THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: EP&D:RHlb

5 August 2020

Peter Achterstraat AM
NSW Productivity Commissioner

By email: ICReview@productivity.nsw.gov.au

Dear Commissioner,

Review of Infrastructure Contributions in NSW – Issues Paper

The Law Society appreciates the opportunity to comment on the Issues Paper as part of the Productivity Commission's review of the infrastructure contribution system in NSW ("Review").
We note that the Review coincides with system improvements led by the Department of Planning, Industry and Environment ("Department").

We enclose our submission in response to the public consultation on a package of reforms designed to improve the existing infrastructure contribution system recently exhibited by the Department. We note that these "proposed reforms are iterative and complementary to this Review".[1] Our submission was informed by our Environmental Planning and Development Committee. It addresses some of the key issues identified within the current infrastructure contribution mechanisms explored in Chapter 3 of the Issues Paper.

The Law Society appreciates the opportunity to participate in the reform process and we look forward to the opportunity to comment further in due course. If you have any questions about this submission, please contact Liza Booth, Principal Policy Lawyer, at liza.booth@lawsociety.com.au or on (02) 9926 0202.

Yours sincerely,

Richard Harvey
President

[1] NSW Productivity Commission, *Review of Infrastructure Contributions in New South Wales- Issues Paper,* July 2020,11 available at < http://productivity.nsw.gov.au/sites/default/files/2020-07/Issues%20Paper%20Combined%20Final.pdf >.

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Our ref: EP&D:RHlb1936382

29 June 2020

Planning Policy
Department of Planning, Industry and Environment
Locked Bag 5022
PARRAMATTA NSW 2124

Dear Sir/Madam,

Improving the infrastructure contribution system

The Law Society appreciates the opportunity to comment on the package of reforms, designed to improve the existing infrastructure contributions system, which were recently exhibited by the Department. The Law Society's Environmental Planning and Development Committee contributed to this submission.

1. Draft planning agreements policy framework

A. The Law Society welcomes the draft planning agreements policy framework, which consists of the Draft Secretary's Practice Note on Planning Agreements ("Draft Practice Note") and the draft Ministerial Direction on Planning Agreements ("Draft Direction"). The Draft Practice Note replaces and updates the current Practice Note, which forms part of the general Development Contributions Practice Note issued by the Director General of the then Department of Infrastructure, Planning, and Natural Resources in July 2005.

The Draft Direction provides that when negotiating or preparing a planning agreement, local councils must have regard to the Draft Practice Note. The current Practice Note is not the subject of such a Direction. This measure should encourage consistency in decision-making.

B. Draft Practice Note

The headings and references to, for example, "Part 2.1" and the following numbering in this section reflect the headings and numbering in the Draft Practice Note.

Preface

Affordable Housing

While it is clear that the Draft Practice Note does not apply to mining projects, which are expressly excluded, the position is less clear in relation to provision for affordable housing under planning agreements. While such provision does not appear to be excluded, the Draft Practice Note states that the preferred pathway for a council to secure contributions in relation to *State Environmental Planning Policy No.70 – Affordable Housing (Revised*

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Schemes) (SEPP 70) is through preparing an affordable housing contribution scheme and amending the local environmental plan.

The Draft Practice Note goes on to state that the *Environmental Planning Assessment (Planning Agreements) Direction 2019* sets out the matters to be considered by a council if negotiating a planning agreement which includes provision for affordable housing.

We question whether this referral to a separate instrument is desirable if the objective is to provide a streamlined framework for planning agreements.

Principles and policy for planning agreements

Fundamental Principles (Part 2.1)

The "fundamental principles" underpin the guidance in the Draft Practice Note. The Draft Practice Note sets out fundamental principles for planning agreements that are, for the most part, different to those set out in the current Practice Note. We consider that the Draft Practice Note is more concise and explicit in setting out the criteria. We welcome the inclusion of the second and third principles which emphasise consistency with strategic planning goals.

The attached table provides our further comments on these principles.

