URBAN DEVELOPMENT INSTITUTE OF AUSTRALIA (NSW)

DRAFT SUBMISSION TO THE SECTION 94 CONTRIBUTIONS AND DEVELOPMENT LEVIES TASKFORCE

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Draft Submission to the Section 94 Contributions and Developer Levies Taskforce

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Background

In the 25 years since Section 94 was first enacted, it has become increasingly utilized by councils to finance local infrastructure. The Planning Institute of Australia notes in its submission that 'councils in NSW have come to rely on s.94 contributions'.

The expansion of s.94 financing has been accompanied almost from the beginning by complaints of excess and unreasonable levies being applied, unclear plans and policies, lack of transparency and accountability, and failure by councils to deliver the infrastructure promised in s.94 plans, when needed.

Objections to councils' use of s.94 powers have, in a small number of more notable instances, been reviewed by the Land and Environment Court providing a body of case law and established principles for the administration of s.94 by councils. However, only applicants with the strongest cases and significant monies at stake opt to appeal a s.94 condition of consent as there are major downsides in the months of delay and appeal costs, and more importantly, the entire consent being put at risk in an appeal. Nor does a successful appeal place any obligation on the council concerned or any other council to review and revise the s.94 plans or procedures found wanting by the court.

For their part, councils generally have not coped well or efficiently with the s.94 regulatory requirements and administration, or found the expectations of developers and communities easy to satisfy. Inherent problems with applying s.94 include unpredictable rates of development, rising land values and construction costs, and the risks associated with financing and delivering major or 'lumpy' (in $ terms) infrastructure. The full realization of the cost of maintaining the infrastructure and providing the services it entails may only come later, while the wide disparity in the financial capacity and skills in councils has led to a perception of poor planning and administration of s.94 and the funds it is generating. The separation of functions and agendas within councils has mostly exacerbated all these problems, rather than providing the comprehensive set of skills needed to resolve them.

Reviews Past & Current

These concerns have prompted an extended series of reviews and inquiries by the NSW Government to refine and improve the s.94 system. National reviews and inquiries into planning processes, infrastructure provision and financing, and housing affordability, have also commented on the need for system improvements and adequate cost control. There is now broad recognition that meeting the local infrastructure needs of growing and changing urban regions cannot rely solely on s.94, although this has become virtually the practice after hardly twenty five years of s.94. Section 94 has allowed all levels of government to avoid much of the pain to local communities that would otherwise have been felt as those governments' debt-phobia took hold from the late

1980's, at the same time that rising community standards for public facilities and environmental quality were being reflected in government policy and legislation.
So while the demands on the s.94 system have multiplied and its total value and significance as a program for communities has grown beyond anything initially anticipated, its structure and administration continue to reflect a minor scheme *to address inadequacies in capital facilities for new urban areas and the timing of their provision* (G Kibble, 1991).

The major weaknesses that have emerged with the s.94 system can be summarised as that it is potentially open-ended and it lacks sufficient checks and balances, hence it is liable to abuse. These are not unresolvable problems in themselves. However, the over-reliance on s.94 to fund infrastructure in general, and growing standards of facilities and services, has to be addressed from other policy perspectives than the s.94 system.

TERMS OF REFERENCE

TR1. Section 94 Review and 2000 Report

UDIA made a major contribution to the review process leading to the 2000 report, through UDIA members who were actively involved, the collection of information, and submissions made by UDIA at various stages. The White Paper that was finally released in 2000 was substantially true to the review and received UDIA's overall support, notwithstanding that some of UDIA's preferred original proposals were modified in the final recommendations. The 2000 report continues to be a very useful document and its recommendations overall are still supported, subject to any necessary updating.

The most critical concerns are the legal capacity to appeal solely on a s.94 condition of a development consent without the remainder of the consent being brought under review (quarantining); and regulation of standard practices as in the manual.

ISSUE	***GOAL***	***STRATEGY***
Recommendations of 2000 White Paper	Soundly-based reforms developed with wide stakeholder participation	Proceed with recommendations of 2000 report, updated.

