Urban Taskforce
AUSTRALIA

25 February 2011

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

Dear Mr Reynolds,

Re: Submission in response to the exhibition material for the Lower Hunter and Illawarra special infrastructure contribution

On 21 January 2011, the Department of Planning released the public consultation documents for a proposed levy on new homes in the Lower Hunter (said to be $8,80 per lot) and a levy on new homes in the southern Illawarra (said to be $6,200 per lot). The Department is also proposing a $42,100 levy on each hectare of new Lower Hunter industrial land, and a $29,000 levy on each hectare of Illawarra industrial land.

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

We also note that the Department of Planning recently finalised and gazetted a ministerial direction and determination in relation to Western Sydney. The Department did not consult industry on the legally drafted documents. The Department disregarded our advice as to the benefits to the Department of proper consultation. We have identified a number of drafting problems in the proposed ministerial direction and the determination, which are also directly relevant to the finalised Western Sydney ministerial direction and determination. We hope the Department will be willing to re-visit these documents in the light of our concerns.

1. This matter has been unresolved for far too long

In October 2007, the NSW Government announced that it had

> resolved to apply a consistent framework to determine levies across the State (i.e. within and outside the Growth Centres) ...[1]

The government said that a

> [r]evised framework for setting State and Local developer contributions [is] to be applied across the State that reflects incremental costs attributable to specific development, which yields: For each region/sub-region/precinct (exact boundaries will need to be determined) a unique levy will be set to recover 75% of attributable State infrastructure costs ...[2]

The Urban Taskforce's immediate reaction was one of concern:

> Today the State Government also said that it will apply the amended growth centre levy principles everywhere, including when existing urban areas are re-developed.
>
> "This means ... new homes in regional release areas, may be hit with a State Government infrastructure charge for the first time," Mr Gadiel said.

[1] NSW Treasury, *Meeting Land Supply Targets: Industry briefing*, 12 October 2007, slide 5.
[2] Ibid 6.

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"The State Government needs to urgently clarify these plans.

"The extra costs imposed on homebuyers through an extended levy system will reduce home affordability.[3]"

Regretfully, the state government has only moved to clarify its intentions now, more than three years after its announcement.

In the meantime a great deal of uncertainty has been created. Levy obligations are unquantifiable at the time of land acquisition and significant investment has been deterred from the Hunter and the Illawarra, as a result.

Resolution of this matter, in a way that is both affordable and workable, is crucial if the regions' are to get the housing and new workplaces they so clearly need.

2. Levy amounts are not certain and are too high

Foreshadowed charge per lot is too high

Proposed levy amounts are too high. This levy has been pitched as a measure to reduce the imposts on home buyers, yet we are not aware of any developer in the Lower Hunter accepting a voluntary planning agreement with an impost equivalent to $8,800 per residential lot, or $42,000 per hectare of industrial land. There is a simple reason for this. Levies of that order will usually compromise the commercial viability of development.

We query whether this charge is not, in truth, a measure to reduce the prospects of greenfield urban development. The use of development charges as a means of preventing or reducing development has many advocates.[4]

Assumption that 12 lots can be secured per net developable hectare is wrong

The Department of Planning has made a serious error in assuming that 12 lots can be generally realised per net developable hectare in the Lower Hunter. It is impossible to say with any accuracy what the correct yield is, because of the serious uncertainty in the definition of "net developable hectare". For instance, the inclusion of flood prone land suggests that the label "net developable hectare" is a misnomer, and in fact should be reference to "gross developable hectare" (see below for more).

To give one example: if actual yields in the Lower Hunter are six lots per "net developable hectare" the levy jumps from just under $8,800 per lot to $17,600 per lot. This would make it more or less equal to the Western Sydney levy, but make up a much higher percentage of the final sale price (due to the lower land values in the region).

Lack of certainty

These levies are based on the 2006 Lower Hunter Strategy. This strategy is due to be reviewed and replaced within the next 12 months. We understand that the Department proposes then to, again, review these levies. This may lead to further increases.

In short, the promised certainty will not eventuate, as any investments made now will not progress quickly enough to be locked in under the proposed arrangements.

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[3] Urban Taskforce Australia, Media Release: "Cut in Western Sydney Charges" (12 October 2007): <http://www.urbantaskforce.com.au/viewmedia.php?id=110>.

[4] Antonio M. Bento, Sofia F. Francob, Daniel Kaffine "The efficiency and distributional impacts of alternative anti-sprawl policies" (2006) 59 *Journal of Urban Economics* 121.

We note that after the Department of Planning recently finalised its ministerial direction and determination for Western Sydney, it issued a planning circular that said:

> The Department will also monitor land costs. Where there are significant changes in land costs (including the costs of acquiring land required to maintain biodiversity certification) a new determination may be issued to account for those changes.[5]

If such a statement is also to be made in relation to the Lower Hunter, or the Illawarra, it will also weaken industry confidence that there is any sense of stability around the new levy regime. This has certainly been the effect of these words in Western Sydney.

3. Crucial information has been omitted from the exhibition documents

We wrote to the Department on 21 January 2011 highlighting the paucity of information on the infrastructure program allegedly funded by the new levies. The Department has not replied to this correspondence.

The exhibition material only includes a single A4 page for each of the Lower Hunter and the Illawarra.

There are no timelines specified for the delivery of infrastructure – other than a broad-brush 25 year horizon for the Lower Hunter, and an even more relaxed 40 year horizon for the Illawarra. The documentation directs the reader to 'Budget Paper No. 4' to see the government's firm commitments, but this document does not even mention most of these projects.

No scope of works is presented or defined for named projects. Some descriptions are very generic, so it will be difficult to hold the government to account. For example the list of infrastructure includes upgrades of two anonymous sections of the (very long) Princes Highway that have been valued at $14 million. It is not clear, for example, what intersection improvements are included (if any) in the Newcastle Link road upgrade.

The government has disclosed how much of each infrastructure project it thinks should be recovered through levies, but it has not disclosed the full cost of these items. This means, in most cases, it's not possible to tell how the cost of the project has been apportioned between existing residents and new residents.

