



Great Lakes Council Draft 2009 Contributions Plan Tea Gardens District

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on behalf of the Urban Taskforce Australia

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Published by Urban Taskforce GPO Box 5396 Sydney NSW 2001

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The Urban Taskforce is a non-profit organisation representing Australia's most prominent property developers and equity financiers. We provide a forum for people involved in the development and planning of the urban environment to engage in constructive dialogue with both government and the community.

Executive Summary

The draft section 94 plan is a very poor example of a contribution plan and it fails a number of serious legal tests (especially nexus and apportionment).

The plan is unreasonable being based upon the very long period to 2041 and the doubtful assumptions about 'gross population' as a basis for demand.

The plan makes reference to what would appear to be an outdated draft of the Riverside voluntary planning agreement, based upon the deed that is currently on exhibition. It should also be noted that this deed has no weight until such time as a consent for Riverside is issued and the agreement offer formalised.

The plan ought to be recast to fix the numerous and sometime major errors. The plan should also be more comprehensive in what is provided to the industry and its customers who reasonably expect get no more and pay no more than they need to, but ought to be fully informed on what is to be provided and where and at what cost.

The plan cannot be adopted in its current form as it is contrary to the Act and Regulation, let alone unworkable due to errors. It effectively requires the prices of other homes to rise, in order to fund the 'affordable' homes that only a small number of individuals can enjoy.

1. Introduction

This is an examination of the *Draft 2009 Section 94 Contributions Plan* (2009 CP) for the Tea Gardens district. The plan may be unreasonable. It may be that the provisions either overlap with proposed voluntary planning agreements or the excessive contributions ought to be revised and be the basis of a review of the offers in the voluntary planning agreements.

This review will examine the fundamentals of the plan to discover whether there is proper nexus and apportionment. To do so a table will be constructed to replicate Council's calculations.

Fundamental to any plan is how the demographic analysis is constructed and whether it is based upon a proper application of the available statistical data.

Generally however a contribution plan based upon a 35 year life span (to 2041) must in itself, be unreasonable, if for no other reason that no basis for this assumption has been provided, other than the land supply might last that long. A developer and purchaser must have a reasonable expectation that facilities will be provided in a reasonable time. This plan allows Council unfettered scope for delay in providing the facilities.

In general a quick scan of the document reveals it is simplistic in the extreme. Given the size of the proposed expenditure, good business sense alone suggests that far more rigour would be advisable for the Council, the ratepayers and the developers.

2. Requirements of the Environmental Planning and Assessment Act

The fundamental requirements for the preparation of a contributions plan are set down in s94 of the *Environmental Planning and Assessment Act 1979* (NSW) ("the Act") and clauses 26 and 27 of the *Environmental Planning and Assessment Regulation 2000* ("the Regulation").

It should be noted that Councils “must have regard” to the Practice Notes issued by the Department of Planning.

Key provisions include:

- Section 94(1) - which deals with *demand*;
- Section 94(2) - which deals with *reasonableness*;
- Section 93E - which requires the Council to spend the funds within a *reasonable time*; and
- Section 27(1)(c) – which deals with the requirement for a proper nexus.

A proper *apportionment* is the working out of what part of the cost applies to the demand by either new or existing development or both. It is the link between reasonableness and nexus. Practice Note 3 makes it abundantly clear what steps ought to be taken to ensure a proper *nexus* and *apportionment* in order to be *reasonable*.¹

It is evident that Council has not abided by the legal requirements in the preparation of this plan, as will be detailed below.

3. Demographics (development forecasts)

Council's projection that the scope of the growth is to 2041 is not based upon any demographic analysis. Only the Department of Planning provides population projections to 2031. Their projections for the past two census have been up to 7 per cent above the actual (i.e. 7 per cent higher).

The yield from new development areas is apparently understated, for example we understand that the Myall River Downs site will accommodate up to 1,400 dwellings (plan claims 610 which is a yield which pre-dated Council's recent housing strategy). We also understand that the yield for developments in North Hawks Nest are also understated.

A proper approach which adheres to the requirements of the statute is to establish, for a reasonable and defined period what the demand would be and set out to meet that demand. The determined growth would be applied to the requirements of nexus and the apportionment would then be applied to providing the facilities (what) in suitable locations (where) and in a timely manner (when). No such exercise has been undertaken by the Council in this case.

There are numerous issues with Council's approach. For example Council rely upon the false assumption that occupancy rates for permanent occupants (2.1) can be used and applied to growth projections. This is easily demonstrated as the ratio of population growth to dwelling/growth in 2006 for the Great Lakes LGA was only 1.4. That means that a new dwelling was constructed for each addition 1.4 per persons. For Tea Gardens and Hawks Nest the rate could be less than 1.0 persons for each new dwelling due to the high vacancy rate.

A low rate is also supported by the fact that the occupancy rate for the increasing number of over-65s households is consistently 1.4 in the three adjacent local government areas (Greater Taree, Great Lakes and Port Stephens).

It is noted that the vacancy rate is assumed to be 5 per cent (for permanents) while the Australian Bureau of Statistics (ABS) data reports 25 per cent for all dwellings for the local government area. Council however state that the rate for the subject area was 53 per cent in 2006. In 2001 Hawks Nest was 60 per cent while Tea Gardens was 25 per cent.

