

## Development Contributions – Practice Note

This practice note refers to Section 94 development contributions. These are now known as Section 7.11 infrastructure contributions. For more information please visit: [planning.nsw.gov.au/infrastructure-policies](http://planning.nsw.gov.au/infrastructure-policies)

## Development contributions as a method of funding public infrastructure

**The purpose of this practice note is to advise local government on selecting the best funding mechanism (or package of funding mechanisms) to provide required infrastructure.**

### Are there alternatives to development contributions?

The provisions of section 94 (s94) of the *EP&A Act* enable councils to obtain development contributions as a means for funding local infrastructure and services that are required as a result of new development. Section 94 is an efficient means of reducing the impact of future development on the provision and financing of public amenities and services as it internalises the impacts to individual developments.

While developer contributions are an essential part of funding local infrastructure, they are not the only, or necessarily always the best, funding mechanism. For example, alternatives may include:

- general rates
- special rate levies
- borrowing/loans
- grant and subsidies from state or federal government agencies
- user charges (eg entry fees)
- some combination of these perhaps coupled with contributions system funds.

The use of alternative and supplementary funding complements the funding available through the development contributions system and enhances the council's delivery of public facilities. Further, the use of such funds reduces the risks associated with the reliance on external funding for facility provision.

Councils are encouraged to pursue more innovative approaches to provide public facilities which:

- ensure more efficient use of public resources
- reduce ongoing management and recurrent costs
- avoid unnecessary duplication of facilities.

There are many facilities provided by other public authorities and the private sector which provide amenities and services to the community. These may assist in satisfying existing and future demand.

Council may also reassess the effectiveness of its own existing facilities, services and programs. Rather than seeking to fund new facilities (more of the same), it may be more appropriate to rationalise existing separate services and to manage existing facilities in a more efficient, alternative and creative

manner in order to satisfy existing as well as likely increased demand.

Some alternative approaches which may be considered also include:

- co-location of private and public facilities, community use of schools and other publicly funded facilities
- multi-use of facilities
- leasing buildings for public purposes rather than outright purchase (although this is not currently covered by s94 or s94A contributions)
- offering incentives for private sector provision (eg planning agreements, rate relief)
- examining the actual capacity of existing facilities as well as investigating alternative approaches to providing the facility through s94
- using opportunities which may arise when clubs, schools and other groups propose to build new premises or undertake alterations and additions to existing facilities.

Alternatives could facilitate the provision of amenities and services to the community, eliminate the up-front capital and ongoing recurrent cost to council (and the community) and reduce or eliminate the reliance on development contributions.

However, a council must be aware of its statutory planning obligations and the desire for transparency in any transactions. The adoption of alternatives to land acquisition will affect financial and asset management obligations. Council also needs to treat landowners fairly and respect its public obligations for land acquisition.

The following focuses on s94 as one means of funding local infrastructure, however, councils are urged to assess all alternative funding mechanisms within the contributions system as well as other alternatives prior to making decisions that may lock in a particular type of funding approach.

### Is the development contribution system appropriate?

The central question in assessing the suitability of using s94 as a public financing mechanism is whether a public facility is required to offset the impacts of development. In addressing this question, a number of matters should be resolved:

## Development Contributions – Practice Note

- what are the risks and uncertainties of the adopted projections?
- will there be growth and increased demand (as opposed to replacement development)?
- can the type of growth and likely population be described?
- can the type and capacity of existing public facilities be identified and quantified?
- can the type and capacity of required public facilities be identified and quantified?
- over what period will capital costs need to be sought?
- should full or partial cost recovery be sought?
- what financial and resource inputs are required?
- can the recurrent costs (eg repairs, maintenance) be met for the full life of the facility?
- is there the capacity to provide for the ongoing administration of the development contributions system?
- what effect will this have on other council programs, commitments and budgets?
- if supplementary grants or subsidies are to fund part of the facility, can the grants or subsidies be relied on?
- to what extent can the provision of services be made by private and non-council providers?

Council should consider each of these issues and be satisfied that on balance it is worth entering into the development contributions system. If warranted and can be justified, council should also consider the management and maintenance of the proposed public facility/ies.

Generally, these ongoing costs cannot be met through s94 but can be met through other types of contributions systems (ie other funding sources, planning agreements in some cases). Therefore, the long-term obligations of council to the operation of the public facilities must also be considered.

### What are the main considerations?

The need for a s94 development contributions plan is often greater and the demonstration of nexus more readily satisfied in areas of high growth, such as urban release areas or areas of major redevelopment. In these situations, the rate and type of development is usually more predictable and the increased demand for infrastructure is more apparent. Also, in new release areas, there is often little or no existing public infrastructure available for the new population. Nexus and apportionment are therefore more readily demonstrated.

Should the council decide to impose a condition requiring a contribution, it can only do so when there is a valid and lawfully adopted contributions plan in place which is relevant to the proposed development (refer practice note *Public exhibition and adoption*).

Where s94 is used along with other sources of funding, council must ensure that 'double-dipping' does not occur (for example, where a contribution is sought for a facility that is funded other than by s94). This is unfair and unreasonable, and could lead to a challenge to the validity of a condition of consent requiring a contribution.

While it is not always possible to secure alternative or supplementary funding, it may be appropriate for the contributions plan to include a contingency provision in case these funds eventuate. If such funds are anticipated, a decision must be made on the purpose for which these funds may be used. Most funding arrangements are specific, require up-front details, are tied to performance measures and milestones and require a demonstration that the purpose for which the funds were required has been identified.

### What can be funded under section 94?

Under the current legislation, s94 can only be applied to the capital funding of facilities. The only recurrent funding permitted is the on-going maintenance of roads where heavy vehicular traffic movements arises directly from a specific development activity such as mining. (Planning agreements do, however, allow for recurrent funding).

Capital funding means the initial one-off designed to meet the cost of providing infrastructure and include:

- the costs of land acquisition including all things necessary to bring the land into council ownership and to a standard suited for the end use
- construction and provision of facilities including all the things necessary to facilitate construction and to bring the facility to a standard that is suited to the end use.

Capital costs do not include on-going operational and maintenance costs. In limited circumstances, contributions can support the management of the contributions systems by employing staff to manage this system where the volume and turnover of contributions is sufficient to utilise large amounts of staff time. In order to ensure that this is not classified as recurrent funding, councils should specifically designate staff to this role (refer practice note *Principles underlying development contributions* for more details).

### Budgeting for future recurrent costs

While the costs of asset management and employment in provided facilities are excluded, it is important that these costs be quantified, as they will become part of the council's recurrent budget once the facility is provided. All departments of council need to be aware of the potential impact, and the

## Development Contributions – Practice Note

likely timing, of a new facility on their operational budgets at the time a contributions plan is developed. Ideally, all departments should have direct input into the drafting of the contributions plan. At the very least, all directors should sign off on the document before it is presented to the council for endorsement to exhibit.

### Innovation and unusual capital cost items

Special care must be taken in the specification of more unusual capital items. For example, a council levying for the provision of library services might seek to justify the purchase of a library bus for the various purposes of initially servicing a new area until a new library is built, for facilitating inter-library loans to maximise the availability of the collection to all users and to provide a service for users of limited mobility. In the case of a small release area, the provision of a mobile service could actually reduce the overall quantum of the contributions by obviating the need for a physical building to provide the same service.

Subject to the council's capacity to justify the need for a mobile service, the initial purchase and fit-out of this bus can be subject to a development contribution. Beyond that, all recurrent costs including fuel, water and oil, maintenance, servicing, cleaning and the like as well as the salary of the driver/librarian are recurrent costs and must be exclusively funded from sources outside the development contributions system.

### Equity and affordability issues

Social equity and affordability have been recognised in previous reviews of s94 where it was found that the extent (if any) of increase in the price of land was dependent among other things on the cyclic period of the land market. These reviews have concluded that when s94 contributions are reasonably applied, they amounted to a marginal increase which did not negate the need for such contributions.

Used appropriately, s94 also enables the timely provision of facilities which benefit new development, avoid the creation of backlogs in the delivery of services and share the cost of infrastructure equitably among the development.

However, if this is a local concern, a council may exempt certain types of development or discount the contribution rate (refer practice note *Exemptions, discounts, credits and refunds*).

### Cross boundary contributions

New provisions (s94C of the *EP&A Act*) allow one or more councils (or consent authorities) to prepare a s94 or s94A development contributions plan. These are referred to as 'cross boundary'

contributions plans as a contribution can be sought from one area and expended in another area.

This means that the boundaries of the contributions plan match the area of generated need but may bear little relevance to the boundaries of the local government areas. Two or more councils can also enter into a planning agreement.

The process of plan preparation is the same for a standard development contributions plan, however, there must be particular emphasis on the agreement between two (or more) councils on such issues as:

- the catchment areas, likely facility requirements, costing of facilities, their timing and standard
- who benefits and how
- contribution collection and sharing arrangements
- sharing of costs of delivery and management including recurrent expenditure
- loan servicing arrangements and the bearing of risk where relevant
- where the population of the new development benefit from facilities provided in one or more local government areas, how mutual arrangements are to be made.

Entering into a contractual relationship will impose obligations that must be accepted by both parties and adhered to.

The types of cross-boundary contributions plans could include:

- a release area straddling a boundary where both collection and expenditure would involve both councils
- a development which is wholly in one area but has a zone of influence into at least one other local government area. This would involve the collection of contributions by only one council but its dissemination to another council for implementation or the carrying out of a work in another council area.

Attention will be required in setting out the works program and each council's obligations and commitments so they are clear and unambiguous. Review and ongoing financial management will also be necessary.

Particular attention is drawn to s94C of the *EP&A Act* in relation to the imposition and division of development contributions received under a cross boundary development contributions plan.

## Development Contributions – Practice Note

## Principles underlying development contributions

The purpose of this practice note is to outline the key principles behind development contributions levied under section 94.

### What is the basis of section 94?

Section 94 (s94) development 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.

Unlike most user pays charges, s94 development contributions relate to the funding of community needs rather than the needs of the individual. Further, s94 charges are targeted to new development and incoming population rather than being a general tax across the whole community.

Generally, contributions can only be sought for the following:

- capital costs, including land acquisition costs
- public facilities that a council has responsibility to provide
- public facilities that are needed as a consequence of, or to facilitate, new development.

### Principles underlying section 94 contributions

Section 94B(1) of the *EP&A Act* requires that a contribution can be imposed only if a development contributions plan so authorises the council. Further, the contribution can only be imposed if it is in accordance with that contributions plan.

Section 94 contributions are based on two key concepts:

- *Reasonableness* in terms of nexus (the connection between development and demand created) and apportionment (the share borne by future development) and other relevant factors
- *Accountability* both public and financial.

#### 1. Reasonableness

The concept of reasonableness is evident throughout s94 and is the philosophy underlying the preparation and administration of a s94 development contributions plan. Failure to properly satisfy reasonableness may undermine the plan, however, what is reasonable in one case may not necessarily be so in another.

The development contributions system places the responsibility on council to determine what may be reasonable and to use s94 in a reasonable manner.

Section 94 of the *EP&A Act* expressly refers to reasonableness by:

- requiring reasonable dedication or contribution (s94(2))
- requiring reasonable contribution towards recoupment (s94(4))
- enabling a condition to be disallowed by the Court because it is unreasonable (s94B(3)).

Reasonableness comprises concepts of fairness, equity, sound judgement and moderation. The two key principles underlying reasonableness are *nexus* and *apportionment*.

#### Nexus

Nexus is the relationship between the expected types of development in the area and the demonstrated need for additional public facilities created by those developments. The requirement to satisfy nexus is one of the core components of a valid development contributions plan and is a specific requirement of clause 27(1)(C) of the *EP&A Regulation*.

The link between the proposed development and the increased demand for public facilities has often been referred to in terms of causal nexus, spatial nexus and temporal nexus. However, these are concepts that are often blurred between each other and with other principles underlying s94 (eg accountability). Further, they often do not relate to a particular facility that is subject of a contribution.

For example, a council may wish to construct a new aquatic centre within the local government area. This facility may provide for all residents in the local government area, and not every future resident is going to live close to it (nor will they probably expect to do so). There is no need to consider a "spatial" element in this sense as it will generally be accessible to all (existing and future) residents and its spatial relationship to future residents is not an issue.

On the other hand, a local park that provides for local recreation needs (eg a children's playground) does need to be in close proximity to users to encourage use and to minimise the need for car travel. But a development contributions plan may contain a number of local playgrounds that will provide for the demand and all may not be in close proximity to every person that makes a contribution. Again, there is no need to discuss this in terms of

## Development Contributions – Practice Note

“spatial” nexus – it is simply part of the nexus and reasonableness test. Provided that a connection can be made between the demand created and the facilities provided, the tests are satisfied.

In addition, some facilities that a council may provide could require a certain threshold for viability, and such a threshold may exceed the time that has previously been determined as ‘reasonable’ (ie often 5 years).

This is not to say that a council should be tardy in the provision of facilities (since this would be unreasonable in itself). Rather, the concept of nexus should be discussed in terms of:

- whether the anticipated development actually creates a need or increases the demand for a particular public facility
- what types of facilities will be required to address that demand
- whether existing facilities are suited to providing for that demand (or a component of it)
- when they are provided to meet the demand of the development (ie thresholds or timing).

Reasonableness will also relate to whether existing facilities have spare capacity to accommodate future demand. These issues are addressed in more detail in the practice note *Relationship between expected development and demand*.

### Apportionment

Apportionment is a tool to arrive at the correct nexus to ensure that a charge under s94 only ever reflects the demands of development and not other demands.

In many cases, new facilities may satisfy demands beyond those of the contributing development. That is, satisfy demand that is existing. While it is quite acceptable for a council to provide facilities that will cater to existing and future demand (and are encouraged to do so), the proportional needs of the existing population must be quantified and taken into account when calculating a s94 contribution.

While new development might provide the impetus for providing a new facility or upgrading an existing facility, where existing demand is satisfied, apportionment must be considered.

The concept of apportionment relates to the process which seeks to isolate demands to ensure that the contributing population only pays for its share of the total demand. For example, an indoor sports facility fully funded by s94 (ie no apportionment to account for existing demand) would be unreasonable if there is no such facility within the local government area and there is clear

demand by the existing population for such a facility.