TR2. Policy Basis and Rationale for Section 94

Notwithstanding that the development industry has consistently criticised aspects of the s.94 system and administration, the view is that the unfinished process of reform initiated with the UDIA's report 'Review of s94 of the EP&A Act and Infrastructure Financing' ('The Green Book'), April 1997, which was presented to Minister Craig Knowles in July 1997, should be maintained. The major investment in this system by the State Government, councils and not least of all, developers and consumers, can and should be made to work effectively and serve efficiently the purposes for which it was intended.

In this sense, the policy basis and rationale for s.94, as a mechanism to meet needs 'at the local level', remain valid.

ISSUE	*GOAL*	*STRATEGY*
Current relevance of policy basis and rationale for s.94	A well-grounded system for planning and providing local infrastructure required as a consequence of development.	Retain as a system but reduce over-reliance on a single system of s.94, and reform processes and accountabilities to ensure acceptable administration and outcomes.

TR3. Data Collection and Analysis

UDIA has previously expressed concern at the paucity of readily available data that would allow informed analysis and assessment of s.94 as a fair, efficient and effective system for levying development to finance essential local infrastructure required as a consequence of the development. We have also highlighted that not only s.94 charges have grown to be a significant revenue source for councils and a major cost on development and affordability in NSW, but are supplemented by a widening and increasing array of charges by authorities in association with development processes. Councils are the principal collectors of planning and development-related fees, but some state and regional monopoly and regulatory bodies and service providers also obtain significant income from the planning and development approval system.

As noted above, s.94 has proved to be open-ended when combined with an attitude prevalent amongst authorities with a legitimate or defacto role in the process that regards development as a cash-cow that it would be foolish not to exploit. A complete audit of all such costs on development would have to take account of demands for land and other in-kind donations, as well as a raft of fees and charges which vary greatly from one council and one regional authority to another, even for the same 'service' or item. Negotiations play a major part in the final agreed cost or value where non-standardised requirements arise and this draws suspicion of corruption when not entirely open.

ISSUE	*GOAL*	*STRATEGY*
S.94 plans increasingly important mechanism for financing local government but beyond s.94 intention; failure to show reasonableness and equity - large pool of underutilised $ + other resources =	Ensure s.94 plans are used strictly for intended purpose, meet legal principles and sound investment and financial management standards.	Purpose and legal principles clearly spelt out and ensured through regulations and manual establishing government policy for scope and limits of s.94, and acceptable practice (see 2000 review). Skills building, monitoring, performance-linked measures to ensure accountability, efficiency, compliance.

low efficiency and equity.		
ISSUE	***GOAL***	***STRATEGY***
Various and varied (many vague & untraceable) fees associated with DA processes add costs. Non-transparent negotiations on fees, in-kind works and contributions.	Full schedule of fees known beforehand, accountable fee-setting process and review. Transparent negotiations.	Fees and fee-setting processes for obligatory, monopoly procedures to comply with standards and formulas of IPaRT/ DIPNR. Councils required to consult users and provide complete fee advice for a DA at lodgement. Legitimise negotiated outcomes but establish clear bounds and open processes.

TR4. Data Analysis - Impacts and Affordability of Section 94 Charges

For the purpose of making a broad assessment of the reasonableness or otherwise of contributions and councils' performance in delivering on s.94 plans, data will need to be an aggregation that disregards locality, type of development, timing and other specific factors.

The value of such an exercise will therefore be limited and inevitably questioned by councils and others receiving the funds. There is already available data (submitted by UDIA in November and further updatable from the Department of Local Government) demonstrating that in total, councils in the Sydney Region alone currently hold close to $1 billion in s.94 funds, excluding the value of some unutilised land dedications and works-in-kind. The size of funds held and the growth in value of funds collected in recent years is a clear indication of increasing value of s.94 plans, which is significantly impacting on costs and affordability for both homebuyers and businesses.

The estimation by the Taskforce of the overall effect and affordability of fees, charges and other impositions, should aim for approximation rather than precision. The value of land dedications and works-in-kind are primarily of interest where these are in excess of what is required to directly service the subject development.