Public Interest and Probity Considerations (Part 2.2)

The Draft Practice Note refers to the potential for misuse where a planning authority, acting as a consent authority in another regulatory capacity, is both a party to a planning agreement and a development joint venture partner. Probity considerations are important in these circumstances. Local councils are increasingly becoming involved in land development projects. The use of an independent third party in development assessment is one way in which the planning authority's regulatory role can be separated from its role in the development. In addition, the determination of proposals and applications by planning panels (either Sydney district, regional or local planning panels) is likely to further reduce the risk of conflict arising because the same entity is the developer, planning authority and consent authority.

Legal practitioners are often asked to advise about the best mechanism that will allow councils to work with developers to carry out development projects on council land that will benefit both the parties and the community. The interaction between the public-private partnership provisions and tendering provisions under the *Local Government Act 1993*, and planning agreement provisions under the Act, can be a source of concern for councils. For example, the council and a developer may agree to both contribute to the construction of a community facility that will form part of a proposed development. Questions arise about whether the arrangement should be a public-private partnership, or the subject of a planning agreement. Factors considered by proponents include consideration of the complexity of the processes involved in having a public-private partnership approved, that planning agreements are not excluded from the requirement to invite tenders, and other procedural considerations.

Although some legislative change may be required to resolve these issues, it would be useful for the Draft Practice Note to provide some guidance about the circumstances where councils and proponents should consider public-private partnerships instead of planning agreements.

Value capture (Part 2.3)

This is a contentious issue. Part 2.3 of the Practice Note discourages the use of "value capture" mechanisms (being a monetary contribution per square metre of the increased floor area achieved through planning incentives) in planning agreements. While value capture for the purposes of revenue raising is not consistent with the purpose of planning agreements, the Draft Practice Note fails to recognise that the majority of current schemes involving "value capture" are based on planning incentives, such as bonus floor space, and are justified by reference to the likely increased need for public amenities and services as a consequence of intensification of development. Many schemes require the developer to make "satisfactory arrangements" towards the provision of public amenities and services, similar to the provisions in many local environmental plans requiring satisfactory arrangements to be made for the provision of designated State public infrastructure in connection with the development of land in urban release areas.

Such schemes should be established through local environmental plans and development control plans. However, planning agreement policies or other policies adopted by councils can support those instruments and provide further guidance. The use of a "value capture" mechanism is a simple, effective and fair means of calculating appropriate contributions to address the increased need for public amenities and services. If the rate per square metre is appropriately determined (through use of external financial, planning and valuation consultants), subject to public consultation, and clearly expressed in public documents, there is no reason why such a mechanism cannot be used to determine the value of contributions to be made under a planning agreement. This type of mechanism is similar to determining a monetary contribution under section 7.11 (or section 7.24) by reference to net developable area or the number of bedrooms in a dwelling. This is because the value of contributions is dependent on the needs likely to arise based on the extent of the development or intensity of use.

The use of a rate per square metre calculation to determine the value of contributions does not undermine the primary purpose of planning agreements to deliver infrastructure for community benefit in connection with planning proposals and development applications. In our experience, this approach is generally based on a requirement for developers seeking increased development potential to make contributions towards the public amenities and public services that will be required because of that intensified development. A well-developed and published mechanism setting clear expectations for determining the extent of contributions in those circumstances provides certainty for both developers and councils, enables councils to treat all developers fairly and consistently and minimises the risk of disputes.

We submit that the position on "value capture" in the Draft Practice Note does not reflect current practice and part 2.3 should be redrafted to distinguish between "value capture" schemes that do not serve the purpose of providing community benefits and schemes that determine appropriate contributions by reference to increased development potential of land.

Relationship with development applications and planning proposals (Part 2.4)

Our comments on the fundamental principles are relevant to the provisions of the Draft Practice Note under the headings *Development applications, Planning proposals* and *Nexus* on page 4. In particular:

a. Planning agreements (and offers to enter planning agreements) are relevant to the consideration of development applications and planning proposals.

b. The Act provides that a planning agreement will not be invalid if the public benefits provided under a planning agreement have no connection to the development. The statement that a planning agreement "must" or "should" provide for public benefits that are not wholly unrelated to the development is inconsistent with this provision. It would be more appropriate to state that "when considering a development application or planning proposal, an authority must not take into account public benefits offered under a planning agreement that are wholly unrelated to the development or the proposal".