Existing demand for a facility may extend beyond the local government boundary. Regional facilities, such as sports stadia, should not be fully funded under s94 nor should s94 be a majority proportion of the funding (unless a joint plan is prepared where such facilities are clearly justified). Development contributions plans should clearly demonstrate that apportionment has been undertaken in arriving at the final contribution rate.

The approach and rate of apportionment will vary in each circumstance. The critical tests are that the system of apportionment is:

- practical
- fair/equitable
- based on relevant information available at the time
- reasonable in the circumstances
- publicly accountable and transparent.

Full cost recovering (ie 100% apportionment to new development) can only be used where the public facility is provided to meet the level of demand anticipated by new development only and there is no facility or spare capacity available in the area. If the proposed public facility satisfies not only the demand of new development, but also some regional demand, demand by people from outside the area, or makes up for some existing deficiency, only the portion of demand created by new development can be charged.

More detail on apportionment and examples are provided in the practice note *Relationship between expected development and demand*.

### 2. Accountability

One of the key issues with accountability in relation to reasonableness relates to completion of the works program adopted by a development contributions plan and the time in which a facility is provided. Although amendments have removed the references to provision of facilities in a “reasonable time” (except in relation to land dedicated for a particular purpose), it remains incumbent upon a council to ensure the facilities meet the needs of a development.

The time for the provision may be expressed as a threshold being achieved (such as a nominated population or floorspace) and need not specify dates. It must nonetheless, be clearly determined by sound projections.

Thresholds of provision may be more appropriate than nominating a specific date for the delivery of a particular public facility. This approach may be particularly relevant where the rate of development

## Development Contributions – Practice Note

is slow or erratic. Thresholds provide a greater degree of flexibility in the development contributions plan while specifying the trigger for the provision of the facility.

The works schedule included in the development contributions plan must specify the likely timing for the provision of the facility based on the anticipated receipt of contributions and the satisfaction of the demands of the population. It is not essential for all contributions for the facility to be collected before it is actually provided. A development contributions plan may adopt a flexible approach to enable provision based on demand for facilities (eg through prioritising of works and borrowing funds).

When contributions have been taken and further development is delayed for an extended period, yet the threshold not reached, council may consider:

- “pooling” of funds – refer clause 27(1)(h) of the *EP&A Regulation* which allows borrowing between section accounts.
- the use of other capital funds to supplement the s94 fund (eg borrowing or general revenue), which may be recouped and repaid through future contributions (including interest)
- reviewing the priority of the proposed facility and amending the works schedule accordingly
- reviewing the need for the proposed facility which may lead to an alternative (perhaps interim) approach to satisfy the demand or abandonment of the proposed facility (refer practice notes *Life of a development contributions plan, review and amendment* and *Public exhibition and adoption*).

Councils are advised not to hold contributions for an extended period but rather to pool funds wherever possible to allow facilities to be provided to meet demand.

### Are there any exclusions from section 94?

There are some specific exclusions from s94 which are discussed below, other restrictions on s94 include:

- it cannot be used for recurrent funding (except for road maintenance costs)
- it cannot be used for planning studies (other than those which directly result in a development contributions plan)
- it generally cannot be used for ongoing administrative costs.

### 1. Crown development

The current limitation on imposition of levies on Crown developments as outlined in *Circular D6 – Crown Development Applications and Conditions of Consent* remain in force. However, this is the

subject of review and a practice note will be issued on this topic after this review.

### 2. Water supply, sewerage and drainage services

The specific references to water supply and sewerage services being excluded under s94 remain and councils should not seek contributions under s94 for these services (refer s93C of the *EP&A Act*). Council can require developers to undertake works or to pay part of the whole cost of these works using the combined authority under s64 of the *Local Government Act 1993* and Division 2, Part 3 of the *Water Supply Authorities Act 1987*. Guidelines issued by the former Department of Land and Water Conservation also note that stormwater and drainage services may be levied under these Acts and, consequently, can also be excluded from s94 contributions if a council wishes.

## Development Contributions – Practice Note

# Purpose of a development contributions plan

**This practice note explains the basis of a section 94 development contributions plan and key objectives that should be considered when setting out the purposes in the plan.**

### What are the requirements for a contributions plan?

The *EP&A Act* and *EP&A Regulation* require that a development contributions plan identify the purpose of a contributions plan [clause 27(1)(a)].

A development contributions plan:

- is a public document which displays the council's policy for the assessment, collection, expenditure and administration of contributions
- provides the legal mechanism by which councils may impose a condition of development consent requiring a monetary contribution, dedication of land or both pursuant to section 94 (s94).

The records, accounts, registers and annual reports, which are required to supplement the contributions plan, demonstrate council's performance in the management, monitoring, accounting and administration of development activity. These should also be informed by the basic purposes of a plan.

### Purposes within a development contributions plan

The purpose of the development contributions plan sets out the principles underlying the plan and the manner in which council is to seek contributions. They should be included in the front of a plan, and be simple and succinct to clearly convey why a council has prepared a plan.

The objectives should not be lengthy nor be overly complex to avoid confusion as to intent. Just as the aims and objectives of local environmental plans provide the basis for zoning and development control, the *purpose* of a development contributions plan is to outline objectives of how the funding and provision of specific public facilities strategies will be implemented and coordinated.

### What are the main considerations?

Some of the key issues that should be taken into consideration in setting the purpose of a plan are:

- the plan authorises council, when granting consent to development applications or the issuing of complying development certificates, to impose conditions under s94 of the *EP&A Act* requiring the payment of monetary

contributions or the dedication of land or both. *It should specifically mention this as an objective to make the authorisation clear*

- the plan is essentially an administrative framework under which the funding and provision of specific public facilities strategies will be implemented and co-ordinated. *It must be specific about how the council will administer the contributions process and funds*
- it is the basis upon which public facilities can be provided to cater to the demand generated by new development. *The plan should clearly identify the purposes for which facilities are to be provided*
- the plan provides a strategy for the assessment, collection, expenditure accounting and review of development contributions on an equitable basis. *It should cover all these issues*
- the plan demonstrates that a council is publicly and financially accountable in its assessment and administration of the contributions plan.

The basis of a section 94 development contributions plan is that it must be reasonable. The purposes should set out how council is to comply with this requirement by indicating how it has identified and addressed nexus (demand), and apportionment.

The template for the section 94 development contributions plan contains examples of how these matters can be addressed.

## Development Contributions – Practice Note

## Application of a section 94 development contributions plan

The purpose of this practice note is to advise councils on the definition of an appropriate area for a section 94 contributions plan.

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

The *EP&A Regulation* requires that a contributions plan state the land to which it applies [clause 27(1)(b)]. This effectively requires the plan to define the areas or catchments within which facilities are to be planned.

A development contributions plan may be prepared by a council for the whole or part of the land within the council's area. A development contributions plan may also be prepared by two or more councils for the purpose of enabling contributions to be required for the benefit of adjoining areas (refer section 94C of the *EP&A Act*).

Where a contributions plan does not apply to the whole of a council's area, it may be useful for the land to which the plan applies to be defined by reference to a map.

### What is a catchment?

Many section 94 (s94) plans operate using catchments and the definitions of catchments can vary depending on the purpose of the plan and the facilities it covers.

For example:

- a catchment may mean a geographic area that will incorporate the population – both existing and future – from which the major demand for a facility or service will be created. This could be a greenfield development area, an entire local government area or a combination of local government areas
- a catchment may also have physical geographic boundaries. For example, while new or additional road infrastructure may be required because a residential/commercial population is moving into a former predominantly rural or industrial area, the design of that road infrastructure must relate to logically identifiable physical features of the landscape
- a catchment may also be wholly or partially defined by a social barrier such as a railway line or a major highway, which in practice, affects the ability or inclination of a resident population to access services on the other side. This may be

due to limited crossing points increasing the distance, a lack of cross-suburban transport options or simply a perception of an impediment. For example, a population may identify with a centre which is further away but easier to access.

### What should be considered in defining catchments?

Catchments should be of a sufficient size to promote efficiency in the timing of the provision of infrastructure. Generally, the smaller the catchment, the greater the difficulty in accumulating sufficient contributions to enable works to proceed and the greater the potential for increased complexity in the management of any internal borrowing.

Catchments should be defined, as far as is practical and equitable, to minimise the proportion of external users of the infrastructure. This means the demands from outside the catchment area must be accounted for through apportionment. Sometimes this is unavoidable, however, a primary consideration should be to define a catchment to reflect the demand arising from future growth.

Although the *EP&A Regulation* does not require that a map showing the area of application of a plan, it is good practice as it ensures that there is no question as to the area where contributions are levied.

However, new provisions do require a map to be included that delineates the specific public amenities and services proposed to be provided by the council [clause 27(1)(g)]. It is therefore vital that the map is accurate and at a scale that clearly shows the boundaries of the area(s) that the plan applies. There have been many instances of disputes over land being within or outside a catchment due to poor mapping. Mapping therefore should not be an afterthought (refer practice note *Works schedules and mapping*).

### Are there specific considerations in setting catchments for a section 94 plan?

A s94 contributions plan will include a range of differing categories which may have catchments that also differ. For example, local open space catchments may be specific to a certain planning area while open space catering for widespread use

## Development Contributions – Practice Note

(eg structured open space such as sports facilities) may have the entire local government area as the catchment.

It is important for council to set out the catchments to which a contribution will apply as a contribution may not be able to be charged for development outside this catchment (even though it may create demand). Consequently, the research and investigations that should be undertaken during the plan making process are extremely important. Accuracy of mapping of facilities is also critical to ensure there is no debate about catchment coverage.

### **What are the considerations for a cross boundary plan?**

Section 94C allows a cross boundary (joint) development contributions plan to be prepared by one or more councils. Setting catchments and defining the area to which a cross boundary plan relates is dependent on the types of demand that are identified in each or all of the areas to which the plan will apply.

Considerations for the establishment of a cross-boundary catchment based plan include:

- does the area to be released for development (rezoned) cross a local government boundary?
- does the area of influence of the new development cross a local government boundary?
- will the population of the new development benefit from facilities provided in one or more local government areas in advance of the release of the development area?
- do other cross-boundary relationships exist (eg inter-library loans, garbage servicing arrangements)?
- can both councils agree concerning the works programme and the investment and timely expenditure of the contributions?
- what management and maintenance agreements need to be made in respect of the infrastructure provided?
- can both councils agree concerning loan servicing arrangements and the bearing of risk?
- in the event of a challenge to the plan, how are legal expenses to be paid?

The matters that should be taken into account in preparing a s94C cross boundary plan are the same as those for a s94 contributions plan, including all the requirements of the *EP&A Regulation*.

## Development Contributions – Practice Note

## Relationship between expected development and demand

The purpose of this practice note is to advise councils on the methods to determine demand for the purposes of demonstrating reasonableness for a section 94 development contributions plan.

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

The *EP&A Regulation* requires that a section 94 (s94) development contributions plan identify the relationship between the expected types of development and the demand for additional public amenities and services to meet that development [clause 27(1)(c)].

This is the first step in determining contributions and, consequently, a significant consideration given the reasonableness of a plan is founded on the assumptions and projections that determine that relationship.

The identification of the relationship between expected development and demand requires an assessment of:

- the makeup, spatial distribution and timing of growth that will be encountered in the catchment area(s) in the planning horizon (**growth and development**)
- the current levels of provision of public amenities and services in the catchment, and the needs of the future residents in this catchment (**nexus/demand identification**).

### How council should identify the “relationship”?

The main aim when assessing growth and development is to ultimately determine the demand that is to be generated by an incoming population. This requires focus on:

- overall **population change** in the planning period
- the implications of **demographic change** (eg trends for children, young people, mature people, older people) and changes in the way people **use and occupy** housing (eg household formation rates, occupancy rates)
- the extent of **land capacity and availability**, whether this is likely to be developed or redeveloped, how much development this will yield and what type of development will result

- changes to **zoning and development controls** that apply to land where this may create additional population
- the implications of development of **employment areas and lands** which could lead to a larger workforce in the area
- **participation rates** for various activities (eg recreation, community facilities/ life cycle stages of the new population).

A s94 plan should distil information from these and other relevant data sources to clearly and succinctly identify the types of likely development to occur in the area. This will permit judgements to be made about the demand that will be created. There is no need to present information that is not relevant to identification of demand.

The information which may assist council in the analysis of the existing and anticipated population, includes:

- **census data** (available from the Australian Bureau of Statistics in various formats which allows the data to be analysed and presented in specific formats)
- user or participation **surveys** undertaken for various public facilities such as recreation or community facilities
- **social plans** and other demographic analysis local residential studies
- area of land **zoned** for development of a particular type
- land **ownership** patterns (large areas of land held in single ownership may be more easily redeveloped).

The demand assessments will have identified the facilities that are required for the incoming population. The link between that demand and the facilities required include consideration of whether new or upgraded facilities are required, and the extent to which existing demand needs to be taken into account (apportionment).

It is only after demand and apportionment have been considered that the “relationship” can be finally established, and the specific requirements of the *EP&A Act* and *EP&A Regulation* are satisfied.

## Development Contributions – Practice Note

### How to set up a works program to cater to demand

Translating population growth and demand, into a works program is one of the most important stages of the preparation of a s94 plan.

A works program is a function of the population and development analyses, demand assessment, and determination of categories of facilities required for the incoming population. It is a critical component of a contributions plan as it essentially locks council into the provision of these facilities. It is therefore a task that is best done in a multi-disciplinary environment within a council (see also practice note *Financial management of development contributions*).

The type and extent of required facilities may be determined by:

- the **anticipated development** (ie the type of development and the characteristics of the incoming population)
- the **spare capacity** in existing facilities (including those owned and operated by other authorities and private organisations)
- the **types and extent of public facilities required** to satisfy the anticipated demand
- The **apportionment** that is required between existing and future development.

Additional guidance on facility planning can be found in the practice note *Template for a section 94 development contributions plan* as well as other relevant documents that provide functional planning guidance (eg *Outdoor Recreation and Open Space: Planning Guidelines for Local Government, Department of Urban Affairs and Planning, 1992*)

Section 94 facilities should not be a 'shopping list' of desirable items based on development opportunity. Justification of facilities and the level of provision must be based on the demands generated by the future population. The test of reasonableness must be applied to a works program (refer also practice note *Principles underlying development contributions*).