ISSUE	***GOAL***	***STRATEGY***
Taskforce to assess s.94 performance and outcomes, quantify value.	An understanding of the size, scope and impact of s.94 and its management by councils.	Seek a broad understanding of fees, scope of s.94 plans and the range of performance by councils. Identify better practice and skills for further reference.

PlanFIRST Levy

UDIA did not support the PlanFIRST levy when it was introduced but subsequently accepted that is could be retained for a limited period provided the funds were quickly applied to directly and substantially improve the utility of the system for users. UDIA advocated an injection of funds to the iPlan system, targeted to areas of high levels of

development activity and change. Strategic plan preparation in these areas was also a priority for funding. However, the industry has always stressed the need for a published program and outcomes by set dates, with the industry involved in setting priorities and monitoring progress. Unfortunately neither the decision process nor any programs or allocations of funds – such as they may be - appear to be open to any involvement or scrutiny outside the department.

UDIA now believes that the lack of transparency and accountability throughout this exercise which has accumulated substantial funds through superlevies on applicants, warrants its immediate termination. The funds already accumulated must be subject to open consultation with the industry to determine an appropriate expenditures program.

ISSUE	***GOAL***	***STRATEGY***
PlanFIRST levy is an additional cost on applicants which has collected substantial funds without a clear plan or accountability	Remove unjustified levies such as PlanFIRST and make the best use of funds already collected	A termination date for the levy to be set – no more than six months. Consult with industry to decide best use of collected funds, set targets, monitor results.

Accumulation of Section 94 funds

A major concern is in the existing data which shows that councils have been rapidly accumulating funds such that the majority of councils are annually collecting increasing amounts but spending less, with the surpluses accumulating year-by-year. Hence the most immediate issue has to be why this is occurring and how this trend can be quickly reversed. It is critical that contributions and dedications received by councils for a nominated purpose are applied in a timely way that maximises their economic and social value to the intended users (payers).

As not every council is reporting this trend, the first place to find answers to these questions would be with that small percentage of councils who are not accumulating funds. Other responses to the problem are listed below

ISSUE	***GOAL***	***STRATEGY***
S.94 funds being accumulated by councils	Timely expenditure of s.94 funds to maximise value. Effective overall financial planning and outcomes. Optimum timing of land acquisition & facilities provision.	Model those councils with efficient financial management and outcomes. Improve financial planning skills and oversight for less efficient councils. Amend legislation to support inter-fund and forward borrowing on development programs. Promote use by councils of targeted borrowings coupled with special rates to ensure efficient use of s.94 funds to deliver services.

TR5. Alternatives for Funding Local Infrastructure

Development Contexts and Options

If the s.94 system is to be retained – and there is significant and justifiable support to do so – it must be more defined, accountable, and efficient than the overall evidence demonstrates, notwithstanding a minority of better examples. Achieving a substantially better system is likely to require legislative, regulatory and administrative reform. Other financing options for the adequate and timely provision of public infrastructure for urban localities and regions are essential, with a clearer and more responsive s.94 system playing a *part* role in the overall financing regime for local and regional infrastructure in the future. A proposed regime is discussed below with reference to the four main sets of circumstances in which development occurs: new greenfield development; major urban renewal; urban infill; and non-urban.

New Greenfield Urban Development

For large-scale new urban development in greenfield situations, there will normally be a detailed planning process for the zoning including an assessment of the infrastructure needs the development will generate. This allows co-ordination of development with infrastructure provision. Adequate and timely financing for the new/augmented public infrastructure identified in the plan, is a key feature in a contemporary urban development program.

Broad-scale development programs provide the optimum circumstances for infrastructure needs assessment and provision as envisaged by s.94 of the EP&A Act: there is the capacity to establish simple nexus between the development as the source of new demand and the public facilities and services required to meet that demand; s.94 contributions plans can establish the program for public infrastructure provision co-ordinated with development and population growth, set out costings and identify and commit funding sources and expenditure programs; and plans can and should have inbuilt flexibility to respond to changing needs and circumstances over an extended development program and beyond.