Financing costs have been built into the figures - apparently to take into account the fact that some infrastructure will be delivered prior to the receipt of levies. However no information has been presented as to which infrastructure has what financing component. Nothing is said about how much is to be borrowed, the applicable interest rate and the expected pay-back period, or anticipated take-up rates.

We think that in failing to disclose the above information the Department has fallen short of its statutory obligation to disclose, in the determination, the reasons for a special infrastructure contribution.[6] If this methodology were adopted by a council in relation to their section 94 contributions plan, they would be rightly condemned.

Accordingly, we request that you re-exhibit these proposals with the following additional information:

- The timelines specified for the delivery of each infrastructure project.
- The description of the scope of works of each infrastructure project.
- The full cost of each infrastructure project, the component to be attributed to new development and the basis for this calculation.
- The financing component of each project, including how much is to be borrowed, the applicable interest rate and the expected pay-back period.

[5] PS 11-004 *Special Infrastructure Contribution – Western Sydney Growth Areas* issued 7 February 2011, page 2.
[6] *Environmental Planning and Assessment Act 1979* s 94EE(5).

4. The Hunter Expressway should not be included

The NSW Government is proposing to fund $81 million of its $200 million contribution to the Hunter Expressway through these new levies.

It is surprising that nearly half of the NSW Government's $200 million announced commitment to the $1.65 billion Hunter Expressway would be financed via the proposed levy on home buyers. (The Federal Government is paying the remaining $1.45 billion for the project.)

The state government has trumpeted its commitment to the Hunter Expressway on numerous occasions, but never previously revealed that new home buyers would actually be picking up the tab.

Hunter home buyers will be paying for the Hunter Expressway twice, once through the general taxes, like the rest of us, and again, through an extra $1,000 added on to the cost of their new home. That particular grab for cash is plainly unjustifiable.

The Hunter Expressway should be dropped from the special infrastructure contribution proposal.

5. "Industrial land" includes a wide range of non-industrial land uses

The definition of "industrial land" makes a mockery of the assertion that only residential and industrial lands are being levied.

That's because many of the dominant land uses in zone B5 ("Business Development") and zone B7 ("Business Park")will not be "industrial" at all. The purpose of a business development zone is to

> enable a mix of business and warehouse uses, and specialised retail uses that require a large floor area, in locations that are close to, and that support the viability of, centres.[7]

While light industry can be expected in a business development zone, it is clear that this need not be the dominant land use in the zone. Typical non-industrial uses envisaged include:

- business premises (i.e. service providers such as doctors, lawyers, accountants, architects, video shops, nightclubs, childcare centres);
- hotel or motel accommodation;
- office premises; and
- retail premises.[8]

Similarly, the main purpose of a business park zone is to provide a range of office, as well as light industrial, uses.[9] Typical non-industrial uses envisaged include:

- business premises;
- educational establishments;
- function centres;
- neighbourhood shops;
- office premises; and
- restaurants.[10]

So, while development in neighbourhood centres, local centres, enterprise corridor zones and commercial core zones is (appropriately) exempt from the levy,[11] retail, office and similar development in industrial zones and business parks is not so exempt. This is illogical.

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[7] *Standard Instrument (Local Environmental Plans) Order 2006*, Part 2, Land Use Table
[8] See, for example, *Ryde Local Environmental Plan 2010*, Part 2, Land Use Table.
[9] *Standard Instrument (Local Environmental Plans) Order 2006*, Part 2, Land Use Table
[10] See, for example, *Ryde Local Environmental Plan 2010*, Part 2, Land Use Table.
[11] Draft *Western Sydney Growth Centres Special Contribution Area: Practice Note*, 4, 18.

According to the former Growth Centres Commission's fact sheet:

> There is no [Special Infrastructure] Contribution for retail and commercial uses to reflect the important role these developments will play in providing local jobs for residents. [12]

This makes sense, 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). Yet, as we have shown above, the levy in the Lower Hunter and the Illawarra misleadingly applies to areas that will be home to retail and commercial uses.

It is utterly unclear to us why the principle has not been applied to its full logical extent in the draft determination. **High intensity employment uses should be exempt from the levy in all zones.**

6. "Residential land" should not include land zoned for private recreation

The definition of "residential land", strangely, includes zone RE2 ("Private Recreation"). The purpose of this zone is:

- To enable land to be used for private open space or recreational purposes.
- To provide a range of recreational settings and activities and compatible land uses.
- To protect and enhance the natural environment for recreational purposes.[13]

The Standard Instrument does not presume that dwellings may be built in this zone. We are not aware of any Standard Instrument compliance local environmental plan where a residence would be permitted on land zoned RE2 and all such plans we have checked prohibit residential accommodation in that zone.[14]

This zone is appropriate for using in relation to land that is to be held privately, but for which no dwelling will be permitted. Developers may seek this zone to apply when they are advised that land is not developable for reasons such as the presence of:

- acid sulphate soils (usually occurring in low-lying parts of coastal floodplains, rivers and creeks);
- bushfire hazard;
- steep slopes;
- soil subject to a high degree of erodibility and instability (for example, fine-grained sediment may be a problem on steep slopes near creek lines);
- wetlands;
- flood risk;
- archaeological sites;
- areas of scenic value;
- riparian corridors (a watercourse - which may only flow infrequently - and its vegetated buffer zone); and
- particular flora or fauna.

[12] Growth Centres Commission, Special Infrastructure Contribution 1.
[13] *Standard Instrument (Local Environmental Plans) Order 2006*, Part 2, Land Use Table
[14] See for example: *Wingecarribee Local Environmental Plan 2010; Albury Local Environmental Plan 2010; Camden Local Environmental Plan 2010; Bellingen Local Environmental Plan 2010; Gloucester Local Environmental Plan 2010; Goulburn Mulwaree Local Environmental Plan 2009; Muswellbrook Local Environmental Plan 2009.*

Given this, we cannot understand how land of this kind could ever be made subject to a special infrastructure contribution or regarded as part of "net developable area".

