

City of Ryde Submission

Improving the Infrastructure Contributions System

<https://www.planning.nsw.gov.au/Policy-and-Legislation/Infrastructure/Infrastructure-Funding/Improving-the-infrastructure-contributions-system>

**Public Exhibition 15 April 2020 to Friday 12 June 2020
extended to Friday 26 June 2020**

Submission Date: 25 June 2020



 **City of Ryde**

Lifestyle and opportunity
@ your doorstep

Draft Planning Agreements Policy Framework

City of Ryde (COR) is generally agreeable with the Draft Planning Agreements Policy Framework in respect of the following Parts:

- 1.1 Purpose of Planning Agreements
- 1.2 Rational for Planning Agreements
- 2.2 Public Interest
- 2.4 Relationship with development applications and planning proposals
- 2.5 Acceptability Test
- 2.6 Policies and procedures for planning agreements
- 3.1 When to use Planning Agreement
- 4.3 Costs and charges
- 4.4 Registration and administration
- 4.5 Public participation and notification
- 4.6 Explanatory Notes
- Part 5 Examples of the use of planning agreements

COR does, however, wish to raise the concerns with the Draft Planning Agreements Policy Framework in respect of the following:

2.1 Fundamental Principles

- *Planning Authorities should always consider a proposal on its merits, not on the basis of a planning agreement*
- *The progression of a planning proposal or the approval of a development application should never be contingent on entering into a planning agreement*

The above statements are contrary to Section 4.15(1)(iiia) of the Environmental Planning and Assessment Act 1979. In particular, this section regarding matters for consideration with respect to a development application states:

any planning agreement that has been entered into under Section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4,...

Thus, some weight in the development assessment process must be given to the extent and nature of a planning agreement or draft planning agreement. This is considered appropriate and should not be undermined; the wording of the fundamental principles should be refined to bring greater clarity to and consistency with the Act.

The statements in the draft framework have the effect of eroding the importance of a relevant planning agreement may have in the development assessment process. It is also contrary to the first example for the use of a planning agreement in Part 5 of the Draft Practice Note where it states:

The planning agreement could impose planning obligations directed towards replacing, substituting, or restoring the public amenity, service, resource or asset to an equivalent standard to that existing before the development is carried out. In this way, planning agreements can offset development impacts that may otherwise be unacceptable.

It is suggested that consideration be given to re-wording the two principles identified above to improve clarity and consistency, as follows:

- *Planning Authorities should always consider a proposal on its merits; a planning agreement is only relevant in so far as it delivers outcomes affecting to the impacts of a proposal.*
- *A planning agreement is only relevant to the progression of a planning proposal or the approval of a development application in so far as it delivers outcomes affecting the impacts of a proposal or application.*

Council also believes that Value Capture is a valid part of any best-practice developer contributions framework and the following proposed principle should be removed:

- *Value Capture should not be the primary purpose of a planning agreement.*

Further detail is provided below in relation to section 2.3.

2.3 Value Capture

It is disappointing that the draft Practice Notes diminishes Value Capture as part of an effective, efficient and equitable contributions framework. It is acknowledged that Value Capture is currently used differently by the various planning authorities. Instead of diminishing the approach to an unspecified secondary role, this opportunity could be used to provide some positive direction for consistent effective use of value capture to the benefit of the communities of NSW.

When undertaken in a clear and transparent manner, within an established and equitable framework, Value Capture can assist in demonstrating to the community that all landowners and developers are equally required to ensure growth is beneficial to the community. In particular, Value Capture principles can be used as a means of clearly expressing the value of public benefits provided in planning agreements. It also assists in demonstrating the appropriateness of those benefits in the wider context of the value being afforded to a landowner. More specifically, by providing a framework to quantify land value uplift, Value Capture is a useful tool in determining the affordability threshold of development in light of necessary public benefit contributions to provide required supporting infrastructure.

Developers have demonstrated their willingness to work with communities to appropriately share the benefits of growth, notwithstanding concerns raised in some sections of the industry around inconsistent application of value capture across the state. A value capture framework consistently applied would improve equity and would also allow more confident and effective planning for planning authorities and landowners.

If Planning Agreements were negotiated with no regard to the Land Value Uplift that results from a planning uplift, there is a risk that VPA offers are not reasonable or commensurate with the planning uplift. Equally, there is a risk that planning authorities could impose contributions requirements that are too onerous for a development, making it unviable.

Without a clear method by which to quantify the value of VPA contributions, protracted assessment times and complex negotiations with proponents will be inevitable.

The practice of quantifying the Land Value Uplift and apportioning a specified share of that Value Uplift allows a dollar value to be quantified, which then guides the overall value of the VPA offer. The Land Value uplift can be verified from market sales evidence by an independent valuer or land economist. It is transparent and provides certainty to the market and industry participants.

