31 January 2017

Director of Environment and Building Policy
Department of Planning and Environment NSW
GPO Box 39
Sydney NSW 2001

Dear Sir/Madam,

PIA SUBMISSION - VOLUNTARY PLANNING AGREEMENT CIRCULAR, NOTES AND DIRECTION

PIA supports the key aspects of the draft VPA package

The Planning Institute of Australia (PIA) welcomes the Department's exhibition of a revised Practice Note, Planning Circular and Ministerial Direction on Voluntary Planning Agreements (VPAs). PIA support the improved application of this tool for achieving a planning benefit and for funding identified infrastructure needs. The exhibition of the material strengthens the integrity of the planning system and addresses the perception that VPAs can be abused to buy increased development standards.

PIA is pleased that the draft material responds to the major issues expressed in our 2016 policy position paper and letter to the Minister for Planning. The improved transparency and best practice principles respond to our members concerns that VPAs neither be abused nor over overregulated.

PIA support the key elements of the policy package consistent with our position statement, and initial letter to yourself, including:

- adoption of best practice principles as a basis for a VPA acceptability test;
- more direct and transparent connection between the VPA and the achievement of agreed and published planning benefits by a council (or planning authority);
- the measurement and valuation of the potential planning benefit, including roles for an independent appraisal of an agreement;
- the need for council VPA policies to be linked to their strategic, infrastructure and asset planning mechanisms;
- clarity on the relationship of Clause 4.6 SILEP with the terms of a VPA;
- defining the boundaries between a VPA negotiated at the planning proposal stage versus development application stage; and
- higher standards of probity, fairness and transparency throughout the package.

PIA recommends revision of some aspects with the potential to distort planning outcomes

Section 2.3 (p14) 'Planning agreements and strategic infrastructure planning' introduces several additional considerations for Planning Authorities entering agreements (dots 1-5). PIA understand that the section is seeking to remove the opportunity for Councils to justify inclusions in an agreement exclusively on the basis that they are capturing the community’s share of unearned uplift from a change in development standards. We also understand that is seeking to avoid the perception that developers are allocated unjustifiably high or inappropriate costs to achieve a planning benefit. While, these points
reflect real concerns of the development industry, the phrasing could be inconsistent with the principles (Section 2.1) and objectives (Section 2.3) of VPAs that the interests of individuals not outweigh the public interest.

The planning profession should continue to acknowledge that Voluntary Planning Agreements are an established means for the community to capture their fair share of the uplift in land value resulting from a decision to change the standards for the development of a parcel of land\(^1\). The community are represented by their council who are guided to invest their share in funding or works for infrastructure or services related to the proposal which delivers the public planning benefit. The Practice Note specifies that these funds or works should not be arbitrary but be justified by a planning process and accepted by the council and fairly apportioned between the developer and the public.

The draft Practice Note also urges consideration of the developers ‘entitlement to profit’ from uplift resulting from rezoning and for maintaining development feasibility and capacity to pay (Section 2.3 in ‘Planning agreements for strategic infrastructure’). These considerations are an important reality in the property industry, but superfluous given that agreements are voluntary and that both parties are negotiating towards a mutually beneficial outcome that must achieve a result in the public interest. Making the Urban Feasibility Model available to councils would be a valuable alternative way of improving council’s appreciation of the impact of infrastructure costs on development feasibility.

The costs included in a VPA to fund justified infrastructure needs should not be obscured by a consideration of an entitlement for profit. The potential infrastructure costs should be predictable so that they can be used in early development feasibility calculations. A situation where anticipated VPA infrastructure costs are not included (on the expectation that they may be avoided) could impact feasibility analysis and inflate the initial purchase price for land. This would have flow-on effects distorting subsequent feasibility analysis.

PIA recommends alternative phrasing of several paragraphs in Section 2.3 of the draft Practice Note ‘Planning agreements for strategic infrastructure’ as outlined in Attachment A to this submission.

**Conclusion**

VPAs can be a fair and effective tool to deliver community benefits where they are based on accepted planning principles and a high standard of probity. PIA is pleased that its advocacy is reflected in the renewed Practice Notes and a Planning Circular that have been recently exhibited by the Department of Planning and Environment.