By zoning private land as RE2 the government (and the wider community) avoid the costs of maintaining the land, but nonetheless receive the benefits of the statutory protection against residential development that the zone confers.

There can be no credible reason why land on which dwelling construction is prohibited, is levied as if a residence was allowed.

Land zoned RE2 ("Private Recreation") should not fall into the definition of "residential land" and should not be included in the definition of "net developable area".

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

Schools

Levies are to be imposed on non-government schools and educational facilities, but not on government schools or TAFEs.[15]

The proposal to levy non-government schools is a relic of the distant past. There is now broad public acceptance of state aid to non-government schools, but this proposal seems hark back to old debates. We note that, without exception, schools are run by non-profit organisations.

In the past, some politicians have sought to portray independent schools as 'wealthy', but in new release suburbs these schools are generally serving the ordinary Australians who are buying a modest home and a modest block of land.

There has been a wide acceptance of needs-based support for schools across the political spectrum and more generally within the Australian community. A non-government school in a new release area will serve the same community demographic as a government school.

It's a mystery why a non-government school run by a church organisation should be taxed harshly, when an equivalent government school can establish itself tax free.

Across NSW, 30 per cent of schools are non-government. We are concerned that parents in some new release areas may not get the same level of choice enjoyed by the rest of the community.

The residents of new release areas should have the right to exercise choice – they should not have the NSW Government using tax policies to penalise and create disincentives for independent schools to set up in new communities.

All schools, not just government ones, should be exempt from the levy.

Health services facilities

Levies will not be imposed on health services facilities owned or operated by a public authority,[16] but they will be imposed on such facilities operated by a non-government entity, such as the Sisters of Charity and Sisters of Mercy.

For example, the Newcastle Mater Misericordiae Hospital is a 191 bed public teaching hospital owned and operated by the Sisters of Mercy. The Mater is the region's major centre for cancer services, especially blood diseases, breast cancer and melanoma as well as being one of the Hunter's teaching hospitals. If the Mater were to set up, for example, a palliative care hospice, a rehabilitation hospital or a mental health facility in a new release area, they would be subject to the special infrastructure levy. Yet, an equivalent government facility would be exempt.

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[15] *Draft Environmental Planning and Assessment (Special Infrastructure Contribution – Lower Hunter) Determination 2011*, cl 4(2).

[16] *Draft Environmental Planning and Assessment (Special Infrastructure Contribution – Lower Hunter) Determination 2011*, cl 4(2).

All health services facilities, not just government ones, should be exempt from the levy.

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 a shop to be exempt from the special 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. Bookshops will be taxed, while newsagents will not be.

Significantly, the purpose of the shop must be 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 ancillary. This means the dominant use must be for the purposes of selling 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.

Bus depot

The exclusion for "bus depot" sensibly applies, whether or not the depot is in government ownership. As the words "bus depot" by themselves do not denote government ownership or control, the additional words "whether or not owned or operated by a public authority" are unnecessary. However, not only are the words unnecessary, they are harmful, because their use may affect the provisions of other parts of the clause.

For example, no statement has been inserted saying that non-government public utility undertakings are exempt. Such a statement isn't, of course, needed, but it is not needed for "bus depot" either. A court may infer, that the inclusion of the statement for "bus depot" and its omission for "passenger transport facility" suggests an intention that non-government passenger transport facilities (or public utility undertakings, neighbourhood shops, etc) are subject to the levy. We hope this is not the Department's intention.

The words "whether or not owned or operated by a public authority" should be dropped from the reference to "bus depot" in clause 4(2).

8. <u>The ministerial direction is poorly written and does not clearly state which development the direction applies too</u>

The role of a ministerial direction is to:

> direct a consent authority, in relation to development or class of development on land within a special contributions area, to impose a condition (determined in accordance with section 94EE) on a grant of development consent in relation to that land.[17]

This means a direction only has two things to do. It must:

- specify the development, or class of development, to which the direction applies; and
- direct a consent authority to impose a condition in the form of the Minister's determination made under section 94EE.

The draft direction does not do either of those things, at least not well.

<u>Firstly</u>, the development, or class of development, to which the directive applies is not specified. All that is said is that it applies to:

> any development ... for which a special infrastructure contribution is required to be made under the *Environmental Planning and Assessment Special Infrastructure Contribution - Lower Hunter) Determination 2011*.[18]

This seems to overlook what the job of the direction is, and confuse it with the job of the determination. It is the *direction* that is supposed to decide which development is to be subject to the determination. Under the Act, the role of a *determination* is to set the "the level and nature of development contributions to be imposed".[19] The *direction* is the document that specifies the development to which the determination applies.

This is important, as the determination becomes a development consent condition. If the direction does not clearly specify which consents are to include the conditions, consent authorities will end up including this lengthy condition in the wrong ones.

<u>Secondly</u>, the draft direction does not actually direct a consent authority to impose a condition in the form of the Minister's determination made under section 94EE. Instead, it contains the text of a condition itself. This is inappropriate, because the condition that must be imposed is the determination formulated by the Minister under section 94EE.

This point is important, because a development consent condition, once imposed, becomes a vested property right. It cannot be altered other than via an application. So even if a determination is changed, after a consent is granted, the consent itself should still reflect the terms of the condition as of the day it was issued.

This is best achieved by fulfilling the intent of the Act an actually imposing the determination as a condition. This requires a re-drafting of both the ministerial determination and the proposed determination. The Minister's determination should consist of the enabling condition, citing a schedule that would form part of both the determination and the development consent. The schedule would then contain the operative provisions.

The ministerial direction and determination should be re-drafted in accordance with the law. In particular, the determination should include both an enabling condition and a schedule with operative provisions, both of which are to form part of each development consent.

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[17] s 94EF(1).
[18] Draft *Environmental Planning and Assessment (Special Infrastructure Contribution - Lower Hunter) Direction 2011* cl 3(2).
[19] s 94EE(1).