Standards of provision should generally not be at odds with those prevailing unless clearly justified. If council decides to provide a facility at a higher standard than that which currently exists in the area the plan must:

- clearly state the current and proposed level of service
- show why the anticipated development creates a demand for the proposed level of service.

A council must explain in the plan the assumptions and policy adopted, why they are considered appropriate, and reference the source of information.

The works program should:

- be a genuine evaluation of the needs of a projected population
- be realistic and achievable
- identify costs that are accurate
- be specific about the facilities that are to be provided and not adopt 'generic' categories for facilities (eg 'road upgrading')
- take into account grants and contributions received by other means
- show how the facilities that are to be provided are to be delivered
- show the timing or thresholds for facility provision
- show the apportionment (where relevant) for any facilities.

The analysis of demand and determination of facility requirements will often be a balance between augmentation of existing facilities and supply of new facilities. It is quite acceptable (and encouraged) for councils to make optimum use of existing facilities to cater to future demand. However, s94 should not be used as a mechanism to cater to existing unmet demand.

Development Contributions – Practice Note

# Determining rates for different types of development

**This practice note provides guidance on the manner of setting section 94 development contributions for different development types.**

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

The *EP&A Regulation* requires that a development contributions plan contain formulas to be used for determining the section 94 (s94) contributions required for different categories of public amenities and services [clause 27(1)(d)]. In addition, the *EP&A Regulation* requires the s94 contribution rates for different types of development to be shown in a schedule to the plan [clause 27(1)(e)].

**How are contributions formulated?**

A s94 development contribution is essentially the conversion of a works schedule into some common base such as a “per person” or “per lot” rate. This then allows a council to advise applicants of the contribution applicable by type of development (whether residential, commercial, industrial or some other form of development). Any applicant or member of the public should also be able to readily calculate a contribution for any type of development.

Formulas are at the heart of a contribution and they are required to show how a contribution was derived to ensure transparency. The underlying principle is that the manner by which the standard base has been derived should be clear.

There have been many instances where formulas have been poorly drafted with adverse consequences. Consequently, they should be prepared by a person that understands how the formulas are to be used and should ideally be verified by another person/s. This is particularly important where a cross boundary plan is being prepared.

At its simplest, the contribution rate is a function of the total cost of the facilities divided by the demand for those facilities multiplied by the apportionment factor.

$$\text{Contribution} = \frac{\text{Facility cost (\$)}}{\text{Demand}} \times \text{AF}$$

(Note: AF = the apportionment factor)

The “demand” in the above formula may be on the basis of the number of lots in a catchment, the total population a facility will serve, the floorspace that will result from a rezoning or the total traffic generated by new development.

As the rate of contribution for a particular type of facility could be arrived at using differing methods (ie lots, persons), the particular method employed must be shown clearly.

**How is existing demand treated?**

In many instances, a council will be augmenting new facilities or providing new facilities, a proportion of which may cater to the demands of the existing population.

This is quite acceptable, however, in these cases, a suitable apportionment will need to be used to make allowance for this demand and to ensure that future development is only paying its fair and reasonable share (refer practice notes *Principles underlying development contributions* and *Relationship between expected development and demand*).

The apportionment factor in the above formula is the means to achieve this end and the relevant apportionment rate must be determined on a case by case basis. For example, in some instances there will be 100% apportionment to new development where the facility is provided to cater only to the demands of future development. In other instances the apportionment factor may be less depending on the extent to which existing demand is being satisfied (that is, there may be apportionment between existing and new demand).

The total costs of the facility should only be the costs to the council and should therefore not include any specific (or tied) grants that have been provided by other sources to fund the facility. This, however, does not apply to grants received by the council that are untied and not specific to a particular facility.

**What type of rate is being used?**

The basis of a contribution is the demand that is created. Essentially, demand arises from population and development growth, however, these may manifest in a number of ways such as in the need for human or physical infrastructure.

To make allowance for these differences, there are a number of different bases that may be used, the most common of which include:

- a “per person” or “per lot” contribution rate
- a “square metre” rate.

A contribution may also be expressed in many other different ways depending on the way the demand is expressed (and assessed):

## Development Contributions – Practice Note

- per dwelling
- per lot
- per worker (for industrial, commercial, tourist and other non-residential forms development)
- per room or key (for tourist facilities)
- per car space (for public car parking facilities required in commercial/business/shopping centres)
- per metre of road frontage (for all types of development).

Arriving at a contribution (whichever base is used) is a relatively simple matter of using the rate to determine the end contribution by development type through a conversion factor. This will vary depending on the base selected.

### How is the contribution calculated on a per person basis?

There are various methods to identify demand by population, however, the most common method is for a council to either use a population projection or establish the population or development yield from a release or redevelopment area. This will give a total number of “persons” for the formula.

Once the demand assessments are undertaken, and a works schedule costed, the derivation of the per person rate can use the basic formula noted above.

By way of example, for a works program of \$10 million uniformly serving an end population of 10,000 with 4,000 existing residents in the area (ie 6,000 incoming population), the apportionment factor is:

$$\begin{aligned} \text{AF} &= \frac{6,000}{10,000} \\ &= 0.6 \end{aligned}$$

The new population is therefore responsible for \$6 million of the works program (ie \$10 m x 0.6) while council commits to funding \$4 million to cover demand by the existing population. To arrive at the per person rate contribution for new development, and using the model formula set out earlier, the contribution is as follows:

$$C = \frac{\$ \text{Facility cost}}{\text{Demand}} \times \text{AF}$$

thus,

$$\frac{\$10,000,000}{6,000} \times 0.6 = \$1,000 \text{ per person}$$

The base rate can then be converted into a contribution for each development type such as a residential dwelling (see below).

### How is the contribution calculated on a floorspace basis?

Contributions based on floorspace follow the same principles as that for population.

As an example, if the council has determined that a new employment area will create 20,000 square metres of floorspace which will require \$10 million in road works and traffic management facilities, the contribution for traffic management facilities will be:

$$\frac{\$10,000,000}{20,000} \times 1.0 = \$500 \text{ per m}^2$$

Again, the contribution can then be converted into a rate by development type. The apportionment factor is 1.0 as all of the works are the responsibility of new development and there is no apportionment between existing and new development.

### How is a contribution set for different development?

Different development generates differing demands. For example, residential development in a release area will generate demand for a variety of facilities including human services (eg community facilities, recreation) or physical services (eg roads and traffic management facilities).

A contribution, then, for this residential development will be made up of various categories according to this demand. That may include community services (community centres, libraries, etc), open space, roads, traffic facilities and so on. The overall contribution is thus the aggregation of the contributions from these sub-categories.

Where a contribution for, say, community facilities is set at a “per person” rate, it will be necessary to convert this into a contribution for a dwelling in the example above. This is achieved by the use of standard occupancy rates that will be set out in the plan.

For example, the occupancy rates published by the Australian Bureau of Statistics for a certain local government area may historically be 1.3 persons per one bedroom dwelling, 1.8 persons per two bedroom dwelling and 2.5 persons per three bedroom dwelling (or allotment). Through research, council may establish that these occupancy rates will continue at the same rate for at least the next 5 years.

The conversion of the “per person” rate is simply a multiplication of the **contribution** per person by the prevailing **occupancy rate** for different types of dwellings or lots within the catchment area.

## Development Contributions – Practice Note

So, if a contribution for community facilities is \$1000, application of the above occupancy standard would result in the following contributions for the various dwelling types:

- in the case of a one bedroom dwelling: \$1,300 (ie \$1,000 x 1.3)
- in the case of a two bedroom dwelling: \$1,800 (ie \$1,000 x 1.8)
- in the case of a two bedroom dwelling: \$2,500 (ie \$1,000 x 2.5)
- if the “standard” occupancy for a detached dwelling is 2.5, then each new allotment can also be charged \$2,500.

This can be repeated for any dwelling or allotment type as long as the occupancy is adopted in the contributions plan.

For the example above of the commercial floorspace where the contribution was \$500 per square metre, the contribution for a new development of 2500 square metres, would be:

$$2,500 \times \$500 = \$125,000$$

### How are employees and workers treated?

There are often debates about whether new persons who both live and work in the area should be counted as both residents and workers for the purposes of levying a contribution. This largely arises with commercial and industrial development applications since the new residents are likely to have already paid a contribution. The extent of the issue depends on the circumstances.

For example, in a country centre, a large proportion of the new workforce may also be new residents. In this circumstance, it would be unreasonable for the contributions plan to assume that they both create the same level demand since the demand overlaps or coincides. There may be some validity in a contribution for civic centre works where the demand for works are from only employees.

In an urban suburb, the proportion of people who both live and work within the same local government area may be less. In these instances, the matters council should consider in applying any discount or similar weighting include:

- whether a weighting is already applied to ensure residents and workers are appropriately sharing the cost of infrastructure provision
- whether a weighting should be applied to differentiate between residents who are not in the workforce and employed residents (the labour force)
- that a resident who works in the area has an opportunity to use facilities during the day, before and after work, that a commuter does not

- that a worker who also lives in the area, is more likely to use facilities on weekends than a worker who lives in another area
- that the reduced time spent in commuting provides additional leisure time.

Councils should ensure that contributions are not seen as a means to upgrade existing centres through contributions. If a council wishes to apply contributions in such situation, it may be more beneficial to apply the s94A flat rate levy which does not require such judgements to be made.

## Development Contributions – Practice Note

# Works schedules and mapping

**This practice note provides guidance on the information in the works schedule and mapping that is required to be included in a development contributions plan.**

### What is the intention of inclusion of works schedules and mapping?

The *EP&A Regulation* requires that a development contributions plan contain a map showing the specific public amenities and services within the plan, supported by a works schedule that contains an estimate of their cost and staging [clause 27(1)(g)].

The intention of these new provisions is to ensure that development contributions plans provide sufficient information that clearly conveys the council's intentions for the provision of facilities and services the subject of contributions.

### What form should a works schedule take?

There is no prescription in the *EP&A Act* or *EP&A Regulation* on the form of the works schedule to provide sufficient latitude for councils to present the information that is relevant to their area.

However, good practice suggests that the following should be included in the works schedule:

- the **category** of public facility that is included in the development contributions plan. That is, whether it is for community facilities, open space, roads or other similar type of public facility
- the **name** or **location** of the particular facility that has been provided, or is being proposed for provision of upgrading. "Generic" names should not be used (eg community facility upgrading) – they should be specific (eg "Smith Street community facility")
- the **cost** of the works – this should again be specific to the facility that is being provided (eg "Smith Street community facility - \$50,000"). In the case of a section 94 (s94) development contributions plan, the schedule should indicate whether the costs are inclusive or exclusive of apportionment
- the **timing** proposed or the **thresholds(s)** being used as the measure for provision (eg "2006/07 or "when population of 3,000 achieved").

Additional notes to the works schedule are encouraged to provide more details of the works and to refer the reader to other relevant sections of the development contributions plans as necessary.

### What form should the maps take?

Again, there is no prescription in the *EP&A Act* or *EP&A Regulation* on the form of the maps that are to be provided in a development contributions plan.

The rationale behind the inclusion of mapping should be that, together with the works schedule, it should inform the reader of the location of the facilities that have or will be funded by the contributions, and their likely timing. This will make the process more transparent with the added advantage that it will encourage a more complete understanding of the benefits of contributions in facility provision.

The type of mapping to be provided should include:

- maps showing the **catchments** for the various types of facilities being provided and the **area of application** of a plan. In many instances, these may be the same, however, if there are differences they should be shown
- maps showing the **locations of specific facilities** (eg open space, community facilities) together with the names of the facilities
- for **cross boundary plans**, the maps should clearly show the catchments within each local government area and the individual facilities that are to be provided by each council party to the plan.

The principles behind the creation of the mapping to be used should be that:

- it is of a **scale** that allows reference to key features such as roads and natural features
- it should have clear **text** showing features and facilities, and should be readable
- it should have a **key** showing differentiation between the types of facilities being provided
- provision of mapping with **aerial photography** is encouraged for clarity, and the use of **Geographic Information Systems** for mapping is encouraged for planning and asset management purposes.

Where the location of a facility cannot be provided accurately (eg in a new release area), the criteria for inclusion of the facility should be included in the mapping. For example, the location of a community facility may be being planned for a town centre and this is not yet finally determined.

Any changes to the mapping will necessitate the need for a review of the plan and public exhibition.

## Development Contributions – Practice Note

## Public exhibition and adoption

**The purpose of this practice note is to provide guidance on the exhibition and adoption of a development contributions plan under section 94, and the administrative consequences. It also discusses community consultation within the plan making process.**

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

The *EP&A Act* and *EP&A Regulation* set out the process for making development contributions plans (refer section 94EA of the *EP&A Act* and Part 4 of the *EP&A Regulation*).

The following sets out the requirements of the *EP&A Act* and *EP&A Regulation* in relation to plan making, but also provides suggestions on making the process for the preparation and adoption of a development contributions plan more inclusive and transparent to the public.

### Consultation procedures during plan preparation

Clause 28 of the *EP&A Regulation* requires council to publicly exhibit the plan and seek submissions from the public on the plan. These are minimum requirements for a council to follow and consideration should be given to other forms of consultation during the plan preparation process including:

- community information sessions, survey and other consultation mechanisms
- consultation with key stakeholder groups in the area such as local developers, chambers of commerce and business groups
- provision of information through web based tools and in convenient locations such as public libraries.

### Consultations with the community

One of the key requirements of a development contributions plan is to assess demand for a range of services of the incoming population. One of the investigations a council should make is the potential capacity of existing facilities to accommodate some (or all) of this demand. Community consultation is an ideal means of assessing the existing capacity of facilities as well as a means to understand potential changing needs of a community.

Depending on resources and circumstances, a council may wish to:

- undertake community consultation sessions to more fully understand current needs and expectations. This may be especially important in new development areas (either greenfield or

brownfield) where some people have moved in but further capacity for development remains

- undertake community surveys – such as open space or community facility needs – to identify current user patterns and current levels of provision/use
- discuss the community's expectation as to what facilities should be planned for to complement or enhance existing community facilities.

