Urban Taskforce
AUSTRALIA

26 December 2010

Mr Ian Reynolds
Deputy Director-General
Strategies and Land Release
Department of Planning
GPO Box 39
Sydney NSW 2001

Dear Mr Reynolds,

Re: Draft special infrastructure contribution "practice notes"

Thank you for giving us the opportunity to review the draft special infrastructure contribution "practice notes" for the Western Sydney Growth Area and the Western Sydney Employment areas. I also appreciated the recent opportunity to meet with your staff.

We have carefully considered the documentation you have made available. We have some comments that will hopefully assist the Department in resolving this issue. Our comments are set out below.

1. **<u>This matter has been unresolved for far too long</u>**

   On the 17 December 2008, the NSW Government announced that it would cut state infrastructure charges in the south west and north west growth centres from $23,000 to around $11,000 per lot until June 2011.[1] From July 2011 the charge is to be $17,000 a lot.[2]

   The then Premier of NSW, Nathan Rees, said the purpose of the changes was to "simplify the structure of levies, reduce unnecessary holding costs and reduce the overall contribution required from new developments".[3]

   The government promised that "revised Ministerial Directions and determinations [are] expected by 1 February 2009".[4] No such determination has been finalised.

   It is of great concern that 22 months have passed since the expiry deadline set by the government itself and these determinations have still not been made.

   We note that the lack of transparency and certainty around infrastructure contribution arrangements, including state infrastructure contributions, adds to the risk of development, and discourages investment that cannot meet the elevated returns required for higher risk projects.

   The determinations, practice note and associated deeds need to be resolved quickly.

2. **<u>The documentation provided to us is not complete</u>**

   We have been provided with draft practices notes for the Western Sydney growth centres and employment land plus the corresponding maps. However, we have not been provided with a draft determination, a draft deed of charge or a draft direction under section 94EF.

[1] Office of the Premier of NSW, "Premier announces plan to kick-start housing construction", Media Release, 17 December 2008.
[2] NSW Department of Planning, *Infrastructure Levies – Questions and Answers* (December 2008). 2
[3] Office of the Premier of NSW, "Premier announces plan to kick-start housing construction", Media Release, 17 December 2008.
[4] NSW Department of Planning, *Infrastructure Levies – Questions and Answers* (December 2008). 1.

Urban Taskforce Australia Ltd. ABN: 21 102 685 174 | GPO Box 5396 Sydney NSW 2001
T 612 9238 3955 | F 612 9222 9122 | Level 12, 32 Martin Place Sydney NSW | Level 6, 39 London Circuit, Canberra ACT
admin@urbantaskforce.com.au | www.urbantaskforce.com.au

The *Environmental Planning and Assessment Act* requires that

> [i]n determining the level and nature of development contributions to be imposed as conditions ... for development within a particular special contributions area ..., the Minister is to do one or more of the following:
>
> (a) consult with owners of land in the special contributions area and other relevant stakeholders,
>
> (b) publicly exhibit a proposal in relation to the level of development contributions and seek submissions within a reasonable time in relation to that proposal,
>
> (c) establish a panel that, in the Minister's opinion, represents the interests of the various relevant stakeholders and consult with that panel.[5]

(We note that this requirement does not apply in relation to "growth centres" under the *Growth Centres (Development Corporations) Act 1974*, however, we also note that the north west and south west "growth centres" no longer have that status, and the Western Sydney Employment Area never had that status.)

As there has been no public exhibition, we assume the government is attempting to satisfy this provision via either (a) or (c). This necessitates that the Minister "consult".

The word "consult" means more than one party telling another party what it is that he or she is going to do. The word involves at the very least the giving of information by one party, the response to that information by the other party, and the consideration by the first party of that response.[6] This will necessarily involve *all* of the relevant information that would necessarily be set out in a determination. Any consultation that only involves the giving of *some* information on matters to be covered in a determination will fall short of the statutory requirement to consult.

