Department of
**Infrastructure, Planning and Natural Resources**

# Development contributions Practice notes – July 2005

New South Wales planning reforms

**Acknowledgments**

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**Important note**

These practice notes do not constitute legal advice. Users are advised to seek professional advice and refer to the relevant legislation, as necessary, before taking action in relation to any matters covered by these documents.

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# Contents

Date of Issue

## INTRODUCTION

Introduction to the practice notes July 2005

## DEVELOPMENT CONTRIBUTIONS PLANS – SECTION 94

**Key concepts and principles**
Development contributions as a method of funding public infrastructure July 2005
Principles underlying development contributions July 2005
Purpose of a development contributions plan July 2005

**Preparing a section 94 development contributions plan**
Application of a section 94 development contributions plan July 2005
Relationship between expected development and demand July 2005
Determining rates for different types of development July 2005
Works schedules and mapping July 2005
Public exhibition and adoption July 2005

**Review, accountability and reporting**
Life of a development contributions plan, review and amendment July 2005
Adjustment of section 94 development contributions July 2005
Financial management of development contributions July 2005
Exemptions, discounts, credits and refunds July 2005
Accountability and reporting July 2005

**Section 94 contributions plan template**
Template for a section 94 development contributions plan July 2005

## DEVELOPMENT CONTRIBUTIONS PLANS – SECTION 94A

Section 94A development contributions plans July 2005
Template for a section 94A development contributions plan July 2005

## PLANNING AGREEMENTS

Planning agreements July 2005

# Introduction to the practice notes

**The *Development Contributions Practice Notes* aim to promote good practice in the operation of the development contributions system and to improve public and financial accountability within the system.**

**Introduction**

These practice notes have been prepared to assist councils, applicants and the community in understanding the issues and legal requirements of Division 6 of Part 4 of the *Environmental Planning and Assessment Act 1979* (*EP&A Act*) relating to planning agreements and development contributions. The intention is to promote accountability and transparency in the administration of the NSW development contributions system.

The practice notes update the Department's 1997 *Section 94 Contributions Plans Manual*, outline the key amendments to the contributions system and provide guidance on preparation of development contributions plans and planning agreements.

This introduction provides a broad outline of the issues surrounding the contributions system, and highlights the matters that should be considered when a council prepares a development contributions plan or enters into a planning agreement. It describes the reasons for having a contributions system and the key features of the system. The overview also canvasses concepts such as flat rate levies, cross-boundary development contributions plans, management of contributions and planning agreements that flow from amendments to the *EP&A Act* in relation to planning agreements (sections 93F to 93L) and development contributions (sections 94 and 94A).

The practice notes provide advice on a range of issues that are relevant to the preparation and administration of development contributions plans, and in the negotiation and implementation of planning agreements. Some of the practice notes provide very detailed advice of a technical nature for councils and practitioners, while others describe issues that should be taken into account or provide background information to the contributions system.

**Purpose of the practice notes**

The practice notes aim to:

- promote the efficient and effective provision of public infrastructure for new development
- ensure that statutory responsibilities are met
- ensure that councils carefully consider the implications of implementing a particular contributions system
- encourage councils to view the contributions system in the context of corporate, financial and strategic planning
- promote development contributions plans which are more user friendly and simplify the approach to plan preparation
- provide guidance on planning agreements and ensure public accountability in the process
- remove inconsistencies of interpretation
- improve public and financial accountability, and governance.

The approach taken to achieve these outcomes is to:

- outline the issues associated with the development contributions system
- update and broaden the existing *Section 94 Contributions Plans Manual* to encompass other contributions methods
- update technical advice through practice notes
- provide a source of reference for specific issues
- provide examples of good practice
- provide templates for section 94 (s94) and section 94A (s94A) development contributions plans, and planning agreements that should be followed
- provide a simple guide to the preparation of a s94 and s94A development contributions plans.

