Challenging quantum of development contributions

Simon Fraser
COLIN BIGGERS & PAISLEY

The *Environmental Planning and Assessment Act 1979* (NSW) **(EPA Act)** empowers local councils or other consent authorities to grant development consent subject to a condition requiring the owner/developer to dedicate land to council and/or make a monetary contribution.

This contribution in cash and/or kind mitigates the costs incurred by council in providing or improving public amenities or infrastructure to service the increased population on the land for which the development is planned.

Rationale

The rationale underlying consent authorities having the power to impose a contribution as a condition of development consent is that if a development attracts a higher population on the land (be it comprised of residents, day workers or mere visitors), this will give rise to a need for the authority to provide new or expanded public amenities, services or infrastructure (such as roads, green space and drainage facilities). It is reasonable to expect the owner/developer who derives financial benefit from the development of the land to contribute to the costs of the infrastructure.

Legislative framework

Sections 94 and 94A are the key provisions in the EPA Act relating to development contributions. Section 94 "contribution towards provision or improvement of amenities or services" is the provision which empowers consent authorities to require development contributions as a consent condition. An authority's power to require development contributions and determine the amount payable is tempered by a standard of reasonableness.

Section 94A "fixed development consent levies" allows consent authorities to impose the payment of a percentage of the proposed cost of the development provided they have the Minister's consent to do so. When the consent authority determines whether the developer is liable to pay contributions and what the quantum of contributions will be, it prepares and approves a "contributions plan" for the purpose of imposing the contributions obligation.

Contributions plans

Developers may wish to influence the public amenities to which they be contributing and how much they will need to contribute. In contrast to having a consent authority unilaterally imposing a liability to pay contributions on developers, sections 93F to 93L of the EPA Act provide a mechanism by which developers and consent authorities may voluntarily agree upon a contributions plan, called a "planning agreement". A developer may negotiate with an authority to include a term in a planning agreement excluding the application of sections 94 and 94A from the development. A dispute resolution mechanism must be specified in the agreement. The developer will be required to provide a bond or guarantee to assure the council that it will not breach the agreement.

Challenging assessed contributions

Developers, often under pressure from landowners to maximise returns where the developer is not the owner, aim to minimise the costs of a development. Negotiating the terms of a voluntary planning agreement is one way of ensuring that an arrangement more palatable to the developer - one which considers the developer's financial constraints, for example - is brought about. However, if an amount of contributions is assessed as payable under a contributions plan or if an amount assessed under a planning agreement appears to be in error, legal advice should be sought. If the consent authority can be convinced that its assessment is in error or excessive, it may agree to reduce the assessment accordingly. Otherwise, an application can be made to the Land and Environment Court to challenge the assessment.

Broadly speaking, there are two grounds upon which an assessment may be challenged. First, council's assessment of the developer having a liability under the instrument may be attacked. If a contributions plan is less than three months old and can be shown to be unreasonable it will be declared invalid and will absolve the developer of any liability under it. Secondly, council's assessment of the quantum of the contributions may be attacked. There is a plethora of ways in which to do this, such as claiming a credit for a past assessment of the contributions liability of a past owner of the land. Two recent challenges to council's assessment of contributions payable are discussed below.

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Meriton Apartments Case

The decision in *Meriton Apartments Pty Limited v Council of the City of Sydney* [2009] NSWLEC 1336 was handed down by Senior Commissioner Tim Moore on 9 October 2009. The developer (Meriton) appealed against a $5,018,529.47 contributions liability imposed upon it under the *City of Sydney Development Contributions Plan 2006* in respect of a proposed apartment block development in Zetland. The liability represented the amount of contributions required for an increased population at the site from zero (the site was vacant at the time of the development application) to the expected post-development population. Meriton argued that due to the site having a peak population of 229 workers in 1965 it should be entitled to a credit for the development contributions that would have been payable in respect of such a population. The rationale underlying this submission was that it would be inequitable for Meriton to have to pay contributions representing the increase from a zero population if the site had had a substantial population in the recent past (for which the council would presumably have had to provide amenities which may well have subsisted as at the date of the development application).

The Senior Commissioner ruled that Meriton was indeed entitled to a credit but reduced it by a fraction of 27 over 45, representing the 27 years in the 45 year period from 1965 to the date of the development application during which the site was under public ownership and therefore non-ratable. Although short of the reduction of $467,462.28 Meriton was seeking, the liability was reduced by $186,984.91.

Valhalla Village case

In *Valhalla Village Pty Limited v Wyong Shire Council* [2009] NSWLEC 1355 a contributions liability was imposed upon a developer (Valhalla) in respect of 42 sites in its 424 site caravan park in Chain Valley Bay. The developer claimed it was entitled to a credit on the ground that the contributions liability of a former owner of the site (then bearing 300 sites) had already been assessed under a contributions plan in place at the time. That former owner developed all but 42 of the sites on the land and was assessed as not having a liability under the contributions plan. It was submitted that given the former owner's lack of liability for the 42 sites it would be unreasonable to impose a liability on Valhalla for those sites. Commissioner Robert Hussey rejected the submission. The Commissioner held that the extension of the caravan park from 300 sites to 424 constituted a change of circumstances justifying a new assessment of contributions liability. It was explained that one may reasonably expect that the extension may require amenities to be provided for all of the new development, including the development of the 42 sites previously assessed.

Although the developer was unsuccessful in this case, it was accepted that if there had not been any change in circumstances from the original assessment to the present one, a credit would have been available to the developer. Therefore, depending upon individual circumstances, the case might work in a developer's favour.

Conclusion

Where owners/developers are not already bound by a contributions plan or planning agreement but are facing the prospect of being bound by one, they should seek to negotiate the terms with council to achieve a known and acceptable outcome. Where an existing plan or agreement is applicable, developers should consider with care whether council's assessment of the amount of contributions allegedly payable under it is properly justified. Courts not infrequently overturn or reduce assessments by council of contribution liabilities.