As a determination sets the "the level and nature of development contributions",[7] any consultation process must embrace this subject in the same level of detail as might be expected in a determination itself. The draft practice note has been prepared "to provide *guidance* as to the calculation and collection (emphasis added)" of the special infrastructure contribution.[8] Accordingly, as a mere guidance document, it is not a document that purports to describe the proposed actual "level and nature of development contributions".

The Act also provides that

> [t]he determination of the Minister:
>
> (a) is to contain reasons for the level and nature of the development contributions, ...[9]

The document clearly sets out to explain the broad mechanics of the proposed contribution regime, but does not offer reasons for either the level or nature of the contributions. We note that a mere recitation of the statement that "public amenities and public services will be required as a result of development" will not be sufficient to constitute a statement of reasons of the level and nature of contributions.[10] This approach is, perhaps, to be expected in a guidance document, but such a document cannot, alone, satisfy the consultation requirements of the Act. Additionally, the draft practice note does not specify the parts of the development contribution for the provision of infrastructure for:

- carrying out of any research or investigation;
- preparing any report, study or instrument; or

---

[5] s 94EE(4).

[6] *Dixon v Roy* (1991) 5 BPR 11,655, 11,658; *Bannister Quest Pty Ltd v Australian Fisheries Management Authority* (1997) 48 ALD 53, 64; *Fletcher v Minister of Town and Country Planning* [1947] 2 All ER 496, 500; *Rollo v Minister of Town and Country Planning* [1948] 1 All ER 13; *Derham v Church Commissioners for England* [1954] AC 245, 249; *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* [1972] 1 WLR 190, 194; *R v Secretary of State* [1986] 1 WLR 1; *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544.

[7] s 94EE(1).

[8] Draft *Western Sydney Growth Centres Special Contribution Area: Practice Note*, 1.

[9] s 94EE(5).

[10] Draft *Western Sydney Growth Centres Special Contribution Area: Practice Note*, 1.

- doing any other matter or thing in connection with the exercise of any statutory function under the Act.

These matters would be detailed in a determination.[11]

The Act also makes it clear that a determination is itself the condition to be imposed on the grant of a development consent.[12] The draft practice note does not provide sufficient information on the text of that condition for the statutory consultation requirement to be satisfied.

We recommend the Department acknowledge that the process it has undertaken does not constitute consultation for the purposes of the Act.

We suggest that Department circulate the draft determination and the draft deed of charge be provided in a further process that *would* constitute consultation under the terms of the Act.

We also note that the Department has not provided us with a draft direction which would require councils to apply to determination as a condition of consent. We note the difficulties experienced by councils, proponents and the Department as consequence of the language used in recent ministerial directions: *Stannic Securities Pty Ltd v Wyong Shire Council*.[13] With respect, we believe the risks of such problems arising would be reduced if the Department was prepared to consult on these documents, and benefit from the free advice of ourselves and others.

We ask that the Department consult on a draft of the proposed direction under section 94EF of the Act.

3. Amendment of special infrastructure contributions

The practice note says that special infrastructure contribution rates

> will be amended in accordance with any orders, determinations or directions made by the Minister under the Act.[14]

The Act does not authorise special infrastructure contribution rates to be amended by order or direction.

The only process for amending a special infrastructure contribution is the making of a determination (which presumably might include the amendment or revocation of an existing determination).[15]

The Minister may direct that a consent authority to impose a condition on a grant of development consent.[16] However, such a direction may only impose a condition that is the subject of a determination (that is, there is no authority under the Act to impose an amended condition). Hence a direction *applies* a determination, but does not *amend* it.