The practice notes are made for the purposes of clause 25B(2) and clause 26(1) of the *Environmental Planning and Assessment Regulation 2000 (EP&A Regulation)*.

While the practice notes are not legally binding, in some cases they may advocate greater restrictions on the content and use of development contribution plans and planning agreements than is provided for in the *EP&A Act* and *EP&A Regulation*. The legislative framework for the contributions system provides broad provisions, whereas the practice notes seek to provide best practice guidance in relation to their use. The practice notes also set out various templates designed to standardise development contributions documentation in order to foster efficient systems. The practice notes must be read in conjunction as they deal with differing issues related to the way the contributions system operates. An overall view of the operation of the contributions system cannot be gained by simple reference to one or two practice notes.

The practice notes have been organised into functional subgroups to provide guidance on key issues and concepts, as well as specific guidance on each type of development contributions plan and planning agreement. These practice notes have been prepared to reflect the legal requirements of

the *EP&A Act* and *EP&A Regulation*, and contain suggestions, alternatives and examples which may assist councils to make the right decision to suit local circumstances.

The table of contents lists the topics covered in each section. The practice notes are arranged in a logical order and are unnumbered to allow for future additions. These will be to promote good practice and respond to community, industry and local government requests.

**Organisation of the practice notes**

The practice notes are organised into the following sections:

- ***Development contributions plan – section 94:*** these describe the requirements for preparation of a s94 development contributions plan. This type of plan is referred to as a "traditional" plan as its foundation remains the same as that proscribed since 1993. This part is broken down into the following function subheadings: key concepts and principles; preparing a section 94 development contributions plan; review, accountability and reporting; and template for s94 development contributions plan.

- ***Development contributions plans – section 94A levies***: these describe the requirements for preparation of a s94A development contributions plan. These types of plans are known as "flat rate levy" plans and reflect the new provisions of the *EP&A Act* which allows a simple percentage rate to be applied to new development. This part includes a template for a s94A development contributions plan.

- ***Planning agreements***: these describe the concept of a planning agreement and how they fit into the planning process. This part also contains a template for a planning agreement.

**Contributions as a method of funding local infrastructure**

The funding of public infrastructure has changed substantially over the last 40 years, moving from traditional sources such as commonwealth, state and local government budget allocations to a mix of sources ranging from public private partnerships to developer charges and user pays charges.

The user pays philosophy underlying the funding of local infrastructure has existed in NSW since the 1940s when the planning process has had the ability to require developers to contribute to the provision of public facilities, the need for which arises as a result of the development. Legislation requiring a contribution towards the provision of public infrastructure was first codified as s94 of the *EP&A Act*.

Section 94 has been subject to review on a number of occasions in response to concerns raised by the development industry and local councils. The merits of maintaining the existing system and making improvements have been explored, as have alternatives that are more or less prescriptive than s94.

These reviews have included:

- the Simpson Inquiry of 1988/89. In general, the inquiry supported the power to levy contributions and described s94 as a 'special type of user pays tax'. Following the Commissioner's recommendation that councils prepare 'a structure/management plan', the provisions of s94 were amended in 1992 to require the preparation of development contributions plans. Such plans needed to be in place before a condition requiring a contribution could be included in a development consent. Such plans were seen in the context of the inquiry as identifying local needs and containing an implementation program for contributions and a fiscal strategy to enable proper administration.

- a Section 94 review committee which reported in 2000 and recommended a range of significant reforms. These were discussed with stakeholders and a range of alternative systems were canvassed that could provide for more flexibility in the system.

- following the formation of the Department of Infrastructure, Planning and Natural Resources in 2003, the Minister for Infrastructure and Planning, and Minister for Natural Resources established a taskforce to look more closely at the way the s94 developer contribution system operated and in particular the alternative mechanisms by which planning authorities may obtain a development contribution.

The Taskforce report supported the intent and function of a well administered s94 regime for funding local infrastructure. It also endorsed a number of improvements to the operation and accountability of the current system as well as the introduction of alternative approaches for obtaining development contributions.