The statements in the Draft Practice Note about variations to development standards on page 4 are inconsistent. The first statement provides that benefits under a planning agreement "must not" be exchanged for a variation from a development standard "under any circumstances". The second statement indicates that planning agreements can justify variations from development standards. We suggest that the following alternative statement addresses the inconsistency and reflects current case law on the issue:

"Variations to development standards under clause 4.6 of the Standard Instrument LEP must be justified on planning grounds and the proposed development must be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone. Benefits provided under a planning agreement are not relevant to the consideration of a request seeking to justify the contravention of a development standard, unless the benefits offered support the justification of the development or contribute to the development meeting, or being consistent with, relevant objectives."

In addition, the reference to SEPP 1 in the Draft Practice Note should be removed as it has been repealed.

Acceptability test (Part 2.5)

The Draft Practice Note incorporates the concept of an "acceptability test" that is found in a number of council policies on planning agreements. In those policies, the "acceptability test" helps both parties understand the circumstances in which a particular council might be prepared to enter into a planning agreement if one is offered by a developer.

The Draft Practice Note, however, purports to "require" planning authorities to apply the acceptability test in all circumstances. This may be taken as a mandatory requirement, which if not complied with could form the basis of a challenge to the validity of a decision to enter into a planning agreement. Such a challenge can have consequences for the validity of any subsequent decision to grant development consent or make an amendment to instrument that has taken into account the planning agreement (*Huntlee Pty Ltd v Sweetwater Action Group Inc; Minister for Planning and Infrastructure v Sweetwater Action Group Inc* [2011] NSWCA 378).

We submit that this part of the Draft Practice Note should be amended, so it is clear that the "acceptability test" is a guide for understanding circumstances in which planning agreements might be appropriate and not a list of matters that must be considered before a planning agreement can be entered into.

Policies and procedures for planning agreements (Part 2.6)

Part 2.6 of the Draft Practice Note (on page 6) sets out a list of matters that should be included in planning agreement policies. The following matters in that list are often not determined at the time a policy is adopted and should be qualified by the addition of the words "if known":

- The kinds of public benefit sought.
- When, how and where public benefits will be provided.

These are matters that may be more appropriately included in a Contributions Plan, which identifies the public amenities and facilities that the council seeks to provide.

Please also see our comments about the "pooling" of monetary contributions received under planning agreements below.

Strategic considerations when using planning agreements

When to use planning agreements (Part 3.1)

This section states that planning agreements should complement contributions plans, and 'should not be used as de facto substitutes for contributions plans'. We consider this a useful reminder to all parties.

Land use and Strategic Infrastructure Planning (Part 3.2)

This paragraph states that it is a requirement for the priorities and infrastructure needs for an area that are identified in local strategic planning statements to 'be reflected in planning agreements that demonstrate a comprehensive approach to infrastructure planning and funding'. We support this goal and the emphasis on a holistic approach to the integration of planning agreements with strategic goals.

Procedures and decision making

Basic procedures for entering into a planning agreement (Part 4.1)

The Draft Practice Note should confirm that planning authorities are likely to have their own procedures for negotiating planning agreements. In addition, it is important to note that the progression of planning agreements can be constrained by procedural requirements under other legislation. Council officers may not have delegated authority under the *Local Government Act 1993* to formally agree to the terms of a planning agreement, and a council resolution may be required before planning agreements are exhibited and executed. The Draft Practice Note should be amended to ensure that developers are aware of these constraints.

The "indicative steps" provide for planning agreements to be negotiated and documented prior to any application or proposal being lodged with the council. As noted previously, it is rare to see the terms of a draft agreement being finalised through negotiations before an application is lodged with the council. The proposed contributions are usually negotiated at the application stage, with terms dealing with security and enforcement, registration and other matters finalised once the application has progressed and the parties are in a position to draft a document. We also consider the approach for negotiating the planning agreement will be different, depending on whether the planning agreement is negotiated in the context of an application to change an environmental planning instrument (planning proposal) or for consent to carry out development (development application). A planning agreement negotiated in the context of a planning proposal should also reference any conditions or timeframes imposed by the planning proposal authority as part of the determination approving the proposal (gateway determination).