We are concerned that this text suggests the Department will attempt, via the text of a determination, to create a new power for the Minister to vary special contribution rates by direction or order, rather than the statutory process of "determination". Perhaps the Department sees some advantage, because it might circumvent the existing requirement to exhibit or consult on changes? In any event, such an approach would undermine the intent and philosophy of the statutory provisions, and is likely to make a determination void because it would be uncertain.[17]

---

[11] s 94EE(3)(a).
[12] s 94EF(1).
[13] [2010] NSWLEC 249.
[14] Draft *Western Sydney Growth Centres Special Contribution Area: Practice Note*, 1.
[15] s 94EE.
[16] s 94EF(1).
[17] Aronson and Dyer, *Judicial Review of Administrative Action*, 58–61; see also *Ballarat Broadcasting Pty Ltd v Australian Broadcasting Tribunal* (1988) 3 BR(NSW) 56.

Neither the practice note, nor the determination, should suggest that special contribution rates might be amended by order or direction.

4. Review of special infrastructure contributions

The draft practice note says that

> [t]he special infrastructure contribution rates will be kept under review ...[18]

The document also says that

> The special infrastructure contribution base rate is subject to review every four years and in the interim will be adjusted annually in accordance with the Consumer Price Index – Sydney – All Groups and any significant change in circumstances such as variations in land value should the Minister or delegate consider such review appropriate.[19]

Grammatically this paragraph does not make sense. It could be saying two different things.

Firstly, it may be saying that the Minister may vary the CPI indexation formula outside of a regular four year review if land value varies. As land value will almost certainly vary, this statement is tantamount to a declaration that there is absolutely no certainty as to the arrangements (see section 4 of this submission above).

Secondly, it may be saying that the determination will authorise the Minister to substitute another method of indexing the base rate (i.e. other than CPI) as he or she sees fit. If this is accurate, it would almost certainly render a determination void because it would be uncertain.[20] Should the Minister see the need to change the indexation arrangement, the only legally robust basis to do so would be via an amendment to the determination. However signalling an intention to do this in a practice note will undermine confidence.

The fluid nature of development levies in Western Sydney has created considerable uncertainty. This clause suggests that further changes are foreshadowed. The recent Henry Tax Review made some important findings about development levies. The Henry Review observed that:

> Where developer charges are set in an ad hoc fashion or are subject to unexpected changes, they can create uncertainty around new developments. If infrastructure charges are increased after a developer has bought land from its original owner, they cannot be factored into the price previously paid for the raw land. In this case, the charge would lower the expected return from the development. In addition, general uncertainty about charging is likely to discourage development activity, which could reduce the overall supply of housing and increase the price of housing.[21]

The government should be seeking to promote a sense of stability around the levy framework. By expressly raising the spectre that levy rates could be altered (particularly given the long 15 year plus lead times involved in land development) it is unlikely that the necessary stability should be achieved.

Lest there be any confusion, the Henry Tax Review also said that

> ... where infrastructure charges are poorly administered — particularly where they are complex, non-transparent or set too high — they can discourage investment in housing, which can lower the overall supply of housing and raise its price.[22]

Stability - as desirable as it is - must also be accompanied by simplicity and transparency and levies must not be too high. There is no argument that levies should remain unreformed when they lack these qualities.

---

[18] Draft *Western Sydney Growth Centres Special Contribution Area: Practice Note*, 1.
[19] Ibid 17.
[20] Aronson and Dyer, *Judicial Review of Administrative Action*, 58–61; see also *Ballarat Broadcasting Pty Ltd v Australian Broadcasting Tribunal* (1988) 3 BR(NSW) 56.
[21] Commonwealth of Australia, Australia's future tax system: *Report to the Treasurer: December 2009: Part Two Detailed analysis: volume 2 of 2*, 426-427.
[22] Ibid 428.

Once a simple, transparent and moderate/affordable levy has been introduced, the government should make a commitment that it will remain unchanged throughout the life of the development area.

5. Additional special infrastructure contributions above the base rate

Under the heading of section 2.2 "Special infrastructure contribution rate" the practice note says the ministerial determination will set a "base contribution rate as at 31 March 2010".[23] By itself, this suggests that there is the potential for additional contributions to be imposed, above the "base" rate.

