



Submission

Draft Local Infrastructure
Contributions System Practice Note
2023

Introduction

The exhibition of the Draft Local Infrastructure Contributions System Practice Note by the Department of Planning, Housing and Infrastructure (the Department) represents an important overhaul and update to the existing contributions practice note first published in 2005. GLN Planning commends the Department for undertaking this work and for seeking feedback on the draft documents prior to their adoption.

GLN Planning provides town planning consultancy services to State agencies, local councils and land developers throughout NSW. GLN has particular expertise in providing development contributions advice to clients and is a leading consultancy in this field.

Our work in this area includes preparing infrastructure funding and delivery plans, preparing nexus-based (Section 7.11) and fixed rate levy (Section 7.12) contributions plans, and designing improvements to contributions management systems, processes and procedures.

Further, our team has significant prior experience working within local and state government infrastructure contributions roles.

We have reviewed the draft practice notes through the lens of our lived experience of working with the local infrastructure contributions framework. Our submission aims to:

- Provide a practitioner's viewpoint on how the draft practice note translates to the real-world planning, funding, delivery and administration of local infrastructure,
- Identify opportunities where additional guidance could be provided on issues which commonly arise during the course of our work but where the draft practice notes are either silent, too brief, confusing or contradictory - particularly on behalf of local government practitioners who are responsible for preparing and implementing contributions plans and planning agreements, and
- Offer corrections and clarifications that should be made to ensure consistency with legislation or contributions planning principles.

We have structured our submission to accord with the modules that comprise the practice note.

We commend the Department on publishing the draft practice note as online modules which include hyperlinks to key legislative provisions up front. This approach is user-friendly, easy to navigate, and more readily accessible.

The draft practice notes would be improved and its concepts easier to interpret by contributions practitioners if they contained case studies of best practice in the following areas:

- Infrastructure needs studies informing the content of contributions plans.
- Easy to read contributions plans.
- Effective management of contributions plan income and expenditure, borrowings etc.
- Timely infrastructure delivery.
- Meeting statutory accountability and reporting requirements of the EP&A Regulation.
- Managing planning agreements and works in kind agreements.
- Effective stakeholder (particularly developer) participation and involvement in contributions plan preparation and implementation.

It is recommended that the Department commits to the regular review of these practice notes, and that reviews are undertaken with the involvement of local government reference groups involving town planning, assets and financial professionals working in local councils who have responsibility for preparing and implementing contributions plans.

We would welcome the opportunity to discuss this submission further with Department officers.



Peter McKenna
Associate Director Infrastructure and Development
February 2024

Local infrastructure contributions system practice note

Principles of infrastructure contributions

Policy positions

Reasonable time

There is no guidance or policy position on what is meant by spending monies received or making dedicated land available for its intended infrastructure purpose within a reasonable time.

Relevance of nexus and apportionment to s7.12 levies overstated

There is no requirement in the EP&A Act or Regulation that 7.12 contributions must be reasonable, other than they have to be spent in a reasonable time. However, the draft practice notes in several places connects s7.12 levies and reasonableness in a way that does not reflect the statutory scheme.

For instance:

- Figure 3 and text on page 12 is misleading. There is no statutory requirement that a S7.12 amount 'must reflect the apportioned costs of infrastructure'. This may be a matter that the Minister might consider in say an application made by Council for a higher s7.12 levy, but it is not a matter that the council need to be concerned with in preparing a s7.12 plan.
- Table 3 says that s7.12 levies 'requires' a relationship between infrastructure and demand', when in fact the statutory scheme explicitly states that a s7.12 levy imposed on a development 'is not invalid' by reason only that there is 'no connection' between that development and the object of expenditure of any levy money required to be paid (EP&A Act (s7.12(4))).

The only statutory requirement is for the relevant s7.12 plan authorising the condition to include 'information' on the relationship between expected development and infrastructure demand (s212 (1)(c) EP&A Regulation). For example, that information can be as basic as the population of X LGA is projected to grow by Y persons and the council will levy developers to help meet the cost of providing infrastructure to meet the growing demands.

Selecting the most appropriate contributions mechanism

Policy positions

What is and is not a 'contribution scheme'?

This is discussed on page 15 of the draft practice note. This needs to be clarified as there are numerous examples of LEPs including 'key sites' provisions that link direct developer provision of public facilities or community infrastructure with obtaining approval for the additional development potential on a site. These arrangements are usually formalised in a planning agreement between the council and developer.

