



PLANNING SYSTEM

Development contributions

Circular	PS 09-001
Issued	23 January 2009
Related	PS 08-017

Review of local contributions— section 94E Direction

The purpose of this circular is to advise councils of a Direction issued under section 94E of the *Environmental Planning and Assessment Act 1979* imposing a maximum amount for section 94 development contributions for residential development.

Introduction

On 17 December 2008 the Premier, the Hon. Nathan Rees MP announced a package of reforms to infrastructure levies. Included in these reforms was the establishment of a threshold for local government levies to help improve affordability and accountability for contributions.

As part of the implementation of these reforms, the Minister for Planning has executed a Direction under section 94E of the *Environmental Planning and Assessment Act 1979* (the Act). The Direction (see attached) applies to all councils in NSW and takes effect on 1 February 2009.

The issue of this Direction was foreshadowed in Planning Circular PS 08-017.

Background

The November 2008 Mini-Budget included an announcement that there would be a review of local government levies with the objective to ensure that the levies are consistent with the Government's plans to boost housing supply and affordability as well as support business and provide a stimulus to the construction industry.

In relation to local government levies, the Premier's announcement on 17 December 2008 included:

- establishing a maximum \$20,000 threshold for local government contributions applying to residential dwellings, unless the Minister for Planning approves a higher amount
- requiring councils, if they wish, to submit to the Government for review existing contributions plans that would allow for contributions above the \$20,000 threshold.

The Direction, together with the procedures for the review of contributions plans set out in this circular implement these reforms.

The Premier also announced a number of changes related to State infrastructure levies, however, they are not the subject of this circular. Further information in relation to these changes will be provided in the near future.

Section 94E Direction

Attached to this circular is a Direction executed by the Minister for Planning under section 94E of the Act. The Direction applies to monetary contributions required by conditions of development consent imposed by councils under section 94(1) or section 94(3) of the Act.

The Direction provides that as from 30 April 2009 development consents for 'residential development' are not to require section 94 contributions the sum of which exceed:

- for consents authorising the erection of one or more dwellings—the amount determined by multiplying the number of dwellings by \$20,000
- for consents authorising the creation of residential lots by subdivision of land (but not the erection of dwellings on those lots)—the amount determined by multiplying the number of residential lots to be created by \$20,000.

The limitation on section 94 contributions applies:

- to the total of all section 94 contributions that may be required by a consent, irrespective of whether the contributions are identified in one or more conditions of the consent

- irrespective of whether the contributions are authorised by one or more contribution plans
- to the amount of section 94 monetary contributions identified in the consent, excluding any indexation provided for in the conditions of consent.

For the purposes of the Direction, 'residential development' means development, or any part of development for the purpose of one or more dwellings. Section 4(1) of the Act defines development as including, amongst other things, the subdivision of land.

As an example, the Direction applies to consents authorising:

- the erection of dwellings
- the subdivision of land for the purposes of a dwelling
- both the subdivision of land for the purposes of a dwelling and the erection of some, but not all, of the dwellings on the lots created
- mixed use development, but only to the residential component of the development.

The Direction further provides that the maximum amount of section 94 contributions may be exceeded where a council seeks, and has received, the approval of the Minister for Planning. The process for councils seeking such approval is set out in this circular (see page 3).

Complying development

The Direction also applies to section 94 monetary contributions required as a result of councils imposing conditions on complying development certificates.

The Direction does not apply to accredited certifiers. However, accredited certifiers have been:

- advised the Direction has been issued to councils
- requested to advise the Building Professionals Board when they issue a complying development certificate that includes a condition requiring section 94 contributions exceeding the amounts referred to in the Direction.

It is anticipated that there will be limited instances where certifiers would be imposing conditions of this kind. This will be monitored as part of the implementation of developer contribution reforms.

Effect of the Direction

The Direction applies to consents granted, and applications for complying development determined, on or after 30 April 2009.

Section 94E(2) of the Act requires councils to comply with the terms of any direction issued under section 94E. Therefore a council, in granting development consent or issuing a complying development certificate to which this latest Direction applies, must not impose a condition that is inconsistent with the terms of the Direction.

Councils should note that the Direction does not affect the requirements under the Act for councils to:

- only impose section 94 contributions that are authorised by a contributions plan
- use contributions for the purpose for which they were required and within a reasonable time.

