

**INQUIRY INTO ENVIRONMENTAL PLANNING AND
ASSESSMENT AMENDMENT (INFRASTRUCTURE
CONTRIBUTIONS) BILL 2021**

Organisation: City of Newcastle

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Governance.MBisson/PMcCarthy
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Phone: 02 4974 2000



11 July 2021

The Director
Portfolio Committee No. 7 – Planning and Environment
Parliament House
Macquarie Street
SYDNEY NSW 2000

Attention: Ms Cate Faehrmann, Committee Chair

Lodged via email: PortfolioCommittee7@parliament.nsw.gov.au

Dear Ms Faehrmann

**INQUIRY INTO THE ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT
(INFRASTRUCTURE CONTRIBUTIONS) BILL 2021**

Please find enclosed City of Newcastle's (CN) submission on the proposed amendments outlined in the *Environmental Planning and Assessment Amendment (Infrastructure Contributions) Bill 2021* (the Bill).

CN understands that the Bill is intended to implement the recommendations of the NSW Productivity Commissioner's Final Report on infrastructure contributions. CN supported in principle many of the Productivity Commissioner's recommendations, however, there is a lack of detail on key aspects of the Bill to clearly demonstrate how these recommendations will be implemented.

Specifically, CN requests more information on the following matters prior to the amendments being made legislation:

- the circumstances in which the Minister will require a contributions plan to accompany a planning proposal
- how land value contributions will be calculated and how they will relate to any Ministerial thresholds on contributions
- financial incentives available, should it wish to borrow funds to bring forward delivery of public infrastructure and to cover associated recurring costs
- the proposed Regulation changes to implement amendments to section 7.12.

Our submission elaborates on these points and makes further recommendations to clarify the intent of the Bill.

Should you require any further information on this matter please contact me on .

Yours faithfully

Michelle Bisson
MANAGER REGULATORY, PLANNING AND ASSESSMENT

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Submission to the Upper House Committee (Portfolio Committee No. 7. Planning and Environment) on the Infrastructure Contributions Bill

This submission outlines City of Newcastle's (CN) response to key aspects of the Infrastructure Contributions Bill and provides recommendations where more information is required prior to the introduction of any new Regulation.

Introduction

The NSW State government has accepted all 29 recommendations of the Productivity Commission's Final Report on how infrastructure is funded in NSW. CN understands that the *Environmental Planning and Assessment Amendment (Infrastructure Contributions) Bill 2021* was introduced to the NSW Parliament as part of the State government's implementation of the Productivity Commission's recommendations.

Our submission is structured to relate key aspects of the Bill to the relevant Final Report recommendations.

Recommendation 4.1 Develop infrastructure contribution plans upfront as part of the zoning process

The Bill proposes to amend section 7.17 of the Environmental Planning and Assessment Act 1979 (the Act) to enable the Minister for Planning and Public Spaces (the Minister) to issue a Ministerial Direction specifying when a contributions plan must accompany a planning proposal.

Discussion

The proposal is a positive step as it aims to ensure that land is not rezoned without the necessary infrastructure planning and funding mechanisms to deliver public infrastructure and facilities that will be required by any increase in demand arising from intensification of development.

However, it is unknown whether the Minister will direct that all planning proposals be accompanied by a draft contributions plan or whether this will only happen in certain areas or if certain thresholds are met. In addition, there is no requirement that the contribution plan be "in force" by the date of commencement of the planning instrument it relates to, merely that the draft contributions plan be exhibited alongside the planning proposal.

CN Recommendation

1. CN supports the introduction of direction-making powers for the Minister to specify the circumstances in which a draft contributions plan must accompany a planning proposal.
2. CN requests that the Minister ensure that any Ministerial Direction require a draft contributions plan accompany a planning proposal that seeks "a change to the planning controls that apply to the land will enable more intensive development of the land" (as per the wording in the proposed section 7.18(5)(a)). In addition, the contributions plan must be endorsed and come into force prior to, or on the date of commencement of the instrument to which the planning proposal relates.