Generally, councils and developers may be reluctant to invest time and money in drafting documents until the application has progressed to a point where it is likely to be recommended for approval. In addition, negotiating the planning agreement at the same time

as the development application is being assessed is more efficient than the step by step process proposed in the Draft Practice Note.

Offer and negotiation (Part 4.2)

The Draft Practice Note emphasises the importance of councils implementing efficient negotiation systems for planning agreements. The Draft Practice Note should include some examples of relevant efficiencies that will reduce the time and cost of drafting and negotiating the final terms of an agreement. These might include the use of template agreements, adoption of a negotiation and assessment procedure, clear documentation of the likely terms to be requested by the council, including securities, or the means used by the council to determine the value of contributions. It should be noted that negotiations are undertaken in a commercial environment and are dependent on the approaches taken by both parties.

There is an inconsistency between the comments about negotiations "running in parallel with applications" (under the heading *Efficient negotiation systems* on page 11) and the "indicative steps for planning agreements" on page 9, which provide for negotiations to be completed before an application is made. As mentioned above, we consider these should occur in parallel, not before an application is made.

The statement about dispute resolution mechanisms appears misplaced in Part 4.2 "Offer and Negotiation". It should be relocated to Part 4.4 "Registration and Administration".

Costs and charges (Part 4.3)

a. GST

The requirement to pay GST inevitably becomes an issue in planning agreements. We understand that GST is not payable on development contributions under section 7.11 and section 7.12 of the Act.

In accordance with Class Ruling CR 2013/13, contributions required to be made under a planning agreement are exempt from GST. We request that the Department provide reference in the Practice Note to this ruling, rather than simply stating that the parties have a "potential GST liability".

b. Recurrent costs and maintenance payments

The Draft Practice Note provides that planning agreements should only require the developer to make contributions towards the recurrent costs of a facility until a public revenue stream is established to support the on-going costs of the facility.

This requirement is inconsistent with many planning agreements, which require the developer to maintain works provided under the agreement for a period of time after handover to the council. Such works may include for example, playground equipment, landscaping, conservation works or other open space embellishments. The maintenance period can include a defects liability period as well as an ongoing maintenance period. The maintenance work forms part of the public benefit that is offered by the developer and ensures that infrastructure and works are established before the public authority takes control.

The maintenance period is not determined by the availability of a public revenue stream, but is usually a set period of time that will allow the parties to confirm that the works have been properly and completely established. We suggest that the Draft Practice Note should be amended accordingly.

c. Pooling

The Draft Practice Note introduces the concept of pooling of monetary contributions received under planning agreements. We submit that the pooling of such funds is not authorised under section 7.3 of the Act. Section 7.3(1) of the Act provides (emphasis added):

> A consent authority or planning authority is to hold any monetary contribution or levy that is paid under this Division (other than Subdivision 4) **in accordance with the conditions of a development consent or with a planning agreement** for the purpose for which the payment was required, and apply the money towards that purpose within a reasonable time.

Section 7.3(2) authorises, notwithstanding section 7.3(1), the pooling of monetary contributions, but only those paid in accordance with the conditions of development consents. That section provides (emphasis added).

> However, money paid under this Division (other than Subdivision 4) for different purposes **in accordance with the conditions of development consents** may be pooled and applied progressively for those purposes, subject to the requirements of any relevant contributions plan or ministerial direction under this Division (other than Subdivision 4).

On that basis, all references to the pooling of monetary contributions received under or in accordance with a planning agreement in the Draft Practice Note should be deleted.

d. Refunds

The Draft Practice Note provides at page 12 that planning agreements may provide for refunds of monetary contributions. This reference to "refunds" may give developers an unreasonable expectation that development contributions under planning agreements will be readily refunded by councils. Development contributions under section 7.11 and 7.12 of the Act are rarely (never, in our Committee members' experience) refunded by councils, and the Court has been reluctant to require refund of contributions in the past. There may be unique circumstances where the parties will agree to a refund and appropriate provisions will be inserted into a particular planning agreement, but this does not occur frequently. In those circumstances, the Practice Note should not indicate that refunds will be offered by councils as a matter of course.