Further, from time to time, new investment in infrastructure or other opportunities create opportunities for growth sooner than had been anticipated. Such “out of sequence” development creates growth and demand scenarios that are beyond those anticipated by strategic plans. While they should not be the default method of delivering growth, the system should be flexible enough to ensure the community gets the best possible value from these opportunities. Value Capture is particularly important to ensure the benefits from significant land value increases are shared with the community/s that will be impacted by the out of sequence development.

An appropriate framework including value capture provisions as part of a well-managed system would facilitate significant infrastructure projects in NSW at both regional and local levels. This would more effectively mitigate the impacts of growth, improving living standards. Further, it would ensure community could make informed decisions about growth, with confidence that the benefits will be shared with the community in an equitable and transparent manner.

Council suggests that the Productivity Commission provide some direction around the appropriate use of Value Capture as part of its review recognizing the benefits outline above and having regard to best practice value capture models used elsewhere or identified in previous reviews. Council is of the view that private entities should not receive all the windfall gain from planning decisions of State or Local Governments, as the Governments represent the community of NSW and the community should also share in such gains.

3.2 Land use and Strategic infrastructure planning

Council agrees that a planning authority is to ensure that adequate infrastructure is available to support development, but rejects the undue focus on the risk that unreasonable or wholly unrelated contributions are being extracted under such agreements.

Applicants must demonstrate that planning proposals are consistent with Council's or the State's strategic planning directions. It is already clear within the existing framework that the lack of planning agreement cannot be grounds, in and of itself, for the refusal of a planning proposal or application. This is also addressed elsewhere in the draft practice note. Further, applicants have established review processes for proposals and applications should there be concern that planning authorities are not appropriately exercising their statutory role.

4.1 Basic procedures for entering into a planning agreement

Council has no real issue with this part other than it should be made clear in Step 3, that the signed Planning Agreement provided by the applicant should be the Planning Agreement that was negotiated and finalised between the parties in Step 2.

4.2 Offer and negotiation

As discussed for Part 2.1, where a VPA is offered but later withdrawn before it is entered into by the developer, the context of the offer should carry some weight in being able to refuse a DA or Planning Proposal, especially if the VPA offer provided a means of mitigating impacts of the proposal and there are no lawful means of imposing conditions to replace the planning agreement.

Improving the review of local infrastructure contributions plans discussion paper

Council supports the review and welcomes the DPIE's recognition that the current limits on the Contribution Caps have devalued since their introduction in 2008 and 2010 respectively due to the principles of inflation.

The discussion paper provides 3 Options for increasing the thresholds. Council supports Option 3 as it provides a holistic increase for all local government areas. Options 1 and 2 are limiting and only apply to contributions plans that have already been reviewed by IPART or involve greenfield development. Option 3 enables all LGAs experiencing significant development growth to increase contributions without the need for IPART to review and time intensive administrative processes. In this context, Council recognises that contributions should only be increased where that relevant contributions plan can justify such increase within its current contribution calculation methodologies.

Council supports an annual indexation of the thresholds, based on the Sydney CPI.

Council is also of the view that the Essential Works List (EWL) needs to be reviewed. A current gap in the EWL is funding for construction, fitout or upgrade of community facilities and buildings. Whilst the EWL allows a contributions plan to fund land acquisitions for community facilities, it does not allow a contributions plan to raise funds for the construction, fitout or upgrade of these facilities. This leaves the burden on the existing community to fund these infrastructure requirements, which in most cases arise due to demand generated by new development. Therefore, the existing community is subsidising new development. In many cases, developers are agreeable to dedicate such land at no cost to Council's where they are receiving uplift in development yields. Council should then be able to appropriately levy development for the construction and fitout of these much needed facilities.

Criteria to request a higher Section 7.12 percentage discussion paper

In terms of the discussion Questions in Section 4.3, COR makes the following comments:

1. *Should all the criteria be mandatory for a s7.12 plan to be considered for a higher percentage levy?*

The criteria should not be mandatory. The criteria should be used as guiding principles. Setting mandatory criteria/s is limiting and could rule out other reasonable methodologies for determining employment growth/targets that may be more suitable depending on the circumstances of the case.

There should be room for innovation in the creation of employment growth. With continuous change in technology, the form and nature of employment changes with it. Further, the recent COVID-19 Pandemic has demonstrated that employment can be highly flexible and uncertain. Therefore, planning methodologies need to be flexible to enable changes in employment type to be accommodated. Mandatory criteria may result in innovation being stifled and employment opportunities and growth foregone. Flexibility is key to creating opportunity in times of uncertainty.

