NSW Legislative Council Hansard

Environmental Planning and Assessment Amendment (Development Contributions) Bill

Extract from NSW Legislative Council Hansard and Papers Friday 6 May 2005.

Second Reading

The Hon. TONY KELLY (Minister for Rural Affairs, Minister for Local Government, Minister for Emergency Services, and Minister for Lands) [2.32 p.m.], on behalf of the Hon. Michael Costa: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

I am pleased to introduce the Environmental Planning and Assessment Amendment (Development Contributions) Bill. This bill makes a number of significant amendments to the development contribution system under the Environmental Planning and Assessment Act 1979 and is an important legislative step in the reform of the New South Wales planning system. It demonstrates the priority of the Government in this critical area and is positive news in that it puts in place some innovative funding mechanisms to enable the provision of infrastructure and facilities. The bill will now lie on the table of the House and there will be further opportunity to discuss any specific issues that are identified. This will allow for consultation on the preparation of the draft regulations that need to be made prior to the commencement of the bill and the updating of guidelines contained in the section 94 contributions plans manual. The Government is committed to continuing to work with stakeholders in finalising the complete package.

Section 94 of the Environmental Planning and Assessment Act is the principal method enabling councils to levy contributions for public amenities and services required as a consequence of development. This may be the provision of new facilities for a new area, or may be the expansion of existing facilities where a developed area is growing. To make the system more transparent, since 1993 councils have been able to levy section 94 contributions only if they have prepared and exhibited a contributions plan. Before outlining the key elements of the bill, I advise the House that these reforms are the product of an extensive consultation process involving all key interest groups.

Section 94 of the Environmental Planning and Assessment Act has been under review for some time in response to concerns raised by the development industry and local councils. The merits of maintaining the existing system and making improvements have been explored, as have alternatives that are more or less prescriptive than section 94. A section 94 review committee reported to the former Minister for Planning, the Hon. Andrew Refshauge, in January 2000. As that report recommended a range of significant reforms, the Minister had the report published in May 2000 and submissions were invited from interested stakeholders. Following the formation of the new Department of Infrastructure, Planning and Natural Resources in 2003, the Minister for Infrastructure and Planning, and Minister for Natural Resources established a task force to look more closely at the way the section 94 developer contribution system currently operates and in particular the alternative mechanisms by which planning authorities may obtain a development contribution.

That task force strongly supported the intent and function of a well administered section 94 regime for funding local infrastructure, for which there is a nexus with new development. The task force also endorsed a number of improvements to the operation and accountability of the current system as well as the introduction of alternative approaches for obtaining development contributions. In a contemporary planning and urban management environment, section 94 is seen by both the development industry and councils as being too inflexible to deal with the uncertainties of development in some areas. The changes proposed recognise that the pattern of development is changing and that a differential approach to the levying of development contributions is needed.

For greenfield areas, the traditional section 94 contributions plan may be the most appropriate. However, in established inner areas, where there is little opportunity to acquire open space, or for small rural councils, where the administration costs associated with preparing a section 94 contributions plan may be exorbitant, application of a flat percentage levy may be the most suitable option. The reforms brought forward today aim to facilitate the means by which planning authorities may obtain a development contribution to be applied for a public purpose. In addition to obtaining such a contribution under the existing section 94 scheme of the Act, a consent authority will have the option of obtaining development contributions through a defined system of voluntary planning agreements, or imposing a condition of a development consent that requires developers to pay a percentage of the proposed cost of carrying out the development.

It will be up to the consent authority to determine which approach best suits its particular needs. If, for example,

a council proposes to use the existing section 94 regime in its release areas but apply the flat percentage levy in its established town centres, it will set out those arrangements in a contributions plan so that an applicant can clearly see what the contribution rate will be for a certain development. I turn now to the provisions of the bill itself. I will cover first one of the specific amendments to the existing section 94 provisions. The bill includes a provision, in clause 93E, designed to clarify the legitimacy of a current practice by councils that allows them to sensibly manage their resources to get the maximum benefit from section 94 funds collected. That provision clearly authorises borrowing between section 94 funds.

In the Sydney region and around the State there is in excess of $800 million locked up in section 94 contribution accounts, unable to be spent. This amendment means freeing up that money, which is trapped in local government accounts, for the provision of infrastructure. Each contribution plan usually involves raising funds for a number of facilities such as libraries, child care centres and local roads. Sufficient funds are rarely raised to allow all works to be carried out at the same time. Instead, as an interim measure, funds are often transferred between section 94 accounts in order to produce sufficient funds to allow councils to build priority works. However, there is no explicit recognition within the Act of the appropriateness of such borrowing or pooling of contributions.

