27 October 2004

Ms Alice Spizzo
Executive Director
Office of the Director General
Department of Infrastructure, Planning and Natural Resources
GPO Box 3927
SYDNEY NSW 2001

Dear Ms Spizzo

Section 94 Submission

Thank you for the opportunity to provide comment on the exposure draft of the Environmental Planning and Assessment Amendment (Development Contributions) Bill 2004.

The Property Council supports the thrust of the proposed legislation and congratulates the Government on introducing significant reforms in relation to planning agreements and fixed development levies.

This submission responds to certain draft provisions contained in the exposure Bill and makes recommendations in light of issues raised. The main recommendations in our submission include:

- the imperative for the Act to set the maximum percentage to be applied to fixed levies
- fixed levies should be set at a maximum of 1% of construction cost
- developer agreements should be limited to capital costs of public infrastructure provision, not ongoing recurrent expenditure
- the provision for appeal by a developer against an authority where a rezoning is held up because of the developer's reluctance to enter into a development agreement. Such an appeal could be heard by an independent panel or appointed arbiter
- the requirement for accountability in relation to the collection and expenditure of fixed levies and developer agreements by a consent authority or Minister
- the exhibition of a developer agreement only after it has been adopted by the developer and the authority.

Our specific comments in relation to these matters are identified below.

Borrowing between accounts-Section 93E(2)

Under section 93E(2) contributions collected for a particular purpose under a section 94 contribution plan may be expended on any other purpose subject of a contribution plan or ministerial direction.
While the Property Council supports the introduction of flexibility to enable borrowing between section 94 accounts it is recommended that the regulations be amended to ensure that contribution plans provide information in relation to:

- circumstances and facilities for which cross borrowing will occur, and
- when the actual public facility for which the contribution was raised will be provided taking into account the anticipated lot production and or development rates.

It is recommended that the section 94 manual be amended to stipulate that the total money spent on a particular facility through borrowing must not exceed the estimated cost of provision of that facility as identified in the contribution plan.

It is also recommended that councils be required to provide accounting and administrative details on amounts borrowed between accounts on a quarterly basis to the Department of local government or the Department of infrastructure planning and natural resources.

Planning Agreements

*Works in kind-Section 93F(c)*

Section 93F (c) identifies the circumstances in which planning agreements would be applied including the dedication of land free of cost, payment of a developer contribution, or to provide any other materials public benefit or any combination of both.

The clause does not however include ‘works in kind’ which we consider to be a critical element of many agreements.

It is recommended that ‘work in kind’ be included in the clause.

*Funding of recurrent expenditure-Section 93(2)(d)*

Section 93(2)(d) states that a public purpose also includes (without limitation) the funding of recurrent expenditure relating to the provision of public amenities or public services, affordable housing or transport or other infrastructure.

We believe that this will introduce a number of significant problems for the industry because of the:

- unlimited timeframe applying to the potential liability or involvement of a developer,
- unknown cost of recurrent expenditure on items such as affordable housing or water quality controls,
- infinite scope of items for which recurrent expenditure may be sought and provides the opportunity to shift liability,
- developer’s liability to meet ongoing costs even when the subject development has been finalised and lots/units are sold,
- developer’s responsibility for the management of land well beyond what could be regarded as a fair or reasonable commitment,
- lack of information on mechanisms to collect ongoing contributions, and
- lack of recognition for the need to apportion costs to take into account future beneficiaries.

We believe that this clause will make the developer liable for costs above and beyond impacts generated by the development.
Monitoring of impacts

Clause 93 (2) (e) provides that a public purpose includes the monitoring of the planning impacts of development. We do not think this is necessary as this requirement could be dealt with through the imposition of a condition of consent.

Exclusion/inclusion of Section 94

In the case of development clause 93F (3) (d) provides that a planning agreement must provide whether the agreement excludes or includes the application of section 94 or 94A.