To assist councils in complying with the maximum amounts for section 94 contributions, the Direction provides that the contribution rates specified in an applicable contributions plan may be reduced for the purpose of determining monetary contributions that are in compliance with the Direction.

What's excluded?

The Direction does not apply to:

- section 94 contribution conditions imposed before 30 April 2009
- monetary contributions required under section 94A (fixed percentage levies) or section 94F (affordable housing contributions) of the Act
- conditions requiring the dedication of land free of cost (section 94(1)(a)).

The Direction does not affect the ability of councils to accept the dedication of land or the provision of material public benefits in lieu of monetary contributions (section 94(5)).

Implications of the Direction for new contributions plans or amendments to existing plans

Clause 26 of the Environmental Planning and Assessment Regulation 2000 provides that councils must not approve a contributions plan (including a plan that amends an existing contributions plan) that is inconsistent with any direction issued under section 94E.

Accordingly, councils should ensure that any contribution plans that are in the course of being prepared or adopted are consistent with the Direction. Where a council wishes to prepare a contributions plan that would allow the imposition of conditions higher than the maximum amount set out in the Direction (either by itself or in conjunction with other applicable contributions plans), it will need to obtain the approval of the Minister for Planning before the plan is made.

Options for councils

Councils should obtain their own legal advice in relation to compliance with the Direction.

Councils with affected contributions plans may consider:

- amending the contributions plan(s) to comply with the Direction, or
- when determining monetary contributions, reducing the contribution rates specified in an applicable contributions plan in order to comply with the Direction (i.e. in accordance with clause 5 of the Direction), or

- seeking the Minister's approval to impose a condition or conditions that exceed(s) the maximum amount set out in the Direction.

Process for seeking approval to impose contributions over maximum amount

Under the terms of the Direction, councils may not impose section 94 contributions that will exceed the maximum amount set out in the Direction, unless the Minister's approval is obtained.

As part of the approval process, councils will need to submit their contributions plan(s) to the Department for review. A Review Panel will be established to undertake the review of the contribution plan(s) and to advise the Minister on requests to impose contributions above the maximum amount.

The Review Panel process will allow councils and the State Government to work together to critically examine contributions plans to determine whether options exist to structure infrastructure delivery and funding programs to ensure that they are appropriate to the amount and type of development.

The Review Panel

The Review Panel will include senior officers of the Departments of Planning and Local Government as well as the NSW Treasury. The Panel will also comprise independent experts in the areas of council financing, infrastructure and development contributions. Further announcements of the membership of the Panel, including who will chair the Panel will be made shortly.

Likely issues that could influence the Review Panel's examination of council contributions plans may include:

- the forward planning of the area and the consequential infrastructure needs
- the connection (or nexus) between the infrastructure in the plan and the demand to be created by the new development
- the extent to which council is apportioning the costs for the provision of the infrastructure between new development areas and existing areas
- the assumptions underlying the contributions plan, including costings of infrastructure, land acquisition costs for the particular area/locality, the expected timing for the delivery of infrastructure and the existing state of assets
- how the financial strategy in the contributions plan is reflected in, or supports, the council's management plan
- the likely consequences of contributions on the ability of developers to bring new product to market.

There will be two key points at which councils will be asked to provide information on their contributions plans: firstly; a notification of the council's intentions if its contributions plans exceed the maximum amount set out in the Minister's direction; secondly; the formal request to impose contributions over the maximum amount, to be supported by more detailed justification of a council's contribution plan(s).

Review process

The process for the review of contributions plans will involve:

Step 1

By 2 February 2009, councils with affected contributions plans must:

- provide notice as to whether it is council's intention to:
 - seek approval to impose contributions over the maximum amount specified in the Direction (either in an individual case or a class of cases), or
 - comply with the Direction by limiting contributions to the maximum of \$20,000, or
 - undertake a review of its contributions plans
- submit, along with that notice of intention, copies of their relevant contributions plans and a list of current contribution rates.

The notice of intent and supporting documents should be sent to:

Local Contributions Review Panel
Department of Planning

post:

GPO Box 39, Sydney NSW 2001

email:

contributions.reform@planning.nsw.gov.au

The notice of intention will allow the Review Panel to understand the likely number of plans to be reviewed and obtain a broad understanding of council intentions.

Step 2

The council is required to make a formal written request to the Minister seeking approval to impose contributions over the maximum amount specified in the Direction (either in an individual case or a class of cases).

Councils will need to provide this formal request to the Minister by 2 March 2009. Extensions beyond this date will not be considered.