Section 94 contributions planning can be a transparent and secure means of planning, financing and scheduling the provision of the new public infrastructure required solely to meet the needs of identified new development i.e. new limited-area infrastructure. It can also be effectively used where there is a clear nexus between a major new development and public infrastructure requiring significant upgrading and investment to meet the needs of that development.

Section 94 offers a comparatively reliable mechanism for planning and providing infrastructure needs created by large-scale development. It is still likely however, that proposed large-scale development adjoining an existing urban area will be expected to draw on existing infrastructure provided in the past by and for the existing population. Where such infrastructure is deemed to need additional capital investment to meet the new demand, councils will seek to have this investment paid for from new development. But to satisfy proper standards of nexus and fair apportionment of costs and benefits across all beneficiaries, becomes more difficult as such facilities are more broadly-based. However this does not mean that the effort should be abandoned in favour of a

simplistic flat levy on new development. For broad-based infrastructure, the most efficient and equitable distribution of costs is through general taxes, or rates applied to the defined benefit area.

However, a simplified and somewhat standardised approach may be reasonable but it should still be based on a sound assessment of need, present capacity and standards, be for a planning purpose, and apply the established principles of nexus, reasonableness and fair apportionment.

Optional Developer Enhancements

In other situations, the development applicant may wish to provide certain infrastructure additional to, at a higher standard than present, or in advance of the normal program, for reasons related to the development. It should be possible for the applicant to choose to provide such infrastructure and if the authority agrees, it would then become the subject of a binding agreement. This should not affect or be affected by s.94, but would have to meet certain transparency and accountability standards.

The development industry has supported the concept of formal provision for developer agreements, subject to this being the outcome of full consultation with the industry so as to ensure that any new mechanism does not become another onerous requirement, without certainty, predictability or the benefits of free and equal agreements. It seems likely that such agreements will mainly have value for large and multi-staged developments.

Major Redevelopment and Renewal of Urban Areas

For a large-scale renewal or surplus land development project, the forward assessment, planning and programming of development and related infrastructure needs is similar to new greenfield development and will generally provide an appropriate opportunity for s.94 planning and other agreements, as discussed above.

Urban Infill and Gradual Renewal

In circumstances where urban development is on a smaller scale or is piecemeal and increased demand (if any) as a consequence cannot be forecast with any reliability – a challenge possibly exacerbated by changing local and regional demographics and patterns of occupancy, settlement and land use, amenities, service needs, etc – s.94 planning is not an effective, equitable or efficient infrastructure planning and financing tool. However, there is an assumption in the community that changes in demand for public facilities and services will somehow be responded to with investment in new or restructured public facilities.

Efficient and appropriate provision of facilities and services to a population can only occur with regular regional and local assessment of changing patterns of demand. What development is occurring or is likely to occur is only one determinant, and where an overall net increase or change in demand is minor, this should be incorporated in general servicing plans for the area, regularly reviewed and revised and including financing plans.

Flat Levy
A threshold levy concept as a variation on s.94 with simplified processes, could have merit in certain limited situations. However, there would need to be a minimal basis for arriving at the figure for a flat contribution that relates to the provision of local facilities in any locality. How geographically or functionally extensive a single levy plan and $ amount could reasonably apply to, is another question that is difficult to answer without reference to specific circumstances. In any event, the minimum basis for determining the amount and establishing broad nexus and accountability, would be a plan for the contribution catchment that identifies the standards applying, and the proposed works and enhancements to meet future estimated demand, including timing.

A Buy-in Fee
For existing or planned broad-based infrastructure, the entry of new users poses both a threat and an opportunity. The threat could be from additional demand diluting the standard of service below an acceptable level; but an opportunity can also be found in increased usage where capital costs are spread across more users to achieve lower fixed costs per capita. Contributions obtained from additional users - where their demands can be accommodated without the need for significant additional capital investment - can support service standards, or contribute to a reinvestment fund, provided it is used within a reasonable period such as three to five years. However, care must be taken to ensure that double-dipping does not occur through contributors also being subject to recurrent charges from which capital investment is made for the same facilities.