Registration and administration (Part 4.4)

a. Security

The Draft Practice Note provides examples of different types of securities that might be "suitable" and provides that the "the planning authority's reasonable assessment of the risk and consequences of non-performance" will be relevant to the means of enforcement set out in the planning agreement. This is consistent with the decision in *Huntlee Pty Ltd v Sweetwater Action Group Inc; Minister for Planning and Infrastructure v Sweetwater Action Group* [2011] NSWCA 378, which confirmed that the suitability of an enforcement mechanism will depend on whether it is likely to "eliminate or reduce to a commercially acceptable level the risk that the obligation created by the planning agreement will not be performed and that the planning authority or the community will not receive the intended benefits".[1] In our experience, developers and councils are likely to disagree about whether the council's position on securities is "reasonable". This is a matter that must be open to

[1] *Huntlee Pty Ltd v Sweetwater Action Group Inc; Minister for Planning and Infrastructure v Sweetwater Action Group* [2011] NSWCA 378 [132].

negotiation between the parties. It is submitted that the Draft Practice Note be amended to remove the term "reasonable" and use terms that are consistent with the decision in *Huntlee v Sweetwater Action Group*. For example:

"The most suitable means of enforcement may depend on … whether the enforcement mechanism eliminates, or reduces to a commercially acceptable level, the risk that the obligations under the planning agreement will not be performed and that the intended benefits will not be provided."

b. Registration on title

The Draft Practice Note refers to the potential for notation of a planning agreement on title to be removed when "the developer has complied with all relevant obligations under the planning agreement relating to a stage of development and the notation about that stage in the planning agreement on the title to the land is removed". We have not seen notations about particular "stages" in a planning agreement being registered on title. Ordinarily, a planning agreement will be registered on title for a particular lot and later removed from title if all obligations concerning that particular lot have been complied with. There is no allowance under the Act or *Conveyancing Act 1919* for "staged" registration of the agreement. We think this may have been the intent, but it is ambiguous and should be clarified in the Draft Practice Note.

Public participation and notification (Part 4.5)

We note that the Draft Practice Note provides some guidance as to the types of amendments that are likely to be material in nature and therefore require re-exhibition. It may, however, be difficult for the parties to determine "whether a non-involved member of the community would have made a submission objecting to the change if it had been publicly notified". The last bullet point under *Amendment to proposed planning agreement after public exhibition* should be deleted.

<u>Examples of using planning agreements (Part 5)</u>

a. Compensation for loss or damage caused by development

Increased impacts on demand for services and facilities is usually covered by contributions made under contributions plans. Impacts on the environment are assessed as part of the application and any unacceptable impacts should not necessarily be made acceptable by way of an agreement. The guidance should relate more to unanticipated impacts that are otherwise acceptable but require a specific management measure not anticipated in contributions plans or planning controls.

b. Meeting demand created by development

This guidance would apply to most developments which create a demand but don't necessarily require a planning agreement. The guidance should note that the agreement should only deal with that demand where it is unanticipated.

c. Providing benefits to the wider community

The examples provided in Part 5 are useful, however some further clarification about the use of planning agreements to provide off-site benefits for the wider community is required. How can such wider off-site benefits that are not "strictly required to make the development acceptable in planning terms" be said to be "not wholly unrelated" to the development (see

page 17)? Presumably, such benefits will at least partly cater for demand created by the development itself.

d. Recurrent funding

Consistent with earlier guidance in the Draft Practice Note, planning agreements should not operate in perpetuity and should have an end point. This section should be amended to provide that the recurrent funding should be reflected in an upfront payment (pro rata as appropriate), dedication of land or instruments registered on the title.