9. Double-dipping

The determination says that:

> If a special infrastructure contribution has been required to be made for development on land in accordance with this Determination, a further special infrastructure contribution is not required to be made for other development on that land.[20]

We strongly support the sentiment, but we are concerned that the wording of the provision suggests that in order to avoid paying the special infrastructure contribution twice, an applicant will need to establish that their development is "other development".

The reason for limiting the exemption is not clear. Surely, if the special infrastructure contribution has been paid once, it does not matter if consent for subsequent development relates to "other development" or the same development?

For example, the Act provides that:

> A development consent that enables the subdivision of land may authorise the carrying out of any physical activity in, on, under or over land in connection with the subdivision, including the construction of roads and stormwater drainage systems.[21]

If a subsequent development application relates to a road or a stormwater drainage system that was referred to in an initial subdivision application, will it be "other development" or the same development? If it is the same development, why on earth should a second lot of special infrastructure contribution be payable? Similar problems could arise where a staged development application has been made, and subsequent applications relate to further stages of a development envisaged in the initial application.[22]

We ask that the determination be re-drafted to say:

> If a special infrastructure contribution has been required to be made for development on land in accordance with this Determination, no further special infrastructure contribution is required to be made in relation to that land.

If a special infrastructure contribution has been required to be made for development on land, no further special infrastructure contribution should be required. It should not matter whether the development is the "same development" or "other development". This provision should be in the ministerial direction, so that the determination is not even imposed as a condition on subsequent development consents.

10. The 'equivalent zone' provision does not follow existing precedents and creates significant ambiguity

The definitions "industrial land" and "residential land" both say that the respective definitions include:

> land within a land use zone that is equivalent to any such [aforementioned] land use zone ...

There are several problems with this approach.

Firstly, the 'equivalent zone' provision applies, whether a zone is a Standard Instrument zone or not. It raises the possibility that, for example, that zone B2 ("Local Centre") or zone B4 ("Mixed Use") could be deemed to an equivalent zone. It even creates an ambiguity about which zone they could be deemed the equivalent of (industrial or residential?).

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[20] *Draft Environmental Planning and Assessment (Special Infrastructure Contribution – Lower Hunter) Determination 2011*, cl 4(3).
[21] *Environmental Planning and Assessment Act 1979* s 81A(3).
[22] *Environmental Planning and Assessment Act 1979* s 83B.

Secondly, there is no process by which such equivalent zones must be identified and published. This means that, at the time a condition is imposed, it may not be clear whether or not development in a given zone will be subject to a levy. The issue may need to go to court to resolve whether or not a given land use zone is "equivalent" to the nominated zones in the determination.

Deciding whether or not a zone is the equivalent of another zone is a highly subjective decision. It is possible that the development consent would be void because it would be uncertain as to whether or not the special infrastructure contribution is payable in relation to the zone.[23]

The Department has, in the past, avoided the problems outlined above through good drafting. It is surprising that the past approach has not been taken in the determination.

For example, the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* makes it clear that its "equivalent zone" provisions do not apply to any zone contained in any Standard Instrument (on the assumption that the Standard Instrument's zones would be expressly identified in the SEPP itself).

The *State Environmental Planning Policy (Affordable Rental Housing) 2009* and the *State Environmental Planning Policy (Infrastructure) 2007* both task the Director-General or other authority with an obligation to determine upfront whether or not zone is equivalent.[24]

As the areas to be subject to the special infrastructure contribution are all new urban land release areas, there is no bona fide reason for extending the determination to an undefined class of zones.

The special infrastructure contribution should only be payable in relation to development in zones expressly named in the determination or direction. If an old zone is to be used, it must be identified as being an "equivalent zone" via a formal process prior to the issue of consent.

11. 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.

Satisfactory arrangements

The determination says that:

> A special infrastructure contribution is not required to be made for ... development on land in relation to which the Director-General has certified to the consent authority that satisfactory arrangements have been made to contribute to the provision of designated State public infrastructure.[25]

Is this intended to refer to historical certifications made prior to the making of the determination? We certainly support the principle that no levy should be imposed where an infrastructure contribution deed has been executed or past satisfactory arrangements have been certified,

However, it is not clear to us what the Department will be doing in the future. Is the Department of Planning intending to continue making certifications? Has the Department satisfied itself that any new certifications will not cause problems as a result of the decision in *Gwandalan Summerland Point Action Group Inc v Minister for Planning?*[26]

The Department needs to better explain and define its future approach on "satisfactory arrangements" certifications.

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[23] 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.
[24] *State Environmental Planning Policy (Affordable Rental Housing) 2009* cl 5(1); *State Environmental Planning Policy (Infrastructure) 2007* cl 6(1).
[25] *Draft Environmental Planning and Assessment (Special Infrastructure Contribution – Lower Hunter) Determination 2011*, cl 4(3).
[26] [2009] NSWLEC 140.

Works-in-kind agreements

Under the Act, the role of a *determination* is to set the "the level and nature of development contributions to be imposed".[27] The determination says that:

> The special infrastructure contribution that must be made for relevant development is ... a monetary contribution, or ... a contribution of a kind specified in a special infrastructure contribution works-in-kind agreement ....[28]

This clearly contemplates a regime where there is a "monetary" contribution or an "in-kind" contribution. In relation to the "in-kind" contribution the determination fails to set the "the level and nature of the contribution". Instead the determination assigns the responsibility to set a compulsory in-kind contribution to another document. This is not envisaged by the Act.

The Act does envisage in-kind contributions being agreed upon. The Act does this by expressly allowing 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).[29]

Under the Act, 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 imposed via a development consent. Where there is a need to settle an in-kind contribution prior to the issue of a consent, the Act envisages that a voluntary planning agreement will be negotiated and publicly exhibited.

In short, the Act allows a consent authority and an applicant to agreement on in-kind provision as an alternative to a mandated contribution – through either a voluntary planning agreement or a post-consent agreement on the provision of a material public benefit.