The bill clearly authorises that monetary contributions paid in accordance with conditions of development consents for a particular purpose may be pooled and applied towards any other purpose for which a monetary contribution is required to be paid. This will promote efficient use of funds and is not designed to weaken the nexus. All borrowing should be accounted for and repaid and this provision is subject to the requirements of any relevant contributions plan or a ministerial direction setting out, for example, the circumstances and facilities for which borrowing will occur, accounting and reporting requirements, and information as to when the actual facility for which the contribution was originally raised will be provided.

Councils and industry groups supported this change on the basis that it provides flexibility and promotes efficient use of funds, provided there is transparency and firm arrangements for the restitution of funds. The pooled use of section 94 funds is a common and reasonable practice that makes for good financial management. Without it fewer facilities could be built, delays in their provision would multiply and councils would retain larger unspent section 94 funds. The practice of entering into planning arrangements to provide agreed infrastructure and appropriate public benefits, in addition to or as an alternative to section 94, is not new. Planning arrangements have existed for some years and in recent times have merged as a market response for development or redevelopment of large-scale sites in single ownership such as the Australian Defence Industries site at St Marys and in the Greystanes development.

However, the legal framework surrounding agreements is uncertain and the existing practice is often hidden from public scrutiny and is, therefore, unaccountable. The bill seeks to make best practice in planning arrangements common practice. The amendments set out in the bill clarify and make the approach less cumbersome by expressly acknowledging the role planning agreements play as part of the development contributions system. Planning authorities and developers will be able to voluntarily enter into planning agreements under which the developer is required to dedicate land free of cost, pay a monetary contribution or provide any other material public benefit, or any combination of them, to be used for or applied to a public purpose.

Planning authorities include local councils, the Minister, a development corporation or other public authority prescribed by the regulations. I stress that the governing principle for planning agreements is that they are intended to be voluntary arrangements between a planning authority and a developer. Planning agreements are particularly appropriate in the case of large-scale developments which have longer time frames and which are likely to be developed in stages and in situations in which the impact upon public infrastructure can be substantial and the developer has a key interest in delivery of public infrastructure.

In the case of such developments it may be necessary and reasonable for the developer to contribute to a range of non-capital added costs, including costs of ongoing monitoring of development impacts and the costs of environmental management, in order for the development to proceed. In many cases planning agreements have been the best way in which vital local and State infrastructure can be guaranteed. Planning agreements can offer different and better outcomes through efficiencies in the process or through innovation by the parties. By recognising the reality in legislation, the Government is regulating the nature and extent of the agreements and also regulating the way in which the agreements are entered into, publicised and reported on. For the first time there will be standards for planning authorities to meet when entering into planning agreements—whether making, amending or revoking them.

The bill will enable communities and the Government to scrutinise the public infrastructure decisions made by planning authorities. The absence of a regulated, fair and transparent system of planning agreements creates an environment conducive to some practices recently reported in the press. However, the system of planning agreements provided for in the bill will ensure that all arrangements between planning authorities and developers are transparent and in the public interest so that the public have the opportunity to comment to the responsible planning authority about the proposed planning agreement and that planning authorities are

accountable in the collection and expenditure of funds and the provision of facilities.

The regulations will contain safeguards to ensure that there is no abuse of planning agreements by either planning authorities or developers. Planning agreements must promote the objects of the Environmental Planning and Assessment Act and the applicable environmental planning instrument. They must be directed towards a legitimate planning purpose and provide for a reasonable means of achieving that purpose. The public interest will be the overriding consideration. The procedures in the regulations governing the entering into of planning arrangements will be transparent, accessible and fair to all parties. They will provide for effective public participation and accountability and will protect the regulatory independence of the planning authority involved in negotiating an agreement.

Any evidence of corruption or maladministration in relation to planning agreements will be dealt with by the appropriate courts, the Independent Commission against Corruption, the Ombudsman, the Minister for Local Government or the Minister for Infrastructure and Planning, as appropriate in the circumstances. The key features of the scheme, set out in clauses 93F to 93K, include the provision that planning agreements between a developer and a planning authority would be voluntary. This is clearly spelt out in clauses 93C and 93F. It is important to understand that no planning authority can compel a developer to enter into a planning agreement before a development application [DA] is made or a development consent is granted.