We suggest the clause be amended to provide that where a public facility has been identified in a contribution plan and contribution rates have been calculated to take into account costs, nexus and apportionment, the same facility should not be also required to be provided under a developer agreement.

The only exception would be if the contribution plan and rates were adjusted to take into account the proportion of cost attributable to an agreement. However, we envisage that it would be difficult to ascertain in advance of an agreement being entered into the proportionate costs which could be attributable to it.

Bonds or guarantees – Section 93F (3)(f)

Under section 93F (3)(f) a planning agreement must provide for the enforcement of the agreement by a suitable means, such as the provision of a bond or guarantee in the event of a breach of the agreement by the developer.

We believe that the requirement for a bond or guarantee should only be applied when the construction certificate for the development is issued or linen plan released.

To require a bond or guarantee in advance of a development is unreasonable given that a rezoning or development application process may actually take years to finalise in which case the developer would be unnecessarily forced to tie up funds and meet associated bank charges.

Third party entitlement – Section 93F(6)

Under section 93 F (6) any other Minister or a public authority, or a person approved by the Minister ‘is entitled’ to be a party to a planning agreement and to receive benefit under the agreement on behalf of the State.

We recommend that the wording of this clause be amended to say ‘may be party’ to the agreement as the intention of the agreement is that it be voluntary between the developer and the authority.

The use of the word ‘entitled’ pollutes the voluntary intent of planning agreements by potentially giving a third party rights to which they should not be automatically entitled.

Appeals–Section 93F(10)

The provision under section 93 F(10) under which a person cannot appeal to the Court against the failure of a planning authority to enter into a planning agreement or against the terms of a planning agreement should also be applied to the developer.

There is concern that authorities will be reluctant to support a rezoning unless a developer is prepared to enter into an agreement.
While there is strong provision to ensure a planning agreement is voluntary when associated with a development application (option of appeal through the court) this will not work in practice with a rezoning application.

There is no mechanism for a developer to challenge the refusal of a consent authority to resolve to place a draft plan for a rezoning on exhibition.

One option would be for the developer to bring the issue to the attention of an independent panel or court appointed arbiter to ensure a just hearing.

**Public exhibition –Section 93G(1)**

As planning agreements are contractually binding agreements which are voluntarily entered into between the developer and the consent authority it seems counter productive to require public exhibition before a planning agreement is entered into, amended or revoked (Section 93G).

While we agree that transparency and accountability are serious issues which need to be ensured, we believe this can be achieved by the exhibition of an agreement after it has been formalised.

Public exhibition prior to the adoption of a planning agreement will only raise expectations about community input and the weight to be given to issues raised. If a consent authority intends to include items in an agreement which the community considers important, then these should be identified through a separate consultation process.

**Registration-Section 93H**

We recommend that developer agreements and the associated development to which they relate must be identified in section 149 certificates to ensure that prospective purchasers are aware of any liabilities they may be inheriting.

**Fixed Levies**

**Maximum percentage--Section 94A(5)(b)**

The Property Council supports the introduction of fixed development consent levies as an alternative means to raise contributions subject to a number of critical qualifications.

Under section 94(5)(a) the regulations ‘may’ make provision for or with respect to the maximum percentage of a levy.

We believe that it is imperative that the Act set the maximum percentage of a levy which could be applied by a council. In its current form, this levy has the potential to be a major new tax on development. It is entirely appropriate for the maximum amount of the levy to be set by Parliament through the Act, not through regulations or the council’s contribution plan. Failure to do so will result in:

• the imposition of levies which will be unaffordable and unsustainable and will impact on development activity
• uncertainty amongst developers as levies will vary widely between councils.

We therefore strongly recommend that the maximum percentage be set out in the Act.

The Section 94 Taskforce skirted around the issue of setting a maximum percentage levy in its deliberations over the introduction of the fixed levy despite the concerns raised by the industry.
The industry accepts that the fixed levy is not a new tax but a ‘hassle free’ alternative for low growth areas. Our members agree that a levy based on 1% of construction cost equates roughly with current section 94 costs applied in these areas.