A reasonably fair system where there is a gradual and/or dispersed inflow of new users for established public facilities serving a wide area or population, could be for additional incoming users generated by new development to be charged a ‘buy-in’ fee.

The concept of a fixed ‘buy-in’ fee where the nexus and the amount of the fee are more broad than specific, but which still shares most of the fundamentals of a s.94 plan could still satisfy principles of fairness and be made subject to a more rigorous accountability. The present s.94 system is often perceived to create obligations only between the authority and the developers or new residents, and not the existing community. However, the existing community has a very direct interest in seeing that the plan is implemented and service standards are maintained as promised.

A ‘buy-in’ fee could make the reality of the authority’s accountability to the wider community more apparent, by prominent identification in the authority’s regular reports of fees received, their source and their purpose, together with accounting of expenditure against plans and results. That is, a ‘buy-in’ system would *mainstream* at least this category of development contributions and associated servicing plans, in contrast to the present obscurity that characterizes most reporting on s.94 funds and results.

Non-urban and Regional Areas
Outside urban centres and regions, major development proposals can arise unexpectedly. The likely impact on public facilities and services – existing and newly-demanded - may be significant, and may also flow over into adjoining local areas. Often the local community wants the economic benefits of the development but cannot meet its

fair share of the costs of new or upgraded infrastructure needed to service the development. And an adjoining area cannot be compensated other than through an approved agreement between the two local authorities.

This situation does not have any simple answer. Where the development has the capacity to fund the infrastructure that it generates a demand for or impacts upon, a limited s.94 plan could be prepared quickly and levies applied as a condition of development consent. However, the many circumstances that may arise can be difficult to predict and devise a prepared policy in advance, and there may be no ready solution where there is a deficiency in the required funding from all potential sources. In these cases, the development either proceeds with inadequate infrastructure to service it, proceeds only at the rate that infrastructure can be financed, or does not proceed.

An alternative not often enough considered, is to rethink the servicing needs of the development or seek out ways to reduce current and potential demands on public infrastructure. For example, by adjusting current patterns of service provision and usage, measures and policies to attract and retain private or non-government providers alone or in association with the public provider, or encouraging more direct developer provision of facilities on-site.

Recommendations – see below under 6.

TR6. Models and Mechanisms - Financing Local Infrastructure for Development

1. In areas of major new development such as greenfield or large-scale urban renewal, s.94 planning offers an efficient and equitable mechanism for planning and providing immediate local infrastructure required to service the development. Acceptable standards and range of local infrastructure should be established for all major new urban development for metropolitan and for regional areas with s.94 plans permitted only to provide up to but not beyond the prescribed standard and range.
2. A s.94 plan for a major development or renewal could tailor the mix of facilities and service levels for a specific development or locality, provided the result is within the overall prescribed standard and range.
3. Where an applicant for major or staged development chooses to provide additional facilities or contribute to raising the standard of service provided by public facilities, the EP&A Act should allow for formalization of agreements between the proponent and relevant authority. Such agreements should be transparent and voluntary, and spell out the obligations on all parties.
4. In established areas and where development is occurring by irregular increments across the area, there will be local public services already provided to which additional incoming population may add demand. At any time, there may or may not be capacity to accommodate that demand without further capital investment. A 'buy-in' fee set at a basic level but derived from a simplified s.94 planning process, could be applied to the incoming population through the development consent process. This would allow infrastructure to be augmented as required. Provisos are that the expenditure program should

be relatively short-term, and checks to guard against the possibility of double-dipping are followed.

5. Good infrastructure planning, provision and financing require there be more than one mechanism to apply in a range of circumstances. In many situations, a combination of the mechanisms above will be most appropriate and should be possible, within certain pre-determined limits.