However, it is stressed that section 94 (s94) should not be used to make up for existing deficiencies in the local government area nor to provide for the needs of current residents (unless apportionment measures are used).

Follow up information to the community, particularly following a survey, workshops or focus groups, is useful to let people know what has developed from information provided. Councils will be aware of the best methods of communicating with their community from newsletters, local newspapers, and the council's internet site or including brochures in the annual rate notices.

### Formal consultations with developers

In both greenfield and brownfield areas, the major local developers are likely to be known to the council. Consultations should, ideally, occur early in the preparation phase of a development contributions plan facilitating a shared understanding of the likely infrastructure requirements and costs and potential for works in kind.

Alternatively, consultation, or further consultation, could occur prior to the plan being placed on exhibition.

### Public exhibition processes

The *EP&A Regulation* requires that council must:

- give public notice in a local newspaper of the places, dates and times for the inspection of the draft development contributions plan (clause 28(a))
- publicly exhibit a copy of the draft development contributions plan and a copy of any supporting documents
- exhibit the draft development contributions plan for a period of at least 28 days (clause 28(b))

## Development Contributions – Practice Note

- make available copies of the draft contributions plan and supporting documents to interested persons (clause 29).

Any person may make a submission on the draft development contributions plan (clause 30). Council should review all submissions thoroughly and make an assessment as to whether the submission has merit and, if so, whether there is a need for review of the exhibited draft plan. Council should assess whether any such amendments are likely to have any impact on the level of contribution (either increase or decrease) or the manner in which the contributions are set (eg how they apply to specific development).

Where there are likely to be significant changes to the quantum of the contributions or the manner in which they are set in the draft plan, council should consider the need for exhibition of these amendments.

Having considered these submissions, council may then:

- approve the plan as exhibited (clause 31(1)(a))
- approve the plan with alterations it considers fit (clause 31(1)(b))
- decide not to proceed with the development contributions plan (clause 31(1)(c)).

Notice of council's decision should be made in a local newspaper (that is, either a decision to proceed or not proceed with the plan) within 28 days (clause 31(2) & (3)). The development contributions plan comes into effect from the date of public notice or such other date as nominated in the notice (clause 31(4)).

### Operational considerations following plan adoption

There is a range of matters that council needs to consider once a plan is in force:

- ensuring administrative requirements relating to the notification of a plan's effect are implemented
- day to day administration such as establishment of trust accounts, management, monitoring and review mechanisms.

These will vary particularly if the plan is a new one (see also practice note *Financial management of development contributions*).

### Section 149 notices and conditions of consent

A certificate issued under section 149 of the *EP&A Act* should identify the name of each development contributions plan applying to the land.

Council will also need to ensure when drafting conditions of consent that they specifically refer to

the new development contributions plan by title and date.

### Making plans more accessible

Many councils place their entire plans on their internet site to enable easy access. Councils should also consider the use of "contributions calculators" which are tools to allow any person to calculate their s94 liability. These should be user-friendly and should require only basic input data – being the details of the proposed development and the details of the existing development – to enable a quote. Calculators should be available on council's internet site.

Council's internet site usually contains information concerning many facilities and features of the local government area. A small extension of this would enable the funding sources of a facility to be disclosed to the community. Alternatively, the internet site could have a regular feature showcasing new or improved facilities and civil works.

Council should also make copies of all plans available at council offices for purchase.

## Development Contributions – Practice Note

## Life of a development contributions plan, review and amendment

The purpose of this practice note is to advise councils on considerations for determining an optimum length for the life of a development contributions plan, and when to review and amend a plan.

### What are the key concepts?

As with many other factors in the management of the development contributions system, the life or the horizon of a development contributions plan needs to be tailored to individual circumstances. It is not uncommon for a plan to be amended on a number of occasions through its life to make allowance for changed circumstances or to ensure that financial management is sound. There is also a requirement to update the contribution rates in a plan to keep pace with inflation and land value changes.

The difference between the life of a plan, the amendment of a plan and its review is discussed under the following headings:

- the **life of a plan** - refers to the length of time over which future growth and demand identified within the plan is projected, or which is identified in the plan itself
- **amendment of a plan** - is the process of changing the plan without the requirement for repeal (refer clause 32(3) of the *EP&A Regulation*).
- **review of a plan** - is the periodical review which may or may not extend the life of the plan, and which leads to the repeal of the plan (refer clause 33A(1) of the *EP&A Regulation*).

These concepts are discussed below.

### What is the life of a development contributions plan?

The life of the development contributions plan will be dictated by the extent of growth or the population projections it contains. However, councils should not attempt to make too long a projection as this can lead to substantial error. Quite often, plans adopt a planning horizon of 10 to 15 years with a commitment to review at least every five years. Where an area is growing very rapidly there may be a need for more regular review.

The chief factors for consideration in the life of a development contributions plan are:

- what long range planning is required for major items of infrastructure?
- what is the life cycle of a development area and of the facilities that are being provided?

- can the short and long-term population and lot/dwelling projections within the plans projections be relied upon or should there be a regular review?
- what is the relationship with local environmental plans (LEP) and development control plans (DCP) such as development potential, and are there any programmed reviews of these instruments which may affect the underlying assumptions within the plan?
- is the relationship with underpinning studies such as social plans and open space strategies likely to change, or are new studies likely to reveal additional information?
- are the rolling capital works program sustainable and in conformity with councils wider management planning?
- are there cash-flow implications arising from the works program (ie surplus/deficit) that need reconsideration?

### Amendment of a contributions plan

Clause 32(3) of the *EP&A Regulation* sets the parameters for amendment of a development contribution plan. A council is not required to prepare a new contributions plan if the amendment is for:

- making minor typographical corrections (clause 32(3)(a)). This should be contingent on such changes not changing the quantum of the contribution or the manner in which it is imposed
- updating contributions rates in accordance with indices adopted by the plan (clause 32(3)(b)). It is noted that the plan **must** set out these indices to enable the amendment to be valid (refer also to the practice note *Adjustment of section 94 development contributions*)
- omitting completed works (clause 32(c)). This is important as it avoids confusion when the plan is reviewed and also demonstrates the progress a council is making on achievement of the works program.

Typographical errors and omission of completed works will generally require council to publish a new plan, however, the updating of works within a plan

## Development Contributions – Practice Note

can be undertaken by council publishing these separately.

### Review of development contributions plans

There are new provisions for review of a contributions plan:

- clause 32 of the *EP&A Regulation* outlines the requirements for repeal of a contributions plan
- clause 33A(1) of the *EP&A Regulation* requires a council to keep a development contributions plan under review. If a date by which a plan is to be reviewed is stated in the plan, council is to review the plan by that date

The triggers for the requirement to prepare a new development contributions plan include:

- if the works program within the plan is to be amended (apart from the removal of items that are complete) which may have consequent impacts on contributions such as increasing the levels or changing the proportional responsibility for provision (apportionment)
- if the basis of the plan is to be changed such as the base population in an area, occupancy rates, standards of provision, timing of delivery
- if the catchment area is to be changed. This may be the result of a boundary change to a local government area or be necessitated for function reasons
- if, in the case of a joint contributions plan, one or both councils propose any of the above.

As the reviewing of a plan is done by way of a new contributions plan, the requirements for public consultation apply to the amending plan (refer practice note *Public exhibition and adoption*).

For example, there are also likely to be population changes during the life of a plan (or plans) that must be recognised such as changes in the demand for child care and youth facilities. Ongoing review of the contributions plan enables the projections to be closely monitored and adjusted as more accurate information becomes available.

### Additional considerations in the life and review of a development contributions plan

Preparation of a contributions plan is not a 'stand alone' task done in isolation of other council policies or management practices. It must of necessity originate from council's strategic or corporate plan since this is where the foundation of funding local infrastructure lies. Most importantly, this gives legitimacy to the overall direction of the contributions plan.

Whilst plans should be reviewed at least every five years, the facilities that are being planned are often longer range such as major recreation or community facilities that require considerable expenditure. These cannot be planned for within a

5 year horizon and the funding of such facilities cannot be expected to be borne only by people that contribute within that time.

Consequently, there is a need for a longer term planning horizon to be adopted. As an area progresses and more information becomes available, this should be used to test past assumptions for validity.

### Relationship to LEPs/DCPs and other underpinning studies

One of the key foundations of population projections in a contributions plan is the underlying statutory regime. A council's local environmental plan will provide the basis for growth and development and changes to future development potential that may lead to additional demand should be monitored.

There may be instances where new greenfields/brownfields development areas are created and a new contributions plan is prepared. The development within this area will be making contributions towards its own specific facilities, however, it is also likely that the new residents will also be making contributions to facilities that are being provided for the entire local government population. For these reasons, it is desirable for the new development contributions plan to become a subset of the main development contributions plan so that it is clearly tied to other contributions and underpinning documents.

Many councils also undertake strategic planning investigations which provide more detail on issues that may directly relate to a contributions plan. For example, a council may prepare an open space management plan that results in fundamental changes to the manner in which the council provides facilities (eg a move away from "pocket parks" to more comprehensive facilities). In these instances, there is likely to be a flow-on effect to the development contributions plan that should be considered.

This underlines the need for constant review. It also emphasises the need for a multi-disciplinary approach within council to the management of development contributions plans (see also practice note *Financial management of development contributions*).

## Development Contributions – Practice Note

## Adjustment of section 94 development contributions

This practice note outlines key considerations in the adjustment of section 94 development contributions.

### Why is adjustment important?

Adjustment of contributions and levies is important to underpin the financial viability of the contributions system that council has in place. This practice note outlines considerations that are most relevant to amendment of a contribution rate.

The new provisions that must be considered in the operations of a council development contributions system are:

- clause 32 of the *EP&A Regulation* that outlines the requirements for amendment or repeal of a development contributions plan
- clause 33A(1) that requires council keep a contributions plan under review. If a date by which a plan is to be reviewed is stated in the plan, council must review the plan by that date
- review for the purposes of updating contributions rates, omitting completed works and correcting minor typographical errors.

### What forms of adjustment are there?

There are essentially two ways that a section 94 (s94) contribution can be adjusted:

- adjustment of the **contribution rate** specified in a s94 development contributions plan
- adjustment of the amount payable under a condition of **development consent** between the time of the granting of consent and payment.

Identification of the most appropriate method of indexing contributions is a vital component of the preparation of a development contributions plan given the eroding effect on the value of money by inflation and the adverse effects of land value escalation.

A development contributions plan needs to specify the type of indexation factor applied and when indexing is to occur being quarterly, six monthly or annually. It is valid for a different, but otherwise appropriate, method of indexation to apply to land values and another to the cost of works.

### Adjustment of section 94 contribution rates

Clause 32(3)(b) of the *EP&A Regulation* allows a development contributions plan to revise the rates of s94 monetary contributions set out in the plan to reflect quarterly or annual variations to “*readily accessible index figures adopted by the plan (such as a Consumer Price Index)*”.

The Australian Bureau of Statistics publishes various indices that may be useful for council to use in the s94 plan. Typical indices used in development contributions plans include the Consumer Price Index and Building Materials Index (BMI). Information on these indices is available from the Australian Bureau of Statistics at <http://www.abs.gov.au>.

Although the *EP&A Regulation* does not specifically mention escalation of land values, a council can include land value indices within a s94 contributions if they are:

*“prepared by or on behalf of the council from time to time that are specifically adopted by the plan” [EP&A Regulation 2000 clause 32(b)(ii)]*

A land value index could, for example, be based on average land values in an area derived from representative sales in the development area, or alternatively, several catchment areas depending on the characteristics of the locality. The appropriate methods and index will need to be assessed by council. However, to be valid, a development contributions plan must specifically adopt such an index.

A sample clause is outlined in the s94 development contributions plan template.

### Adjustment of section 94 contribution at the time of payment

It is recommended that a clause be included in a s94 development contributions plan that sets out the manner in which a contribution is adjusted between the granting of the consent and the payment of the contribution. A sample clause is outlined in the s94 development contributions plan template.

### Conditions requiring adjustment

Development consents that have a requirement for the payment of a contribution or a levy must include the amount of the contribution.

In addition, the condition of consent must specify that the contribution or levy will be adjusted at the time of payment in the manner outlined in the contribution plan. A model set of conditions are set out below.

## Development Contributions – Practice Note

### Sample section 94 contribution condition

#### Condition ##

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

The contribution is calculated from Council's adopted Section 94 Development Contributions Plan in the following manner:

Open Space	<b>[\$amount]</b>
Community Services facilities	<b>[\$amount]</b>
Roads	<b>[\$amount]</b>
Civic improvements	<b>[\$amount]</b>
Administration	<b>[\$amount]</b>

*These are examples of the types of contributions that may be in a plan – more or less categories may be applicable in the circumstances*

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 94 Development Contributions Plan. The contribution is to be paid before **[insert requirement]**.

## Development Contributions – Practice Note

# Financial management of development contributions

**This practice note outlines issues concerning financial and risk management considerations in implementing a development contributions system.**

## What are the considerations?

The financial management of development contributions relates to every aspect of the system from monetary contributions, land purchase and management, works-in-kind, material public benefits, internal and external borrowings, and planning agreements.

While this practice note is not a substitution for expert advice from internal or external sources, it is intended to highlight the key financial management issues that a council should consider.

The key considerations in this practice note cover:

- **whole of council approach** – council should view section 94 (s94) as for any large project and address it in a multi-disciplinary manner
- **risk management** – council should understand the risks inherent in the contributions system, and seek to minimise exposure to risk
- **developing financial models and cash flow management** – cash flow is a significant management consideration
- **pooling funds and borrowing** – issues concerning fund pooling and borrowing to fund facilities
- **interest** – flowing from contributions that are unspent and invested
- **indexing** – of contributions and consents
- **valuing** works in kind (WIK)/material public benefit (MPB)/planning agreements.

## Whole of council approach

Section 94 (s94) is often a very significant component of council's financial management and it demands the input from all senior managers to make it an effective program for the delivery of human services.

A contributions system must have regard to the management plan as well as other relevant adopted plans, strategies and policies of a council to ensure that contributions are integrated within the overall management framework.