The Taskforce focussed on those initiatives where it was considered that the most gains could be made and where the most effort was required to correct perceived deficiencies. The Taskforce found that:

- the original policy basis for levying developer contributions at the local level (s94) generally remained legitimate and sound, and that the current system should be maintained

- developer agreements and flat rate percentage levies could be alternative approaches in certain circumstances
- improvements to the operation and accountability of the current system were appropriate such as allowing for cross boundary levying; promoting consistency in the format of development contributions plans; ensuring regular review of development contributions plans; encouraging better accounting practices and the publication of data relating to the collection and expenditure of s94 funds
- a system could be developed to allow councils to borrow funds for the upfront acquisition of land identified in development contributions plans.

The Taskforce recommendations also focussed on the review of the *Section 94 Contributions Plans Manual* to capture the new provisions, but also ensure that the contributions system improves public and financial accountability and governance.

The Taskforce recommendations have been implemented in the main through the legislative reforms to the contributions system and have led to the preparation of these practice notes.

**What is the development contributions system?**

Section 94 of the *EP&A Act* has traditionally been the principal method enabling councils to levy contributions for public amenities and services required as a consequence of development. This may be the provision of new facilities for a new area, or may be the expansion of existing facilities where a developed area is growing.

Section 94 contributions are imposed by way of a condition of development consent or complying development, and can be satisfied by:

- dedication of land
- a monetary contribution
- material public benefit
- a combination of some or all of the above.

Since 1993 councils have been able to levy s94 contributions only if they have prepared and exhibited a development contributions plan which has allowed the system to be made more transparent. Reforms to s94 maintain the power to levy a contribution as a consequence of development provided a development contributions plan is in place.

However, reforms have widened the scope of the contributions system to include new provisions under s93 and s94A of the *EP&A Act,* which provide greater flexibility as to the means of levying a contribution.

The amendments provide for the following methods of funding local infrastructure by a consent authority:

- s94 development contributions
- s94A levy
- planning agreements.

The various methods of funding local infrastructure are collectively known as the development contributions system.

Consent authorities can include the Director-General of the Department of Infrastructure, Planning and Natural Resources, the Minister for Infrastructure and Planning, local government and statutory bodies charged with certain planning functions.

It will be up to the consent authority to determine which contributions system best suits its particular needs. The existing contributions system will continue as an option as its foundations remain a key element of identifying, planning and funding local infrastructure.

The decision on the type of contributions system to adopt should be considered in light of a council's corporate-wide strategy of infrastructure funding. The making of a development contributions plan places a financial obligation on council to deliver the public amenities and public services which it has identified and for which development contributions are then sought. Planning agreements may also lock in a council for the provision or funding of infrastructure.

The preparation of a development contributions plan and the levying of contributions under that plan, or entering into a planning agreement, are discretionary powers of council.

If, for example, a council proposes to use the traditional s94 regime in its release areas but apply the flat percentage levy in its established town centres, it should set out those arrangements in a development contributions plan so that an applicant can clearly see what the contribution rate will be for a certain development.

The types of development contributions and their possible application are highlighted below. More detail can be found in the practice notes dedicated to that issue. It should be noted that s80A of the *EP&A Act* also allows consent authorities to require developers to carry out public works through conditions of development consent.

**Cross-referencing *EP&A Act and EP&A Regulation* requirements with practice notes**

Each practice note includes a reference to the requirements of the *EP&A Act* or *EP&A Regulation* as necessary. These are referenced to the relevant clauses applicable to the issue being covered.

