



**lindsaytaylorlawyers**

planning • environment • local government

## **Bargaining for Affordable Housing in the Planning System**

Overview of Practices in New South Wales, United Kingdom and the United States of America

**lindsaytaylorlawyers**

Level 9, Suite 3, 420 George Street, Sydney NSW 2000, Australia

**T** 02 8235 9700 • **F** 02 8235 9799 • **W** [www.lindsaytaylorlawyers.com.au](http://www.lindsaytaylorlawyers.com.au) • **E** [mail@lindsaytaylorlawyers.com.au](mailto:mail@lindsaytaylorlawyers.com.au)

**ABN** 29 682 671 304

Liability limited by a scheme approved under Professional Standards Legislation

# Bargaining for Affordable Housing



Planning Agreements in New South Wales

# Bargaining for Affordable Housing



## Planning Agreements in NSW

- *Voluntary planning agreements* ('**VPAs**') are provided for in s93F of the *Environmental Planning & Assessment Act 1979* ('**EPA Act**')
- Section 93F is supported by Secretary's *Practice Note on Planning Agreements* (2005), which is currently under revision
- VPAs enable planning authorities and developers to negotiate the provision of local, regional and State public infrastructure, facilities and benefits in the planning process
- VPAs can be used in connection with *planning proposals* (i.e. rezoning) or *development applications*

# Bargaining for Affordable Housing



## Planning Agreements in NSW

- VPAs can require developers to make cash or in-kind *development contributions* for *public purposes*
- Contributions can be directed towards forward funding, cost recoupment or recurrent funding
- Public purposes include affordable housing
- No planning nexus is required between development contributions under a VPA and the planning proposal or development application
- VPAs can be in addition to or instead of other development contributions under the EPA Act
- VPAs must be considered in the determination of development applications
- VPAs cannot oblige planning authorities to rezone land, grant development consent or breach applicable development standards

# Bargaining for Affordable Housing



## Planning Agreements in NSW

- VPAs must specify:
  - the land, and the planning proposal or development application
  - the nature, extent and timing of development contributions
  - whether the contributions under the VPA are additional to or replace other development contributions under the EPA Act
  - security for the developer's performance
  - dispute resolution
- VPAs can be registered on land title
- VPAs cannot be appealed to the Land & Environment Court
- Breaches of VPAs are enforced as breaches of the EPA Act
- Public notice is required before a VPA is entered into, amended or revoked

# Bargaining for Affordable Housing



## Planning Agreements in NSW

- *'Affordable housing'* is defined in s4(1) of the EPA Act to mean:  
*'[H]ousing for very low income households, low income households or moderate income households, being such households as are prescribed by the regulations or as are provided for in an environmental planning instrument'*
- *'Affordable housing'* is defined in cl.8 of *State Environmental Planning Policy No 70—Affordable Housing (Revised Schemes)* as follows:  
*'For the purposes of the definition of affordable housing in section 4 (1) of the Act, very low income households, low income households and moderate income households are those whose gross incomes fall within the following ranges of percentages of the median household income for the time being for the Greater Sydney (Greater Capital City Statistical Area) according to the Australian Bureau of Statistics:*  
*Very low income household - less than 50%*  
*Low income household- 50 or more but less than 80%*  
*Moderate income household - 80–120%'*

# Bargaining for Affordable Housing



## Planning Agreements in NSW

- *'Affordable housing'* is defined in cl.6(1) of *State Environmental Planning Policy (Affordable Rental Housing) 2009* as follows:

*'In this Policy, a household is taken to be a very low income household, low income household or moderate income household if the household:*

- (a) has a gross income that is less than 120 per cent of the median household income for the time being for the Greater Sydney (Greater Capital City Statistical Area) (according to the Australian Bureau of Statistics) and pays no more than 30 per cent of that gross income in rent, or*
- (b) is eligible to occupy rental accommodation under the National Rental Affordability Scheme and pays no more rent than that which would be charged if the household were to occupy rental accommodation under that scheme.'*

# Bargaining for Affordable Housing



## Planning Agreements in NSW

- Section 94F of the EPA Act enables a consent authority to impose conditions requiring monetary contributions or land dedication free of cost towards affordable housing if a State environmental planning policy identifies that there is a need for affordable housing within the area
- *State Environmental Planning Policy No 70—Affordable Housing (Revised Schemes)* identifies such a need in 4 inner Sydney council areas
- *State Environmental Planning Policy (Affordable Rental Housing) 2009* provides density bonuses to development on a progressive scale if the percentage of the gross floor area of a development that is to be used for the purposes of affordable housing is at least 20 per cent



# Bargaining for Affordable Housing



## Planning Agreements in NSW

- Other than the above, VPAs are the principal means for achieving affordable housing through the planning system in NSW
- Many local council VPA policies expressly contemplate the use of planning agreements for affordable housing
- The affordable housing planning policies of local councils are primarily implemented through VPAs – see, for example, Waverley Council, the City of Canada Bay Council, former Marrickville Council, Byron Shire Council
- These policies commonly offer density bonuses in return for cash or in-kind affordable housing contributions
- All schemes are fundamentally incentive and value-capture based

