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Related	

New definition of capital investment value

This circular is to advise councils, developers and the community of a new definition of 'capital investment value' under the *Environmental Planning and Assessment Regulation 2000* and certain State Environmental Planning Policies.

Introduction

A new definition of 'capital investment value' (CIV) has been included in the *Environmental Planning and Assessment Regulation 2000* (the Regulation) to provide greater certainty as to what items should be included and excluded when calculating the CIV for a project.

From 7 May 2010, this definition is to be used when considering whether Schedule 1 of the State Environmental Planning Policy (Major Development) 2005 (MD SEPP) identifies a proposal as a project to which Part 3A of the *Environmental Planning and Assessment Act 1979* (EP&A Act) applies or if it is an application to be determined by a Joint Regional Planning Panel (Regional Panel). The definition is also to be used to determine the fees payable for an application under Part 3A of the EP&A Act. It is also relevant to certain other types of development and actions covered by SEPPs that reference the term.

However it does not apply for the purpose of calculating an application fee for a Part 4 development application, which continues to use 'cost of works' (see Clause 246 of the Regulation).

On 7 May 2010, the *State Environmental Planning Policy Amendment (Capital Investment Value) 2010* (the CIV SEPP) amended several State Environmental Planning Policies (SEPPs) to ensure the definition of CIV is consistent throughout the NSW planning system.

Changes relating to the Regulation

The amended definition is included in clause 3 of the Regulation, as follows:

Capital investment value of a development or project includes all costs necessary to establish and operate the project, including the design and construction of buildings, structures, associated infrastructure and fixed or mobile plant and equipment, other than the following costs:

- (a) amounts payable, or the cost of land dedicated or any other benefit provided, under a condition imposed under Division 6 or 6A of Part 4 of the *Environmental Planning and Assessment Act* or a planning agreement under that Division
- (b) costs relating to any part of the development or project that is the subject of a separate development consent or project approval
- (c) land costs (including any costs of marketing and selling land)
- (d) GST (as defined by *A New Tax System (Goods and Services Tax) Act 1999* of the Commonwealth).

The main change to the definition is a clear direction that the following items should be excluded when calculating the CIV for a development:

- Development contributions - it is not appropriate to include development contribution charges in calculating the capital investment value. These charges are considered an external cost that should not contribute to the value of the development or be included for the purpose of calculating the project fees or other developer charges.

- Costs relating to any part of the development or project that is, or will be, the subject of a separate development consent or project approval – the capital investment value of the development must only include those works that are subject to the current application, not prior or subsequent applications.

CIV made consistent in all SEPPs

The CIV SEPP amends:

- MD SEPP
- Statement Environmental Planning Policy (Sydney Regional Growth Centres) 2006
- State Environmental Planning Policy (Infrastructure) 2007, and
- State Environmental Planning Policy (Western Sydney Parklands) 2009.

These instruments are amended to ensure CIV has the same meaning as in the Regulation (as above).

Recent court case on CIV

The recent Land and Environment Court judgment, *Calardu Penrith Pty Ltd v Penrith City Council* [2010] NSWLEC 50 Pty Ltd was partly concerned with the calculation of CIV. Although the judgement did not consider the amended definition of CIV, it provides relevant principles when calculating CIV, as follows:

- The included costs must relate to works contemplated in the application
- The CIV of a proposed development is to be calculated at the time of lodgement of the application for the purposes of determining whether an application should go to a Regional Panel
- CIV is expressly concerned with “costs” that are of a capital nature
- Those costs do not need to be incurred by the proponent/ applicant
- There must be sufficient evidence to support the amounts, and considerable weight should be given to amounts that have been contractually agreed upon
- Finance costs should not be included.

Determination of CIV

- The calculation of CIV under clause 13B of the MD SEPP is one of fact; it is not subject to the ‘opinion’ of either the Council or the Regional Panel. Any disagreement about the CIV should be resolved objectively by a quantity surveyor.
- The Minister has the sole responsibility for forming the opinion if a development is a project to which Part 3A applies. Once such an opinion is formed, the project remains a Part 3A project regardless of any subsequent variations to CIV (or other relevant factor).

Staged development

When calculating the CIV for a staged development, the CIV of the separate applications comprising the overall staged development must be considered in determining the CIV for that development. However,

an application can only be ‘staged’ at the request of the applicant.

Calculating CIV

The following information is provided as a guide to assist in establishing the types of costs that should be included and excluded when calculating CIV. The following information is not exhaustive and should be considered as a general guide based on the amended definition and the relevant matters raised in the recent court case.

Design and construction

The calculation of CIV should include the amount required to design and construct all buildings and other facilities that are part of/ included in the application, including any temporary buildings that will be used during the construction phase.

Structures and infrastructure

CIV should include all costs incurred from the construction of associated structures and infrastructure that are the subject of the current application. These costs include any supplementary or site preparatory works such as remediation, demolition, excavation and filling, that are required for the construction of buildings, provided these works are needed to make the site suitable for construction and for the operation of the project.

Site services

CIV should include the costs of providing electrical services, water, gas, sewerage and stormwater drainage, including any temporary diversions and/ or arrangements during construction, and should form part of the application.

The costs of fire protection and communications services that are reasonably required to construct and operate the project should also be included.

Site works such as landscaping, car parking, roads and footpaths should also be included.

Plant and equipment

CIV should include standard building plant, such as lifts and air-conditioning, and all specialist and specific equipment related to the operation of the project, provided these are specifically included as part of the application.

Fit-out costs of a building may be included in the calculation of CIV where the costs are subject to the application. In such cases, the application would need to include specific tenancy use, and would be defined by specific reference to description in the application. Where such tenancy is not referred to or will be subject to further applications, the fit out costs should not be included.

Labour fees

All labour and personnel costs, including the payment of long service levies and other associated construction and labour costs should be included in the calculation of the CIV.

Other fees

Costs such as finance application fees, mortgage stamp duty, fees paid to register strata titles or to amalgamate land prior to development, and interest payable on the loans associated with the development should be excluded in the calculation of CIV.

Further information

A copy of the amended Regulation and relevant SEPPs are available on the NSW legislation website:

<http://www.legislation.nsw.gov.au>

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

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