In fact, the Department most recently exhibited draft plans for Macquarie Park that included certain sites being subject to an 'incentive' clause in LEP in exchange for the provision of 16 ha of land and works for local roads and open space. This would not have been practical or achievable if the proposed acquisition and embellishment of the proposed open space was included in a local contributions plan.

Similarly, it has been established practice to require developers to provide 'through site links' as part of their development and identified in DCPs.

Are these infrastructure provision strategies considered to be contributions schemes inconsistent with the draft practice note?

Best practice guidance

'Key sites' provisions in LEPs are a legitimate mechanism for providing local infrastructure. They complement contributions plans and have been used effectively by councils over many years.

There is no published guidance on what they are or how they should be used. The Department should prepare best practice guidance on the use of 'key sites' provisions in LEPs.

Apportionment

The following statement on page 15 is misleading:

‘This often means that councils will need to fund the part of the cost of infrastructure that benefit existing residents from other funding sources, such as rate revenue or grants.’

That is, if a s7.11 infrastructure item is sized to meet the net increase in demand generated by the proposed development, but that item also, by its mere existence, has some incidental benefit to other populations, there is no need on the grounds of reasonableness for Council to find other funding sources.

Table 5 - resource requirements for planning agreements

The term ‘requires lawyers’ is sending the wrong message. Shouldn’t we be working towards the situation where the majority of agreements would not be covering new ground, and so would be drafted in accordance with a template and would not need legal input.

Infrastructure needs — s7.12 levies (page 18)

The needs shown in the table may be relevant for 1% levies but are not indicative of the needs one would expect in an area with a higher rate levy.

Administering contributions practice note

Borrowing, pooling contributions and forward funding infrastructure

Legislative requirements

Treasury and the Office of Local Government should develop guidelines around the sustainable use of funds pooling. Councils across NSW currently hold over \$3.8 billion in unspent contributions funds. It is not enough for the government to be passive and suggesting that councils should endeavour to pool funds. The multiple factors chart shows that funds pooling is the least risk financial option for forward funding infrastructure. In our opinion funds pooling should be an essential component of every council's implementation activities.

Borrowing, both internal and external, in the early years of the life of a contributions plan is essential for the plans to be financially sustainable and deliver the infrastructure included in them. This was established in the Land Acquisition and Dedication Discussion Paper (2022) prepared by GLN & Atlas for Western Sydney Planning Partnership at <https://theparks.nsw.gov.au/wp-content/uploads/2023/05/Final-GLN-Atlas-WSPP-Land-Acquisition-Dedication.pdf>

Contribution receipts are usually very low in the first 5 years of the plan. NSW councils (particularly metropolitan councils) do not generally borrow money to provide lead in infrastructure on behalf of developers. The practice notes need to give councils practical ways or avenues that will turn this practice around. Please refer to the recommendations in the Western Sydney Planning Partnership report linked above.

Policy positions

Simply urging councils to consider borrowing and forward funding to deliver infrastructure will not make that happen.

GLN and Atlas's Land Acquisition and Dedication paper for the Western Sydney Planning Partnership showed that for greenfield areas an early acquisition program funded by pooled funds / borrowings has the potential to address insufficient contributions and funding shortfalls.

We urge the Department in collaboration with NSW Treasury and the OLG to implement the report's recommendations in relation to forward funding infrastructure, particularly:

- Prepare a draft practice note on how to use pooled contribution funds for financing early infrastructure land acquisition without compromising financial sustainability. (Recommendation 5(d)(ii))
- Establish T-Corp low-cost lending facility to support land acquisition for local infrastructure, including updating guidelines to allow councils to use low-cost loans to permit purchase of whole parcels of land that contain contributions plan infrastructure land and allows future contributions plan income as security for loans, if required. (Recommendation 8(a))
- Adjust the minimum debt service ratio (DSR) for high growth councils to a positive percentage (i.e. 5%) rather than zero to facilitate greater borrowing capacity to allow for early land acquisition. (Recommendation 8(b))

Best practice guidance

Section 212(1)(h) of the EP&A Regulation requires that where the council intends to pool contributions and levies between contributions plans, the affected plans are to include the priorities for spending pooled funds 'by reference to a works schedule'. How should these priorities be expressed in the works schedules? For instance, would a simple 'A, B, C' priority rating be acceptable?

Section 212(6) of the EP&A Regulation requires that a council proposing to include a provision in a contributions plan to pool contributions and levies paid for different purposes can only do this if the council is satisfied that the pooling and progressive application will not unreasonably prejudice the carrying into effect, within a reasonable time, of the purposes for which the money was originally paid.