e. Biodiversity offsetting

The example provided for *Biodiversity offsetting* is confusing. A planning agreement can be entered into to document a proposal to offset impacts of biodiversity values of proposed development (see section 7.18 of the *Biodiversity Conservation Act 2016* ("BC Act")). Such a proposal may include the retirement of biodiversity credits or other actions that benefit biodiversity values (section 6.4 BC Act). There is not, however, as indicated by the Draft Practice Note, a necessary relationship between a planning agreement and a biodiversity stewardship agreement. If a biodiversity stewardship agreement has been entered into for the conservation of land (and the creation of biodiversity credits), there should be no need to further document those requirements under a planning agreement. A planning agreement can separately provide for the retirement of biodiversity credits that are created under a biodiversity stewardship agreement, but the provisions of the BC Act, the biodiversity stewardship agreement (and possibly any agreement entered into by the developer for the purchase of those credits) will regulate the requirements for payments into the total fund deposit. The planning agreement (and the Department's Practice Note on planning agreements) should not attempt to provide guidance on this issue.

However, it could anticipate those situations where agreements have not yet been formalised or where the agreement is only entered into to ensure there is a precondition to the issue of a certificate.

f. Other examples

Examples of planning agreements not shown in Part 5 could include a regime for maintenance of an asset protection zone, buffer or riparian corridor or where draft contributions plans are contemplated but the agreement pre-empts an anticipated future regime.

<u>Language</u>

We understand the Draft Practice Note seeks to provide a plain English guide on planning agreements. We suggest, however, that in some instances the Draft Practice Note does not adequately distinguish between statutory requirements relating to planning agreements and guidance notes. For example, the Draft Practice Note frequently uses the term "must", which implies that the relevant subject matter forms part of a statutory requirement and non-compliance will have legal consequences. The Draft Practice Note should be carefully reviewed to ensure that it is not misleading readers about legal obligations and requirements for planning agreements.

<u>Template Planning Agreement</u>

The template planning agreement has not been updated from the example included in the current Practice Note. It still refers to an Instrument Change being gazetted (see Recital C for Changes to Environmental Planning Instruments). Section 3.24 of the Act now provides

that an environmental planning instrument shall be published on the NSW legislation website and will commence on and from the date of publication (or such later date specified in the agreement).

The template agreement provides only general guidance as to standard terms. Some further guidance on some of the more important provisions may help to standardise the format of agreements, however we note that the terms of each planning agreement will depend on individual facts and circumstances.

2. *Environmental Planning and Assessment Regulation 2000* - proposed amendments

The Department has published a Policy Paper *Environmental Planning and Assessment Regulation 2000* - proposed amendments and a draft Environmental Planning and Assessment Amendment (Development Contributions) Regulation 2019 ("Draft Regulation").

The proposed amendments in the Draft Regulation fall into three broad categories: measures designed to increase transparency and accountability by requiring councils to publish more detailed information about development contributions and contributions received via planning agreements; elimination of additional notification periods following Independent Pricing and Regulatory Tribunal ("IPART") review; and some housekeeping amendments dealing with fixed levies in Gosford and Wollongong.

Transparency and accountability

The proposed amendments require more detailed reporting by consent authorities about amounts received and expended by councils and other planning authorities under planning agreements and contributions plans, which are to be made publicly available on a website. These general reporting measures reflect recommendations 10 and 12 of the Kaldas review.[2]

Although these requirements will place an additional reporting burden on councils in terms of collection and presentation of data, they fulfill a function required by the review and are welcome.

Elimination of notification period post IPART review

The proposed amendments require contribution plans to be amended to give effect to the advice of the Minister (or Minister's nominee) in relation to implementing IPART recommendations, without requiring a further 28 days exhibition following IPART review.

The rationale for the amendments is to streamline the process and promote efficient infrastructure provision for development. The Policy Paper also states that councils are constrained in their ability to make any further changes as a result of submissions made during this final exhibition period.[3] While this rationale appears reasonable, the measure removes a layer of public oversight in favour of efficiency.

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[2] Nick Kaldas, *Review of governance in the NSW Planning System*, December 2018, 8 available at <https://www.planning.nsw.gov.au/-/media/Files/DPE/Reports/Assess-and-Regulate/compliance/review-of-governance-of-decision-making-in-the-nsw-planning-system-report-2018-12-18.pdf >

[3] Department of Planning, Industry and Environment, *Environmental Planning and Assessment Regulation 2000 proposed amendments*, Policy Paper April 2020,11 available at https://shared-drupal-s3fs.s3-ap-southeast-2.amazonaws.com/master-

Housekeeping measures

The changes relating to these two Councils appear to be timely and necessary.