2. *Are there any alternative criteria that should be considered?*

Yes. As discussed in item 1 above, innovation. A general criteria that encourages demonstrated innovation in the development of a town centre that creates employment growth should be considered.

3. *C1.2: Considering the different ways 'significant' employment growth can be measured, what would be the most effective?*

The 3 dot points provided in the criteria are in many ways quite limiting and do not reflect qualitative or quantitative reasoning. For example:

Dot point 1 – in a post pandemic world where working from home is likely to become normal, residents and workers can be one of the same. Further, high density mixed use developments can provide both employment growth as well as residential growth. 10% employment growth for a highly populated town centre, may involve more new jobs than say 30% employment growth in a lower populated town centre. However, the cost of new infrastructure in the higher populated area may be more costly than the lower populated area. Percentage measures are therefore not very good guides unless you are comparing similar population distributions.

Further, the type of employment to be generated should also be considered. One form of employment may generate higher incomes, contribute more to GDP, medical research and technological innovation (but not limited to) than other forms.

Dot point 2 – as stated for dot point 1 percentage measures are not very good guides unless you are comparing similar population distributions. For example, one centre may employ 1000 people and would, therefore, need an increase of 250 jobs; whereas another centre may employ 100,000 people and would therefore need an increase of 25,000 jobs.

In the case of the later, even a 10% increase in jobs far outweighs the former as an employment generator and overall contributor to the economy. Thus the strict measure of 25% in this case is advantageous for smaller centres and less advantageous for larger centres, that are likely to create more jobs, but at a lower percentage of growth.

This measure also has no regard for the quality of employment that may be on offer.

Dot point 3 – as per dot points 1 and 2.

The commentary in this section provides little to no justification as to why the 3 dot points are good indicators of employment growth or targets. As demonstrated the percentage increase measures have significant flaws and provide no qualitative or quantitative reasoning for their use. Further, meeting these criteria would demonstrate that the Council has high growth demand and a nexus between growth demand and the infrastructure required to support it, indicating that a s7.11 would be more appropriate for the locality in any case. Thus, making all remaining criteria redundant; i.e. increases in the levy would never be approved.

C1.9: Is the requirement necessary? Are there other mechanisms that would ensure ongoing monitoring and review?

This appears reasonable, however, there are alternatives such as delegates to the Minister or IPART. Notwithstanding, there should be separate review processes for minor and major changes. 'Minor' being in the order of the change of intersection treatment from a roundabout to traffic signals for example; and 'Major' being a revisiting of the entire works program. Clearly each scenario would need a different level of scrutiny and resourcing. As such different levels of process should be employed to deal with minor and major changes to alleviate unnecessary delays.

4. *C2.1: District level infrastructure remains generally undefined. Should the Department publish a list of acceptable district-level infrastructure items or should it be determined on a case by case basis?*

Publishing a list of what may be considered district-level items could provide some certainty to for Councils in knowing whether to apply for the 3% levy or not. This may have the added advantage of reducing administrative processing and helping a Council determine if a S7.11 plan is more suitable in the circumstances of the case.

5. *C2.1: Is 10% of the total value of the contributions an appropriate amount to be allocated for the provision of district level infrastructure? Should this be desirable rather than mandatory?*

A 10% minimum district-level infrastructure spend in the works program should be a desirable criteria for applying for a 3% levy. There may be other important infrastructure that may just fall short of being 'district-level', but nevertheless worthy of the higher level when considered as a packaged works program.

When C2.2 is considered in this context, a Council when applying for the 3% should have confidence when collaborating with the DPIE that it can justify the increased levy.

Other criteria that require further consideration are:

C1.6 *The contributions plan should clearly set out the relationship between the expected types of development in the area and the demand for additional public amenities and services*

This creates a scenario where the analysis would be similar to that of creating a s7.11 plan, thus eroding the efficiencies of developing a s7.12 plan.

C1.7 *Demonstrate that s7.11 has been considered and why it is not appropriate in this area.*

This criteria appears to be over-complicating or even undermining the process, especially when the increase requested is from 1% to 2%. This is essentially asking “*why are development rates difficult to predict for this town centre*”, whilst on the other hand the DPIE is asking a Council to prove that the Centre is going to have 25% increase in employment/commercial floor area or alike? One criteria disproves the other in manner that would never allow an increase from 1% to 2%.

Both C1.6 and C1.7 work against the efficiencies of using a s7.12 plan in the first place. Considering the increase is only from 1% to 2%, these criteria are overbearing. C1.8 on its own should be main criteria for an increase from 1% to 2%.