The Department should provide guidance on:

- What is meant by 'a reasonable time' to provide the purposes that will likely be delayed because of pooling?
- How a council should approach the task of satisfying itself that the proposed pooling will not unreasonably prejudice the timely provision of the purposes included in the 'lender' contributions plans

Further to the second point, councils need to meet the requirement before it adopts the contributions plan and before any contributions are received. Guidance from DPHI is critical because it is difficult to imagine how a council could meet the requirements of s212(6) before the plan is operating.

Procedure and process

The practice note should provide further details on:

- How does a council authorise pooling of funds between all of its contributions plans? For instance, can a council insert a provision in any individual contributions plan authorising funds pooling between all current and future contributions plans, or does it have to insert provisions about funds pooling in every plan the council intends to pool funds?
- How can a council determine whether pooled funds can be paid back to the particular contributions plan they were borrowed from?
- How should internal borrowing / funds pooling activity be recorded in the financial statements?

Financial management of contributions

Legislative requirements

Timely provision of infrastructure using the contributions received from developers is crucial to creating and maintaining public trust in the infrastructure contributions system.

Section 7.3 of the EP&A Act requires money collected by councils under s7.11 contributions, s7.12 levies, and in planning agreements to be applied towards the purpose for which they were collected in a reasonable time.

There is no guidance provided in any of the draft practice notes on what is a 'reasonable time' or how councils may implement the obligations under s7.3(1) and (3) of the EP&A Act and s212(6) of the EP&A Regulation.

However, without guidance and regular audit by State government of spending of contributions, there have been many examples of councils hoarding funds and not attempting to implement this statutory requirement.

Policy positions

Further guidance is required on the opportunities and limitations around the application of repealed plan funds. This includes funds already held at the time of repealed as well as funds it to be received from contribution conditions yet to be acted on. What happens to any funds owed or owing to the repealed plan?

The Department should advise what is included in the calculation of a council's debt service ratio because of the current exclusion of contributions received in the calculation of the ratio. Loans taken out to forward fund growth infrastructure included in contributions plans can be paid back by contributions as they are received from developers. While the rate of income and development will depend on many factors, it would be reasonable for some portion of the current plan balance to be included in the calculation of DSR.

Procedure and process

The lack of guidance, lack of scrutiny, as well as State government tending to turn a blind eye to the build-up of funds in council contributions accounts are some of the main reasons for the statutory requirement that funds are spent within a reasonable time being widely ignored by councils.

The evidence is clear. The sustained and relentless increase in the accumulated local contributions held by NSW councils – from \$2.2 billion to \$3.8 billion (i.e.+67%) in the 7 years to June 2023 (see Figure 1) – reflects an unwillingness or inability, or both, among many councils to spend contributions in a reasonable time.

The Department should, as a high priority, identify reasonable time indicators and targets in a draft practice note and prepare an action plan to spend-down the accumulated funds while maintaining a reasonable buffer (of, say, no more than \$1.5 billion)

that infrastructure priorities which inform funds pooling can be updated without the need to exhibit the plan.

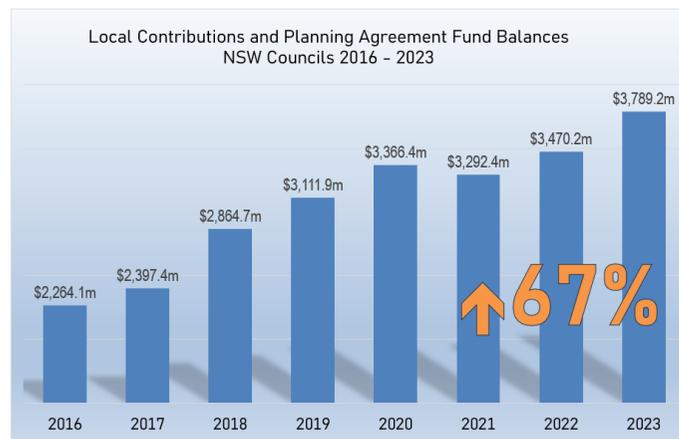


Figure 1: Local contributions and planning agreement fund balance – 2016-2023

Reporting and publication requirements

Templates

The reporting templates are a welcome addition to the practice notes, however the contribution rates template is confusing.

Reviewing, amending and repealing contributions plans

Legislative requirements

The very limited circumstances in which a contributions plan may be amended without public exhibition actively prevents the effective management and implementation of contributions plans. Infrastructure priorities change often from year to year. The plan amendment section of the EP&A Regulation should be updated so

Section 7.11 contributions practice note

Making a section 7.11 contributions plan

Legislative requirements

Complying development

Contributions plans must set out in what cases a contribution is to be imposed on complying development.