The Council then go on to extrapolate a 'gross' population which is purported to be the basis of demand for facilities. While gross is not defined it appears to include visitors/tourists. However how this is relevant to facilities for permanent residents is not explained and probably not considered.

The above raises a number of concerns:

1. What will the actual demand be for open space which may be in part for permanent facilities, particularly active sport and what may be required for visitors by way of passive space?

¹ NSW Department of Infrastructure, Planning and Natural Resources, *Development Contributions – Practice Note: Relationship between expected development and demand* (2005).

2. For the road works, is a gross population achieved only over 60 days per annum a proper basis for assessing demand? Generally trying to support a demand assumed to be the maximum demand is not a rational basis for planning works.
3. A proper analysis of demand could put the growth of permanent population for the 3600 dwellings and 3600 persons (less than 50 per cent of what Council assess). However whether and over what period the number of dwellings might be provided, and what facilities might be provided remains a challenge, not resolved by Council.

The 3600 dwellings might be accommodated to 2031 if a 1 per cent increase in demand occurs.

In essence given the lack of nexus for open space for example, it is apparent the Council's exercise is merely pointless mathematics.

In summary the demographic analysis needs to be recast as an essential starting point for a proper plan. The gross population would merely serve to overstate the demand for facilities and should be abandoned. There is ground to consider some increase in traffic, but not as if the gross population were permanents. The planning period ought to be limited to 15-20 years.

4. Traffic assessment

The assessment is simplistic and to the disadvantage of new development.

The reasons include:

1. It cannot be assumed that only new development will benefit from the new works listed.
2. In addition various developments will have different demands. While some agglomeration of demand may be justified, it cannot be assumed that all developments have a nexus to all works.
3. The total demand used does not take into account that there is a difference between local trips and trips on the arterial road. The rate may be 9 for local traffic but 6 to 7 for arterial traffic.
4. Counting the same residential traffic travelling to retail and industrial is obviously double dipping. Only external traffic not already counted as local ought to be used for these categories. These figures may be ok for design purposes but they are inappropriate for apportionment in section 94 plans.

5. Major roads

As indicated above the plan appears to include the Council's works program and further assumes that only new development benefits.

It is noted that the certain works are excluded - being provided under a voluntary planning agreement for the Riverside Development. The Table 3.6 appears to be in error. The funds held listed as \$119,238 should be \$257,238 as per the table on page 9.

The allowances for the Riverside development area as listed in the current draft voluntary planning agreement different to the amounts allowed in Table 3.6.

In table 3.4 of the total \$3,716,560 for arterial roads \$2,030,160 has been spent. However only \$495,627 has been collected. It suggests that only 24 per cent was met by section 94 contributions and interest accrued. The balance being met by Council on behalf of existing users.

By comparison Council propose that the arterial road works be paid 100 per cent by new development post 2009. This comparison supports the concern that the apportionment may be challengeable.

A revision of the apportionment based upon a proper share with existing users, a lower demand as indicated by the demographic analysis and the lower trips per day for arterial roads is warranted.

6. Open Space

The principal issue with the Open Space provisions is the complete lack of a work schedule, nexus and apportionment as required by the Act and Regulation.

6.1 Acquisition

Plan defines need as being 53.68 hectares (3600 lots at 2.1 and 7.1 square metres per person). No contribution ought to be made by Riverside and Myall River Downs as these are being provided on site.

The Council needs to consider the local reserves may be provided in other estates and the nature of works-in-kinds offsets that will be allowed.

6.2 Embellishment

As there is no land to be provided except for local reserves: what reserves are to be embellished and why? Without the location of these reserves it is impossible to establish spatial nexus (where).

Temporal nexus (when) are also missing as there is no dates or thresholds.

Even if the assumptions of cost are accepted the cost should be charged at the net population increase of 1.0 per lot.

This provision is the most compelling grounds to have the draft plan declared to be 'void and of no effect'.

7. Community facilities

While the sort of facilities proposed are reasonable, a better explanation of the proposals including their locality would be useful. The scant detail for such expenditure is lamentable. How proper nexus and apportionment is to be met is unexplained. The community centre for example is to be provided on a site to be 'determined'.

How the community facilities serve holiday makers is unstated. It cannot be a reasonable assumption that the facilities will serve other than the permanent population. That assumption should be abandoned and a reduced demand applied.

Further the assumption that the permanent population will grow from 53 per cent to 80 per cent has no basis. This is why a proper demographic analysis is needed; ie to provide a proper basis for the demand.

In regard to the Table 5.5, the sums are wrong. The sum should be \$3,760,000 not \$4,160,000.

The interest calculation is not based upon a proper cash flow analysis and is overstated by about \$150,000 Therefore Table 5.6 should be recast to adjust for the lower demand, errors in cost, and apportionment.

8. Surf life saving facilities

While there is no explanation as to why the facility needs a 25 per cent increase in size, the apportionment over all users is correct.

It should be noted that the Act does not consider 'value'. As found in the *Group Development Services Pty Limited v Baulkham Hills Shire Council*² this concept is unlawful. It is possible however to apply cost plus consumer price index to the date of the CP. Therefore the current cost needs to be recalculated.

A better explanation of the proposed works and a revision of the apportionment is a basic requirement.

² [2004] NSWLEC 537.