## Potential application of development contribution methods

| METHOD | APPLICATION/ISSUES |
|---|---|
| Section 94 development contributions | **Application:**<br>• Optimum where growth is faster and higher levels of contributions are able to offset the considerable administration costs, financial risks and inefficiencies of managing money amongst and within the funds<br>• Areas with multiple owners who are unable to co-ordinate in offering dedications or works-in-kind<br>**Key issue**:<br>• Substantial work required to satisfy statutory requirements against potential benefits |
| Section 94A levy | **Application:**<br>• Little growth and slow accrual of funds in established urban areas or rural areas, or where provision of facilities benefits a dispersed set of contributors<br>• Areas with multiple ownership with little scope for land dedications or works-in-kind<br>• Costs of needed infrastructure are relatively low and spread over time<br>**Key issue**:<br>• Lower level of contributions but greater flexibility in expenditure |
| Planning agreements | **Application:**<br>• One or few owners that have an incentive to fund infrastructure<br>• More successful where major growth or development occurs in a distinct area<br>• Can offer different and better outcomes through efficiencies in the process or through innovation by the parties<br>**Key issue**:<br>• Are the outcomes worth the substantial effort required to implement a satisfactory agreement |

## Acknowledgments

The Department of Infrastructure, Planning and Natural Resources acknowledges the contribution of **Connell Wagner Pty Ltd** and **Lindsay Taylor Lawyers**, and the numerous council officers, industry groups and professional associations who provided valuable input through submissions on the review of section 94 of the *EP&A Act* and in the preparation of these practice notes.

# Dictionary

**“Capital cost”** means all of the costs of a one-off nature designed to meet the cost of providing, extending or augmenting infrastructure.

**“Catchment”** means a geographic or other defined area to which a contributions plan applies.

**“Community infrastructure”** means infrastructure of a communal, human or social nature, which caters for the various life-cycle needs of the public including but not limited to childcare facilities, community halls, youth centres, aged persons facilities.

**“Contributions Plan”** means a public document prepared by council pursuant to s94EA of the *Environmental Planning and Assessment Act.*

**“Development”** means:

- the erection of a building on that land
- the carrying out of a work in, on, over or under that land
- the use of that land or of a building or work on that land
- the subdivision of that land.

**“Developer contribution”** means a monetary contribution, the dedication of land free of cost or the provision of a material public benefit.

**“Material Public Benefit”** does not include the payment of a monetary contribution or the dedication of land free of cost.

**“Nexus”** means the relationship between the expected types of development in the area and the demand for additional public facilities to meet that demand.

**“Planning agreement”** means a voluntary agreement referred to in s93F of the *Environmental Planning and Assessment Act.*

**“Planning authority”** means:
(a) a council, or
(b) the Minister, or
(c) the corporation, or
(d) a development corporation (within the meaning of the *Growth Centres (Development Corporations) Act 1974*), or
(e) a public authority declared by the *EP&A Regulations* to be a planning authority for the purposes of this Division.

**“Planning benefit”** means a development contribution that confers a net public benefit, that is, a benefit that exceeds the benefit derived from measures that would address the impacts of particular development on surrounding land or the wider community.

**“Planning obligation”** means an obligation imposed by a planning agreement on a developer requiring the developer to make a development contribution.

**“Public”** includes a section of the public.

**“Public benefit”** is the benefit enjoyed by the public as a consequence of a development contribution.

**“Public facilities”** means public infrastructure, facilities, amenities and services.

**“Public purpose”** is defined in s93F(2) of the *Environmental Planning and Assessment Act* to include the provision of, or the recoupment of the cost of providing public amenities and public services (as defined in *s93C*), affordable housing, transport or other infrastructure. It also includes the funding of recurrent expenditure relating to such things, the monitoring of the planning impacts of development and the conservation or enhancement of the natural environment.

**“Recurrent costs”** mean any cost which is of a repeated nature that is required for the operation or maintenance of a public facility.

**“Regional infrastructure”** means facilities which satisfy the demands of a catchment greater than one local government area.

**“Thresholds”** means the level at which the capacity of an infrastructure item is reached or the event which triggers the requirement for the provision of a facility.

**“Utility service”** means basic engineering services such as power, water, sewerage and telecommunications.

**“Works-in-Kind”** means the construction or provision of the whole or part of a public facility that it identified in a works schedule in a contributions plan.

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