

Report on an Affordable Housing Network NSW workshop on using planning agreements for affordable housing

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The Affordable Housing Network NSW is an informal network of workers in local government and community organizations who support protection, promotion and provision of affordable housing through the planning system in New South Wales. It meets bimonthly and has an e-list for notices and webpages hosted on the Shelter NSW website (at <www.shelternsw.org.au/ahn/ahn.html>).

The Network agreed, at its meeting of 19 August 2005, to turn its scheduled December 2005 meeting over to a workshop on planning agreements and affordable housing.

Background

The state government has introduced a regulation and practice notes to assist local government councils that want to use planning agreements with developers to collect contributions for affordable housing, transport and public infrastructure.

The Environmental Planning and Assessment Amendment (Development Contribution) Regulation 2005 was gazetted on 8 July, when the Environmental Planning and Assessment Amendment (Development Contribution) Act 2005 also came into effect. Accompanying guidelines, called ‘practice notes’, were also issued by the Department of Infrastructure, Planning and Natural Resources (DIPNR).

These instruments are generic and make little direct reference to affordable housing. They are significant because they relate to a new section 93F of the Environmental Planning and Assessment Act 1979 which regulates how councils may negotiate agreements for contributions for affordable housing (among other public purposes).

The DIPNR materials indicate that voluntary planning agreements are most likely to be useful for developments that are large-scale, have longer timeframes, and are likely to be developed in stages, and for developments where the developer has a key interest in delivering public infrastructure. The DIPNR contrasts these scenarios with those where section 94 development contributions or section 94A levies could apply.

What is different about section 93F agreements, in contrast with section 94 contributions, is that they (a) extend to more public purposes; (b) apply to recurrent costs as well as capital costs; and (c) do not require a direct nexus to be established between the development and the purpose. Contributions from planning agreements follow from a general public interest; the practice notes say: ‘Benefit to the developer is not a primary consideration.’ The developer’s voluntary contribution to affordable housing is a contribution of part (‘a reasonable share’) of the development profit for a public purpose.

For this reason, the practice notes state that planning agreements should be governed

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by 'the fundamental principle that planning decisions may not be bought or sold'. The practice notes specifically state that developments that are not acceptable in planning terms should not be permitted just because the developer makes a contribution for affordable housing (or other public purposes). I infer that this does not mean that councils may not make concessions on development standards, but the development must still meet satisfactory environmental criteria. Specifically, a planning agreement cannot be used to justify waiving of development standards under State Environmental Planning Policy 1 – Development Standards.

The practice notes also state that contributions from developers should not be encouraged if the purpose of the contribution is 'wholly unrelated to the development'. They give development contributions toward the provision or retention of off-site affordable housing as an example of a purpose not 'wholly unrelated' to the development.

If a council makes a planning agreement (or a draft agreement) about affordable housing contributions with a developer, it must take it into consideration when assessing a development application where it is relevant to the proposed development. The council may require a developer to agree to a planning agreement, through conditions of consent, only if the consent requires an agreement following an offer from the developer (s.93I(3)).

While section 93F allows contributions for recurrent costs of affordable housing that is not directly related to the development, the practice notes state that such a contribution should only be required until a public revenue stream is established to support the ongoing costs. So, if a council wishes to use a planning agreement to contribute towards recurrent costs of providing affordable housing, the revenue from a developer contribution will be time-limited: if the affordable housing needs ongoing subsidy, the council will need to subsidize that from its own sources or seek other sources (e.g. state government).

The practice notes say that development contributions reached through planning agreements are not be used as a form of taxation on development.

Process

The event was a ½-day workshop at which local government practitioners and community stakeholders discussed the challenges and opportunities for affordable housing presented by section 93F of the Act. It was held at the Parramatta Town Hall, Parramatta, on 9 December 2005.