Only when a later section, section 2.7, is studied does it become clearer that the reference to "base rate" was intended to merely indicate that the rate will be indexed.

The heading and positioning of section 2.2 is misleading. The level of the special infrastructure contribution is set out in section 2.7, not 2.2. All section 2.2 provides is one numerical input to the formula which is used to calculate the applicable level of contribution.

The determination needs to more clearly laid out, to identify the "base contribution rate" as nothing more than an input into the formula which is used to calculate the actual special infrastructure contribution.

6. The rates have not been indexed in accordance with the proposed index formula

The draft practice note suggests that the:

- residential rate will be set at $269,649 per hectare as at 31 March 2010 – up from the $260,090 on 31 March 2009;[24] and
- industrial rate will be set at $116,899 per hectare as at 31 March 2010 – up from the $112,756 flagged on 31 March 2009.

This is a 3.7 per cent increase in a 12 month period. However, if the indexation formula set out in section 2.7.3 were to be used, the rates would, in fact, be 3.0 per cent higher (i.e. this was percentage change in the Sydney All Groups CPI index in that period). Accordingly, if the government were to be faithful to its own formula, the:

- residential rate should be set at $267,892 per hectare as at 31 March 2010; and
- industrial rate should be set at $116,138 per hectare as at 31 March 2010.

The proposed base rates should be revised downward, so that any increase in the rates is consistent with the government's own indexation formula.

On the subject of the indexation formula, we note that "CP2" is defined to be "the most recent annual value" of the CPI. There would be greater clarity, if it was expressed as the "the most recent March quarter value" of the CPI.

On the related subject of the formula, set out in section 2.7.2 its needs to be clear that the input, "net developable area" is the area expressed in hectares.

7. The exemptions of the SIC levy defy logic and must be broader

Community facilities and public amenities

"Development" for the purpose of "community facilities and public amenities" are, sensibly, exempt from the requirement to pay a special infrastructure contribution.[25]

---

[23] Draft *Western Sydney Growth Centres Special Contribution Area: Practice Note*, 1.
[24] As per the previous draft determination and practice note widely circulated to industry in 2009.
[25] Draft *Western Sydney Growth Centres Special Contribution Area: Practice Note*, 5.

According to the practice note the phrase "community facility" has the same meaning as it has in the *Standard Instrument (Local Environmental Plans) Order 2006*.[26] Accordingly a "community facility" means a building or place:

- owned or controlled by a public authority or non-profit community organisation, and
- used for the physical, social, cultural or intellectual development or welfare of the community,

but does not include an educational establishment, hospital, retail premises, place of public worship or residential accommodation.[27]

However, the draft practice note says that "community facilities or public amenities":

> include but are not limited to: ... government educational establishments, health services and public utility undertakings, such as for the supply of water and sewer including associated services and facilities and the supply of electricity including associated services and facilities; ...

As "community facilities" do not include schools, but the composite phrase "community facilities or public amenities" clearly includes *government* schools, we can only assume that government schools are included by virtue of being "public amenities". While a school can be an "amenity", a non-government school is unlikely to be regarded as a "public amenity". Furthermore rather than utilities generally being exempt from levies, the exclusion is limited to "public utilities".

Hence levies are to be imposed on:

- non-government educational establishments; and
- utilities undertakings in private ownership, irrespective as to whether they are for supply of water, sewer, electricity or communications.

This is clearly inconsistent with the *NSW Government Policy Statement on the Application of Competitive Neutrality*.[28] This policy statement is of great significance. It has been implemented under the N*ational Competition Policy and Related Reforms Agreement* – an intergovernmental agreement between the federal government and each state government.