Agreements can be entered into at either the rezoning or development application stage. In order to ensure open, transparent, accountable and consistent decision making, planning agreements must be weighed against other planning considerations when the consent authority determines an application. Hence, a planning agreement that accompanies a development application will be a matter for consideration under section 79C of the Act. Once a planning agreement has been made it will be legally binding and, if registered, bind successors in title and so be enforceable by planning authorities against subsequent purchasers to whom all or part of the land is on-sold by the developer. The agreement would clearly state whether it is an alternative to or co-exists with the usual section 94 contribution.

The State Government can be a party to, and receive contributions under, an agreement. In order to provide for flexible outcomes that best serve the public interest, there does not have to be a direct nexus or connection between development to which a planning agreement relates and the object of expenditure of any money required to be paid under the agreement. Unlike traditional section 94 contributions, a planning agreement is a voluntary arrangement that redistributes the costs and benefits of development through a process that involves public participation. However, clearly, money paid under a planning agreement must be applied for the purpose for which it was paid within a reasonable time.

Planning agreements can provide for infrastructure for a range of public purposes, not just those permitted by section 94. Public purpose includes the provision of, or recoupment of the cost of providing, public amenities or public services, affordable housing, transport or other infrastructure, the funding of resulting recurrent expenditure, monitoring of the impacts of development and the conservation or enhancement of the natural environment. A council may enter into a joint planning agreement with another council or another planning authority. An agreement will be publicly available and exhibited at the rezoning or DA stage as relevant. A copy of the agreement would also be lodged with the Minister or the council, in the event that one is not party to a planning agreement. It is recognised that a properly entered into planning agreement is a relevant consideration for the consent authority when determining a development application or rezoning land.

Acknowledging the voluntary nature of planning agreements, a developer cannot appeal to the Land and Environment Court against the failure of a planning authority to enter into a planning agreement or against the terms of a planning agreement. This approach is consistent with the current law that developers cannot appeal to the court in relation to matters concerning development applications about which they agreed or acquiesced. The bill will enable civil proceedings to be brought by any person in the Land and Environment Court to remedy or restrain a breach of a planning agreement under the Act.

Nothing in a planning agreement will be able to authorise a breach of any environmental planning instrument or development consent. This will ensure that the integrity of planning and assessment decisions is maintained. As well, planning authorities will be prevented from converting planning agreements into mandatory requirements of a planning instrument. Planning authorities will not be able to include provisions in their environmental instruments that would force developers to enter into a planning agreement as a precondition to the grant of consent. Similarly, when negotiations between developers and planning authorities to enter into a planning agreement have failed, the planning authority is not able to refuse consent simply because the developer did not ultimately enter into a planning agreement. A planning authority may not issue a condition of development consent requiring a planning agreement to be made.

In addition, the regulations to be made following the passage of the bill will set out the circumstances in which planning agreements will be publicly available after they are made, their availability at the rezoning or DA stage as relevant and the form and subject matter of agreements. Ministerial directions about the negotiating procedures and other matters will also be able to be given. This will ensure that the new system is implemented

reliably and that the planning agreements scheme will operate consistently amongst all planning authorities. The Department of Infrastructure, Planning and Natural Resources [DIPNR] will consult with stakeholders on the preparation of the supporting regulations that need to be made prior to the commencement of the bill. By recognising planning agreements under the Act, the Government will be able to set standards for best practice covering planning and public interest criteria that agreements must meet, as well as the way in which agreements are drafted and entered into.

A further major matter to be covered under the bill is a provision to enable the imposition of a fixed-rate levy. The recent section 94 task force was of the view that flat percentage levies can have a role in circumstances where the strength of either imposing section 94 contributions or entering into a planning agreement is not as great. This would be in situations, for example, where growth rates and development patterns are slow or unpredictable, and therefore accrual of section 94 contribution funds is slow, such as in established urban areas; where there are multiple owners undertaking dispersed and unrelated development; where there is little scope for the receipt of relevant land dedications or works-in-kind; where contributions cannot fund the high administrative demands relative to low outputs of a contributions plan in a slow growth area; or where the costs of needed infrastructure are relatively low and spread over time.

Councils generally agree that a flat percentage levy may be useful in limited circumstances, particularly in slow growth areas. However, the general use of a flat-rate levy would not recognise inherent differences between localities, community needs and the availability of existing infrastructure. By way of example, a flat-rate levies system has been operating in the city of Sydney for some years now. It has been an effective alternative to section 94 contributions due to the difficulties in establishing the strict nexus required for section 94 contributions in the city. The contributions raised assist the council in the provision of public infrastructure, community projects and facilities.