The draft determination attempts to circumvent both of these provisions of the Act, by directly delegating the role of setting the level and nature of contributions to a non-statutory document (a works-in-kind agreement). Knowing the Department of Planning, we expect that a standard form works-in-kind agreement will appear at some point.

The framework of the Act offers an applicant protections, the most important of these protections is legal certainty. A regime that is clearly contemplated by the Act is less likely to be struck down in a legal challenge. We note that the agreement declared void by the Land and Environment Court in *Gwandalan Summerland Point Action Group Inc v Minister for Planning*[30] was an agreement that took place outside of the framework of the Act.

The Department should use the framework of the Act to deal with in-kind arrangements. That is, voluntary planning agreements prior to consent being issued, or by acceptance of an agreed material public benefit after a consent is issued. If the Department thinks there are problems in the framework of the Act it should consult industry on the necessary amendments.

We are concerned that there will be a need to negotiate and settle on a works-in-kind agreement and then possibly a separate voluntary planning agreement, prior to the grant of any consent. This means that government agencies may have two bites of the cherry. A developer could think that they have settled infrastructure issues with a works-in-kind agreement, only to be told that they should enter into a voluntary planning agreement after the works-in-kind agreement is finalised.

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[27] s 94EE(1).
[28] *Draft Environmental Planning and Assessment (Special Infrastructure Contribution – Lower Hunter) Determination 2011*, cl 5(1).
[29] s 94EF(5).
[30] [2009] NSWLEC 140.

Public authorities should not be entitled to two bites at cherry - infrastructure funding discussions raised before a consent is issued should be settled in a single agreement, not separate voluntary planning agreements and works-in-kind agreements.

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

According to the former Growth Centres Commission's fact sheet, the definition of "net developable area"

> is the total area of the land available for development, not necessarily the total area of a property itself. It does not include open space, drainage land, regional roads and land used for other public facilities. For example, if an area is partly developable and partly affected by drainage, only the area that is developable will incur the Contribution.[31]

Yet the levy in the Lower Hunter and the Illawarra misleadingly applied to "net developable area", when in truth, it is in fact gross developable area that is being taxed. That is because flood prone land and some roads are part of the definition. There are also grave ambiguities around the open space provisions.

Flood prone land

According to the document, "net developable area" includes flood prone land located at or below the one in 100 average recurrence interval.[32] Such flood prone land will only be excluded from a levy if the land

> is unsuitable for the relevant development by virtue of it being at or below that level.[33]

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;
- any act, matter or thing for or with respect to protecting, improving or utilising, to the best advantage, the environment;
- any act, matter or thing for or with respect to protecting or preserving trees or vegetation;
- advertising.[34]

While this is clearly a wide-ranging list, it is the first two dot points ("the subdivision of land" and "the use of land") that are the most all-encompassing.

The "subdivision of land" is in itself development, irrespective of what the ultimate purpose of the subdivision is.[35] So by definition, if flood prone land is included in a subdivision application, and the consent authority intends to approve the application, it can be safely said that it is not

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[31] Growth Centres Commission, Special Infrastructure Contribution 2.
[32] *Draft Environmental Planning and Assessment (Special Infrastructure Contribution – Lower Hunter) Determination 2011*, cl 4(3).
[33] *Draft Environmental Planning and Assessment (Special Infrastructure Contribution – Lower Hunter) Determination 2011*, cl 9(4)(a).
[34] s 4; s 26.
[35] Lyne *and Another v Moree Plains Shire Council* 110 LGERA 120

unsuitable for relevant development (i.e. the subdivision). It is impossible to exclude flood prone land from such a subdivision application if it, and land that is not flood prone, currently forms part of a single lot.

The "use of land" is also a type of development, distinct from the subdivision of land.[36] 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*[37] 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 … would be a 'use' …

In *Sustainable Fishing and Tourism Inc v Minister for Fisheries*[38], 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".

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. This means that, quite apart from any issue of subdivision, flood prone land that is being used from stormwater quality improvement associated with a residential development, is likely to be taken to be land that is being used for the purposes of residential development.

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.

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.

Roads

The determination says that:

> The net developable area for a relevant development includes the area of any land that the development consent authorises, or requires, to be used as a road, or reserved or dedicated as a public roads ....[39]

Some roads are excluded, namely roads nominated for funding in the determination itself. However, there is no certainty that all "regional" roads will be excluded.

If the levy is truly to be based on "net developable area" then surely regional/arterial/sub-arterial roads must be excluded, whether they have been identified for funding under the determination or not? This is the practice in other jurisdictions.[40]

Regional/arterial/sub-arterial roads must be excluded, whether they have been identified for funding under the determination or not.

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[36] Ibid.
[37] [1997] 2 Qd R 618, 629–630.
[38] (2000) 106 LGERA 322.
[39] *Draft Environmental Planning and Assessment (Special Infrastructure Contribution – Lower Hunter) Determination 2011*, cl 9(2).
[40] Consider this definition from the Wyndham Planning Scheme in Victoria: "Net developable area for the purposes of this schedule is defined as "the total site area, *minus arterial and sub-arterial road* widenings and reserves, floodways in dedicated reservations, school sites and the open space required by Council (emphasis added). <http://www.dse.vic.gov.au/planningschemes/wyndham/ordinance/45_06s03_wynd.pdf> at 19 February 2011.

Public open space

Land to be used for "public open space" is only to be excluded from the "net developable area" if it has been identified as such in a development control plan or a contributions plan.[41]

This seems to overlook the fact that land release can take place without an up-to-date (or any) development control plan.[42]

For example, an application may be made as a staged development application.[43] The initial application would set out concept proposals for the development of a site, and for which detailed proposals for separate parts of the site are to be the subject of subsequent development applications. Where this occurs, public open space issues may be dealt with in the stage one application. A similar process exists under Part 3A, where a concept plan approval may deal with such matters. In both cases a development control plan need not be prepared.

Even if there is already a development control plan, it may be outdated, or suggest a poor solution for the site. In such case, the Act allows for the development control plan to be considered, but it may be departed from where the merit of the application requires it. Using the development control plan as a basis for a special infrastructure contribution liability is bizarre, if the approved development varies from it in material respects.