Recommendation 4.2 Introduce a direct land contribution mechanism to improve both efficiency and certainty for funding land acquisition

The Bill proposes to insert new sections 7.16A-F into the Act (collectively under a new “Subdivision 3A, summarised as follows:

- the new provisions will permit a new land value contribution that may be imposed by council in addition to any applicable development contributions
- the land value contribution would be a monetary contribution paid to council or direct dedication of land to council to facilitate the acquisition of land for a public purpose (e.g., a public park) within a land value contributions area
- a land value contributions area would need to be identified within a contributions plan
- the land value contribution will be based on a percentage of land area or value and would be imposed when land is rezoned as a charge on the land
- landowners will be notified of the land value contribution being imposed as part of the public exhibition of draft contributions plans and planning proposal
- the land value contribution must be paid:
 - by the vendor, on or before completion of the sale of the land, at which time the charge on the land will be discharged; or
 - by a developer via a condition imposed by the granting of a development consent. An amended Regulation would specify the “the circumstances in which a consent authority may refuse to consider development applications for development on land for which a land value contribution has not been satisfied”.
- A land value contribution certificate will be introduced which would be a certificate issued by a council specifying whether there is a land value contribution requirement applicable to the land and if so, whether it has or has not been satisfied.

Discussion

A local council can currently impose a condition of development consent requiring a monetary contribution toward the acquisition of land. However, the contribution need only be paid after a development consent is issued and typically prior to issue of a construction certificate (CC) or subdivision certificate (SC).

The new approach appears to be aimed at ensuring that existing landowners that benefit from an uplift in land value associated with a rezoning, take on the burden of the contributions value when they sell their land. However, unless the acquisition value (i.e. land value contribution) is tied to the actual sale price, a landowner could keep increasing the asking price to cover this additional cost, resulting in further increase in land value and requiring a council to fund the difference.

One of the difficulties in the traditional approach of requiring contributions toward land acquisition is trying to estimate the value of land that may need to be acquired and using an indexation mechanism that keeps pace with the often significant fluctuations in land value over time. This can leave a council in the position of having insufficient funds to acquire the most suitably located land or insufficient funds to acquire enough land to accommodate the public purpose in the manner originally intended.

It is not clear whether the new approach will resolve this issue as the way the land value contribution is to be calculated (and thereafter indexed) will be left to a future change to the Regulation, of which we have no information.

Furthermore, there is no information within the Bill or accompanying explanatory material to indicate how the land value contribution will relate to the existing Ministerial thresholds that limit the amount that a consent authority can impose for new dwellings / lots. Typically, the land acquisition component of a contributions plan can be significant and in CN's opinion, it should be excluded from any future thresholds.

CN Recommendation

1. CN supports a mechanism that seeks to capture part of the uplift in land value arising from a rezoning. However, there is insufficient detail regarding:
 - (a) How the land value contribution will be calculated i.e., will it be based on an estimated value or on the actual sale price?
 - (b) How a land value contribution will relate to any Ministerial thresholds on contributions for new dwellings / lots.
2. CN requests that this information be made available for comment prior to the introduction of any new Regulation.

Recommendation 4.9 - Encourage councils to forward fund infrastructure, through borrowing and pooling of funds

The Bill proposes to:

- (a) make it explicitly clear that a council may pool contributions received for different purposes even though those contributions may have been levied under more than one contribution plan applying to the “area concerned” and
- (b) require that any contributions required by a contribution plan be calculated in accordance with the regulations and relevant Ministerial Directions.

Discussion

The ability to pool contributions taken for different purposes is already possible under the Act.

There has been a lack of clarity as to whether contributions taken from different plans may be pooled. In 2020, the Minister issued a Direction requiring councils to “endeavour” to pool contributions for different purposes and across different plans that apply “in the local government area concerned”. Including this flexibility within the Act itself, without relying on a Ministerial Direction is logical and positive.