Table 2 of the draft practice note, which specifies the content of a s7.11 plan, does not include the requirements of s7.21 of the Act – i.e. what should be included in a plan in relation to complying development.

Operation of s7.11(5)(a) is unclear and needs to be explained:

S7.11(5) of the EP&A Act addresses ways in which a contribution obligation to be partly or fully satisfied by making contributions other than cash.

S7.11 (5)(b) is regularly used, particularly for settling obligations via works in kind.

Neither the current 2005 practice notes nor the 2023 draft practice notes provide explanation on how s7.11(5)(a) is meant to operate in practice.

The provision appears not to make sense as it connects two seemingly unrelated actions: settling a recoupment condition requirement through the dedication of land.

Policy positions

The phrases 'In the strictest sense' and 'strict application' are unnecessary terms to describe how nexus, apportionment, and reasonableness are applied – they are simply applied outright. If this phrase is used to mean that nexus, apportionment, and reasonableness are applied to s7.11 contributions more strictly than s7.12 levies, then this could be confusing and misconstrued. We suggest re-visiting and simplifying this language.

As stated elsewhere, s7.12 levies are a tax where the rate is set by the Council for various development types, up to the maximum allowed by the EP&A Regulation.

Best practice guidance

Cash flow analysis

A basic cash flow analysis is considered essential for implementing significant urban release area and urban renewal developments infrastructure programs. A basic cash flow analysis, which is essentially a map of the timing of contributions receipts and expenditure, is:

- a useful tool to inform works item staging and priorities, and for showing the financial impact of a council's proposed exemptions and discounts policies,
- important for showing whether a contributions plan is likely to be financially sustainable throughout its life, and
- is an effective tool for showing when internal or external borrowings will be needed to provide all plan items in a timely manner.

Best practice should be that a cash flow analysis is prepared and accompanying the exhibition of major contributions plans. The Department can assist by preparing a cash flow template in providing guidance and training on completing analyses or contributions plans.

The cash flow of an area's infrastructure delivery should then be regularly monitored and be an essential part of the regular review of contributions plans.

The cash flow analysis should have construction and operation (i.e. life-cycle) costs included to understand the full impact on a council's finances of development areas containing significant new local infrastructure.

GLN Planning has prepared a life cycle costs tracking model for an urban release area for Shoalhaven Council. We would be happy to discuss the use of cash flow models and potential template for example models in future versions of the practice notes.

Undertaking cash flow modelling for a period of 10 years is likely to be insufficient for a s7.11 plan, particularly for those which apply to greenfield release area. We recommend that cashflow modelling is undertaken for the expected life of any plan.

Procedure and process

Contributions plan steps

The following should be added to the contributions plan steps table:

- Identify infrastructure item staging and - where funds pooling is proposed - infrastructure item priorities. Include details in works schedule.
- Please include a step that requires a cash flow analysis to be prepared.
- Step 10 is a task which is part of step 9. They should be combined.

The minimum information in Step 3 should be listed, and would include council's policies on:

- the payment of contributions.
- the indexing of rates.
- the indexing of contributions in consents.
- accounting for demand credits in the contribution calculation.
- the responsibilities of private certifiers.
- developments that are exempted from contributions.
- how proposals for land dedications and works in kind will be dealt with (This is dealt with in step 9 and 10).
- the periodic review of the plan.

Exempting certain development from contributions

Legislative requirements

Crown DAs

The revised circular D6 deals with the imposition of conditions generally on Crown DAs, including contributions conditions.

The circular is not fit for purpose because:

- It was issued in September 1995 – over 28 years ago.
- It refers to now repealed section(s) of the Act.
- It refers to now repealed other Acts.
- Both the public service/ amenities and the Crown activities/land uses listed in the matrix on page 7 are not contemporary and do not cover the range of circumstances and matters that relate to imposing contributions on SSDAs in 2024.

It is unreasonable to expect councils to regularly update their contributions plans, whilst the Department has not updated its decades-old policy.

It is also recommended that the circular not be referred to in the practice notes. The updated government policy and practice on how s7.11 / s7.12 contributions will be addressed in DAs lodged by public authorities should also be set out in a new draft practice note.

Determining demand and demonstrating nexus

Policy positions

The Department should provide guidance on what is considered 'appropriate' publicly available studies and strategies in terms of acceptable timeframes for the plan being prepared. For example, a study that was prepared 10 years prior to the current date may still be acceptable in the circumstances of the individual council's case, due to intermittent growth.