Furthermore, even when there is no staged application, under the terms of the standard clause currently used by the Department of Planning, there is no requirement for a development control plan to be in place for a subdivision when

> any of the lots proposed to be created is to be reserved or dedicated for public open space, public roads or any other public or environmental protection purpose ...[44]

In any event, the provisions of a determination are intended to constitute a condition in a development consent. How can the development consent purport to leave unresolved the precise area to be exempted from a levy as open space? Bearing in mind, that a development control plan can be unilaterally changed after a consent has been issued, while the terms of the consent cannot. We would suggest that such a consent condition risks rendering the consent void for uncertainty.

Land to be used for "public open space" is to be excluded from the "net developable area" if the development consent requires or contemplates that it be set aside for that purpose.

13. Treatment of heritage land and E4 zone

According to the determination, large lots that:

- comprises the relevant curtilage of an item of environmental heritage that is listed on the State Heritage Register;
- is within zone E4 ("Environmental Living"),

receive concessional treatment.[45]

However, that same treatment has not been extended in relation to:

- the relevant curtilage of an item of local environmental heritage that is listed in the local environmental plan;
- land that is of significant environmental value and therefore unable to be built upon, but not in an E4 zone; and
- land that is not developable for reasons of bushfire management, etc.

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[41] cl 9(4)(b).
[42] *Environmental Planning and Assessment Act 1979*, s 83C.
[43] *Environmental Planning and Assessment Act 1979*, s 83B.
[44] See for example, *Bellingen Local Environmental Plan 2010*, cl 6.2(4)(b).
[45] *Draft Environmental Planning and Assessment (Special Infrastructure Contribution – Lower Hunter) Determination 2011*, cl 12.

There can be no logic in that inconsistency. It is common practice to include undevelopable land in normal lots for sale, wherever practicable, and to make those lots larger to compensate. This is necessary because public authorities typically wish to avoid assuming responsibility for the maintenance and care of the land. These areas will often not be zoned E4. They might be zoned RE2 ("Private Recreation"), E2 ("Environmental Conservation") or E3 ("Environmental Management") or they might be zoned residential, etc.

(We are aware that the E2 and the E3 zones have not been expressly included in the definition of "residential land", but we think there is a risk that they could be held to be "equivalent zones" to zone E4 - see our separate comments on this above.)

The concessions extended to large lots within the E4 zone, should be extended to lots that include land in:

- the RE2 zone;
- any zones that are equivalent to zone E4 or RE2;
- and residential, business and industrial zones, where it has been established that a portion of the lot is undevelopable.

Similarly, there is no logic in denying local listed environmental heritage items the same benefits granted to state listed items.

Local heritage items should receive the same concessional treatment as state heritage items.

14. The application of the proposed levy to land zoned "large lot residential" is perverse

The definition of "residential land" includes zone R5 "Large Lot Residential".[46] This means land that is zoned as R5 will be subject to a special infrastructure levy. Minimum lot sizes in this zone can easily be 2,000 square metres or more.[47] This may mean, for example, just two or three lots (or less) may be developed per "net developable hectare" in this zone. As a result, in such example, the per lot levy may easily range from $35,000 to $52,000.

According to the Standard Instrument, the purpose of this zone is:

- To provide residential housing in a rural setting while preserving, and minimising impacts on, environmentally sensitive locations and scenic quality. ...
- To ensure that development in the area does not unreasonably increase the demand for public services or public facilities.[48]

It is difficult to understand why a punitive special infrastructure levy should be imposed, when the purpose of the zone is to provide housing in large lots, in order to preserve a "rural setting" and to constrain "the demand for public services or public facilities". Surely development that is deliberately planned to limit demand for public services and facilities should face a lower, or at least the same levy, as other lots?

We hope it is not the Department of Planning's intent to undermine the commercial viability of large lot residential development. If it is, we predict several adverse policy outcomes.

Firstly, some rural settings will not be preserved and there will be greater impacts on environmentally sensitive locations and scenic quality.

Secondly, there will be more intense residential development in some areas, when this was not the optimal outcome, leading to greater than necessary demands on public infrastructure.

Thirdly, there will be reduced provision of high quality lifestyle/executive housing in Lower Hunter

[46] *Draft Environmental Planning and Assessment (Special Infrastructure Contribution – Lower Hunter) Determination 2011*, following cl 3.
[47] Tamworth Regional Local Environmental Plan 2010 provides a minimum lot size of 2 hectares in the R5 zone.
[48] *Standard Instrument (Local Environmental Plans) Order 2006*, Land Use Table.

communities. This latter warrants some exposition.

New executive housing is considered by many regional leaders as essential to providing a more robust and self-sustaining regional economy.[49] It has been established that the owner-managers of small to medium sized firms are making decisions about locating business premises are more motivated by such personal issues as the proximity of the industrial site to their home, and the amenity of their living environment, rather than access to transport routes or freight terminals.[50]

The research suggests that high amenity housing can also play an important role in attracting members of the "creative class" (i.e. high income professionals). Property developers, but academics too,[51] have concluded that the appeal of natural amenities and associated recreational opportunities is sufficiently strong for some members of the "creative class" to locate in areas rich in outdoor amenities, rather than conventional highly urbanised environments. Experts have highlighted the need for planners and economic development practitioners to target occupations rather than just industries for particular regions.[52] The importance of allowing traditional resource/export orientated communities the chance of attracting professionals has been well documented.[53]

A punitive levy arrangement for large lots will inappropriately retard the development of lots important to attracting key business owners (and their businesses) and high income earning professionals to communities such as Maitland.

We note that it is separately proposed in the determination to limit the burden of levies on lots of more than 1,000 square metres - at the very least this principle needs to be considered in relation to the "large lot residential" zone in regional locations.