PIA recommends rephrasing of several considerations included in Section 2.3 to ensure the Practice Note contributes to VPAs achieving their balanced objectives in the public interest (refer Attachment A).

PIA also observes that meeting the considerations of the Practice Note would require some councils to improve their VPA policies to incorporate probity measures, better appreciate feasibility and to formally consult the community and adopt works or schemes intended to be included in VPAs. This may place demands on the resources of some less prepared councils. The Department should consider offering support and training to candidate councils as well as making tools such as the Urban Feasibility Model available.

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Should you wish to discuss our submission please contact John Brockhoff on john.brockhoff@planning.org.au or 0400 953 025.

Yours sincerely,

[Signature]

Jenny Rudolph
President, PIA NSW

ATTACHMENT A

Recommended Revision of Extract from DPE Draft VPA Practice Note: Section 2.3 ‘Planning agreements and strategic infrastructure’ (p14-15)

(Green for inclusion – Red struck out for deletion)

Planning agreements should not be used exclusively to explicitly capture windfall gain in connection with the making of planning decisions under the EP&A Act, in particular in relation to changes to planning instruments.

Planning authorities should be aware of the profit motivations and feasibility considerations driving development decisions as well as always have regard to a developer’s entitlement to a share of development profit, while continuing to ensure new development is appropriately serviced by infrastructure. Should a planning agreement result in a developer’s share of the profit dropping below a point where the development is no longer feasible, the development may not proceed and benefits would not be realised.

Planning authorities should ensure that:

- planning agreements are not used exclusively as a mechanism to capture windfall gain;
- planning agreements are evidence based and preferably independently peer reviewed and should be used as a mechanism to introduce agreed public benefit developed through appropriate processes of strategic planning and community consultation;
- a proposed development gives opportunity for public benefit and infrastructure, including affordable housing, to be delivered by development with regard to the fair apportionment of costs;
- the method of apportioning infrastructure costs is clearly set out, justified and predictable such that development costs can be taken into account in feasibility analysis ensures the developer an entitlement to profit that enables the development to proceed; and
- proper investigation and consideration of development feasibility and capacity to pay is carried out, preferably on an ‘open-book’ basis, if raised as an issue by the developer.

When seeking to implement strategic infrastructure planning through a planning agreement and when determining charges, planning authorities should allow for flexibility.
When considering opportunities to deliver agreed infrastructure objectives through planning agreements, consideration should be given to apportionment for different development types or in development circumstances, and include thresholds and exemptions.

If planning authorities seek to link planning agreements to planning incentives, density bonuses, planning tradeoffs or the like, details of the relevant scheme and its implementation should preferably be contained in an environmental planning instrument or development control plan. This is to avoid parallel, non-statutory and largely unregulated planning processes, which can undermine the proper functioning of the planning system established by the EP&A Act.

When considering a ‘bonus scheme’ planning authorities should carry out public consultation, consider the apportionment of funding, look at the feasibility impact and determine the need for the infrastructure. Such a scheme should also satisfy the fundamental principles and considerations for acceptability set out in Part 2 of this practice note.

Planning authorities should not use any bargaining power accruing to them by reason of their regulatory functions under the EP&A Act to force or attempt to force developers to enter into planning agreements providing for any windfall gain on the terms sought by the planning authority.

Planning authorities should consider all applications for planning proposals, development consents or modifications on their merits. The unwillingness of a developer to offer to enter into a planning agreement related to land value increase should not be a reason why a proposal is refused. Equally, a planning proposal that may have negative planning outcomes cannot be justified solely on the basis of an opportunity to enter into a planning agreement related to windfall gain.

It is not appropriate for a planning authority to prioritise site specific planning proposals on the basis they provide for opportunity to capture windfall gain, over undertaking precinct-, centre-, or LGA-wide strategic planning initiatives. Infrastructure and public benefit, including affordable housing, is likely to be planned and delivered in a more comprehensive way if linked to broad strategic planning exercises, rather than determining planning impacts and potential public benefits on a site-by-site basis. Other contributions mechanisms can also provide for a more efficient and reasonable distribution of the costs of infrastructure associated with growth, rather than focusing on individual large developments. These considerations are not inconsistent with the role of a council to assess site specific planning proposals on their planning merits.