None of the proposed amendments to the Act under this Bill require a council to “forward fund” infrastructure through borrowing. The Productivity Commission’s recommendations did not infer any legislative amendments were required. The recommendations merely mooted that NSW Treasury review its lending criteria and investigate financial incentives for councils that borrow to build infrastructure.

Notwithstanding the necessity to have sufficient funds on hand to forward fund infrastructure, providing these infrastructure items represents a significant liability to council in recurring costs. An opportune incentive for councils to bring forward infrastructure delivery would be to provide funding for the recurring costs council will incur prior to the full associated rates base being in place.

CN Recommendation

1. CN supports moving pooling provisions into the Act although suggests that the mooted section 7.3(2) be amended to clarify that the “area concerned” means “the local government area in which the development is being carried out”.
2. CN would welcome further information regarding the financial incentives available should it wish to borrow funds to bring forward delivery of public infrastructure and to cover associated recurring costs.

Recommendation 4.10 - Defer payment of contributions to the occupation certificate stage

In 2020, the Minister issued a Direction that enabled development contributions for certain types of development to be paid prior to issue of an Occupation Certificate (OC) even if the development consent in question stated an earlier time. The Direction was a temporary measure in response to the Covid 19 pandemic.

The Bill proposes that the Minister may extend the Direction and that the Direction would have the effect of modifying an existing development consent where the payment of the contribution has yet to be paid.

Discussion

The Productivity Commission made additional recommendations relating to the deferral of contributions as follows:

- (a) Design the NSW Planning Portal so that the release of occupation certificates is contingent upon payment of infrastructure contributions.
- (b) Increase oversight of private certifiers by requiring that the certifying authority must confirm payment of contributions before issuing an occupation certificate.
- (c) Amend legislation to create an offence should certifiers issue a certificate without an infrastructure contribution payment.

The Bill does not respond to these recommendations and should the Minister seek to extend the Direction indefinitely, there must be urgent action on these recommendations to ensure that councils are not burdened by a shortfall in contributions arising from any lax practices of private certifiers.

CN Recommendation

1. CN oppose the permanent deferral of payment of contributions to OC stage, however if the Minister extends Direction indefinitely CN urges the NSW Government to urgently act on the Productivity Commission’s recommendation to:
 - (a) Design the NSW Planning Portal so that the release of occupation certificates is contingent upon payment of infrastructure contributions.
 - (b) Increase oversight of private certifiers by requiring that the certifying authority must confirm payment of contributions before issuing an occupation certificate.
 - (c) Amend legislation to create an offence should certifiers issue a certificate without an infrastructure contribution payment.

Recommendation 4.11 - Increase maximum section 7.12 fixed development consent levies

Section 7.12 of the Act enables a consent authority to impose a condition of consent requiring a monetary contribution toward public facilities and services calculated based on a percentage of the cost of carrying out the development.

The Bill proposes to refer to this type of condition as a local levy condition and proposes that the Regulation can specify:

- (c) the “types of development” to which a local levy condition can apply;
- (d) the LGAs or land to which a local levy condition can apply; and
- (e) the manner in which the contribution under a local levy condition is to be calculated.

Discussion

The Bill proposes to broaden the scope for the Regulation to set the calculation methodologies for contributions under section 7.12.

Currently, the type of development and the land to which a section 7.12 contributions plan might apply are unrestricted. Only the percentage levy is restricted by the Regulation.

CN is concerned that deferring the detail of section 7.12 calculation methodologies to the Regulation results in a risk that a highly valuable and simple contributions mechanism is diminished or taken away from councils.

CN Recommendation

1. CN requests further information regarding the Regulation changes be provided prior to the amendments to section 7.12 being implemented.

Recommendation 4.12 - Planning agreements consistent with principles-based approach

The Bill proposes to:

- (a) require planning authorities to “publicly exhibit” draft planning agreements for a mandated period of 28 days and thereafter to consider submissions, rather than merely to “notify” the draft planning agreement; and
- (b) remove the requirement for hard copies of planning agreements given that planning agreement information will now be available online.

Discussion

This is currently CN practice under its adopted Community Participation Plan.