The competitive neutrality policy means that government businesses must operate without net competitive advantages over other businesses as a result of their public ownership. Sydney Water, Energy Australia, Integral Energy and NBN Co are all government owned businesses, subject to the policy. Each is subject to a regulatory framework where private only owned utilities may establish networks in competition with some or all of their business. It is not the job of the planning system to discriminate against privately owned utilities companies, in favour of publicly owned utilities. This, in fact, is forbidden under the competitive neutrality arrangements.

As the policy itself states:

> The benefits of adopting competitive neutrality reside in developing fairer and more cost reflective pricing policies and production in line with market requirements. These in turn should provide a basis for better resource allocation decisions throughout the economy and higher Gross Domestic Product growth than would otherwise occur.

The NSW government policy also requires government business activities to be subject to "corporatisation principles". Among other things, these principles affirm the business must "operate within the same regulatory framework as other businesses". The same rules should apply to all utility companies performing the same role, whether they are publicly or private owned. We note that private owned utilities are subject to access regulation via federal (and in some cases) state laws. These laws mean that there is no basis for separate planning regulation on equity or other grounds.

---

[26] Ibid 16.
[27] *Standard Instrument (Local Environmental Plans) Order 2006*, Dictionary.
[28] See <http://www.treasury.nsw.gov.au/__data/assets/pdf_file/0007/3868/tpp02-1.pdf>.

We also note that a government or non-profit running a childcare centre will be exempt from the contribution, but a private sector childcare centre will be subject to it. All are running a fee-for-service business and there is often little difference in fee structure between a for-profit and a non-profit childcare centre.

It's particularly worrying that new government-run schools will not be faced with a levy, but new non-government schools will. This raises serious policy issues about the treatment of private education. The proposed approach is inconsistent with public positions favoured generally by government at a state and national level. We note that, without exception, schools are run by non-profit organisations.

The proposed exception for "community facilities and public amenities" should be extended to childcare centres, group homes, all educational establishments, places of public worship; bed and breakfasts, boarding houses and utility services, irrespective of ownership.

Neighbourhood shops and shop top housing

Development for the purposes of neighbourhood shops is (appropriately) exempt from the levy. Under the Standard Instrument, these are defined to be

> retail premises used for the purposes of selling small daily convenience goods such as foodstuffs, personal care products, newspapers and the like to provide for the day-to-day needs of people who live or work in the local area, and may include ancillary services such as a post office, bank or dry cleaning, but does not include restricted premises.

This means, in order for shop to be exempt from the state infrastructure contribution levy, it must:

- sell "small daily convenience goods";
- sell the goods to satisfy day-to-day needs; and
- be directed to people who live or work locally.

A special infrastructure levy will be payable if the shop's purpose is to sell large grocery items, clothing, music, home-wares or electrical goods. A developer who wants to provide for, say, a dedicated florist will have to argue that flowers are a "small daily convenience good" and "satisfy day-to-day needs" of locals, but a mixed business that sells flowers as an ancillary item, will have no such problem and be exempt from the levy Shops that sell iPhones will be taxed, while newsagents will not be.

Significantly, the purpose of the shop is the sale of *goods*. That means shop-fronts whose dominant purpose is the provision of services, rather than goods, will be subject to the special infrastructure contribution. (These shops are known as "business premises" in the nomenclature of the Standard Instrument.) Premises to be used by real estate agents, hairdressers, beauty salons, chiropractors, doctors surgeries and conveyancers will be subject to the levy, while chemists, tobacconists, mini-supermarkets will be exempt.

While the definition of "neighbourhood shop" makes reference to "services such as a post office, bank or dry cleaning", these uses must be <u>ancillary</u>. This means the dominant use must be for the purposes of the small of small daily convenience goods. Therefore, a dedicated bank, dry cleaner or post office will be subject to the levy, while a general store that includes these services as an ancillary part of its offer, will be exempt.

Are we the only ones noticing how bizarre this proposed taxation regime is? This will create perverse incentives and heavily distort the provision of important services to the public in new release areas.