15. Need for greater clarity on the effect on an exclusion provision in a VPA

The determination includes a note saying that:

> A special infrastructure contribution may be imposed only as a condition of development consent. Accordingly, such a contribution can be required only in respect of development that may be carried out with development consent. A special infrastructure contribution cannot be imposed as a condition of consent if a planning agreement made in accordance with section 93F of the Environmental Planning and Assessment Act 1979 excludes the application of section 94EF.[54]

We assume that has only been included as a note because the Department of Planning believes that statutory provisions adequately provide for this exclusion. However, there is an anomaly in this legislation. The anomaly does cause us some concern; as a result we think there should be a more explicit provision in the ministerial direction.

Section 93F of the Act clearly contemplates that in the case of development a voluntary planning agreement may exclude (wholly or in part) the application of section 94EF (the imposition of a development consent condition requiring the payment of a special infrastructure contribution). [55]

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[49] Graham Haughton and Dave Counsell, " Regions and sustainable development: regional planning matters" (2004) 170(2) *The Geographical Journal* 135,

[50] Tim Mazzaro and Stephen Choo, "A study of the factors influencing the operating location decisions of small firms" (2003) 21(2) *Property Management* 190.

[51] D McGranahan and T Wojan "Recasting the creative class to examine growth processes in rural and urban counties" (2007) 41(2) *Regional Studies*, 197; LP Apedaile, "The new rural economy", in G Halseth and R Halseth (Eds.): *Building for Success: Explorations of Rural Community and Rural Development* (2004) 111.

[52] M Markusen, "Targeting occupations in regional and community economic development" (2004) 70 *Journal of the American Planning Association* 253.

[53] Tony Jackson* and Barbara Illsley" Amenity migration and sustainable development in remote resource-based communities: lessons from northern British Columbia" (2008) 1 *International Journal of Society Systems Science* 26.

[54] *Draft Environmental Planning and Assessment (Special Infrastructure Contribution – Lower Hunter) Determination 2011*, following cl 4.

[55] s 93F(3)(d); s 93F(5)(a).

These statutory provisions are more or less identical for section 94 (local council per lot contributions), section 94A (local council percentage contributions) and section 94EF (special infrastructure contribution).

However, in relation to sections 94 and 94A, the Act makes an additional provision:

> If a planning agreement excludes the application of section 94 or 94A to particular development, a consent authority cannot impose a condition of development consent in respect of that development under either of those sections (except in respect of the application of any part of those sections that is not excluded by the agreement).[56]

No equivalent provision exists in relation to section 94EF (special infrastructure contributions).

An ambiguity arises because there is a provision that expressly provides that a planning agreement that "excludes" the application of sections 94 and 94A prevents a consent authority imposing a development condition under those sections. No such express provision is made in relation to section 94EF.

A normal principle of statutory interpretation is that words are inserted for a reason.[57] The presence of an express provision for sections 94 and 94A, and the absence for section 94EF, may cause courts to read down the meaning of the word "exclude", and allow the imposition of a special infrastructure contribution condition - even where it has been "excluded" by a voluntary planning agreement.

The Urban Taskforce would be keen to see this anomaly addressed in the next statute law revision bill, but, in the meantime, we think additional certainty should be given to industry through an express provision in the ministerial direction.

The ministerial direction/determination should expressly state, within its substantive terms, a provision based on section 93F(5), that is:

> If a planning agreement excludes the application of section 94EF to a particular development, a consent authority cannot impose a condition of development consent in respect of that development under that section (except in respect of the application of any part of those sections that is not excluded by the agreement).

16. Power of the Director-General to determine net developable area

The determination says that:

> The Director-General may make any determination required to be made for the purpose of calculating the net developable area for a relevant development in accordance with this Determination .... [58]

It is important to bear in mind that the ultimate status of this determination is a development consent condition. It is difficult to see how the above words, as drafted, are within the powers of a consent authority to impose as condition.

Firstly, the only mechanisms that can be employed to ensure that the net developable areas are calculated correctly are the ones authorised by the Act.

Secondly, nothing the Act allows the Minister s determination to authorise other determinations by the Director-General. Additionally, the determination under section 94EE takes effect as a condition of development consent; it is therefore crystallised at the time the consent is granted, and subsequent changes to the determination cannot alter the terms of the consent. This

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[56] s 93F(5).

[57] The "known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent": *Commonwealth v Baume* (1905) 2 CLR 405 at 414[PDF] cited in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355[PDF] at [71] per McHugh, Gummow, Kirby and Hayne JJ.

[58] *Draft Environmental Planning and Assessment (Special Infrastructure Contribution – Lower Hunter) Determination 2011*, cl 13.

provision appears to be an attempt to circumvent this legal regime by allowing for additional determinations by the Director-General after the grant of consent.

Thirdly, a development consent, like other administrative decisions, requires finality. There are several statutory provisions, in Part 4, which set aside that requirement, but none are relevant here. This provision essentially says the consent is not final.

The closest analogy is offered by section 80A(2) of the Act, which provides that:

> A consent may be granted subject to a condition that a specified aspect of the development that is ancillary to the core purpose of the development is to be carried out to the satisfaction, determined in accordance with the regulations, of the consent authority or a person specified by the consent authority.

However, section 80A(2) cannot apply in this situation, because the process of establishing the net developable area is not the carrying out of a specified aspect of the development, and it is certainly not ancillary the core purpose of the development.

Finally, the courts will the final arbitrators of net developable area in a particular case, and their decision will be based on the Act, the regulations, the provisions of the development consent, and not determinations of the Director-General that sit outside this process.

Clause 13 should be deleted.

17. Deed of charge may conflict with landowners' obligations to their first or second mortgagees

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.

Generally speaking, by making the deferred payment arrangements contingent on a registered charge or a bank guarantee, the utility of the deferred payment arrangement is significantly reduced, if not nullified. If this occurs, otherwise viable development opportunities will be unable to proceed because of insurmountable financing issues, rather than any basic project feasibility issues. To the extent that any charge is required, it would better if it arose directly under legislation, in the same way as unpaid land tax, rather than as an instrument that is registered on the title in its own right.

