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## PLANNING SYSTEM

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### Local planning

<b>Circular</b>	PS 06-020
<b>Issued</b>	6 December 2006
<b>Related</b>	PS 05_003, PS 05_004

# Changes to the application of section 94A of the EP&A Act – ministerial direction

This circular is to advise councils and the planning and development industry of recent changes affecting section 94A of the *Environmental Planning and Assessment Act 1979*.

## Introduction

On 10 November 2006 the Minister for Planning issued a direction under section 94E of the *Environmental Planning and Assessment Act 1979* (EP&A Act). The direction makes a number of changes to how section 94A of the EP&A Act is applied.

The changes take effect from 1 December 2006 and apply to development consents granted after that date.

## Background

In July 2005, changes to the development contributions system under the EP&A Act commenced. One of the changes included the ability to collect development contributions by a fixed development consent levy, under section 94A of the Act.

Section 94A permits a consent authority to impose a condition of consent requiring that the applicant pay a levy of the percentage of the proposed cost of carrying out the development. This is set at a maximum of 1% under the *Environmental Planning and Assessment Regulation 2000* (EP&A Regulation). The levy may be imposed when a development consent or complying development certificate is issued.

A section 94A levy must be expended towards capital costs associated with the provision, extension or augmentation of public amenities or public services and must be authorised by a contributions plan.

A section 94A contributions plan must identify the relationship between the expected types of development in the area and the demand for additional public amenities and services to meet that development, and include a works schedule that contains an estimate of their cost and staging.

## Summary of changes

Following a review of the application of section 94A, the Minister for Planning has issued a direction under section 94E of the EP&A Act restricting the imposition of the maximum rate so that a consent authority:

- 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.

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

Irrespective of the proposed cost of carrying out the development, the section 94E direction also states that a levy under section 94A can not be imposed on development:

- for the purpose of disabled access
- for the sole purpose of affordable housing
- for the purpose of reducing the consumption of mains supplied potable water, or reducing the energy consumption of a building

- for the sole purpose of the adaptive reuse of an item of environmental heritage, or
- other than the subdivision of land, where a condition under section 94 of the EP&A Act has been imposed under a previous development consent relating to the subdivision of the land on which the development is proposed to be carried out.

A consent authority to which a direction is given under section 94E must comply with the direction in accordance with its terms.

Section 94E(3) of the EP&A Act provides that a consent authority must not, in granting development consent in relation to which a direction applies, impose a condition that is not in accordance with the terms of the direction, despite the other provisions of the Act and despite the provisions of any contributions plan.

Imposing a levy in contravention of the Minister's direction may render the condition unenforceable.

The Department of Planning has updated the two practice notes relating to the preparation of section 94A contributions plans, previously issued in July 2005.

The practice notes reiterate that section 94A was introduced to allow appropriate development contributions to be levied in areas where it is often difficult to determine the expected types of future development, the rate at which development will occur or where it will occur. Such areas are rural and regional areas, where there are slow rates of development or development is sporadic; and established urban areas, where development is mainly "in-fill" development and is also sporadic.

## Existing or draft section 94A contributions plans

The direction issued under section 94E of the Act relates to the power to impose consent conditions relating to section 94A on development applications and applications for complying development certificates, and will prevail over the provisions of any existing section 94A contributions plan.

Where a council has in place an adopted section 94A contributions plan, it is recommended that council, at the earliest opportunity, amend the plan to reflect the changes brought about by the direction under section 94E.

Where a council has recently exhibited a draft section 94A, but has not adopted such a plan, council will need to amend the draft plan in accordance with the direction under section 94E, prior to its adoption.

## Further information

A copy of the ministerial direction is attached and updated practice notes are available from the Department's website at:  
[www.planning.nsw.gov.au/planning\\_reforms/practicenote.asp](http://www.planning.nsw.gov.au/planning_reforms/practicenote.asp)

The Department is currently updating the other practice notes on the development contributions system and these will be available shortly on the website.

### Authorised by:

Sam Haddad  
Director General

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### Important note

This circular does 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 this circular.

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## ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979

### DIRECTION UNDER SECTION 94E

I, the Minister for Planning, under section 94E of the *Environmental Planning and Assessment Act 1979* (“the Act”), direct consent authorities that:

- (1) The maximum percentage of the levy for development under section 94A of the Act, having a proposed cost within the range specified in the Table to Schedule A, is to be calculated in accordance with that Table.
- (2) Despite subclause (1), a levy under section 94A of the Act cannot be imposed on development:
  - a) for the purpose of disabled access,
  - b) for the sole purpose of affordable housing,
  - c) for the purpose of reducing the consumption of mains-supplied potable water, or reducing the energy consumption of a building,
  - d) for the sole purpose of the adaptive reuse of an item of environmental heritage, or
  - e) other than the subdivision of land, where a condition under section 94 of the Act has been imposed under a previous development consent relating to the subdivision of the land on which the development is proposed to be carried out.

In this direction words and expressions used have the same meaning as they have in the Act. The term “item” and “environmental heritage” have the same meaning as in the *Heritage Act 1977*.

This direction does not apply to development applications and applications for complying development certificates finally determined before 1 December 2006.



FRANK SARTOR, M.P.,  
Minister for Planning,  
Sydney.  
[Dated: 10 November 2006]

### SCHEDULE A

Proposed cost of the development	Maximum percentage of the levy
Up to \$100,000	Nil
\$100,001–\$200,000	0.5 percent
More than \$200,000	1.0 percent