All development for the purposes of "retail premises" and "business premises" (as well as shop top housing) should be exempt from the special infrastructure contribution.

Some high intensity employment uses shave been exempted, but others aren't

Development in neighbourhood centres, local centres, enterprise corridor zones and commercial core zones is (appropriately) exempt from the levy,[29] but retail and office development in industrial zones and business parks is not so exempted. **High intensity employment uses should be exempt from the levy in all zones,** given that such development in the vicinity of residential development *reduces* infrastructure vehicle kilometres travelled and therefore *reduces* infrastructure requirements (and offers increased social benefits for the community as a whole).

8. <u>There are problems with the definition of net developable area</u>

Flood prone land

The existing exclusion from the definition of "net developable area" for flood prone land located below the one in 100 average recurrence interval has been modified.[30] Such flood prone land will now be subject to a levy if it is able "to form part of a development".

In planning law, the term "development" is a technical term with a very broad meaning. It covers a very wide range of activity and land uses that a layperson would not regard as "development". Most flood prone land, in an urban development area, will be subject to some form of development when surrounding land is converted to urban uses.

For example, "development" is defined by the *Environmental Planning and Assessment Act* to include:

- the use of land;
- the subdivision of land;
- the erection of a building;
- the carrying out of a work;
- the demolition of a building or work;
- protecting, improving or utilising, to the best advantage, the environment;
- protecting or preserving trees or vegetation;
- protecting and conserving native animals and plants, including threatened species, populations and ecological communities, and their habitats; and
- advertising.[31]

While this is clearly a wide-ranging list, it is the first dot point ("the use of land") that is the most all-encompassing. The concept of the "use" of land is one that has received extensive judicial treatment in a number of contexts. In *Settlers Cove Development Pty Ltd v Noosa Shire Council*[32] for example, it was said by McPherson JA and Helman J that, leaving to one side any statutory definition of "use":

> using the sand-dune area … as a means of access to … Noosa Inlet would be a 'use' that is or would be incidental to and associated with the purpose for which the other part of proposed Lot 2 is to be used …

In *Sustainable Fishing and Tourism Inc v Minister for Fisheries*[33], it was held that the taking of fish by professional fishers from estuaries of the Manning River near Taree, not being ancillary or incidental to any other use of the relevant land, was itself "use of land".

---

[29] Draft *Western Sydney Growth Centres Special Contribution Area: Practice Note*, 4, 18.
[30] Ibid 6.
[31] s 4; s 26.
[32] [1997] 2 Qd R 618, 629–630.
[33] (2000) 106 LGERA 322.

When an owner of land is seeking to develop a site - which includes both flood prone land and land that is not subject to flooding - the owner would normally be expected to appropriately treat the flood prone land. This may include landscape embellishment and revegetating with appropriate species. On occasion an owner might install stormwater quality improvement structures and facilities to promote passive recreation, such as paths or cycle-ways.

In essence, flood prone land, where it is present, will always form part of a development, but the development of the flood prone land will usually not be value creating for the developer. In fact, the "development" of the flood prone land (by way of revegetation, embellishment or stormwater management or passive recreation) would normally amount to a service to the community. The idea that, by carrying out such a service, that a developer would then become liable for a special infrastructure contribution obligation would be ridiculous. If this proposition were to stand, developers would be heavily disincentivised from developing sites that include flood prone land, and wherever possible would seek to leave the flood prone portions of the site untouched.

Flood prone land located below the one in 100 average recurrence interval should be exempt from the definition of "net developable area" whether it forms part of a development or not.

Existing roads

At present land used for existing road to be included as part of the proposed road network, is excluded in the definition of "net developable area". For no apparent reason, this exclusion has been dropped.