Partnerships

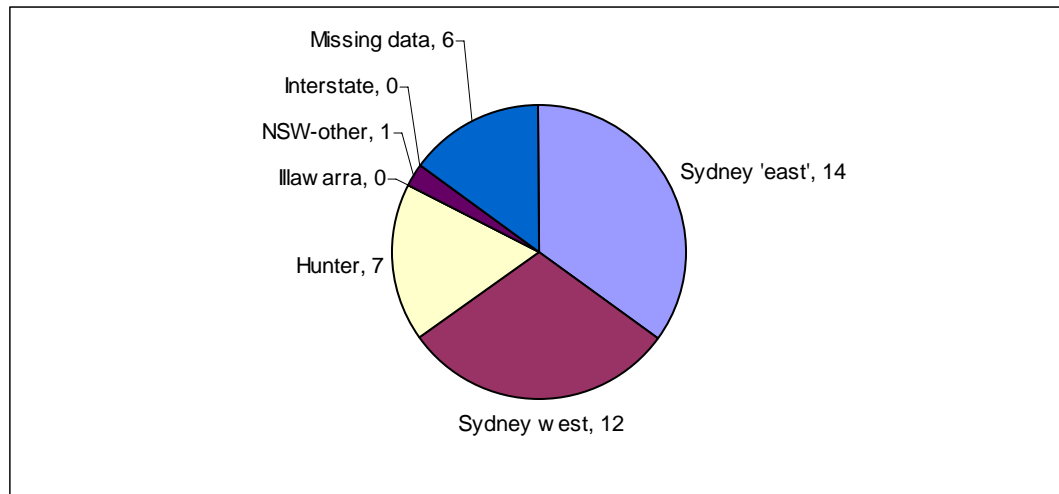
The workshop was

- presented by the Affordable Housing Network NSW
- hosted by Parramatta City Council
- sponsored by the Western Sydney Regional Organisation of Councils and Shelter NSW

Audience

The audience was local government practitioners and community stakeholders in affordable housing provided through the local environmental planning system. The workshop attracted 40 people (including speakers), 34 of whom were from local governments. The catchment was the whole state: most participants came from Sydney (see Figure 1).

Figure 1: Work location of participants



Format

The format was an interactive workshop comprising a mix of presentations and 'small group' discussions.

Program

The program took the form of:

- opening, by the lord mayor of Parramatta, Councilor David Borger
- presentation on the new section 93F and on the DIPNR *practice note* on planning agreements, by the assistant director of the Western Sydney Regional Organisation of Councils, Sharon Fingland
- panel presentation on case studies of use of planning agreements currently by NSW local councils, from Sima Truuvert and Teresa Mok from Randwick City Council, and Ray Darney from Byron Shire Council (the latter by proxy since a flight problem prevented Ray and Margi O'Connell-Hood from that Council attending in person)
- small group discussion on the challenges/limitations of the regulatory framework
- presentation on opportunities for local government involvement in affordable housing activities, by the acting director of the Department of Housing Centre for Affordable Housing, Andrew Larkin
- small group discussion on the opportunities of the regulatory framework, and on the capacity-building needs of councils and the competencies needed by council staff for negotiating affordable housing contributions from developers

Issues

This section reports views expressed by participants in two, concurrent small-group discussions on the matters (subheadings) indicated. Some views expressed might have been inadvertently omitted from this list because of the dynamics and summary nature of the write-up process. Views are not differentiated by either small group. Because the discussion in the small groups took the form of 'brainstorm', the views expressed and reported here cannot be presumed to be those of each and every participant. The views expressed are not listed in any order of priority or degree of support.