Draft Special Infrastructure Contributions (SIC) guidelines

- Council supports key principles for SIC
- Council supports components that a SIC is to contain
- Council supports types of Infrastructure that a SIC is to fund
- Table 2 - Approach to apportionment is supported
- Table 3 – Approach to SIC Feasibility
 - Planning Uplift – Value Capture – SIC would need to be adopted before the Planning Uplift is given to the subject land to enable the SIC rate to be calculated in the Residual Land Value (RLV) upon the increase. This would not only ensure it is captured in the RLV, but the uplift in value is not foregone. If the SIC value is not known at the time of uplift the RLV does not capture the amount and could be foregone, especially if the land is sold on at a premium soon after the uplift.
 - COR notes that its Affordable Housing Planning Proposal is yet to receive formal assessment for a Gateway Determination, however, SIC's should be undertaken in a manner that do not obstruct delivery of Affordable Housing.
 - No issue is raised with respect to the s7.11 rate being used in feasibility analysis.
 - Incremental increases in a SIC rate should not apply where there is significant Planning Uplift provided via a planning proposal. Value Capture is important at the early stage where there is the greatest profit, otherwise it maybe foregone and the opportunity lost. Trying to recoup value capture at a later time, when developers may have already paid high premiums for land has the potential to make development unfeasible, as the entity who profited from the uplift has moved on.
 - Timing of payment of the SIC at CC or SC is agreeable. OC is too late and provides opportunities for the developer to pass on the obligation to the Strata Body or other subsequent owners, whom should not be burdened with the obligation.
- Public Consultation and transparency must involve mandatory consultation with the relevant Councils affected by the SIC to ensure there is no cross-over in infrastructure funding and opportunities for synchronized local and state infrastructure delivery are considered. This should start early in the process and not confined to a standard, minimal public consultation period.
- Expending SIC Revenue – this section only mentions the spending of SIC funding once there are substantial funds collected via the SIC levy for SCA. Consideration should be given to forward funding of projects in high growth areas and using SIC funds to recoup those costs. This would enable infrastructure to be provided earlier, with the development that creates the demand. This could help resolve current lag time between when development is finished and the delivery of the infrastructure required to support it.
- Council has no issues with State Planning Agreements, but notes that as with VPAs, they should be used in a transparent and equitable manner, and in circumstances where they are the most efficient means of infrastructure delivery. They should not be used in circumstances where a SIC would be a more transparent and equitable mechanism for infrastructure funding.

Proposed amendments to the EP&A Regulation

- COR has no issues with the proposed amendments to the Regulations, especially in terms of the new financial reporting requirements for s7.11/7.12 Plans and VPAs. COR is well on its way to meeting such requirements and already has an online VPA Register. COR also provides information in its annual reports and projections for VPA income, land dedications and material public benefits received or to be received.

Summary

- It is recommended that the Fundamental Principles in the draft framework be reworded to improve consistency and clarity as follows:
 - *Planning Authorities should always consider a proposal on its merits; a planning agreement is only relevant in so far as it delivers outcomes affecting to the impacts of a proposal.*
 - *A planning agreement is only relevant to the progression of a planning proposal or the approval of a development application in so far as it delivers outcomes affecting the impacts of a proposal or application.*
- Council objects to Value Capture within the framework being diminished to a secondary role and it is recommended that this be removed from the draft practice note. It is further recommended that the Productivity Commission's review include consideration of best practice value capture methods with a view to ensuring it is consistently and transparently applied across the state.
- Council suggests Section 3.2 of the practice note be reworded to focus on the impact of planning agreements, noting the probity concerns currently raised in the section are already covered in the relevant sections. Undue focus on these concerns simply serves to further emphasis the ways planning agreements should not be used, rather than providing clarity on how they should be used.
- Council suggests the basic procedures in section 4.1 of the draft practice note be amended to make it clear that the signed draft Planning Agreement provided by the applicant in Step 3 should be the Planning Agreement that was negotiated and finalised between the parties in Step 2.
- Of the options proposed in the *Improving the review of local infrastructure contributions plans discussion paper*, council's preference is Option 3.
- Council supports an annual indexation of the thresholds, based on the Sydney CPI.
- Council recommends that the Essential Works List (EWL) be revised to more effectively facilitate delivery of community facilities and open space, particularly in infill areas.

- Council supports key principles for SIC.
- Council supports components that a SIC is to contain.
- Council supports types of Infrastructure that a SIC is to fund.
- The approach to apportionment in SIC Table 2 is supported.
- SIC planning and implementation should occur much earlier in the process to ensure it can be calculated in the RLV upon the relevant uplift.
- SIC should be paid at CC or SC. Payment at OC is not supported.
- The SIC process should include mandatory early consultation with affected Councils.
- Consideration should be given to forward funding of projects in high growth areas and using SIC funds to recoup those costs.