# Bargaining for Affordable Housing



## Planning Agreements in NSW

- The NSW Government has used planning agreements to achieve affordable housing outcomes
- These include:
  - **Barangaroo**: 2.3% of the residential developable gross floor area in the South Precinct required to be provided as 'key worker' housing
  - **Former Carlton United Brewery Site, Chippendale**: a monetary contribution equivalent to 2.7–3.1% of total project costs required for offsite affordable rental housing
  - **Rouse Hill**: 3% of residential lots required for affordable housing
  - **Sydney Olympic Park**: 3% of dwelling units required to be given to the Land and Housing Corporation as affordable housing
  - **The former ADI site, St Marys**: 3% of residential lots required as affordable rental housing

# Bargaining for Affordable Housing



## Planning Obligations in the United Kingdom

# Bargaining for Affordable Housing



## Planning Obligations in UK

- *Planning agreements* are provided for in s106 of the *Town and Country Planning Act 1990* (UK)
- These enable persons having an interest in land to enter into *planning obligations* with a local planning authority ('**LPA**') involving restrictions or positive obligations relating to the development or use of land or the provision of public benefits
- Planning obligations can be made to run with the title to land
- Planning obligations in England and Wales exist alongside the *Community Infrastructure Levy*, which is a standard charge under the *Planning Act 2008* (UK) that applies to the construction of most new buildings
- Affordable housing is expressly excluded from the scope of the community infrastructure levy

# Bargaining for Affordable Housing



## Planning Obligations in UK

- Planning obligations are a form of value capture or betterment - referred to in the UK as *planning gain*
- An embedded purpose of planning obligations in the UK planning system is to achieve affordable housing
- The *National Planning Policy Framework 2012* contains the following regarding affordable housing:

***Affordable housing:** Social rented, affordable rented and intermediate housing, provided to eligible households whose needs are not met by the market. Eligibility is determined with regard to local incomes and local house prices. Affordable housing should include provisions to remain at an affordable price for future eligible households or for the subsidy to be recycled for alternative affordable housing provision.'* (p.50)

# Bargaining for Affordable Housing



## Planning Obligations in UK

*'use their evidence base to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area...'* (par. 47)

*'where they have identified that affordable housing is needed, set policies for meeting this need on site, unless off-site provision or a financial contribution of broadly equivalent value can be robustly justified..'* (par. 50)

*'Local planning authorities should set out their policy on local standards in the Local Plan, including requirements for affordable housing.'* (par. 174)

*'Any affordable housing or local standards requirements that may be applied to development should be assessed at the plan-making stage, where possible, and kept under review.'* (par. 177)

- Many LPA *development plans* impose planning requirements for affordable housing for new development
- Inadequate provision of affordable housing is generally an acceptable reason for the refusal of planning permission (see Circular 6/98)

# Bargaining for Affordable Housing



## Planning Obligations in UK

- In such cases, planning obligations can render development acceptable by making adequate provision for affordable housing
- Most planning obligations relate to new residential development
- Research shows that:
  - nationally, planning obligations applied to more than 90 per cent of all new housing development exceeding 100 dwelling units
  - affordable housing planning obligations dominated to a large extent compared to other kinds of planning obligations
  - affordable housing planning obligations varied between inclusion of affordable housing units, land dedication, and payments
  - typically, planning obligations involved on-site requirements to *pepper-pot* between 20 and 30 per cent affordable housing units in new development

# Bargaining for Affordable Housing



## Planning Obligations in UK

- Planning obligations tend to be used by LPAs as a type of inclusionary zoning
- The inclusionary zoning method means that the output of affordable housing is dependent on market-output and economic cycles
- One key issue relating to planning obligations for affordable housing is the impact on development viability
- The *Department of Communities and Local Government* has published a note on planning obligations and affordable housing requirements addressing viability testing and related procedures (April 2013)
- A number of LPAs address development viability testing in connection with planning obligations for affordable housing in their supplementary planning documents



# Bargaining for Affordable Housing



## Incentive Zoning & Agreements in the United States

# Bargaining for Affordable Housing



## Agreements in US

- In the US context, in general terms, affordable housing is considered to be government-subsidized, privately owned rental apartments inhabited by low-income households
- The Office of Policy Development and Research (PD&R), United States Department of Housing and Urban Development defines affordable housing as follows:

*'In general, housing for which the occupant(s) is/are paying no more than 30 percent of his or her income for gross housing costs, including utilities. Please note that some jurisdictions may define affordable housing based on other, locally determined criteria, and that this definition is intended solely as an approximate guideline or general rule'*

# Bargaining for Affordable Housing



## Agreements in US

- *Incentive zoning* involves offering development bonuses, such as additional floor space, in exchange for the provision of public benefits by a developer
- Affordable housing is a typical public benefit covered by incentive zoning schemes
- Incentive zoning schemes are commonly contained in local land use ordinances
- Incentive zoning has been coupled with inclusionary zoning practices to achieve affordable housing in many states
- Incentive zoning schemes can be *by-right* or subject to negotiation through site-specific agreements