Land used for existing road to be included as part of the proposed road network, should not included in the definition of "net developable area"

Public utility undertakings

Land to be dedicated or used for the purpose of a *public* utility undertaking is excluded from the definition of "net developable area". This overlooks the fact that under national competition policy reforms, it is possible for such networks to be provided by the private sector. For the competitive neutrality reasons outlined above, **privately owned utility service providers should be treated on the same basis as publicly owned providers.**

9. Treatment of heritage land

According to the draft practice note, land that comprises the relevant curtilage of an item of environmental heritage that is listed on the State Heritage Register is exempt from the levy.[34] Yet, strangely, the same document says (in a different section) that "development within the heritage curtilage of land identified on the State Heritage Register will be required to pay a residential special infrastructure contribution".[35]

The relevant curtilage of an item of environmental heritage that is listed on the State Heritage Register should be exempt from the levy. This exemption should also apply to land on which an item of local environmental heritage is situated.

10. Requiring a deferred payment to be made 20 days before settlement will create financing problems

The requirement for payment of a deferred special infrastructure contribution to be made 20 working days from settlement on the sale of a subdivided lot will create a new financing problem.

[34] Draft *Western Sydney Growth Centres Special Contribution Area: Practice Note*, 6.
[35] Ibid 10.

Furthermore, it is inconsistent with the Government's announcement of December 2008, when the government said that:

> We have also changed the timing of the payment of the reduced levies – they will no longer be charged up front and will now be charged when the lot is sold.[36]

Deferred levies should be payable when a subdivided lot is sold, as per the Government public announcement, not 20 days beforehand.

11. <u>The levy for industrial land has been increased</u>

On the 23 December 2008 the NSW Government issued a planning circular (PS 08–017) with an accompanying question and answer sheet. That sheet advised that the discounted special infrastructure levy would be $68,000 per hectare of net developable area. This document now claims it will be "one third of the amount that would otherwise be payable" which is equal to $77,932 per hectare.[37] This 15 per cent increase in the levy on industrial land cannot be justified by any CPI increase.

Any increase in the industrial land levy will be strongly opposed by the industry and will discourage investment on job-creating development in Western Sydney.

12. <u>Deed of charge may conflict with landowners' obligations to their first or second mortgagees</u>

As mentioned above, the Department of Planning has not provided us with a deed of charge, on this occasion, to review. We were previously provided with a draft deed in May 2009. We have no reason to believe that the concerns we expressed in 2009 have been addressed.

The 2009 deed of charge provided that no mortgage or other charge will rank equal in priority or ahead of the charge. If this provision stands as is, the deferral arrangement is rendered useless.

The deferral mechanism was introduced in order to overcome the financing difficulties faced by developers having to fund large cash levies to the government before receipts from the sale of finished lots were available.

In almost all cases, land will be subject to a first, and in some cases, second mortgage. These lenders are unlikely to agree to surrender their priority over the land, in favour of the charge without a commensurate reduction in percentage of land value, that they are willing to lend (assuming that they are prepared to stand behind the charge at all). In effect, developers will be back exactly where they started, because they will be trying (unsuccessfully) to convince lenders to confidence both development costs and development levies.

Any deed will need to:

- recognise pre-existing mortgages and charges will take priority; and
- oblige the government to consent, in the event that a pre-existing mortgages and charge is assigned to another party.

13. <u>Further alternatives should be available in the event that it is not practicable to burden the land with a charge</u>

In some cases it may not be practicable to burden the land with a charge. In particular:

- Mortgages generally contain a provision prohibiting the imposition of a charge on land (even a lower priority charge) unless the mortgagee consents – in such cases mortgagees may not give consent.

[36] Office of the Premier of NSW, "Premier announces plan to kick-start housing construction", Media Release, 17 December 2008.
[37] Draft *Western Sydney Growth Centres Special Contribution Area: Practice Note*, 14.

- A developer may be in a joint venture with a landowner and the landowner may not give consent to the charge being placed on his/her land, as it could affect the apportionment of obligations between the parties under their joint venture agreement.