Step 3

A review of the contributions plan(s) will be undertaken by the Review Panel. At this stage the panel may identify further information required from the council to justify or explain the contributions plan(s) and the request to impose contributions over the maximum amount.

Step 4

Following completion of the review, the Review Panel will provide advice to the Minister.

The Minister will then determine whether:

- approval should be granted to allow contributions over \$20,000 in a particular case or class of cases
- affected councils should be authorised to use contributions for other community infrastructure
- affected councils will be required to amend their contributions plans to comply with the Minister's determination.

Step 5

Councils will be notified of the Minister's decision. Councils may be required to take further action to comply with the Minister's determination, e.g. by making amendments to contributions plan(s).

Further Information

If you have further enquiries in relation to the Direction and this Planning Circular please contact the Department's Information Centre, phone (02) 9228 6333 or email information@planning.nsw.gov.au.

Note: This and other Department of Planning circulars are published on the web at www.planning.nsw.gov.au/planningsystem/practicenotes.

Authorised by:

Sam Haddad
Director-General
NSW Department of Planning

Important note: This circular does not constitute legal advice. Users are advised to seek professional advice and refer to the relevant legislation, as necessary, before taking action in relation to any matters covered by this circular.

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ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979

DIRECTION UNDER SECTION 94E

1. INTRODUCTION

- 1.1. I, the Minister for Planning (**Minister**), being the Minister administering the *Environmental Planning and Assessment Act 1979 (Act)*, pursuant to section 94E of that Act:
- (a) direct all Councils to comply with the requirements set out in this Direction; and
 - (b) revoke any previous direction under section 94E to the extent of any inconsistency with this Direction.
- 1.2. This Direction takes effect from 1 February 2009.

2. DEFINITIONS

- 2.1. Words and expressions used in this Direction have the same meaning as in the Act except where otherwise indicated.
- 2.2. The following definitions apply in this Direction:

'Contributions Plan' means a contributions plan referred to in section 94EA of the Act and in force from time to time.

'Council' means a council as defined in section 4(1) of the Act acting in its capacity as a *consent authority* as defined in section 4(1) of the Act.

'Development Consent' means consent under Part 4 of the Act to carry out development and includes a complying development certificate.

'Dwelling' means a room or suite of rooms occupied or used or so constructed or adapted as to be capable of being occupied or used as a separate domicile.

'Monetary Contribution' means a monetary contribution required by a condition of Development Consent imposed by a Council under s94(1) or s94(3) of the Act, excluding any indexation provided for in the condition.

'Residential Development' means development, or any part of development, for the purpose of one or more Dwellings.

Note: Development is defined in section 4(1) of the Act to include, amongst other things, *the subdivision of land* as defined in s4B of the Act.

'Residential Lot' means a lot created by the subdivision of land as defined in section 4B of the Act for the purpose of a Dwelling not being a lot that, in the opinion of the Council, is to be further subdivided for the purpose of Residential Development.

3. MAXIMUM AMOUNT OF CONDITIONS OF DEVELOPMENT CONSENT

- 3.1. On and from 30 April 2009, a Development Consent authorising Residential Development is not to require Monetary Contributions in respect of such development the sum of which exceed the following amount:
- (a) to the extent that the consent authorises the erection of one or more Dwellings - the amount determined by multiplying the number of Dwellings by \$20,000;

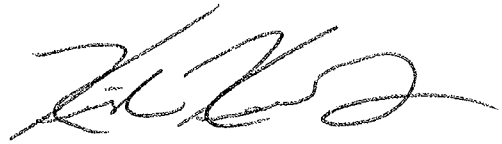
- (b) to the extent that the consent authorises the creation of Residential Lots but not the erection of Dwellings on those lots - the amount determined by multiplying the number of Residential Lots to be created by \$20,000.

4. APPROVAL OF CONDITIONS IN EXCESS OF MAXIMUM AMOUNT

- 4.1. The Minister may, on written application by a Council, give written approval to the Council to the granting of a Development Consent or Development Consents requiring Monetary Contributions that exceed the amount referred to in clause 3.

5. REDUCTION OF CONTRIBUTIONS ALLOWED BY CONTRIBUTIONS PLAN

- 5.1 The contribution rates specified in an applicable Contributions Plan relating to Residential Development may be reduced for the purpose of determining Monetary Contributions that comply with clause 3.



MINISTER FOR PLANNING

DATE: 13 Jan 09