Developing a works schedule and mapping infrastructure

Best practice guidance

When identifying the infrastructure needs of a new development area, it is best practice to initially identify all of the infrastructure required to meet the demands of the development. This is important for at least two reasons:

- There may be local infrastructure that can be more effectively provided by entities apart from the council (e.g. indoor recreation centres by PCYC). These may not need to go into the plan works schedule.
- Infrastructure to be funded by the State government will not need to be included in the plan. In many cases, the line between what is a council responsibility and what is the state's responsibility is blurred. Preparing a pre-contributions plan comprehensive works list enables the Department and the council to clarify what are local and what are State responsibilities.

Procedure and process

The draft practice note states that grants should be accounted for when preparing a works schedule. However, knowledge of the amount of any grant, or the projects that will receive grants is rarely known when a plan is prepared. It is more likely that the details of grants and their consideration in the calculation of contribution rates can be addressed for recoupment items.

Templates

The practice note refers to Contents of the works schedule – [section 7.12 plans](#). To not confuse the reader, each practice note should be tailored to its subject matter. In this case – s7.11 contributions.

Estimating infrastructure costs

Examples

In the Net Present Value (NPV) versus the nominal value worked example the NPV contribution rate is escalated at CPI (2.5%). We suggest that it should be escalated at the indexed used for calculating the future cost of the work used in the example (i.e. 7%).

The practice note refers to discount rate – consider explaining / clarifying what this is given its importance to net present value approach.

The practice note refers to nominal costs. This does not work well when rates are close to \$20k/dwelling and not IPART- reviewed i.e. the contribution that is able to be collected remains at \$20k/dwelling regardless of escalating costs. This is a key financial issue / risk that many councils are not aware of and should be made clear in the Practice Note.

Templates

The practice note would be more useful if it included a template NPV work schedule / contribution rates model with inbuilt assumptions on discount rate. This is a policy area that is not well understood by contributions practitioners except finance staff. Any tools that can aid understanding of the NPV will promote its take-up and help make delivery of plans more financially sustainable.

IPART review of section 7.11 plans

Policy positions

Could the Department please confirm whether the land in stratum in a strata title scheme is included in the category of Essential Works called 'land for community facilities'.

Works in kind agreements

Best practice guidance

Accounting for land dedication

In most cases, a developer seeking to enter a works in kind agreement will also dedicate land associated with the works being completed.

Some advice on how the value of land being dedicated should be accounted for in this process would be useful.

The practice note instructs councils to obtain independent valuations when assessing offers from developers to dedicate land. Contributions plans should contain land values for categories of land proposed to be acquired under a plan. These values are used to determine contribution rates for land acquisitions under the plan.

Land being dedicated to council should fall within one or more of these categories. Therefore, the land value should be determined in accordance with the contributions plan value. Councils should be encouraged to not pay more for land than a contributions plan allows as this would generate a contributions shortfall.

Procedure and process

Offsetting contribution amounts

None of the draft practice notes mention the issue of contribution offsets. Offsets are relevant when contribution amounts in consents are adjusted to account for the value of a material public benefit that an applicant has offered and the council has agreed to accept in part or full satisfaction of a condition obligation under s7.11(5). Guidance should be provided on how should a MPB be valued – i.e. attributable value in the plan, quotation/tender prices?

Modification applications / conditions of consent / other

Legislative requirements

Guidance should be provided on what is needed to include in a contributions plan to address the requirements of s7.11(6).

Modifications

Greater clarity on what is the relevant contributions plan to use to assess DA modification applications against should be included in the practice note. Councils regularly seek advice from us as to the procedures around calculating updated contributions or levies in relation to a modification application.

Conditions of consent

The practice notes should be clear in advising councils that it can impose a s7.11 or a s7.12 condition on a consent, but only if in the contribution amount has been calculated strictly in accordance with the formulas and values in the contributions plan.

What happens when an infrastructure item that is included in a contributions plan works schedule can reasonably be conditioned to be provided by the developer as a Works condition under section 4.17 of the Act?

Conditions of consent (s7.11)

S7.11(1) states that a consent condition can include the requirement to dedicate land free of cost. S7.11(2) states that a condition imposed under s7.11(1) must be reasonable. Neither the current nor the draft practice notes provide councils with guidance on the matters that need to be addressed so that the dedication of land condition is reasonable. For instance, if an applicant is required to provide land free of cost, usual practice is to adjust the total cash contributions that would otherwise be included in the s7.11 condition. The practice note should also confirm the basis on

which the adjustment would be made (one assumes it would be based on the current indexed attributable value of the dedication land under the plan).