Most would find the bank guarantee an inefficient form of funding and not much better than paying the levies. That's because a bank guarantee is effectively a form of secured borrowing and the reason that the deferral mechanism was introduced was to overcome the difficulties developers have when financing both levies and development costs before revenue comes in.

That's why there should be two further alternatives (in addition to the current alternative being proposed) **for the state to obtain security for the deferred state infrastructure contribution levy**:

- it should be possible for a developer to offer to place the charge on other land held by the developer of equal or greater value to SIC liability; or

- it should be possible to enter into a deed for a floating charge over the assets of the development company.

14. The Department needs to ensure that the process it uses to reach agreement with developers is clear and that there is no risk of a successful legal challenge.

We note that the Department is suggesting that an arrangement for the provision of a material public benefit in lieu of a monetary contribution may be entered into by way of an agreement with the Minister without the public exhibition if the agreement.[38] According to the draft practice note, property developers would need to reach an agreement with the consent authority:

- on the nature of the in-kind contribution;
- security; and
- clear milestones for the delivery.[39]

The Act does expressly allow a consent authority to, subject to the consent of the Minister, accept:

- the dedication of land in part or full satisfaction of a condition imposed in accordance with this section, or
- the provision of a material public benefit (other than the dedication of land or the payment of a monetary contribution) in part or full satisfaction of a condition imposed in accordance with this section.[40]

Such an acceptance can clearly take place without a voluntary planning agreement (and therefore the associated requirement for the exhibition of such an agreement). However, this statutory provision does not authorise a departure from the standard condition, as embodied in the determination of the Minister. The standard condition must still be imposed. In fact, the use of the word "imposed" in past tense, suggests that the decision of a consent authority to "accept" dedication of land or the provision of a material public benefit will come *after* a condition has been affected via a development consent. (The existence of such a condition is likely to be a "jurisdictional fact" – that is, the criterion which, if satisfied, enlivens the power of a decision maker to exercise the discretion.)

This is all well and good, provided that the Department understands and adheres to the statutory process. In the event, in a particular context, it is considered desirable to reach an agreement before the consent is issued, a statutory voluntary planning agreement is likely to be necessary to

[38] Ibid 16.
[39] Ibid 15.
[40] s 94EF(5).

avoid the apprehension of bias issues raised in *Gwandalan Summerland Point Action Group Inc v Minister for Planning.*[41] As the law stands – public exhibition will be required.

In *Gwandalan* the NSW Government came under heavy judicial criticism when it had used an agreement-making mechanism (prior to the issue of a consent) outside of the statutory voluntary planning agreement process. Lloyd J said:

> I note that neither the MOU nor the deed was a planning agreement to which s 93F to s 93L of the Act apply, and neither of the respondents sought to rely upon those provisions. .... [T]he Parliament has recognised the danger that this sort of agreement can subvert the proper operation of the planning and assessment process by providing built-in safety procedures, most notably in s 93G - the public notification, the 28 days inspection period and the associated right to make submission.[42]

The practice note should explain that:

- a decision by a consent authority to "accept" an in-kind contribution under section 4 of the note would be made *after* a consent is issued; and
- if there is a need to settle matters *prior* to the issue of a consent, the most appropriate mechanism is a voluntary planning agreement, which must be publicly exhibited.

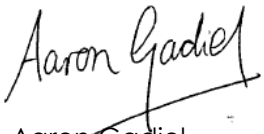
15. <u>Levy amounts</u>

The post June 2011 levy amounts are too high. There is a serious risk that development will be sterilised in these areas if they are not kept at the discounted rate.

We would also welcome an opportunity to meet with you to further discuss these matters once you have had a chance to consider them.

Yours sincerely

Urban Taskforce Australia



Aaron Gadiel
Chief Executive Officer

[41] [2009] NSWLEC 140.
[42] *Gwandalan Summerland Point Action Group Inc v Minister for Planning* [2009] NSWLEC 140 [138], [145].