3. Special Infrastructure Contributions Guidelines

Special Infrastructure Contributions ("SICs") are governed by Subdivision 4 of Part 7 of the Act (sections 7.22 to 7.26). Contrary to the position with the Draft Practice Note, there is no Ministerial Direction mandating the application of the Special Infrastructure Contributions Guidelines for the initiation and negotiation of SICs.

As a general comment, we consider that if a SIC is being imposed there should be a similar level of transparency and accountability required as in the case of local contributions. We do not find the same level of transparency or nexus apparent. For example, what is the service and demand catchment for schools and parks? To what extent is the levy funding past inadequacies versus growth? It is difficult to justify infill development on the basis of demand generated by the new development, so how is this to be tested?

Currently the funding of infrastructure does not allow for staged implementation, which we acknowledge may not be practical, but often SICs are levied but the infrastructure not built until years later.

4. Improving the review of local infrastructure contributions plans

The process of reviewing higher-rate local (section 7.11) infrastructure contributions plans is triggered when a local section 7.11 development contributions plan exceeds the thresholds set out in the *Environmental Planning and Assessment (Local Infrastructure Contributions Directions 2012* (currently $20,000 per lot/dwelling and $30,000 per lot/dwelling in identified urban release/greenfield areas).

The proposals for amendment in the Discussion Paper, *Improving the review of local infrastructure contributions plans* include options for either indexing the existing thresholds, increasing thresholds to $35,000 per lot/dwelling and $45,000 per lot/dwelling in greenfield areas, or implementing a single threshold of $45,000 for all IPART reviewed contribution plans.

We support increasing the thresholds as proposed in the second option and implementing an annual adjustment of the review thresholds, based on the Australian Bureau of Statistics Consumer Price Index- All Groups, Sydney - although we note that a different index more reflective of the building and construction industry may be a better guide.

5. Criteria to request a higher s 7.12 percentage

For a council to impose a flat rate contribution under section 7.12, rather than invoke the more complex policy considerations and formula under section 7.11, is a more attractive option administratively, for both councils and developers.

The *Environmental Planning and Assessment Regulation 2000* ("EP & A Regulation") sets 1 per cent as the standard highest maximum percentage which councils can levy under a section 7.12 development contributions plan. The EP&A Regulation identifies specific areas which are subject to higher maximum percentage levies if listed in clause 25K(1)(b).

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The Department is proposing, in its Discussion Paper, *Criteria to request a higher s 7.12 percentage,* to adopt a set of criteria which must apply in order for the flat rate contribution to be increased to 2 or 3 per cent. First, the area being proposed for a higher maximum percentage levy must be identified in a strategic plan as a strategic centre, local centre or economic corridor. Second, it must have an existing or identified potential for significant employment growth. Third, planning controls will need to reflect and support the planned increase in population and employment capacity of the identified area.

Section 7.12 is designed to deliver an efficient outcome for both developers and government where provision of the infrastructure benefits a dispersed set of contributors, and the connection, or nexus, between the development and required infrastructure is difficult to identify.[4]

We question whether this adherence to a future growth spurt as the justification for a higher section 7.12 amount is well-founded. Dormitory suburbs with little or no employment growth can still experience significant growth. For instance, *State Environmental Planning Policy No.70 - Affordable Housing (Revised Schemes)* (SEPP 70) allows developers to take single housing lots (occupancy: one family, two to three persons) and change them into sites allowing 30 or more dwellings and 60 or more occupants. These developments create demand for improved services. Yet the mechanism under section 7.12 is not available to councils because the development is not employment-generating.

We suggest there is a case for amending the criteria to take account of empirical data to analyse whether there is actual growth and pressure on local resources. Further, the analysis should factor in other potential costs such as a SIC and affordable housing levies.

