

## Development Contributions – Practice Note

# Section 94A development contributions plans

**This practice note provides advice on the preparation of section 94A development contributions plans.**

### Planning context for section 94A levies

Section 94A was introduced to allow appropriate development contributions to be levied in areas, such as:

- rural and regional areas, where there are slow rates of development or development is sporadic; and
- established urban areas, where development is mainly 'infill' development and is also sporadic.

In such areas, it is difficult to determine the expected types of future development, the rate at which development will occur or where it will occur. This makes it difficult to prepare a contributions plan that authorises the imposition of section 94 contributions on development because of the nexus required to be established under section 94 between development and the increased demand for public amenities and public services.

Those difficulties do not exist under section 94A because that section authorises the imposition of a levy which is calculated as a flat percentage of development cost, and the EP&A Act does not require any connection between development which pays the levy and the object of the expenditure of the levy.

### What is a section 94A development contributions plan?

Section 94A allows a levy to be imposed when a development consent or complying development certificate is issued. The levy can only be imposed if a section 94A development contributions plan is validly in place.

Councils should:

- ensure, as far as possible, that land is not subject to more than one contributions plan (whether a section 94A contributions plan or a section 94 contributions plan); and
- ensure section 94A contributions plans state the criteria used by councils to determine when a section 94A levy will be imposed rather than a section 94 contribution (for example, where a section 94 development contributions plan provides that certain development is to be

covered by a section 94A development contributions plan).

### What are the requirements of the EP&A Regulation?

The EP&A Regulation requires a section 94A plan to include the following:

- the purpose of the plan
- the land to which the plan applies
- the percentage of the section 94A levy and, if the percentage differs for different types of development, the percentage of the levy for those different types of development, as specified in a schedule to the plan
- the manner (if any) in which the proposed costs of carrying out the development, after being determined by the consent authority, are to be adjusted between the date of that determination and the date the levy is required to be paid
- the council's policy concerning the timing of the payment of s94A levies and the imposition of 94A conditions that allow deferred or periodic payment
- a map showing the specific public amenities and services proposed to be provided by the council, supported by a works schedule that contains an estimate of their cost and staging (whether by reference to dates of thresholds)
- if the plan authorises section 94A levies paid for different purposes to be pooled and applied progressively for those purposes, the priorities for the expenditure of the contributions, particularised by reference to the works schedule.

These must all be covered in the s94A development contributions plan. Some of these requirements are the same for a section 94 development contributions plan and the practice notes concerning section 94 plans cover these issues. Consequently, they are not covered in this practice note.

### Administrative costs of council

A works schedule in a section 94A contributions plan should not include any costs associated with the administration of a section 94A contributions plan.

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### What is the maximum rate of the levy?

Subject to the restrictions discussed below, the EP&A Regulation (clause 25K) sets a **maximum** rate of 1% of the cost of the construction of a development although a lower rate may be set.

Section 94A plans must clearly set out the rates. In the case of a joint section 94A plan, each council area subject of a section 94A levy should be specifically identified as well as the rates adopted for each area.

### How is the construction cost determined?

The EP&A Regulation specifies the things that should and should not be included in the calculation of the cost of construction (clause 25J).

### Adjustment of section 94A payments

The EP&A Regulation [clause 25J(4)] allows the adjustment of a section 94A contribution between the date of the consent and the time of payment of the contribution. A sample clause is outlined in the section 94A development contributions plan template.

### Are there any restrictions?

Although a section 94A levy may be widely used, there are a number of restrictions on its application and use:

- a section 94A levy cannot be imposed on the same development application or complying development certificate if a section 94 contribution is required.
- contributions must be expended towards capital costs associated with the provision, extension or augmentation of public amenities or public services (or towards recouping the cost of their provision, extension or augmentation).

On 10 November 2006 the Minister for Planning issued a direction under section 94E of the EP&A Act restricting the imposition of the maximum rate so consent authorities:

- cannot impose a section 94A levy where the proposed cost of carrying out the development is \$100,000 or less;
- may impose a maximum rate of 0.5% where the proposed cost of carrying out the development is between \$100,001 and \$200,000.

Consent authorities may impose the maximum rate of 1% where the proposed cost of carrying out the development exceeds \$200,000.

The intention of the Minister's section 94E direction is that, where the proposed cost of carrying out the development is between \$100,001 and \$200,000, consent authorities may levy the full cost of the development at a maximum rate 0.5%. Where the proposed cost of carrying out the development exceeds \$200,000, consent authorities may levy the full cost of the development at the maximum rate of 1%.

Irrespective of the cost of construction of the development, the section 94E direction prohibits the use of section 94A in respect of development:

- for the purpose of disabled access; or
- for the sole purpose of affordable housing; or
- for the purpose of reducing a building's use of potable water (where supplied from water mains) or energy; or
- for the sole purpose of the adaptive reuse of an item of environmental heritage; or
- that has been the subject of a condition under section 94 under a previous development consent relating to the subdivision of the land on which the development is to be carried out.

### Other exemptions

Councils may choose to exempt other types of development from section 94A levies. Such exemptions are at the discretion of council. Considerations regarding exemptions are covered in detail in the practice note entitled 'Exemptions, discounts, credits and refunds'. That practice note suggests that exemptions have previously been given by council's in respect of the following types of development:

- low income (affordable) housing;
- works undertaken for charitable purposes or by a registered charity;
- places of worship, public hospitals, police and fire stations;
- childcare facilities;
- libraries;
- other community or educational facilities.

Policies on exemptions must be stated in the section 94A contributions plan and, as far as possible, be specific about the types of facilities to be exempted. Alternatively, council must state the criteria that will be used to determine an exemption.

### Conditions of consent

A model condition for a section 94A levy is set out below.

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### Sample section 94A contribution condition

#### Condition ##

Pursuant to section 80A(1) of the *Environmental Planning and Assessment Act 1979*, and the **[name]** Section 94A Development Contributions Plan, a contribution of **[\$insert total amount]** shall be paid to Council.

The amount to be paid is to be adjusted at the time of the actual payment, in accordance with the provisions of the **[name]** Section 94A Development Contributions Plan. The contribution is to be paid before **[insert requirement]**.