The practice notes should clarify whether a condition requiring the dedication of land can lawfully be imposed if there is no contributions plan or planning agreement authorising such condition. Councils have for many years required and accepted land for roads and land for public reserves through the provisions of s9 of the Roads Act and s49 of the Local Government Act without such pre-requisite. It is important to clarify this because of recent court judgements (*L & G Management Pty Ltd v Council of the City of Sydney* [2021] NSWLEC 1084; *Urban Apartments Pty Ltd v Penrith City Council* [2023] NSWLEC 1094) and that many councils are pointlessly carrying the costs and time of preparing planning agreements for very minor and /or incidental dedications (e.g. splay corners in subdivisions).

Templates

The practice notes should include template conditions of development consent and issuing of CDCs.

Section 7.12 levies practice note

Making a section 7.12 contributions plan

Legislative requirements

Guidance is needed by councils and certifiers to implement the *Environmental Planning and Assessment (Local Infrastructure Levies) Direction 2015*.

The direction requires that consent authorities / councils must not charge section 7.12 levies to development on subdivided land if a section 7.11 contribution (or former s94 contribution) was already made for the initial subdivision unless the development will or is likely to result in an increase in demand beyond the demand of the original subdivision.

This direction is difficult to interpret and inefficient for councils to administer because:

- S 94 conditions on subdivision approvals go back to the 1980s and records of subdivision approvals back to that time are often incomplete.
- Measuring the increase in demand is difficult because of the time gap between the current DA and initial subdivision, which could be many years or even decades. This is exacerbated by the range of facilities levied on new lots has changed over the years, to the extent where a comparison of demand between developments is difficult to undertake.

Policy positions

The Department appears to elevate the significance / relevance of nexus and apportionment in relation to s7.12 levies beyond that described in the Act and Regulation.

For instance, the following statement is difficult to understand and in our opinion confuses the reader:

‘While there may not need to be a direct connection between an individual development and specific infrastructure item, there still should be a connection between the types of development on which the levy is imposed and the infrastructure being funded by the levy’.

Please refer to our comments on the ‘Local infrastructure contributions system practice note’ for more information.

Exempting certain development from contributions

Legislative requirements

As per our earlier comments on the s7.11 contributions practice note, the revised circular D6 deals with the imposition of conditions generally on Crown DAs, including contributions conditions.

The circular is not fit for purpose because:

- It was issued in September 1995 – over 28 years ago.
- It refers to now repealed section(s) of the Act
- It refers to now repealed other Acts
- Both the public service/ amenities and the Crown activities/land uses listed in the matrix on page 7 are not contemporary and do not cover the range of circumstances and matters that relate to imposing contributions on SSDAs in 2024.

It is unreasonable to expect councils to regularly update their contributions plans, whilst the Department has not updated its decades-old policy.

The circular should not be referred to in the practice notes. The updated government policy and practice on how s7.11 / s7.12 contributions will be addressed in DAs lodged by public authorities should be set out in a new draft practice note.

Procedure and process

The draft Practice Note does not include guidance on the process for obtaining exemptions. Could the practice notes please address:

- Is the onus on the council to automatically apply the exemption or is it on applicants to formally request an exemption in their application?
- Clarify the exemption process for complying development.

- Consider including example / sample wording for exemptions for affordable housing as this exemption is becoming increasingly common but many councils struggle with the wording given SEPP complexities etc.

Defining plan catchments and sub catchments

Policy positions

Much of the text appears to be relevant to s7.11 but not s7.12. In our experience many / most s7.12 plans only have a single catchment and do not have sub catchments, because they add an unnecessary layer of complexity to plans.

Best practice guidance

The practice note indicates catchment boundaries should relate to the demand for infrastructure. This is relevant to s7.11 but not s7.12 and should be removed.

Developing a works schedule and mapping infrastructure

Policy positions

The practice note refers to the requirement for a s7.11 contributions plan to be exhibited before being IPART-reviewed – this is not relevant to a s7.12 contributions plan.

Best practice guidance

Page 22 – states “the [works] cost used to calculate the contribution rate should only include the proportion that will be funded through the contributions plan.” This is relevant to s7.11 not s7.12.

Page 23 – includes a template works schedule for s7.11 plans. Consider removing /adjusting as the practice note relates to s7.12 levies.

Templates

The practice note refers to contents of the works schedule – section 7.11 plans. This should be updated.