CN Recommendation

1. CN supports the proposed measure to increase the transparency and accountability of planning agreements.

Recommendations 5.1 - Adopt regional infrastructure contributions, 5.3 - Adopt transport contributions for major projects and 5.4 - Create a new category of contributions specific to biodiversity

Sections 7.22-31 of the Act currently relate to “Special Infrastructure Contributions” (SIC) and enable the Minister to create a “special contributions area” and to determine contributions that might apply to development within that area. These contributions fund higher order infrastructure which are responsibilities of the State.

A Hunter Region Special Infrastructure Contributions has been consulted on several times, most recently in 2019.

The Bill proposes to:

- (a) rename SICs to Regional Infrastructure Contributions;
- (b) identify Regional Infrastructure Contributions in State Environmental Planning Policies (SEPPs);
- (c) quarantine the component/s of Regional Infrastructure Contributions that relate to “transport projects” and “strategic biodiversity” and only use those contributions for the specified transport projects /or nominated areas in the region that are bio-certified under the Biodiversity Conservation Act 2016.

Discussion

The proposed amendments consolidate a number of requirements for higher order infrastructure contributions which are currently spread across numerous regulations, determinations and directions. Simplifying and consolidating provisions is supported.

However, unlike s7.11 and s7.12 provisions of the Act, there is no legislative requirement for the NSW Government to “apply the payment towards the purpose within a reasonable time”. In CN’s opinion, the NSW Government should be held to the same standard as local councils with regard to the expectation to deliver infrastructure in a timely manner.

In addition, the current legislative requirement for the Minister to consult with relevant stakeholders (s7.23(4)) prior to introducing Special Infrastructure Contributions (to be known Regional Infrastructure Contributions) appears to have been excluded from the Bill.

This is a concern as the local council/s to which Regional Infrastructure Contributions might apply should be actively involved in formulating the strategies for the provision of infrastructure. This should not be left to a cursory Explanation of Intended Effect associated with a SEPP or included in a non-statutory document such as the draft Special Infrastructure Contribution Guidelines mooted in recent years.

CN Recommendation

1. There should be a legislative requirement for the NSW Government to apply payments towards Regional Infrastructure Contributions towards the purposes for which they have been made within a reasonable time.
2. The current legislative requirement for the Minister to consult with relevant stakeholders (s7.23(4)) prior to introducing Special Infrastructure Contributions (to be known Regional Infrastructure Contributions) should be included in the Bill.

Recommendation 6.1 - Use digital tools to make contributions simpler and more transparent

The Bill requires that a contributions plan must be prepared in accordance with the regulations and Ministerial directions.

Discussion

This is an existing requirement of the Act and Regulation, and the Bill does not address the recommendation of the Productivity Commission to “develop a contributions digital tool in the NSW Planning Portal, integrated with the spatial mapping and development application system” and to “Amend legislation to support the digital tools and require their use to be phased in”.

CN Recommendation

1. CN supports the Productivity Commission’s recommendations to use digital tools to make contributions easier to understand and use. The Bill should include detail on financing, timing and implementation of such systems.

Recommendation 6.5 - Better synchronise State and local strategic planning frameworks

The Bill proposes to amend section 3.9 of the Act to reduce the timeframe for councils to review their local strategic planning statements (LSPSs) from seven to five years to align with review requirements for State infrastructure strategies and regional plans.

Discussion

This change is derived from the recommendations of the Productivity Commission to ensure that a LSPS can inform and be informed by State and regional strategies and plans which are prepared on a five yearly basis.

This is a logical change which would also accord with the typical review period for contributions plans of five years.

Notwithstanding, undertaking a review of a LSPS could be a significant project and reducing the timeframe may have cost implications to council.

CN Recommendation

1. CN supports the alignment of LSPSs with State and regional strategies and plans although notes that there will be an additional financial burden on Councils to undertake the reviews more regularly.

Conclusion

CN requests that more detail is provided on the points raised in relation to the above recommendations prior to the introduction of any new Regulation.