Our advice on this point has been ignored, and the Department of Planning is proposing that a charge be agreed and registered when a deferred payment mechanism is used (and there is no bank guarantee).

The Department of Planning has not provided us with a deed of charge to review. We were previously provided with a draft deed in May 2009 in the context of consultations about the Western Sydney state infrastructure contribution. 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.

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.

18. Further alternatives should be available in the event that it is not practicable to burden the land with a charge

We note the proposal to allow the use of bank guarantee to secure a deferred payment option. This will be rarely used, as a bank will require security equivalent to that of a first mortgage, which raises the same issues above. 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.

Additionally, in some cases it may not be practicable to burden the land with a charge in the way that is envisaged by clause 17(2)(a). Some reasons, additional to those mentioned in the above section are:

- 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.
- 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.

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 special infrastructure contribution liability; or
- it should be possible to enter into a deed for a floating charge over the assets of the development company.

19. Requiring a deferred payment to be made 21 days before settlement will create financing problems

The requirement for payment of a deferred special infrastructure contribution to be made 21 working days from settlement on the sale of a subdivided lot will create a new financing problem.[59]

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.[60]

Deferred levies should be payable when a subdivided lot is sold, as per the Government's public announcement, not 21 days beforehand.

It is clear that this requirement has only been introduced to prevent lot purchasers becoming aware that they are, in truth, paying a levy to the government when purchasing a new lot.

20. Illawarra falls short

The documents also show that in the Illawarra the Government is only planning for an average of just 640 extra detached houses a year, compared to the Lower Hunter's anticipated rate of new house supply of 2,640 a year.

The Illawarra's population is more than half the Lower Hunter's, but the government is only planning for detached housing growth at less than a quarter of the Lower Hunter's level.

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[59] *Draft Environmental Planning and Assessment (Special Infrastructure Contribution – Lower Hunter) Determination 2011*, cl 18.
[60] Office of the Premier of NSW, "Premier announces plan to kick-start housing construction", Media Release, 17 December 2008.

The Illawarra's status as a major region within NSW will diminish if government plans don't support sufficient housing growth.

21. <u>The definition of "special infrastructure contribution" is circular</u>

"Special infrastructure contribution" is defined to mean

> a development contribution that is determined under section 94EE of the Act.[61]

This is odd, because the document itself is intended to be a determination under section 94EE. In plain terms it says: 'we are setting a special infrastructure contribution under the Act, and by saying "special infrastructure contribution" we are referring to something that is set under the Act'. This statement is pointless.

The only rational purpose this kind of circular definition could is to invoke special infrastructure contributions set by other determinations, in addition to any particular contribution set by this particular determination. We trust this is not the intended outcome, because it would have bizarre implications too wide-ranging to properly document in this submission.

There is no need for a definition for "special infrastructure contribution" and we ask that it be deleted.

22. <u>The drafting of clause 4(7) is problematic</u>

Clause 4(7), which is clearly designed to override other provisions of clause 4 says that a special infrastructure contribution is required to be made

> (a) for *any part of the land* to which a development consent relates within the Lower Hunter Special Contributions Area, even if the same development consent authorises development on land outside the Special Contributions Area, and
>
> (b) *for any part of the land on which relevant development is authorised to be carried out* by a development consent, even if the same development consent also authorises development that is not relevant development (because, for example, of land use zoning) on another part of the land emphasis).

<u>Firstly</u>, the differences in the drafting of (a) and (b) are confusing.

Sub-paragraph (b) is directed to "relevant development" and this phrase is defined by the determination to refer to "development for which a special infrastructure contribution must be paid under this determination".

Clearly clause 4 is intended to set out the substantive requirements in this respect. So it is completely circular, for clause 4 itself to refer to "relevant development".

In any event why does (b) apply to "part of the land on which relevant development is authorised to be carried out", but (a) apply to an apparently broader category of land: "for any part of the land to which a development consent relates"? The courts will generally presume that words are inserted for a purpose,[62] and this suggests that (a) is intended to apply to land that would not otherwise be "relevant development". We trust that the uncertainty that flows from this drafting is obvious.

<u>Secondly</u>, clause 4(7) strives "to avoid doubt" by saying that:

> special infrastructure contribution is required to be made ... for any part of the land to which a development consent relates within the Lower Hunter Special Contributions Area ...

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[61] *Draft Environmental Planning and Assessment (Special Infrastructure Contribution – Lower Hunter) Determination 2011*, cl 3.
[62] The "known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent": *Commonwealth v Baume* (1905) 2 CLR 405 at 414[PDF] cited in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355[PDF] at [71] per McHugh, Gummow, Kirby and Hayne JJ.

This text purports to cancel out the exemptions set out in the balance of clause 4.

We would suggest that clause 4(7) be re-drafted as follows:

> (7) To avoid doubt, no exemption from the requirement to make a special infrastructure contribution arises:
>
> (a) in relation to land within a Lower Hunter Special Contributions Area - merely because the same development consent authorises development on land outside the Special Contributions Area, and
>
> (b) in relation to development for which a special infrastructure contribution must otherwise be made – merely because the development consent also authorises development that is not relevant development (because, for example, of land use zoning) on another part of the land.

23. <u>The status of "notes" is unclear</u>

The determination says that:

> Notes in this Determination are provided for guidance only.[63]

This form of words is odd, given that the traditional form of words is something along the lines of:

> Notes included in this Act are explanatory notes and do not form part of this [instrument].[64]

As the notes are not "marginal notes" [65] and the determination does not say otherwise, these notes *do* form part of the determination. Their status would be clear if they did <u>not</u> form part of the determination (they would be extrinsic material), however, it appears they form part of the determination, but are provided for "guidance" only.

We suggest that the conventional approach to notes be taken, that is, that they do not form part of the determination.

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

[63] *Draft Environmental Planning and Assessment (Special Infrastructure Contribution – Lower Hunter) Determination 2011*, cl 3(5).
[64] *Aboriginal Land Rights Act 1983* s 4. There are very many more such examples.
[65] *Interpretation Act* 1987 s 35.