Under clause 94A, a consent authority can impose as a condition of development consent a requirement that the applicant pay a levy of the percentage of the proposed cost of carrying out the development. The levy must be authorised by a contributions plan. However, like planning agreements, there does not have to be a connection between the development the subject of the levy and the object of expenditure of any money required to be paid. Money required to be paid by such a condition is to be applied towards the provision and recoupment, extension or augmentation of public amenities or services. A consent authority will need to identify these public amenities or services in its contributions plan, including an estimated cost of each and an estimate of the proposed timing for their provision. A consent authority cannot in the same development impose a condition requiring the payment of both the percentage levy and a normal section 94 contribution.

Under the regulations to be made following the passage of the bill, I can foreshadow that the Minister will, amongst other things, set the maximum percentage of the levy at 1 per cent, as is currently the case under equivalent provisions applying to the city of Sydney, as well as prescribe the means by which the proposed cost of a development is to be estimated or determined. The Minister will also set out the requirements for councils to publicise and consult on their intention to adopt a flat percentage levy and report on the expenditure of money collected. The Minister will review this rate and the general operation of this provision in two years, following commencement of the legislation. Indeed, this means that there is a high level of accountability to ensure that the regulations adopted are fair and in the interests of all.

Let me be clear that although the Minister may prescribe the rate of the levy, it will be up to councils to choose whether or not they apply it in their local government area. The regulation-making powers provide sufficient protections to ensure that percentage levies operate within a clear, certain and robust planning framework, and to ensure consistent, reasonable and equitable application. Let me now return to the other major changes to the current section 94 contribution arrangements. A further important position of the bill, clause 94C, concerns cross-council boundary contributions. Council boundaries and facility catchments do not always match. This can lead to inequities between council areas if a development significantly impacts on more than one local government area yet contributes to facilities only in the consent authority's area.

Under the current interpretation of section 94, a neighbouring council cannot levy contributions, nor can levies be spent in a neighbouring council area. This creates inequities as a development might pay one area's section 94 levies for new facilities while creating a demand for facilities in another area where no payment is made. The inability to impose cross-boundary levies also acts as a disincentive to the achievement of economies of scale and related efficiencies in providing facilities which are usually funded from section 94 contributions.

Examples of cross-boundary impacts where it would be reasonable to seek a contribution from developments include community facilities and contributions for cross local government area road or drainage works associated with major developments. The demand for these types of facilities or works would involve clear impacts on the neighbouring area and the need to supply the facility in both places. Duplication of facilities must be avoided. This will be achieved by compliance with the basic section 94 requirements to substantiate demand and demonstrate nexus with the facilities to be provided. The management of cross-boundary issues by councils will be assisted by improved regional and sub-regional planning, now being carried out in both the metropolitan area and regional New South Wales as part of the Government's planning reforms.

The bill allows for joint contributions plans to be prepared by two or more councils to clearly allocate demand in each local government area to substantiate the nexus with the facility that is the subject of the levy. The plan should also set out financial accountability processes for collection and distribution of contributions. A condition can be imposed for the benefit of an adjoining local government area and for the apportionment among the relevant councils of any monetary contribution required to be paid under the condition. A further matter covered by the bill is that section 94 contributions for the recoupment of the historical cost of previously provided public services and amenities will be able to be indexed in accordance with the regulations.

Finally, the bill re-enacts the development contributions provisions in the current Act and makes minor and consequential changes to those provisions. These are important reforms to the Environmental Protection and Assessment Act to improve the system of providing services and facilities required as a result of development. In short, the main object of this bill is to extend the means by which planning authorities may obtain development contributions to be applied for the provision of public amenities and services and for other public purposes. As an alternative to obtaining contributions towards public amenities and services through the imposition of conditions of development consent, as is currently provided for under section 94 of the Environmental Planning and Assessment Act, a council or other consent authority may, if authorised by a development contributions plan, impose a condition of development consent that requires applicants to pay a levy of the percentage of the proposed cost of the development.

In addition, planning authorities will be specifically authorised to obtain development contributions for any public purpose through planning agreements with a developer. I wish to thank all those parties that have contributed to the review process since 1997 when the Urban Development Institute of Australia published a report recommending changes to section 94 through to the recent detailed and extensive comments provided by local government and development industry interests on the draft legislative proposals. Finally, I assure stakeholders of the Government's commitment to continue consultation during the implementation phase of the bill. I note that the Department of Infrastructure, Planning and Natural Resources will consult with stakeholders on the preparation of the supporting regulations and the revision of guidelines on section 94 contained in the section 94 contributions plans manual. Apart from the matters already mentioned, these will also deal with issues like consistency in the format and preparation of contributions plans, the regular review of contributions plans, and better accounting practices. I commend the bill to the House.