Challenges/limitations of the regulatory framework

- A planning agreement process might work in some parts of the state but might not be the best local government tool for facilitating affordable housing in other parts of the state.
- A proper planning agreement system in a council will require rewriting of planning instruments such as LEPs and DCPs, which cannot be changed quickly.
- A proper planning agreement system in a council will require writing new procedures manuals and guidelines.
- Council staff from a broad range of areas, e.g. accounting, planning, legal, property management, and property development, will need to be involved, and be involved before and after actual finalization of an agreement.
- Council staff have underdeveloped competencies in negotiation compared with developers and might be 'out-bargained'.
- Councils do not have a good evidence basis for determining what might be a reasonable contribution towards affordable housing – contributions of 1% of the development value seem too low, especially if the development is on state government land.
- Councils will have to wear possible accusations of corruption for negotiating affordable housing outcomes not acceptable to opponents of affordable housing in an area.
- Councils will need to commit ongoing resources to this area of social policy (e.g. housing officers) which they do not generally do now.
- Councils will need to develop their own housing policies and housing needs analyses.
- Councils' affordable housing actions are not always backed up by regional planning strategies, e.g. in the Hunter region.
- Doing the front-end work to establish effective and efficient planning agreement processes could be very time-intensive.
- Fluctuations in profitability in various property development submarkets will limit developers' ability to make a voluntary affordable housing contribution from profits.
- Getting a planning agreement for affordable housing could be difficult if a council is seeking a section 94 or 94A contribution for public facilities; a council could be seen to be 'double dipping', or, alternatively, give priority to contributions for public facilities over affordable housing.
- Implementing negotiation and agreement processes could be very time-intensive.
- It needs to include the government-owned property developer, Landcom.

- It would not apply on state-significant sites (sites possibly more appropriate for consideration of a planning agreement for affordable housing) where the state government has determined a council will not be the consent authority.
- Planners have limited technical tools to use.
- Planning agreements might contribute a small amount of affordable housing but the contribution is likely to be a drop in the ocean in relation to need: will the small output be worth the effort?
- The approach would not work well with fragmented sites, dispersed landholdings on large sites, and with small developers.
- The negotiation process could be extensive and frustrating for both parties.
- The policy framework for planning agreements for affordable housing at a state level is still very weak.
- The voluntary nature of the system could be less efficient and efficient than other approaches, e.g. inclusionary zoning.
- The voluntary nature of the system will see varying implementation because of different priorities given to affordable housing by different councils.
- There is little support from other spheres of government, e.g. the Commonwealth (Australian Taxation Office) because of the GST implications.

Opportunities of the regulatory framework

- A registered planning agreement is binding on, and enforceable against, the owner of the land even if there is a change of land owner.
- Contributions can be pooled.
- Contributions may be asked for recurrent costs of affordable housing (at least for a period).
- It legitimizes affordable housing as an appropriate public purpose for which development contributions may be asked.
- Planning agreements do not require a direct nexus to be established between the development and affordable housing.
- Registration of agreements is a better system than contracts/deeds.
- There are some sites that lend themselves to planning agreements for affordable housing in a diverse range of local government areas, e.g. town centers, brownfield regeneration sites, greenfield housing estates.
- There is a system of public scrutiny and accountability associated with them.
- They could be used for small sites if the development value allows.
- Use of the planning agreement negotiation processes could encourage and draw on better social impact assessment processes by councils.

Capacity-building needs of councils and the competencies needed by council staff for negotiating affordable housing contributions from developers

- The extent of the impact on staff is difficult to anticipate and document.
- There is a need for continued networking so that local governments generally can learn.
- There is a need for success stories to be shared so that local governments generally can learn.
- There is a need for training and more experience for council staff in negotiation skills.
- There needs to be leadership and commitment from councilors.

- There needs to be strong support for implementation of planning agreements for affordable housing from the minister for planning.
- Use of planning agreements will require structural and procedural changes within councils because of the need to involve diverse staff from different work areas.

Other matters

- The resourcing by the Centre for Affordable Housing will assist councils.
- There needs to be educational activities with councilors on the provisions.
- The new system could encourage councils to do collaborative research studies on their local housing markets.
- Councils will need processes to ensure that affordable housing stock (especially if it takes the form of owner-purchased housing) stays affordable over time.
- The system could be seen as a cumulative cost-shifting of responsibility for promoting affordable housing from state government to local government without proper resources being available to councils.
- Having a mindset of 'There is little to be gained from using planning agreements for affordable housing' is a limitation, but having a mindset of 'Start small and do what is feasible' could change that.