Estimating infrastructure costs

Policy positions

Page 26 refers to inaccurate costs as being one of the highest risk factors. We suggest the Department elaborates on this given the scale of the risk i.e. underestimating costs can lead to funding shortfalls for Council and failure to deliver infrastructure in accordance with the schedule. This has been a significant issue for councils in recent years.

Page 28 refers to discount rate – consider explaining / clarifying what this is given its importance to net present value approach.

Indexing contribution rates and conditions of consent

Policy positions

The practice note refers to contribution rates in s7.11 contributions plans needing to be indexed. This is not applicable to s7.12 plan.

Further, it also provides guidance on how to index contribution rates in a s7.11 contributions plan.

Any reference to s7.11 should be removed to avoid any confusion.

Best practice guidance

The Department should consider providing guidance on quarterly versus annual indexation e.g. if a council receives less than \$500k in contributions each year from 200 applications, say, the additional income from quarterly indexation may not justify the increased administrative burden from needing to index 150 rather than 50 (say) applications. It's a balancing act that most councils are not aware of. This is most relevant to low growth regional councils.

We recommend providing an example of indexation where a works schedule includes both land and capital costs and a hybrid approach is used for indexation. This is relevant to both s7.11 and s7.12.

Procedure and process

Consider providing guidance (perhaps through a case study) for council staff on process for indexing at payment e.g. can applicants do it online, over the phone or do they have to do it in person? Who does it from council's end e.g. customer service or planning admin? How do they do it e.g. using an Excel-based indexation tool or online software?

Requesting a higher section 7.12 rate

Policy positions

Higher rate s7.12 levies are becoming increasingly attractive to councils as the s7.11 IPART-review threshold has not been indexed since 2012 and inflation rates have been unusually high in recent years.

Paradoxically, the IPART-review process is not suitable for many councils given the extent of community facilities capital works which are not essential works and cannot be funded from IPART-reviewed contributions. Many councils cannot fund the works using other funding sources.

Given this situation, we recommend consider developing updated criteria to seek a higher s7.12 levy so that this option can be more widely pursued across both metropolitan and regional Councils.

Planning agreements practice note

Using planning agreements

Legislative requirements

The description of what is included in public purposes excludes the term 'without limitation' which is included in the definition of public purpose in s7.4(2) of the Act. This is important because it effectively means that a public purpose is whatever the planning agreement parties agree to be a public purpose.

Policy positions

The requirement that infrastructure included in a planning agreement should be 'not wholly unrelated' to the development is not plain language and is very confusing.

Could the Department please instead use plain English rather than the current double-negative term so that councils can implement this this policy position. Understanding of the principle could also be assisted by the practice notes providing examples of wholly unrelated development and infrastructure.

Best practice guidance

Value capture and planning agreements

The guidance on the use of planning agreements for value capture appears murkier than what is stated in the current 2021 planning agreement practice note.

For example, the current practice note is clear in stating that agreements '**should not be used to capture land value uplift as a result of rezonings...**' (i.e. planning proposals). Yet the draft practice note states that agreements '**should not be used exclusively to capture land value uplift resulting from rezoning...**'.

The guidance concludes with the following statement:

'For each planning agreement, council should consider the development and identify legitimate infrastructure requirements that may be delivered through the agreement to benefit the community.'

The wording changes appear to have the purpose of clarifying that a planning agreement that solely or 'exclusively' requires value capture contributions is unacceptable. This is supported by the statement in the practice note's Policy position that agreements should adhere to the principles for planning agreements which includes '*value capture should not be the primary purpose of a planning agreement.*'

The updated wording also appears to support inclusion of value capture contributions in planning agreements if they also:

'include legitimate infrastructure requirements that benefit the community.'

Value capture is a policy area in which there is broad public interest. It is therefore disappointing that both the draft practice note and current practice note have failed to provide sufficient guidance and clarity on value capture.

There are considerable deficiencies in the guidance offered in both the current and draft practice notes:

- (a) Nowhere is the term 'value capture' adequately defined. Guidance notes are of little use if the reader is not given a clear idea of what the guidance is for.
- (b) Many Sydney councils continue to seek value capture contributions through a planning agreement at the planning proposal stage. This is so that developer commitments can be locked in before the DA stage (which has avenues of appeal in the Land and Environment Court). These councils continue to leverage their bargaining position based on their statutory powers, and planning proposals are routinely held up until the developer gives in to a council's demands for extra (value capture) contributions.