Given that s94, s94A and planning agreements are one of several mechanisms for funding public infrastructure, the development contributions system should also integrate with financial management plans prepared by council for budgeting and expenditure purposes. The implications arising from the adoption of any

development contributions plan or entering into a planning agreement must be appreciated in the context of council's overall service delivery function.

The development contributions system affects all sections/departments of council including:

- **planning, environmental services** - in forecasting and facilitating development, preparing and reviewing contribution plans and providing advice on planning agreements as well as the issue and enforcement of development consents
- **engineering, community and recreation services** - in providing and managing public facilities
- **administrative and corporate services** - for managing the administrative, legal and financial accounting processes.

It is therefore critical that the preparation and ongoing administration of the development contributions system involve all relevant departments of council. Many councils have established a s94 committee which typically comprises senior council officers from each department/section which is often chaired by the council's general manager. This is considered good practice particularly with the introduction of s94A levies and planning agreement provisions.

There may also be representation of elected representatives on such committees (although participation by councillors is often through a committee of council that deals with the preparation and implementation of development contributions systems). However, councillors are encouraged to participate in the administration of development contributions, as they are, ultimately, responsible for overseeing council's development contributions system.

It is recommended that where councils have a development contributions budget in excess of \$20 million (including the value of planning agreements), an internal working group or committee be established that should, at minimum:

- meet at least monthly to track collections
- expenditure and report on works completion
- make decisions on the timing of facility construction
- track planning agreements and ensure that works are being implemented

## Development Contributions – Practice Note

- make decisions on the need for review of the development contributions plan(s).

This group should also oversee the preparation of annual reports to be submitted to the Department of Local Government (see also practice note *Accountability and reporting*).

### Risk management

Risk arises because of limited knowledge, experience or uncertainty about the future. They may also arise through contractual relationships where there may be changes in the relationship or changes to the assumptions underlying the relationship.

Risk management is the set of activities concerned with identifying potential risks, analysing their consequences and devising strategies to address and, where possible, minimise the risk. The NSW Government's *Total Asset Management Manual* identifies the range of risks to which agencies responsible for development may be exposed.

It is not the intention of this practice note to canvass all possible risk scenarios that may be experienced in implementing a development contributions process. However, some of the key risks in the development contributions system can include:

- **capital risk:** the capital costs of works estimated in a development contributions plan or planning agreement may be underestimated which means that the assessed contributions may be insufficient to meet capital expenditure estimates
- **demand or development rate risk:** those associated with assumptions in the development contributions plan on growth (may be lower for example which affects cash flow), inflation and property value escalation, demand (higher or lower demand than assumed) could affect works programs
- **interest rate risk:** if facilities are funded by borrowing, and where the plan includes an allowance for interest payments, the difference between the real interest rate and that assumed in the plan
- **recoupment risk:** if council uses fixed rate financing with a deemed maturity date, and development occurs at a more rapid rate, the difference between the costs of interest on borrowing to the rate of return of recoupment funds invested until maturity date
- **recurrent expenditure risk:** where recurrent expenditure is greater than anticipated for early facilities, the risk that other facilities may need to be scaled back
- **regulatory and environmental risk:** where changes to standards may mean a facility is more costly to construct.

There is a range of techniques for risk management and councils should fully investigate all methods

before deciding on the best techniques and strategies to implement.

The selection of a particular technique for identification and management of risks varies widely and the *Total Asset Management Manual* provides a summary of some of the techniques that are available. The following qualitative techniques may be appropriate for the development contributions system:

- **sensitivity analysis:** very wide application, from economic appraisal and financial feasibility, to operations and maintenance models
- **scenario analysis:** economic appraisals and feasibility studies
- **probability assessment:** quantification of risk probabilities and consequence distributions.

It is highly recommended that councils fully understand the risk management process before adopting a particular technique. There are many guidelines available on risk management and councils may wish to seek professional advice in relation to their risk management activities relating to development contributions.

### Developing works programs

The development of a works program is one of the most significant activities in the plan preparation and review process. The key steps include:

- the determination of the capital costs of facilities to be provided (construction and land acquisition)
- development of a cash flow model to identify when expenditure and income are to be expected

Determination of costs is one of the most significant risk factors in a development contributions plan as this may expose a council to funding shortfalls. Estimation of costs of construction of facilities and the value of land acquisition are often significantly under-estimated.

One of the greatest difficulties involved in cost estimation is that there are rarely final designs that can be fully costed and, often, design considerations may change. Council should, however, undertake concept planning for any works that are included in a development contributions plan and make a reasonable estimate of the costs of facilities.

Reference to standard industry costs (eg reference to costs guides such as *Rawlinsons*), council staff experience or the involvement of quantity surveyors or valuers to assist in cost estimates may be useful.

Land acquisition costs are often one of the largest cost items in a development contributions plan.

## Development Contributions – Practice Note

This underlines the need for regular review including estimates of all costs.

### Cash flow management

The cash flow within a development contributions plans over its life can be substantial and management of this cash flow is important so that council can deliver the facilities in a timely manner. This also minimises councils risk from escalation of costs of infrastructure, land and facilities.

While many development contributions plans include a works program, this is typically provided as a “total works” figure rather than showing a cash flow for the delivery of the facilities. Development of cash flows within a plan is considered good practice as it assists in project planning and signals the assumptions a council has made in the timing of delivery of facilities.

If a future facility is required to be provided, a council will have to estimate the facility’s future cost. If a facility has been already provided, the cost has been established and this is readily inserted into the development contributions plan. Councils can now account for the historic costs of facilities through inflation escalation which addresses issues raised in the *Allsands* decision.

There are two basic techniques for including future costs of facilities within a works program:

- Nominal costs
- Net Present Value (NPV) Costs.

Estimating future costs has traditionally been undertaken in development contributions plans using “nominal” dollar values. That is, the value of the facility in today’s dollars even though it may be constructed in 2, 5 or 10 years time. They are termed “nominal” values because they do not include the effects of inflation.

The use of the Net Present Value (NPV) approach discounts future cash flows to account for the fact that funds received or expended today are worth more than future funds (due to the effects of inflation). It is a relatively standard financial accounting tool although it can be complex.

Although the nominal approach has been criticised, the inclusion of inflation within a s94 development contributions plan effectively takes into account the future value of money. Provided the correct inflation and land value escalation indices are used, the delivery of the facility will ultimately be achieved in terms of the value of the project and contributions will be reasonable.

While some councils use NPV methods it requires a sophisticated understanding of NPV and cash flow modelling, and having staff with a full understanding of the model is essential. By comparison, the nominal method is less complex and easier to

administer. Most development contributions plans currently in existence use nominal values and it remains an acceptable approach.

### Timing and cashflow

The timing of receipt of contributions and the timing of expenditures on works and land acquisition are high risk factors in a development contributions plan.

The timing of cashflow into a development contributions account relate to:

- underlying economic conditions that may influence land development
- population growth that may, or may not, be related to economic conditions
- incentives to development such as improved road access, environmental amenity, servicing availability.

Cash flow from a development contributions system account will be partly determined by the above conditions but also be influenced by council’s wider management actions and its current financial position.

Councils also have some control over the timing of contribution payments which can assist in cash flow management. For example, contributions for residential development are often required at the subdivision stage when demand for all the facilities will not be immediate (as the residents have not yet moved in) and there is consequent lag that allows planning for expenditure.

The typical contribution received by a council involves a time lag between when the contribution is levied on approval of the development application and when it is required to be paid. Councils should also ensure that contributions are paid at the rate applicable at the time of payment, not at the date of approval of the development application. This ensures that any financial risk due to the time lag (between development approval and payment) is minimised (refer practice notes on s94 and s94A plan templates for examples).

Changes in assumptions on timing of works and land acquisition also have the potential to impact on cash flow and, again, council should be reviewing this situation regularly.

### Cash flow example

A simple cash flow model based on the “nominal approach” is show below. This is relatively simple and can be developed using relatively simple spreadsheets. A suite of spreadsheets for individual s94 categories (eg open space, community facilities, roads) can then be linked to a summary schedule which provides a instant ‘snapshot’ of a contribution at any time. The benefit of this is that it allows automatic updating of the

## Development Contributions – Practice Note

contributions by the various indices that council specifies in a development contributions plan.

### Simple cash flow example – nominal approach

Facility	Year 1 (\$)	Year 2 (\$)	Year 3 (\$)	Year 4 (\$)	Year 5 (\$)	Total
<b>Expenditure</b>						
Facility 1	50,000		50,000		25,000	125,000
Facility 2		100,000		100,000		200,000
Facility 3	15,000	15,000	15,000	15,000	15,000	75,000
Facility 4	25,000	50,000			50,000	125,000
Total	90,000	165,000	65,000	115,000	90,000	525,000
<b>Contributions Income (includes interest)</b>						
	50000	150000	75000	125000	100000	500000
<b>Surplus/(Deficit)</b>						
Yearly	40,000	15,000	-10,000	-10,000	-10,000	
Cumulative	40,000	55,000	45,000	35,000	25,000	25,000
<b>Estimated lot/dwelling production</b>						
Yearly	100	200	450	400	150	100
Cumulative	100	300	750	1,150	1,300	1,400

**Note: this is an example only and councils should investigate the best technique for cash flow management that is relevant to their individual circumstances**

### Interest and investment

Investment is essential in order to attempt to maintain the time-value of monetary contributions between the time of payment and the time of expenditure for the purpose for which they were required.

The *EP&A Regulation* (clause 35) requires council to maintain accounting records of contributions (including investment return) and distinguish them from other accounts. This maintains the accepted practice of ensuring that interest from s94 accounts is returned to the accounts rather than being placed within general revenue funds.

### Pooling of funds

Pooling of funds is a new provision which allows a council to 'borrow' between s94 accounts to provide sufficient funds to build facilities. This allows greater flexibility in the way facilities can be provided.

Clause 27(3) of the *EP&A Regulation* allows a council (or councils in the case of a joint plan) to pool funds only if the council is satisfied that the pooling and progressive application of the funds will not unreasonably delay the implementation of the works program.

### Joint development contributions plan funds

Where one or more councils have a joint development contributions plan (either s94 or s94A), the collection and expenditure of those funds must be agreed between the councils. These matters must be agreed from the outset to avoid disputes and ensure facility delivery is achieved to the benefit of those that made the contribution.

Section 94C provides that any monetary contribution that is required to be paid under any consent is to be apportioned among the relevant councils in accordance with any joint or other development contributions plan approved by those councils. However, if provision is not made for the apportionment in any such plan, it will be apportioned in accordance with the terms of the development consent for the development. Such conditions cannot be contrary to any agreement contained within a plan or agreed between the councils.

Section 94C(3) provides that any dispute between the councils concerned is to be referred to the Director-General and resolved in accordance with any direction given by the Director-General.

### Valuing WIK/MPB/Planning agreements

There will be circumstances where a council wishes to assess the value of a works in kind or material public benefit. This will be particularly important in the case of a joint development contributions plan.

The key issues for council(s) to consider are:

- there must be a statement within the plan in relation to the criteria for acceptance
- such alternatives should only be accepted provided the value of the works to be undertaken is at least equal to the value of the contribution that would otherwise be required unless there is a compelling reason to do so
- council should critically examine its works program to ensure that it would not adversely affect the overall implementation of the works program

## Development Contributions – Practice Note

- the value of the works should be provided by the applicant and be independently certified by a qualified professional (eg quantity surveyor). Council should indicate that it may review the valuation of works and may seek the services of an independent person to verify the costs (which should be borne by the applicant)
- ideally, a formula should be applied for works in kind or material public benefit contributions in lieu of s94 contributions.

## Development Contributions – Practice Note

## Exemptions, discounts, credits and refunds

The purpose of this practice note is to advise councils on the matters surrounding exemptions to contributions, discounts, credits and refunds, and how they should be treated within the contributions system.

### Exemptions

#### What exemptions should be considered?

A council may elect to exempt particular types of development or class of development from the payment of development contributions on the basis of strategic planning, economic or social purposes. The Minister for Infrastructure and Planning may also direct that a certain class (or classes) of development be exempted under section 94E (s94E) of the *EP&A Act*.

The types of development which have been granted exemptions by councils in the past include:

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

This is not to promote exemption for these types of facilities. Rather, it demonstrates that some councils do exempt certain types of developments where nexus may be difficult to demonstrate or for some other purpose (such as a public good).

While it is not possible to foresee every scenario, permitting the possibility of future requests for exemption being decided on their merits is reasonable – subject to some criteria being specified in advance to ensure equity.

Council's policy on exemptions must be stated in the development contributions plan and, as far as possible, be specific about the types of facilities to be exempted. Alternatively, a council may state the criteria that will be used to determine an exemption or exclusion.

There may also be a case for having a s94A development contributions plan to cover those uses where nexus may be more difficult to establish (refer practice note *Principles underlying development contributions*).

### Implications of exemption of section 94 contributions

Where exemptions are granted (or development is to be covered by a s94A plan), council should not factor this exempt development into the assessment of demand for the purposes of a s94 development contributions plan. Where the exempted development will create future demand, and the council intends to cater for this demand through provision of facilities (eg through the application of s94A levies), it must specify the amount of apportionment that will be applied to the development which is exempted.

### Discounting contributions

Discounting means reducing the calculated contribution rate in order to achieve a specific planning, social, economic or environmental purpose.

Discounting should **not** be confused with:

- *apportionment* which ensures that new development only pays for the proportion of the demand that it generates
- *exemptions* which provide relief of some types of development from a specified contribution (or part)
- *credits* which refer to the allowance a council may make for existing development, for works in kind or for a material public benefit.

Exemptions and credits are addressed in other sections of this practice note while apportionment is addressed in the practice note *Principles underlying development contributions*.

It is extremely important for a council to consider the implications which discounting, and the consequent reduction in contributions, may have for the existing and/or the new community.

Implications could include the delay in the provision of an identified facility or the provision of a facility of a lesser standard or capacity.

Another implication is the creation of precedent. Where discounting has been actively employed, perhaps to encourage development, it is often difficult to shift the policy or defend a new policy in the face of past actions.

## Development Contributions – Practice Note

Discounting should be used judiciously as it effectively means that existing ratepayers are subsidising future development. Council and the community must be made fully aware of the financial implications of discounting practices (see also practice note *Financial management of development contributions*).