# Bargaining for Affordable Housing



## Agreements in US

- The nature and legal basis of agreements differ:
  - some local land use ordinances directly provide for incentive zoning agreements
  - numerous states have development agreement enabling statutes that allow *development agreements* to be used in conjunction with incentive zoning practices
  - there is a recent trend towards the use of *community benefit agreements* in conjunction with incentive zoning
- For development agreements, the usual rationale is the exchange of public benefits for vested development rights
- Development agreement statutes ordinarily specify the types of development and the kinds of public benefits that are covered

# Bargaining for Affordable Housing



## Agreements in US

- The public benefits obtained through development agreements are often additional to, or different from, those that can be funded through exactions or impact fees – notably affordable housing
- Experience in numerous states shows that development agreements have successfully bridged the gap between unfettered bargaining and rigid, inflexible zoning
- Community benefits agreements result from negotiations between developers and community bodies representing individuals and groups affected by proposed development.
- The community bodies typically exchange their support or non-objection to development in return for the provision of community benefits
- Many community benefit agreements have been used to secure affordable housing as a community benefit

# Bargaining for Affordable Housing



## Examples of Agreement-Based Affordable Housing Schemes

# Bargaining for Affordable Housing



## Agreements in NSW

### Waverley Affordable Housing Program Policy 2007

- Operates in through *Waverley Development Control Plan 2006* ('**DCP**') and *Waverley Council Planning Agreement Policy 2014*
- Allows additional floor space on sites in return for affordable housing contributions
- Eligibility for participation is through developers indicating in writing a willingness to enter into VPAs to make affordable housing contributions
- Additional floor space is not as-of-right; it must meet acceptable environmental impacts upon assessment
- Enables the Council to receive affordable housing contributions in cash or in-kind

# Bargaining for Affordable Housing



## Agreements in NSW

- The program applies to developments containing a *residential component*
- The bias of the program is towards on-site provision of affordable housing
- In-kind contributions can be rent-capped or transferred to Council ownership in perpetuity
- Based on capturing '*an equal public/private share of the value of the additional floor space*'



# Bargaining for Affordable Housing



## Agreements in UK

### **Horsham District Council, *Planning Obligations and Affordable Housing, SPD, September 2017***

- SPD is specifically directed to circumstances where planning permission could be refused for a lack of, or inadequate provision of, affordable housing
- SPD operates in conjunction with the *Horsham District Planning Framework Policy 16: Strategic Policy: Meeting Local Housing Needs*
- The affordable housing scheme applies to most types of residential development
- Requires 35% on-site provision of affordable housing on development sites of 15 or more dwellings, or sites over 0.5ha
- Requires 20% on-site provision of affordable housing on development sites of between 5 and 14 dwellings

# Bargaining for Affordable Housing



## Agreements in UK

- Off-site provision can be accepted but only in exceptional circumstances
- Provision of land is acceptable in some circumstances
- The scheme provides for development viability assessment where development does not comply with the scheme
- Requires all aspects of the provision and delivery of affordable housing relating to developments to be included in s106 agreements

# Bargaining for Affordable Housing



## Agreements in US

### The Seattle Municipal Code, Chapter 23.58A – Incentive Provisions

- The Chapter contains a typical affordable housing incentive zoning program (§23.58A.003)
  - defines affordable housing as *'a unit or units of housing provided as a condition to bonus floor area that are affordable to and reserved solely for income-eligible households'*
  - contains a complex definition of *income eligible households*
  - specifies floor area bonuses for residential and non-residential development in return for affordable housing contributions
  - allows contributions to be made in cash or in-kind
  - in-kind contributions involve setting aside 14% of the gross bonus residential floor area and 15.6% of gross bonus non-residential floor area for affordable housing

# Bargaining for Affordable Housing



## Agreements in US

- fixes monthly rental and sale prices of affordable housing units
- the affordable housing arrangements are contained in agreements between the city and developers
- agreements have a minimum 50 year duration
- the agreements also specify security and on-going reporting requirements



**lindsaytaylorlawyers**

planning • environment • local government

for regular legal updates in

planning | environment | local government

subscribe to our *in focus* page

**[www.lindsaytaylorlawyers.com.au/in\\_focus](http://www.lindsaytaylorlawyers.com.au/in_focus)**

**lindsaytaylorlawyers**

Level 9, Suite 3, 420 George Street, Sydney NSW 2000, Australia

**T** 02 8235 9700 • **F** 02 8235 9799 • **W** [www.lindsaytaylorlawyers.com.au](http://www.lindsaytaylorlawyers.com.au) • **E** [mail@lindsaytaylorlawyers.com.au](mailto:mail@lindsaytaylorlawyers.com.au)

**ABN** 29 682 671 304

Liability limited by a scheme approved under Professional Standards Legislation