The practice notes address none of the above matters.
- (c) The rationale / justification for the changes to wording in the draft practice note - which appear to support the use of value capture in planning agreements that address additional issues or offer infrastructure beyond value capture - is missing. That is, exactly how is it that the chief concern with value capture - i.e. the perception that planning decisions are not bought or sold - is (apparently) fully addressed by the planning agreement dealing with additional matters and not just value capture?

Procedure and process

Guidance is required on the use of planning agreements for multistage developments to take place over several years. Some councils resist the idea of strategic level planning agreements.

Strategic type agreements need to be flexible enough so that the agreement doesn't necessarily need to be varied or amended when details of each stage emerge if they are different from what was originally envisaged.

Council policies and procedures for planning agreements

Legislative requirements

The draft practice note should explain whether a draft planning agreement be lodged if any of the relevant parties with an interest in the land affected by the draft agreement (for instance, all landowners and banks - where there is an outstanding mortgage) have not agreed to its lodgement?

Negotiating and entering into a planning agreement

Policy positions

The draft practice note contains minimal guidance on the offer or 'letter of offer' as it is usually referred to.

The offer is a critical step or steps in the process. For example, an 'initial' offer will usually precede the final or 'irrevocable' letter of offer – the latter being usually the subject of the condition of consent requiring the agreement to be entered into.

Many or even most agreements are negotiated prior to a final letter of offer. The purpose is to defer the legal drafting costs of the planning agreement to a time when the planning agreement content is more certain.

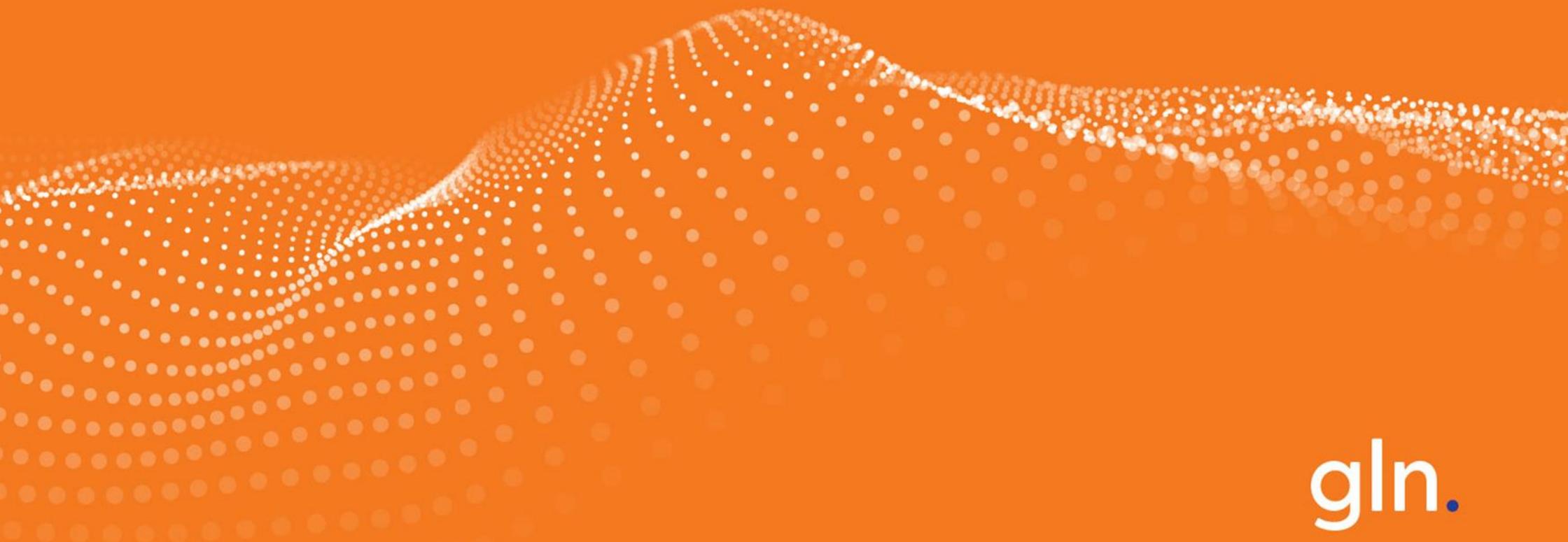
It is also common for letters of offer to be exhibited prior to Council deciding whether to start an agreement negotiation.

The practice note should uncover these practices (perhaps through case studies).

Procedure and process

Indicative steps (Table 5): The table should refer to the option (which is often used) of carrying out all the negotiation steps leading to making a final and irrevocable letter of offer.

This approach is commonly used to save costs and time.



gln.