### Material public benefits and works in kind

The concept of material public benefits (MPBs) and works in kind (WIK) are often misunderstood as they are often referred to in contributions plans in quite different ways.

#### What is a MPB?

A MPB may be offered as a means of partial or full settlement of a condition of consent requiring a s94 contribution in accordance with s94(5) of the *EP&A Act*.

A MPB could be:

- a work in kind which is undertaking a work that is specifically listed in the works schedule of a development contributions plan for which a monetary contribution would normally be sought.
- the provision of certain public amenities or services that may or may not exist in the area such as a community facility, that is not included in a development contributions plan.

Examples have included developers providing a swimming pool as part of a development that is available to the public with a handover to the council in a specified period, or provision of a public car park that is handed over to the council.

By definition, a MPB is **not**:

- the dedication of land
- the payment of a monetary contribution (refer s94 of the *EP&A Act*).

As a WIK is the completion of a work specifically **included** in a development contributions plan, it is discussed separately from other MPBs as they have differing implications for the completion of a works program (and thus differing financial implications).

The acceptance of a work by way of a MPB which is not identified and costed in a development contributions plan may have significant implications for the implementation of the plan. This is not to suggest that a MPB may be a negative – indeed, it may be that a MPB may offer substantial benefits to a local government area and its residents if accepted.

### Offer and assessment of a work in kind

The provision of public facilities by an applicant undertaking a work in kind can facilitate early provision of public facilities concurrent with the demand generated by a new development. This approach may be desirable to both the developer and the council.

Any offer for the carrying out of a work in kind with the intent of wholly or partly off-setting a monetary contribution must be made in writing, preferably following extensive liaison with council. Council should have a specific clause in the development contributions plan that refers to the manner in which a WIK will be assessed, valued and accepted.

It is important that the council is able to formally assess:

- the access, siting and design of the proposed facility in the context of the proposed development and adjoining current or future development that would be expected to benefit from the facility
- whether the proposed work in kind will be to a suitable standard for the council to eventually accept
- whether the works program, particularly the design and cost of the specified facility, in the adopted development contributions plan remains valid or requires amendment
- whether the applicant proposes to carry out the work to a higher standard than the baseline facility specified in the development contributions plan and whether there is any requirement or expectation for a credit against other contributions
- the financial implications for cash-flow and the continued implementation of the adopted works program
- the timing of completion and future recurrent costs including staffing and maintenance and future management (particularly if a work to a higher standard is proposed)
- future dedication, handover and management arrangements.

To ensure transparency, especially where the works are of a substantial value, such agreements should be reported and accounted for in the annual reporting of contributions (refer practice note *Accountability and reporting*). Copies of the documentation of the assessment of these and any other relevant factors should be included on the file relating to the development contributions plan as well as any specific file for the proposed work itself.

Where the value of the WIK is over \$150,000, many councils require that the works must be publicly tendered to comply with s55 of the *Local Government Act*.

## Development Contributions – Practice Note

If the settlement of the contributions payable involves technically offsetting another category of contribution, it will be necessary for the council to make an internal adjustment to its contribution accounts (refer practice note *Financial management of development contributions*).

### Offer and assessment of other material public benefits

The provision of public facilities by way of a MPB can facilitate provision of public facilities that may have wider benefit. Any offer for the carrying out of a work in kind with the intent of wholly or partly offsetting a monetary contribution should be by way of a written agreement. Council should have a specific clause in the development contributions plan that refers to the manner in which a MPB will be assessed, valued and accepted.

The key considerations in assessing a MPB includes:

- the overall benefit of the proposal
- the monetary value of the MPB
- what needs of the population would be satisfied and whether these equal or exceed those provided by conventional means
- whether the works program in the adopted development contributions plan remains valid or requires amendment
- the financial implications for cash-flow and the continued implementation of the adopted works program
- whether council may need to make up the short-fall in anticipated contributions (ie adopt higher council apportionment)
- the timing of completion and future recurrent costs
- future dedication, handover and management arrangements.

If a MPB is provided in lieu of a contribution, it will mean that the works schedule to the plan will require amendment, since council will be technically funding part (or all) of the provision of some of the works. In other words, the apportionment rate will be changed.

If the settlement of the contributions payable involves technically offsetting another category of contribution, it will be necessary for the council to make an internal adjustment to its contribution accounts (refer practice note *Financial management of development contributions*).

### Credits and offsets

Credits and offsets can be considered in the following way:

- **credits:** where the cost burden on an applicant is less because of a previous dedication of

land, monetary payment or through provision of a MPB (excluding where this has been done as a consequence of the granting of a condition of consent or through a planning agreement), or where allowance is made for existing development on a site

- **offsets:** where the cost burden on the applicant is the same, however, the applicant may seek to offset part or all of that burden in a different way such as through provision of a MPB.

Each should be treated differently as outlined below.

### Credits for past contributions

Section 94(6) of the *EP&A Act* requires that a consent authority must take into consideration any land, money or other material public benefit that the applicant has elsewhere dedicated or provided free of cost within the area (or any adjoining area) or previously paid to the consent authority, other than:

- (a) a benefit provided as a condition of the grant of development consent under the Act, or
- (b) a benefit excluded from consideration under section 93F(6).

This consideration will be at the time of granting of a consent or the issue of a complying development certificate which will result in a lower contribution being made. It will be up to council to determine how to value these previous contributions. Council should provide some guidance to assist applicants in such cases.

### Credits for existing development

In the case of existing development on a site, it is accepted practice that a credit equal to that existing development on a site is taken into consideration. For example:

- where an existing detached dwelling is located on a site, the credit would be for a single dwelling
- where a residential allotment is vacant, the credit would be for a standard residential allotment
- where a residential flat building is located on a site, the credit would be for the floorspace or unit mix (ie 1, 2 and 3 bedroom units) on the site
- where a contribution has been paid on a site and the development application has been superseded by another application/contribution
- where a contribution has been paid on a site and the development consent has lapsed (although this is rare).

For commercial and industrial development, credits are more complicated, as the same development

## Development Contributions – Practice Note

may have differing implications such as higher (or lower) levels of traffic generation. Councils will need to assess these on a case by case basis. In all cases, council should have a specific policy on credits in their s94 development contributions plan.

These will need to be documented and the implication for the s94 development contributions plan assessed particularly if the credit is large.

### Offsets through an offer to provide a MPB

Where an applicant wishes to carry out a MPB (including a WIK) to partially or fully satisfy a condition requiring a s94 contribution, a s94 contribution will be calculated in accordance with the plan and a condition placed in the consent reflecting that monetary value. The council and applicant will agree on the value of the offset and the payment to the council will be the difference between the contribution minus the offset amount (ie the value of the works). The condition requiring the contribution will remain in place as s94(5)(b) provides the legal means of a council accepting such an offer and there is no need for the consent to be modified.

Where the works are offered as part of a development application, the works will be set out in the development application as a condition and the contribution will be lowered (or deleted if relevant) to reflect the offset. Where these works are offered after the grant of a consent, there will be a need for the modification of the consent to reflect the credit to be given for these works.

### Refunds

The *EP&A Act* does not refer to refunds, and a number of decisions in the NSW Land and Environment Court (eg *Frevcourt Pty Ltd & Anor v Wingecarribee Shire Council*, [2005] NSWCA 107) indicate that there is no express power for a council to refund s94 contributions even if there is an excess of funds after the fulfilment of the public purpose for which the contributions were made, or if the development contributions plan is repealed and no new plan is made providing for the use of the prior contributed and surplus funds.

Councils should always seek legal advice if a refund is requested.

### Where a contribution has been paid and the development does not proceed or the consent lapses

The Land and Environment Court held in *Denham Pty Ltd v Manly Council*, 1995, LGERA 108 that a refund would not be available in circumstances where council has either expended the monetary contribution in accordance with the adopted development contributions plan or committed and

applied the contributions which can no longer be isolated in the contributions account. The decision was confirmed in *Frevcourt Pty Ltd & Anor v Wingecarribee Shire Council*, [2005] NSWCA 107.

If development does not proceed, a council could collect more funds than is necessary to complete the works in the works schedule. In such a case, an amendment to the works schedule may be appropriate in order to expend the surplus funds. If a further application is made for development on the same site, a council could give consideration to whether the contribution otherwise applicable should be waived or a credit granted in accordance with the development contributions plan.

Nevertheless, a credit or waiver will not necessarily be appropriate as the future development may create additional or different demands for which no provision was previously made or provided for.

### Where the actual costs are less than estimated

A change in the total cost of the works program may occur as a result of downsizing the scale of the works program, economies achieved or if a grant is received.

In these circumstances, it will usually be most appropriate for council to determine what additional works to serve relevant development can be completed with the surplus funds and to amend the works schedule to so specify.

If the works schedule is amended, the public will be consulted and have an opportunity to make submissions on how the money should be spent.

### Reasonable substitutions or abandonment

As in the case above, a grant or bequest may be quite specific and may give rise to the need to delete an item from the works program. In these circumstances, council should consider amending the development contributions plan.

Alternatively, in monitoring development contributions plans, it may become apparent that a specified facility or work is no longer required or may require substantial modification to meet current demand.

In these circumstances, although councils are generally bound to provide the facilities that are contained within a development contributions plan in accordance with the conditions by which the contributions were required, it may be reasonable for a council to consider substituting for the existing works others works which are more appropriate to meet the identified needs. That approach was considered in *Frevcourt* which held that a council can amend a development contributions plan so as to alter the extent (and possibly the type) of public

## Development Contributions – Practice Note

facilities proposed to meet demands of development.

Examples of circumstances where it may be appropriate to amend the works schedule in a development contributions plan include:

- where contributions are exhausted due to cost increases between collection and later application of contributions;
- where there is less demand for services than forecast;
- where demands have changed or where council wishes to combine some types of facilities (such as a child care centre and community centre being combined to create a multi-purpose facility to respond to community needs).

## Development Contributions – Practice Note

## Accountability and reporting

**The purpose of this practice note is to provide guidance on public accountability, and to advise councils on the reporting requirements of the *EP&A Act* and *EP&A Regulation* in relation to section 94 development contributions and planning agreements.**

### Why accountability is important

Accountability is a basic requirement of the NSW development contributions system. Public accountability may be achieved through:

- transparent decision making processes
- provision of plain English documents
- maintenance of appropriate and responsible financial records and databases
- community involvement, as part of the public participation process, in the decision making and management process (eg through precinct committees, planning forums).

Financial accountability must be sought through:

- development contributions plans and in particular the adopted works schedule
- planning agreements
- annual reports
- the contributions register
- financial statements.

The level of accountability within the development contributions system is significant and there are certain prescribed procedures that must be followed. Councils are also encouraged to ensure that decisions on development contributions plans and planning agreements are transparent so that the public can clearly see the processes and decisions involved. These concepts are discussed in more detail in relation to development contributions plans in the practice notes *Public exhibition and adoption* and *Planning agreements*.

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

The *EP&A Regulation* requires council to maintain or provide:

- a contributions register (clause 34)
- accounting records that allow monetary section 94 (s94) contributions, section 94A levies, and any additional amounts earned from their investment) to be distinguished from all other money held by council (clause 35(1) and (2))
- an annual statement for all contributions plans (clause 36).

The requirements for reporting in relation to planning agreements are addressed in the practice note on *Planning agreements*.

As part of the demonstration of public and financial accountability and in accordance with the *EP&A Regulation*, council must also make available for inspection:

- each current development contributions plan operating in the local government area
- each of its annual statement
- the contributions register
- any document referred to in any development contributions plan.

### Development contributions register

The *EP&A Regulation* (clause 34(2)) sets down specific requirements for councils for the management of the development contributions system.

The register must indicate:

- particulars sufficient to identify each development consent for which any such condition has been imposed
- the nature and extent of the s94 contribution or 94A levy required by any such condition for each public amenity or service
- the contribution plan under which any such condition was imposed
- the date or dates on which any s94 contribution or 94A levy required by any such condition was received, and its nature and extent.

This will be particularly important when pooling of funds is proposed and in the cases of joint development contributions plans. It is recommended that a separate register be used for each contribution type (ie s94 contributions and s94A levies) to allow for separate identification of funds, and for accounting and reporting requirements.

### Annual reports to the Department of Local Government

Under the *Local Government Act 1993*, council is required to submit the following:

- a draft management plan - required by s 402 of the *Local Government Act* which outlines its activities for the next three years and revenue policy for the next 12 months

## Development Contributions – Practice Note

- financial report - required by s413 of the *Local Government Act* which is to be submitted to the Department of Local Government by the 15 November each year. The financial report is to include the information referred to in its annual statement for development contributions plans being:
  - opening balance
  - contributions held as a restricted asset
  - contributions expended during the year, contributions received during the year (cash and non-cash such as land dedications and material public benefits.
  - amount expended on works to date
- further, as a measure of performance and ongoing obligation, the financial report may also stipulate:
  - the date of endorsement of the plan and the expected life of the plan
  - the time over which contributions have been held
  - key milestones and target dates for implementation.
- annual report - required by s 428 of the *Local Government Act* which is to be submitted to the Department of Local Government by the end of November each year.

### Reporting to council

The reporting to councillors and senior management is vital during the plan formulation and process. The following provides a template report to assist staff in summarising the chief aspects of the draft development contributions plan for elected representatives and senior management.

This report can be adapted for both pre- and post-exhibition reporting depending on the individual preferences of the council concerned and the degree of information likely to be required prior to exhibition.

### Sample report to council – for plan adoption

Section	Issues/Matters for Consideration
Purpose	Briefly state the purpose of the report - Why is it being presented to council. Outline in dot point form the key issues of the report. Provide a brief outline of the contents of the report.
Background	Outline the background to the subject of the report, including any previous relevant resolutions of council (attach as necessary).
Proposal	This section forms the body of the report.
Critical Dates	
Exhibition	
Submissions (Post Exhibition Only)	
Legal/Policy Implications	Briefly state any legal implications or relevance to council policies).
Management Implications	Briefly state how the subject of the report relates to the management plan and/or any strategic plans within council.
Financial Implications	Include reference to source of funds, capital, recurrent and any staff resource implications. It may include comments from the Finance Manager.
Economic/Social/Environmental Impacts	May relate to social and cultural, economic, or development impacts and must be addressed.
Consultation (With Whom, Internal And External)	Outline the consultation that has or will occur in relation to the item. Consultation may occur with the public, other authorities, or other divisions within council - including Finance Manager. This section may be arranged under sub headings.
Relevant Legislation	The relevant legislation is:  Division 6 of Part 4 of the <i>Environmental Planning and Assessment Act 1979</i> and Part 4 of the <i>Environmental Planning and Assessment Regulation 2000</i> .
Conclusion	
Recommendation	

Development Contributions – Practice Note

# Template for a section 94 development contributions plan

The following provides a template for a section 94 (s94) development contributions plan. It is recommended that councils follow the format closely as there is considerable benefit in having consistency across local government areas.

