for doing so. Without investigating the bona fides of such perceptions, anecdotal evidence suggests that it is both possible and probable that VPAs are being used in this way.

Improved Processes for VPAs are Necessary

PIA is concerned that the potential for misuse of VPAs is seen as having a negative effect on both the planning process and good planning practice and may lead to state government intervention that could affect positive aspects of VPAs. PIA is also concerned that misuse of VPAs does not provide certainty for communities, nor does it dispel the perception of potential for corruption in the
planning process. PIA recognises the value of the Department’s earlier Planning Agreement Practice Note (19 July 2005) and seeks to update and build on the principles it contained (refer Appendix A).

**Application of best planning practice principles for VPAs**

- **Improving transparency of the process.** Under the current framework a VPA must be publically exhibited for 28 days and include an Explanatory Note. In addition, council’s must report on the VPAs they have entered into as part of the annual reporting process.

- **Principles for individual councils** around the circumstances in which they will enter into VPAs could be developed either as part of a Contributions Plan or through the Community Planning process. This will provide the community with more certainty and the council decision makers with a basis for the negotiation to achieve public benefits.

- **Independent planning assessment** – based on the value of the agreement and undertaken via the Joint Regional Planning Panel (JRPP) or an independent assessment panel. This could be introduced as an assessment mechanism and include:
  - probity;
  - quantification of the community benefit;
  - ensuring that the overall project delivers a desired planning outcome; and
  - valuation and QS advice to maintain transparency.

**Updated practice note or direction for preparing VPAs**

This should include clarification around:

- the circumstances under which a VPA will be an acceptable tool for the developer of community infrastructure or public benefit;
- what constitutes a planning benefit;
- The means of valuing the anticipated uplift from planning gain and the proportion of the uplift to be captured\(^2\) – as a transparent starting point for negotiating a financial agreement.
- the relationship between the agreement and the development, (preferred, as opposed to no nexus whatsoever);
- the use or otherwise of Clause 4.6 Standard LEP (exceptions to development standards), this clause which needs review in any case;
- providing a guideline for the use of Clause 4.6 for the variation of standards should be reintroduced to provide more certainty in the planning system; and
- re-defining the boundaries between a VPA negotiated at the planning proposal stage verses development application process.

An outline of the key components and best practice planning principles for an updated practice note are included in *Appendix A*.

\(^2\) In some urban situations bonus FSR can be given a residual value and together with a council policy position on the proportion of uplift sought to be shared – offers a quantitative basis for the negotiation of a VPA (eg City of Melbourne)
Conclusion

VPAs are a powerful and effective tool to provide community benefits via “value capture”. Because in doing so they also generate substantial wealth for developers and land owners, they have the potential to distort good planning practice for the sake of improved outcomes.

PIA can see the potential for abuse of VPAs which will lead to negative outcomes in a number of areas. To avoid this, PIA wishes to see adherence to strong planning principles in all negotiations involving VPAs. In addition, PIA urges the Department to actively participate in the development of improved guidelines and education to ensure that VPAs will only be used where they generate net benefits without a degradation of best planning principles and practice.

The increased reliance on VPAs for funding growth infrastructure is indicative of a wider concern on the appropriate use and mix of infrastructure funding mechanisms and the role of development contributions. PIA propose to prepare a future policy submission on this subject.

Recommended Action

- The Department to draft an updated practice note or direction dealing with principles of probity and practice for VPAs.
- The Department require Councils to adopt a VPA policy consistent with best practice VPA principles.
Appendix A

Elements of best practice for an updated VPA practice note

Many councils adopt policies for the preparation of planning agreements. These policies should establish a process designed to meet high standards of probity and deliver positive public benefits. The following elements of best practice are recommended to government for the updating of an overarching NSW Government practice note on VPAs and the preparation of LGA specific VPA frameworks by councils.

Fundamental Principles

Planning agreements are subject to the overarching principle that planning decisions may not be bought or sold.

The following principles for governing the participation in planning agreements by planning authorities are based on those recognised by DIPNR (2005)3:

- Planning authorities must keep their regulatory independence - planning agreements should not improperly fetter the exercise of the statutory decision making functions with which they are charged.
- The motivation for planning agreements should not as a means to overcome the revenue raising or spending limitations of a planning authority.
- Planning authorities should not improperly rely on their statutory position to extract unreasonable public benefits from developers.
- Planning agreements should not be sought to seek public benefits that are unrelated to particular development.
- The interests of individuals or interest groups should not outweigh the public interest when considering planning agreements.
- Planning authorities should avoid being party (or use independent governance processes) where they also have a stake in the subject development.
- Planning authorities should be open with published rules and accessible procedures and provide for effective formalised public participation.

The last principle promoting public participation is significant as it is the means by which the community can express its preference to bear some of the costs of a particular development on the public domain in order to share in wider community benefits provided under an agreement (DIPNR 2005).