TR7. Accountability

The current Manual or Guidelines were essentially sound but are in need of revision and tightening up, as well as more guidance on certain aspects of s.94 planning and administration. Some of this could be provided by reference to other technical support documents, and it should be accompanied by intensive training courses, for example, on accounting and financial management. However, the main problem of the manual was not within, but the fact that it could be ignored or selectively applied by councils, and was not automatically taken into account by the Courts.

Another important issue of accountability is that where the application of a s.94 plan is overturned by a court, there is no obligation on the council to even review, let alone revise the plan. There should be a mechanism whereby councils are required to review and revise their plans in these instances, and all councils are advised to have regard to the decision. Where the practice is contrary to the manual (or higher authority), which means it is not in accordance with state policy, then DIPNR should act to ensure that all councils comply with the manual, or else amend the manual.

ISSUE	***GOAL***	***STRATEGY***
Inconsistent and often poor administration of s.94, despite existence of the Manual	A mechanism to ensure good, consistent practice, accountable through the Courts	Review and revise manual, expand to include additional information, and then raise status to regulation or similar. Provide specialised skills training.

TR8. Role of Section 94

The present problems of an over-stretched s.94 system have arisen in large part from two trends in the last few decades – rate pegging, and governments' determined pursuit of debt-free status. Both of these policy directions have outlived their relevance and value to the societies whose needs governments are committed to serve. The concurrent review of local government finances is awaited but it will hopefully recommend a review of both policies.

In regard to the larger question of how infrastructure should be financed, UDIA supports the findings of the report by Applied Economics, that there are different mechanisms appropriate to different circumstances and types of infrastructure, but for large-scale infrastructure and that which serves wider needs (i.e. beyond what is required to meet

the immediate, direct needs of new communities where s94 has a legitimate role), public debt financing is the most efficient and equitable mechanism. There is also more scope for applying user charges to specific facilities.

There is also the option, in certain limited circumstances, of a 'buy-in' fee, as discussed above. In some circumstances the most effective response will be a single mechanism, for others the best results will be achieved by combining and balancing several mechanisms.

ISSUE	***GOAL***	***STRATEGY***
Role of s.94 and other mechanisms for financing local infrastructure	A fair, affordable and effective suite of mechanisms to fund local infrastructure to meet contemporary and future needs	S.94 recognised as having a defined but limited role in meeting the direct needs of new development; debt financing paid for from broad-based taxes and rates for broad-based infrastructure; other options such as Developer agreements and buy-in fees as additional options available under appropriate or prescribed circumstances.

Conclusion: The Case for Change – How Wide, How Deep?

The 2000 White Paper provided a number of valid solutions which are still awaiting implementation. The Terms of Reference for this Review raise those same issues plus highlight some more recent issues and concepts. There is obviously a need for a wide-ranging review of contemporary government policy on financing infrastructure and the judicious application of government debt. It is understood that the NSW Government is undertaking this at some level, it should be recognised that s.94 is a mechanism with limited purpose and limited application. Those limits have been exceeded and the system is showing severe signs of stress - the weaknesses that were present from the start now urgently need addressing. There is a need for improved clarity, flexibility and administration. Fundamentally however, s.94 has to be returned to its appropriate and intended context and scope, with its purpose and principles retained and reinforced. At the forefront of the current review has to be an awareness that today the sums involved in s.94 are substantial and so claims from development must be balanced by substantial justification and accountability.

At the same time, alternatives to s.94 both old and new, must be brought to bear on the challenge of providing infrastructure and services to meet the contemporary needs of urban and regional areas. These include debt financing and repayment through broad-based taxes or rates for broad-scale infrastructure, special agreements for large or staged developments as an option for developers, 'buy-in' levies in specified, limited circumstances, and increased use of user charges.

UDIA commends the work of the Taskforce and the contribution this will make to policy development, knowledge and understanding of the challenges of financing infrastructure, and specifically local infrastructure and the application of the s.94 system. Section 94 is not sufficiently broken to warrant its abandonment or even a major restructure. The work that went into the 2000 recommendations provide a sound basis for revising s.94 and instituting better practice. The Taskforce can take this opportunity to take those recommendations further and promote wider policy consideration.