The aim is to ensure that future plans, when properly prepared, conform to the requirements of the *EP&A Regulation*.

The template can only be a guide for plan preparation and the setting of contributions, since any resulting contribution must be tailored to the individual circumstances to pass the 'reasonableness' test. This task remains in the hands of council. In this regard, reference should be

made to the section of the practice notes on *Key Concepts and Principles* which discusses the concepts of reasonableness in plan preparation.

The template is structured as shown in the table below. This table also shows how each section addresses the mandatory requirements of the *EP&A Regulation*. The concepts in the table are discussed in more detail in the template.

Within the template format, notes are provided in boxes to clarify the concepts within the individual clauses or sections. These are for reference only and do not form part of the template proper.

Recommended section of plan	What it should contain	Section of <i>EP&amp;A Regulation</i> it addresses
<b>PART A: Summary schedules</b>	Summary schedules should be provided to show contribution rates applicable to various types of development and for the various categories of contributions being sought. This should also indicate costs and timing of facility provision.	Clause 27(e)
<b>PART B: Administration</b>	This part establishes the statutory framework of the plan. It should cover: <ul style="list-style-type: none"> <li>• The purpose of the plan</li> <li>• Land to which the plan applies</li> <li>• Council's policy on deferred or periodic payments</li> <li>• Council's policy on the acceptance of material public benefits (including works in kind)</li> <li>• The way the contribution is to be adjusted (as provided for in the plan and a consent)</li> </ul>	Clause 27(a), (b), (f), (g), (h)
<b>PART C: Strategy plans</b>	This part should identify development, population and employment projections used to determine the nexus between new development and proposed public facilities. It should outline the strategies that council will implement to address the demand for new public amenities and facilities that is likely to occur in the area. <p>This section should cover the following:</p> <ul style="list-style-type: none"> <li>• Past population growth and demographics to determine the existing makeup of the population</li> <li>• Past housing growth and development to understand the types of development in the area</li> <li>• The expected growth (population, housing, types of development, location, timing)</li> <li>• The demand of this growth and the facilities required.</li> <li>• Whether existing facilities are sufficient to cater to the growth</li> <li>• The apportionment rate as required</li> <li>• The costs of the new works and the resulting contribution</li> <li>• The formulas applied to determine the contributions.</li> </ul>	Clause 27 (c), (d), (e), (g) Clause 35
<b>PART D: References</b>	This part should provide a summary of the documents used for the preparation of the development contributions plan. References should be cited to demonstrate the information that council used in preparing the development contributions plan.	

## Development Contributions – Practice Note

# Section 94 development contributions plan for the council of *[insert name of council]*

### 1. Part A – Summary schedules

The following summary schedules are included in this plan:

- Works program
- Contributions by area and category
- Contributions by development type and area.

It is stressed that these are provided as summary tables only and more details are contained in the individual strategies within the plan.

*The EP&A Regulation [clause 27(1)(e)] requires a s94 plan to identify the s94 contribution rates for different types of development. While it is quite acceptable to have more details in the Strategy Plan part of the plan, this part should provide the summary to enable an applicant to determine the contribution that will be payable for any particular development within the identified catchment(s).*

*The following provides an example. Notes to the table can be used to explain how the contribution has been arrived at, exclusions, differential rates by development type. In the case of a joint s94 plan, each council area should be specifically identified as well as the rates adopted for each area.*

#### 1.1 Example summary works program

FACILITY [insert as appropriate eg]	SCHEDULE OF WORKS [insert as appropriate eg]	COST SUMMARY [insert as appropriate eg]	TIMING/THRESHOLDS [insert as appropriate eg]
<b>Community Facilities</b>	<ul style="list-style-type: none"> <li>• Embellish Jones Street community centre/s (refer schedule in Strategy Plan No. ??)</li> <li>• Civic Library improvement / redevelopment (refer schedule in Strategy Plan No. ??)</li> <li>• Child care facilities (refer schedule in Strategy Plan No. ??)</li> <li>• Youth centre (refer schedule in Strategy Plan No. ??)</li> <li>• Multi-purpose centre – Jones Street (refer schedule in Strategy Plan No. ??)</li> </ul>	<ul style="list-style-type: none"> <li>• \$212,000</li> <li>• \$510,000</li> <li>• \$200,000</li> <li>• \$100,000</li> <li>• \$750,000</li> </ul>	<b>[INSERT AS APPROPRIATE EG]</b>
<b>Open Space:</b>	<ul style="list-style-type: none"> <li>• Local parks acquisition/embellishment (refer schedule in Strategy Plan No. ??)</li> <li>• Embellish existing parks/ Structured open space (refer schedule in Strategy Plan No. ??)</li> </ul>	<ul style="list-style-type: none"> <li>• \$787,000</li> <li>• \$1,454,000</li> </ul>	<ul style="list-style-type: none"> <li>• Community centre embellishment – 2006/07</li> <li>• Multi-purpose centre – population threshold in Catchment A reaches 3,500 people</li> <li>• District Park (Park Road) to be complete following Stage 3 of release</li> </ul>
<b>Roads</b>	<ul style="list-style-type: none"> <li>• Traffic management (refer schedule in Strategy Plan No. ??)</li> </ul>	<ul style="list-style-type: none"> <li>• \$470,000</li> </ul>	
<b>Car Parking</b>	<ul style="list-style-type: none"> <li>• Additional spaces (refer schedule in Strategy Plan No. ??)</li> </ul>	<ul style="list-style-type: none"> <li>• \$878,000</li> </ul>	
<b>Cycleways</b>	<ul style="list-style-type: none"> <li>• Upgrading/new cycleways (refer schedule in Strategy Plan No. ??)</li> </ul>	<ul style="list-style-type: none"> <li>• \$232,000</li> </ul>	
<b>Civic/Urban Improvements</b>	<ul style="list-style-type: none"> <li>• Town centre Works (refer schedule in Strategy Plan No. ??)</li> <li>• Main Street upgrade</li> </ul>	<ul style="list-style-type: none"> <li>• \$641,000</li> </ul>	
<b>Administration</b>	<ul style="list-style-type: none"> <li>• Administrative resources/studies/legal</li> </ul>	<ul style="list-style-type: none"> <li>• \$184,000</li> </ul>	
<b>TOTAL</b>		<ul style="list-style-type: none"> <li>• <b>\$6,388,000</b></li> </ul>	

Notes: **[NOTES SHOULD BE INCLUDED TO EXPLAIN THE ABOVE AS NECESSARY]**

## Development Contributions – Practice Note

### 1.2 Example summary schedule – contributions by area and by category

CATCHMENT		A	B	C
SUB-PLAN	Base			
Community Facilities	Per Person	[\$rate)	[\$rate)	[\$rate)
Open Space	Per Person	[\$rate)	[\$rate)	[\$rate)
Roads	Per Trip	[\$rate)	[\$rate)	[\$rate)
Car Parking	Per Space	[\$rate)	[\$rate)	[\$rate)
Cycleways	Per Person	[\$rate)	[\$rate)	[\$rate)
Civic and Urban Improvements	Per Person	[\$rate)	[\$rate)	[\$rate)
Administration	Per Person	[\$rate)	[\$rate)	[\$rate)

Notes: [NOTES SHOULD BE INCLUDED TO EXPLAIN THE ABOVE AS NECESSARY]

### 1.3 Example summary schedule – contribution rates by development type and by area

Contribution Rates		Catchment A	Catchment B	Catchment C
	Rate			
<b>Residential Development</b>				
Residential flats/medium density 1-bedroom dwelling	[insert no.] persons/dw	[\$rate)	[\$rate)	[\$rate)
2-bedroom dwelling	[insert no.] persons/dw	[\$rate)	[\$rate)	[\$rate)
3 or more-bedroom dwelling	[insert no.] persons/dw	[\$rate)	[\$rate)	[\$rate)
Detached dwelling	[insert no.] persons/dw	[\$rate)	[\$rate)	[\$rate)
Subdivision	[insert no.] persons/dw	[\$rate)	[\$rate)	[\$rate)
<b>Tourist Accommodation</b>	Per bed	[\$rate)	[\$rate)	[\$rate)
<b>Other Development</b>	In accordance with the particular categories of contributions applicable to each form of other development			

Notes: [NOTES SHOULD BE INCLUDED TO EXPLAIN THE ABOVE AS NECESSARY]

**NOTE: These schedules are examples only**

## Development Contributions – Practice Note

### 2. Part B – Administration and operation of the plan

#### 2.1 What is the name of this development contributions plan?

This development contributions plan is called the ***[insert the name of the plan – either a geographic reference to the local government area or specified part of the local government area(s) to which the plan applies]*** Development Contributions Plan 200? **[Year: eg 2005]**.

*The name of the plan is important especially if it will apply to a specific part of a local government area (or areas in the case of a joint s94 plan). If this plan is a review of an existing plan, add the advisory note (ie “this plan amends ....”).*

#### 2.2 Area the plan applies

##### **Alternative 1: entire LGA (or LGAs)**

This plan applies to all land within the local government area(s) of ***[insert name or names in the case of joint plans]*** as shown on the Map ***[or maps as relevant]***.

*Is extremely important to delineate the area to which the plan applies to avoid confusion and potential challenges. It is also important to indicate if the plan applies to the entire local government area or a specific area, or if it applies to more than one council area (in the case of joint plans). Maps must be included in accordance with clause 27(1)(g) of the EP&A Regulation.*

##### **Alternative 2: portion of a LGA or LGAs**

This plan applies to land within the local government area(s) of ***[insert name or names in the case of joint plans]*** as shown on the Map ***[or maps as relevant]***.

#### 2.3 What is the purpose of this development contributions plan?

The purpose of the Development Contributions Plan is to:

- (a) provide an administrative framework under which specific public facilities strategies may be implemented and coordinated
- (b) ensure that adequate public facilities are provided for as part of any new development
- (c) to authorise the council to impose conditions under section 94 (s94) of the *Environmental Planning and Assessment Act 1979* when granting consent to development on land to which this plan applies
- (d) provide a comprehensive strategy for the assessment, collection, expenditure accounting and review of development contributions on an equitable basis
- (e) ensure that the existing community is not burdened by the provision of public amenities and public services required as a result of future development
- (f) enable the council to be both publicly and financially accountable in its assessment and administration of the development contributions plan.

*The purpose of the plan sets out the principles underlying the plan and the manner in which council is to seek contributions. This is an example of how these principles could be met, however, each council is likely to have particular issues that may be important.*

*They should be as simple and succinct as shown in the example. When applied to more than one local government area, it will be important to ensure that the purposes are sufficiently worded to cover each council's intentions.*

#### 2.4 Commencement of the plan

This development contributions plan has been prepared pursuant to the provisions of s94 of the *EP&A Act* and Part 4 of the *EP&A Regulation* and takes effect from the date on which public notice was published, pursuant to clause 31(4) of the *EP&A Regulation*.

## Development Contributions – Practice Note

### 2.5 Relationship with other plans and policies

This development contributions plan repeals the **[insert name of former plan]**.....

The development contributions plan supplements the provisions of the *[insert the name of the relevant LEP]*... Local Environmental Plan and any amendment or local environmental plan which it may supersede.

*The relationship to other plans and policies is a referral to other planning instruments and policies that may provide the basis for the contributions. This clause also covers the circumstances where amendments to a plan occur.*

### 2.6 Definitions

**[definitions should be included here or as an appendix]**

*As for planning instruments, definitions are important and should be included in the plan. Definitions should correspond with council's other planning instruments to avoid confusion and disputes.*

### 2.7 When is the contribution payable?

A contribution must be paid to the council at the time specified in the condition that imposes the contribution. If no such time is specified, the contribution must be paid prior to the issue of a construction certificate or complying development certificate.

*Councils will have their own preferences for the timing of payments. These preferences should be identified in the development consent.*

### 2.8 Construction certificates and the obligation of accredited certifiers

In accordance with section 94EC of the *EP&A Act* and Clause 146 of the *EP&A Regulation*, a certifying authority must not issue a construction certificate for building work or subdivision work under a development consent unless it has verified that each condition requiring the payment of monetary contributions has been satisfied.

*This suggested clause imposes an obligation on an accredited certifier to ensure the contributions are paid prior to issue of a construction certificate. Most certifiers are aware of these obligations, however, councils may wish to undertake consultations with local certifiers to assist them in meeting their obligations.*

In particular, the certifier must ensure that the applicant provides a receipt(s) confirming that contributions have been fully paid and copies of such receipts must be included with copies of the certified plans provided to the council in accordance with clause 142(2) of the *EP&A Regulation*. Failure to follow this procedure may render such a certificate invalid.

The only exceptions to the requirement are where a works in kind, material public benefit, dedication of land or deferred payment arrangement has been agreed by the council. In such cases, council will issue a letter confirming that an alternative payment method has been agreed with the applicant.

## Development Contributions – Practice Note

### 2.9 Complying development and the obligation of accredited certifiers

In accordance with s94EC(1) of the *EP&A Act*, accredited certifiers must impose a condition requiring monetary contributions in accordance with this development contributions plan which satisfies the following criteria:

- **[insert here any particular development types that should be covered]**

The conditions imposed must be consistent with council's standard section 94 consent conditions and be strictly in accordance with this development contributions plan. It is the professional responsibility of accredited certifiers to accurately calculate the contribution and to apply the section 94 condition correctly.