Furthermore the precedent for applying 1% has been tried and proven to be successful in the City of Sydney where the percentage is enshrined in the City of Sydney Act. Rightly, any amendments to the levy bears the scrutiny of the Parliament.

The introduction of a maximum percentage levy of 1% of construction costs across the entire state will enable the repeal of section 61 of the City of Sydney Act and allow a consistent approach to be applied across NSW.

Unless the maximum percentage is fixed there is potential for councils to apply levies far and above what could be considered reasonable. For instance there would be nothing stopping a council imposing a levy of 20% of construction cost and no opportunity for a developer to challenge such a decision.

The imposition of a levy above 1% is also not justified given the absence of the requirement to demonstrate a nexus between the need for additional facilities as a result of development. Basically the levy can be used by a council to upgrade and augment facilities totally unrelated to a development for which the levy has been applied.

We are concerned that the unconstrained ability of a council to impose a levy will exacerbate housing affordability in an already strained sector.

We therefore strongly recommend that the maximum percentage be fixed at 1% of the cost of construction. Any amendment of the fixed rate should undergo the scrutiny of the Parliament.

**Section 61 levy under the City of Sydney Act**

Provision needs to be made to ensure that development in the City of Sydney is not levied twice under both these fixed levy provisions as well as the City of Sydney Act provision.

**Estimation of cost-Clause 94A(5) (a)**

Clause 95(5)(a) provides that the regulation ‘may’ make provision with respect to the means by which the proposed cost of a development is to be estimated or determined. We recommend that the regulations be amended to provide clear guidance as to the means by which the proposed cost will be estimated.

It should specify exactly what will be included as well as what types of development will trigger the payment of the levy.

We consider it would be inappropriate for example for a levy to apply to a fit out or refurbishment which would not in any way increase the total floor area of a building.

**Contribution plans-Section 94A(3) and (4)**

Under section 94A(3) the application of money collected under fixed levies are to be subject to any relevant provisions of the contribution plan.

A key element of a contribution plan is the demonstration of nexus between new development and the public facility for which the levy is being applied.
Yet in the case of fixed levies there is no requirement to demonstrate nexus. This is made clear under clause 94A(4) which provides that a condition to impose a fixed levy is not invalid even where there is no connection between the development the subject of the consent and the object of expenditure.

Given the differential treatment to be accorded to the expenditure of fixed levies it is recommended that the regulations specify exactly what information should be provided in a contribution plan to ensure at the very least that consent authorities collect, manage and spend money collected through the application of fixed levies in a transparent and accountable manner.

**Court appeals—Section 94B(3)**

It is noted that a condition requiring fixed levies may not be disallowed or amended by the Court on appeal if it is unreasonable. This is in contrast to conditions imposed under section 94 that is in accordance with a contribution plan.

Given the lack of appeal mechanism applying to fixed levies it recommended that the regulations be amended to ensure that levies are imposed under strict scrutiny with respect to:

- the maximum percentage to be imposed
- reasonableness of the levy
- expenditure of money collected and timeframes
- types of development for which a levy can be imposed
- definition of costs of development and items to be included in estimating cost
- verification of costs
- disclosure of how money collected has been expended on a quarterly and annual basis in accordance with Councils normal reporting schedule.

**Conclusion**

The Property Council believes that the introduction of fixed levies and developer agreements will provide a more flexible approach to meeting the cost of infrastructure provision.

Our submission addresses a number of issues relating to the exposure bill, most important of which being the need to ensure that the Act prescribes the maximum percentage on fixed levies at 1% of the construction cost of a development.

We appreciate the ongoing consultation afforded to the industry on the issue of developer contributions. We would greatly appreciate an opportunity to meet with you in the near future to discuss the issues raised in our submission.

Yours sincerely

Ken Morrison
NSW Executive Director