Conclusion

The Law Society appreciates the opportunity to participate in the reform process and we look forward to the opportunity to comment further in due course. If you have any questions about this submission, please contact Liza Booth, Principal Policy Lawyer, at liza.booth@lawsociety.com.au or on (02) 9926 0202.

Yours faithfully,

Richard Harvey
President

[4] Department of Planning, Industry and Environment, *Criteria to request a higher s7.12* percentage, Discussion Paper, April 2020, 4 available at:< https://shared-drupal-s3fs.s3-ap-southeast-2.amazonaws.com/master-test/fapub_pdf/Planning+Reforms+Exhibition/Criteria+to+request+a+higher+s7.12+percentage+-+April+2020.pdf>.

Principle	Comment
Planning authorities should always consider a proposal on its merits, not on the basis of a planning agreement.	We note that a planning agreement or an offer to enter into a planning agreement is a relevant matter for consideration in assessing a development application or a planning proposal. It is important to note that there is a legal requirement for decision makers to consider "relevant" matters. For development applications, section 4.15 of the Act sets out those relevant matters including "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".
Planning agreements must be underpinned by proper strategic land use and infrastructure planning carried out on a regular basis and must address expected growth and the associated infrastructure demand.	While we support the focus on strategic land use and infrastructure planning, further guidance on what this principle requires would be helpful. All local councils will have strategic land use and infrastructure plans. A broad "requirement" to develop strategic studies to support each planning agreement is not practicable. It may be appropriate for strategic planning work to be undertaken to justify a planning agreement in circumstances where proposed development is "out of sequence with broader strategic planning" (as expressed in the rationale for planning agreements in part 1.2 of the Draft Practice Note). In most cases, however, development (including any associated planning agreement) must be assessed in the context of existing planning instruments and policies (including infrastructure plans).
Strategic planning should ensure that development is supported by the infrastructure needed to meet the needs of the growing population.	This appears to be a principle concerning strategic planning and not planning agreements.

Principle	Comment
The progression of a planning proposal or the approval of a development application should never be contingent on entering into a planning agreement.	We note that a planning agreement or an offer to enter into a planning agreement is a relevant matter for consideration in assessing a development application or a planning proposal. The public benefits offered under a planning agreement are relevant to the merit assessment of a planning proposal and / or a development application. This is particularly the case where a planning agreement provides for development contributions that meet increased demand for public amenities or services arising from proposed development. In practice, whether or not a planning agreement is offered or entered into will form part of the decision-making process. In particular, for development applications the consent authority will need to be in a position to make a determination about whether a condition requiring a planning agreement (on the terms of an offer) should be imposed under section 7.7(3) of the Act, or in some cases whether conditions requiring contributions under section 7.11 or 7.12 of the Act should be imposed. For planning proposals, if the planning agreement offers benefits for the wider community or environmental offsets or other public benefits that contribute to the justification of the proposal, the planning agreement must be taken into account and should be entered into before the amendment to the instrument takes effect. The planning authority cannot "require" a planning agreement to be entered into on the amendment of a planning instrument and may be left with no avenue to enforce the provision of public benefits that have been used to justify that amendment.
Planning agreements should not be used as a means of general revenue raising or to overcome revenue shortfalls.	While this principle is reasonable, the way it is drafted implies that planning authorities are likely to misuse planning agreements. It may be preferable to redraft the principle in a positive manner. For example: "The primary purpose of planning agreements should be to deliver infrastructure for community benefit in connection with planning proposals and development applications."

Principle	Comment
Planning agreements must not include public benefits wholly unrelated to the particular development.	The use of the term “must” implies that this is a statutory requirement. Section 7.4(4) of the Act provides that a provision of a planning agreement will not be invalid because there is “no connection” between the object of expenditure of any money paid under the agreement and the development. A planning agreement can validly require benefits that are wholly unrelated to the development. While the provision of such a benefit will not be relevant to the assessment of the merits of that development (because it is unrelated), the planning agreement itself is not invalid.
Value capture should not be the primary purpose of a planning agreement.	Please see our comments above regarding value capture. As stated above, it may be preferable to state in the principles what the “primary purpose” of a planning agreement should be.