Circumstances for commencing VPAs

A council (or other planning authority) would consider negotiating a planning agreement with a developer when that proposed agreement would secure a public benefit and would:

- enable council to meet specific adopted planning and environmental objectives;
- not result in major financial risks for council;

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3 DIPNR (2005) Planning Agreements Chapter, in Development Contributions Practice Note.
- enable infrastructure items in council’s Developer Contributions Plans to be brought forward or deficiencies to be addressed - which have a connection with the planning proposal / development application;
- compensate for the loss of, or damage to, a public infrastructure, facilities, services, resources or environmental assets caused by the proposed development;
- meet the demands created by the development for new public infrastructure, amenities and services;
- provide an environmental offset to compensate for impacts on the environment or provides a public benefit;
- achieve reasonable recurrent funding in respect of public infrastructure, services or facilities and for on-going maintenance of land which is to be conserved; and
- monitor the planning impacts of the planning proposal / proposed development.

Public Benefit

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

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

VPAs should not be used as justification to vary development standards

The public benefits provided under a planning agreement should not be used to justify a dispensation with applicable development standards with reference to Clause 4.6 of the Standard Instrument Local Environmental Plan unless they deliver a public benefit consistent with the acceptability test (below). Any proposal being considered in a planning agreement to vary a development standard should not ‘fetter the statutory obligations of planning authorities’ to make their decision. This point is central to the fundamental principle that planning decisions are not bought or sold.

Probity and independent review

Public probity is fundamentally important to ensure that the negotiation of any planning agreements is fair, transparent and is directed at achieving public benefits in an appropriate manner, free of corruption. Good practice for councils and other planning authorities is to:

- ensure that stakeholders understand the system and council’s role – specifically, how the planning agreements system operates and how council will deal with developments objectively;
- ensure that all negotiations with proponents and their representatives are accurately and comprehensively documented;
- validly and comprehensively respond to the acceptability test and include those responses with the explanatory note for public exhibition;
• ensure openness and transparency of negotiation, notification/exhibition processes – specifically, achieving public awareness of the matters contained in PA’s and the potential benefits;
• seek separation of responsibilities of assessment of Planning Proposals/Development Applications and PAs;
• clarify roles for councillors and council management and staff; and
• prevent and avoid conflicts of interest (actual and perceived) – specifically by independent assessment by third parties where council has a commercial interest, and not entering into any contractual arrangement which fetters the discretion of the assessment and determination.

Councils should involve an independent person when:

• council has a commercial interest in the matter;
• the size or complexity of the project requires specialist skills to participate in the negotiations; and
• independent advice is needed on sensitive cost estimations or other technical aspects.

A key element of good probity practice is public notification and engagement of community stakeholders in the process of preparing planning agreements. While public notification is a statutory requirement, PIA urge that council’s include their consideration of an ‘acceptability test’ for each VPA. This would occur at the same time as the planning proposal is notified and alongside a signed draft ‘heads of agreement’ between the parties. The draft final agreement which may include any changes due to submissions and legal wording should be re-notified and made available for public inspection if it is substantially revised.

Acceptability Test

An acceptability test based on the DIPNR (2005) guidelines should require that planning agreements:

• are directed towards planning purposes, having regard to the planning controls and alignment with adopted strategic objectives and planning policies applying to development;
• provide for public benefits that bear a relationship to development^4;  
• produce outcomes that are fair, mutually beneficial and meet the values and expectations of the public and protect the overall public interest;
• provide for a reasonable means of achieving the relevant purposes and outcomes and securing the benefits;
• provide a valid basis (and does not fetter) consideration of the merits of a planning proposal or development application;
• protect the community against planning harm;
• demonstrate that probity has been ensured by publishing an explanatory note describing how the planning authority’s probity standards have been met; and
• establish that there are no circumstances that may preclude a planning authority being a party to an agreement.

^4 While their does not have to be a direct nexus, the benefits cannot be wholly unrelated to development.
Process and content for VPAs

The basic steps and statutory procedures for entering a planning agreement are set out in the DIPNR 2005 practice notes. Councils are expected to publish policies and procedures concerning their use of planning agreements consistent with the principles described.

Improved consistency could be achieved via an updated practice note which also outlines:

- How planning authorities should establish the cost or value of elements of planning agreements including:
  - recurrent costs;
  - land dedication in planning agreements;
  - monetary contributions in planning agreements – including application of s94 and s94a;
  - works in kind and material public benefit
  - capital works in kind; and
  - recovery of costs negotiating, entering, monitoring and enforcing an agreement.

- The practice note should include methodologies relevant to valuing public benefits under a planning agreement which are relevant to urban and regional situations.

- The means for monitoring, implementation and enforcement of a planning agreement.
References

Department of Infrastructure Planning and Natural Resources (DIPNR) (2005) Planning Agreements Chapter, in Development Contributions Practice Note.