### 2.10 Deferred/periodic payments

Deferred or periodic payments may be permitted in the following circumstances:

- compliance with the provisions of Clause *[insert as appropriate]* is unreasonable or unnecessary in the circumstances of the case,
- deferred or periodic payment of the contribution will not prejudice the timing or the manner of the provision of public facilities included in the works program,
- where the applicant intends to make a contribution by way of a planning agreement, works-in-kind or land dedication in lieu of a cash contribution and council and the applicant have a legally binding agreement for the provision of the works or land dedication,
- there are circumstances justifying the deferred or periodic payment of the contribution.

If council does decide to accept deferred or periodic payment, council may require the applicant to provide a bank guarantee by a bank for the full amount of the contribution or the outstanding balance on condition that:

- the bank guarantee be by a bank for the amount of the total contribution, or the amount of the outstanding contribution, plus an amount equal to thirteen (13) months interest plus any charges associated with establishing or operating the bank security
- the bank unconditionally pays the guaranteed sum to the council if the council so demands in writing not earlier than 12 months from the provision of the guarantee or completion of the work
- the bank must pay the guaranteed sum without reference to the applicant or landowner or other person who provided the guarantee, and without regard to any dispute, controversy, issue or other matter relating to the development consent or the carrying out of development
- the bank's obligations are discharged when payment to the council is made in accordance with this guarantee or when council notifies the bank in writing that the guarantee is no longer required

*This suggested clause requires and authorises an accredited certifier to impose a contribution in accordance with the plan for complying development.*

*This also alerts the certifier to check if council has accepted another form of contribution.*

*The EP&A Regulation [clause 27(f)] requires a council to specify the conditions under which it may accept a deferred or periodic payment of the contribution. Councils may seek bank guarantees for contributions if deferred payments are contemplated.*

*Councils may wish to consider circumstances where, for example, staged development is being proposed and payment of the total contribution up front may be onerous or unnecessary in the circumstances.*

*This is a typical clause found in contributions plans and is intended to allow councils to seek bank guarantees for the amount of the contribution (this may be the entire contribution or that part relating to the individual stage). The clause provides for councils to draw down the contribution within 12 months if necessary. Councils are encouraged to maintain dialogue with applicants particularly where the guarantee is large.*

*Many developers are accustomed to providing bank guarantees or bonds, however councils should consider a type of security which is appropriate to the circumstances of the particular development.*

## Development Contributions – Practice Note

- where a bank guarantee has been deposited with council, the guarantee shall not be cancelled until such time as the original contribution and accrued interest are paid.

### 2.11 Can the contribution be settled “in-kind” or through a material public benefit?

The council may accept an offer by the applicant to provide an “in-kind” contribution (ie the applicant completes part or all of work/s identified in the plan) or through provision of another material public benefit in lieu of the applicant satisfying its obligations under this plan.

Council may accept such alternatives in the following circumstances:

- the value of the works to be undertaken is at least equal to the value of the contribution that would otherwise be required under this plan; and
- the standard of the works is to council’s full satisfaction; and
- the provision of the material public benefit will not prejudice the timing or the manner of the provision of public facilities included in the works program; and
- [other as appropriate in the circumstances].**

The value of the works to be substituted must be provided by the applicant at the time of the request and must be independently certified by a Quantity Surveyor who is registered with the Australian Institute of Quantity Surveyors or a person who can demonstrate equivalent qualifications.

Council will require the applicant to enter into a written agreement for the provision of the works.

Acceptance of any such alternative is at the sole discretion of the council. Council may review the valuation of works or land to be dedicated, and may seek the services of an independent person to verify their value. In these cases, all costs and expenses borne by the council in determining the value of the works or land will be paid for by the applicant.

### 2.12 Exemptions

Council may consider exempting developments, or components of developments from the requirement for a contribution that include:

- ***[INSERT ANY PARTICULAR TYPES OF DEVELOPMENT FOR WHICH EXEMPTION IS TO BE GRANTED]***

For such claims to be considered, a development application will need to include a comprehensive submission arguing the case for exemption and including details of the following matters:

- [insert here the planning criteria that will be used to determine whether the exemption is granted].**

*Council should state its policy on works in kind, land dedication and material public benefits clearly.*

*This suggested clause sets out various conditions whereby a council may contemplate such alternatives. It is strongly recommended that council seek to enter into a formal agreement with an applicant where such alternatives are being proposed. See also practice note Exemptions, discounts, credits and refunds).*

*Exemptions from contributions are at the discretion of the council. However, council should state its policy on exemption if they are to be considered.*

*Some councils exempt long term affordable housing, short term family/crisis housing, or the maintenance of an item of heritage significance, under certain circumstances. Refer also practice note Exemptions, discounts, credits and refunds).*

## Development Contributions – Practice Note

### 2.13 Review of contribution rates

To ensure that the value of contributions are not eroded over time by movements in the **[insert here relevant index]**, land value increases, the capital costs of administration of the plan or through changes in the costs of studies used to support the Plan, the council will review the contribution rates.

The contribution rates will be reviewed by reference to the following specific indices:

- construction costs by the **[insert here relevant index]** as published by **[insert here source of index]**
- land acquisition costs by reference to average land valuation figures published by council in Council's Management Plan
- specific valuations for particular parcels of land that are identified in the s94 plan as published by the council in Council's Management Plan
- changes in the capital costs associated with provision of administration and salary costs for staff involved in implementing council's s94 plan by reference to increases in salary rates under the Local Government State Award Plan as published by the council in Council's Management Plan
- changes in the capital costs of various studies and activities required to support the strategies in the plan by reference to the actual costs incurred by council in obtaining these studies plan as published by the council in Council's Management Plan.

In accordance with clause 32(3)(b) of *the EP&A Regulation*, the following sets out the means that the council will make changes to the rates set out in this plan.

For changes to the **[insert here relevant index name]** index, the contribution rates within the plan will be reviewed on a quarterly basis in accordance with the following formula:

$$\text{\$C}_A + \frac{\text{\$C}_A \times (\text{[Current Index - Base Index]})}{\text{[Base Index]}}$$

Where

<b>\\$C<sub>A</sub></b>	is the contribution at the time of adoption of the plan expressed in dollars;
Current Index <b>[index name to be inserted]</b>	is the <b>[index name to be selected by the council]</b> as published by the <b>[insert source of index]</b> available at the time of review of the contribution rate;
Base Index <b>[index name to be inserted]</b>	is the <b>[index name to be selected by the council]</b> as published by the <b>[insert source of index]</b> at the date of adoption of this Plan which is <b>[insert index number at time of adoption]</b> .

Note: In the event that the Current **[index to be inserted]** is less than the previous **[index to be inserted]**, the Current **[index to be inserted]** shall be taken as not less than the previous **[index to be inserted]**

*The EP&A Regulation [clause 32(3)(B)] permits changes to the rates of section 94 monetary contributions to take account of movements in such indices as the Consumer Price Index (CPI) and land values without the need to review the plan. However, the specific indices must be referred to in the plan and they must be in accordance with the requirements of the EP&A Regulation. The following is an example (also refer to the practice note Adjustment of section 94 development contributions).*

*Council should ensure that any indices prepared by or on behalf of the council are published in council's management plan to ensure that the process of review of the rates is transparent and that the indices are validly adopted.*

## Development Contributions – Practice Note

For changes to land values, the council will publish at least on an annual basis the revised land index values that are to be used to change the base land values contained in the plan which will be determined in accordance with the following formula:

$$\text{\$C}_{LV} + \frac{\text{\$C}_{LV} \times (\text{[Current LV - Base LV Index]})}{\text{[Base Index]}}$$

Where

<b>\\$C<sub>LV</sub></b>	is the land values within the plan at the time of adoption of the plan expressed in dollars;
Current LV Index <b>[index name to be inserted]</b>	is the land value index as published by the council available at the time of review of the contribution rate;
Base LV Index <b>[index name to be inserted]</b>	is the land value index as published by the council at the date of adoption of this Plan which is <b>[insert index number at time of adoption]</b>

For changes in salary costs and changes in the costs for studies and other activities associated with the plan, council will publish at least on an annual basis the revised indices that are to be used to change the base costs of salaries and the costs of studies and associated activities in administering the plan.

**Note:** This clause does not cover the adjustment of a contribution between the time of consent and the time payment is made. This is covered by clause **[note clause no.]**

### 2.14 How are contributions adjusted at the time of payment?

The contributions stated in a consent are calculated on the basis of the s94 contribution rates determined in accordance with this plan. If the contributions are not paid within the quarter in which consent is granted, the contributions payable will be adjusted and the amount payable will be calculated on the basis of the contribution rates that are applicable at time of payment in the following manner:

$$\text{\$C}_P = \text{\$C}_{DC} + \frac{\text{\$C}_{DC} \times (\text{\$C}_Q - \text{\$C}_C)}{\text{\$C}_C}$$

Where

- \\$C<sub>P</sub>** is the amount of the contribution calculated at the time of payment
- \\$C<sub>DC</sub>** is the amount of the original contribution as set out in the development consent
- \\$C<sub>Q</sub>** is the contribution rate applicable at the time of payment
- \\$C<sub>C</sub>** is the contribution rate applicable at the time of the original consent

The following is an example of how a contribution can be adjusted at the time of payment of the contribution (also refer to the practice note Adjustment of section 94 development contributions).

It is extremely important that the formula is not amended as this may render the calculation of the contribution incorrect.

## Development Contributions – Practice Note

The current contributions are published by council and are available from council offices. Should the council not validly publish the applicable contribution rates, the rate applicable will be calculated in accordance with the rate prevailing in the previous quarter.

*Council may wish to state its policy on credits for existing development. The following is an example (also refer to the practice note Adjustment of section 94 development contributions).*

### 2.15 Are there allowances for existing development?

Contributions will be levied according to the estimated increase in demand. An amount equivalent to the contribution attributable to any existing (or approved) development on the site of a proposed new development will be allowed for in the calculation of contributions. In assessing the contribution of existing development the following occupancy rates will be used:

- dwelling houses and single vacant allotments – **[inset no.]** persons per dwelling or lot
- other dwellings – 1 bedroom units - **[inset no.]** persons per dwelling; 2 bedroom dwellings – **[inset no.]** persons per dwelling; 3 bedroom units – **[inset no.]** persons per dwelling
- tourist development – **[inset no.]** person per bed
- commercial/office space – one employee per **[inset no.]** square metres of gross floor area
- retail space – one employee per **[inset no.]** square metres of gross floor area
- industrial space – one employee per **[inset no.]** square metres of gross floor space.

Where a development does not fall within any of the items noted above, the council would determine the credit on the basis of the likely demand that the existing development would create.

### 2.16 Pooling of contributions

This plan expressly authorises monetary s94 contributions paid for different purposes to be pooled and applied (progressively or otherwise) for those purposes. The priorities for the expenditure of the levies are shown in the works schedule.

*The EP&A Regulation permits the pooling of s94 levies [clause 27 (1)(h)] and, should council wish to pool their contributions, a specific clause to permit this should be included in the plan (see also practice note Financial management of development contributions).*

### 2.17 Savings and transitional arrangements

A development application which has been submitted prior to the adoption of this plan but not determined shall be determined in accordance with the provisions of the plan which applied at the date of determination of the application.

*This is a suggested clause to address possible disputes in the determination of a contribution at the time of consent. It requires that an application is subject to the plan which is in place when the consent is issued.*

## Development Contributions – Practice Note

### 3. Part C – Strategy plans

#### What should this section consider?

The strategy plans are the heart of a development contributions plan and include many of the matters required to be addressed by the *EP&A Regulation*. The focus of this section is to give guidance on what should be considered and how it should be researched and presented.

Fundamentally, this section needs to demonstrate that the resulting contributions are **reasonable** through consideration of nexus (or a connection between the development and new facilities) and apportionment.

This is essentially a three step process:

- **Step 1:** Determining the anticipated development in the area to which the plan applies
- **Step 2:** Determining the expected demand for public facilities and infrastructure arising from the proposed development
- **Step 3:** Identifying the relationship between this development and the demand for additional public amenities and public services.

The information to satisfy these steps will vary according to the circumstances although there are some common themes that need to be considered which are illustrated in this section.

Council must make these decisions after considering the demand likely to arise, which could include specialist investigations to determine the types of facilities required.

#### Step 1: What is anticipated development?

Anticipated development is the population or employment growth expected in an area. It can be determined through an analysis of:

- **Past Population Growth:** past growth and demographic changes
- **Housing Trends:** past occupancy levels and changes
- **Future Population Growth:** greenfield areas, brownfield locations, infill, locations and timing
- **Non-Residential Development:** locations and timing.

To identify future development, it is beneficial to look at past growth and development. This includes past population and housing growth. It is then necessary to assess what growth might occur through analysis of landstocks and development potential.

#### Step 2: How to identify demand

To identify demand, it is necessary to look at measures such as standards or existing level of provision. It is also necessary to look at the existing facilities that may provide for some demand.

Expected demand can be determined through the following process:

- **Identify categories of facilities required for the incoming population:** these may include community facilities, open space, roads, car parking, civic improvements and other support facilities
- **Examine levels of existing provision:** the standard that exists at present may be appropriate to meet some of the needs of the incoming population
- **Use relevant industry standard** for provision for facilities where existing provision is not appropriate
- **Derive demand** by analysis of existing provision/industry standards against the incoming population.

The demand for public facilities could include:

1. **Physical infrastructure** required to support development. Examples include (but is not limited to) such public facilities as:
  - roads and other traffic management facilities, public car parking
  - public transport facilities
  - cycleways.
2. **Social or community Infrastructure** required to serve the needs of the incoming population. Social infrastructure may include (but is not limited to) such facilities as:
  - open space/recreation facilities
  - childcare facilities
  - multi-function community facilities
  - libraries.

#### Step 3: Identifying the relationship

The relationship between expected development and demand is one of establishing the proportional responsibility of expected development, and whether there is a need to make allowance for any existing demand or past deficiencies (apportionment).

Reference should be made to the practice notes *Principles underlying development contributions* and *Relationship between expected development and demand* for guidance on these matters.

## Development Contributions – Practice Note

### **4. Part D – References**

Council should include here all the reference documents used to compile the plan. These may include:

- Policy documents such as management plans
- Plans of management for open space areas
- Social plan
- Local environmental plan
- Other supporting specialist studies that have been prepared to support the plan.