



planning consultants

ATTACHMENT I

26 February 2013

The General Manager
Blacktown City Council
DX 8117
BLACKTOWN

Our File: SEP:130319
Director: John Boland
Contact: Megan Hardge 9806 7477

Attention: John Smith

Dear Sir

Re: Advice on Reserve Rationalisation

We thank you for your instructions of 14 February and confirm that Council seeks advice as to the appropriate method of:

- (a) Recouping money paid by Council from its Lands Projects Reserve Fund for the acquisition of Residential zoned land, which is proposed to be now rezoned Open Space and incorporated into Council's s94 Contribution Plan (Site 1a); and
- (b) Reimbursing the s94 Fund as a consequence of no longer using land (Site 1b) for the public purpose for which it was purchased.

Essentially, the question is whether or not the amount to be recouped under a proposed new s94 Contribution Plan or to be repaid into the s94 Fund can be calculated on the basis of current market value of the relevant parcels of land.

1 Summary of Advice

- 1.1 In our opinion, the approach proposed by Council is both legal and reasonable.

2 Discussion

- 2.1 As a general comment, substitution of works for which contributions have been required is permissible but must be authorised by amendments to a current contributions plan (see *Frevcourt Pty Limited v Wingecarribee Shire Council* [2005] NSWCA 107).
- 2.2 Section 94 of the *Environmental Planning and Assessment Act 1979* ("EP&A Act") specifies the basis upon which Council may seek to impose a monetary contribution on a developer for public amenities and services.
- 2.3 Pursuant to ss94(1) and 94(2) Council may seek to impose a condition of consent which requires a reasonable contribution towards the provision, extension or augmentation of public services and amenities.

Matthews Folbigg
Pty Limited
ACN 078 845 271
Level 7 The Barrington
10-14 Smith Street
PO Box 248
Parramatta NSW 2124
Australia
DX 8233 Parramatta
Tel (61 2) 9635 7966
Fax (61 2) 9689 3494
matthewsfolbigg.com.au

Liability limited by
a scheme approved
under Professional
Standards Legislation.
Legal Practitioners
including employees
and directors employed
by the Company are
members of this scheme

MEMBER OF
LAW AUSTRALASIA

N:\Docs\130319\1677844.doc(MYH)

- 2.4 Pursuant to s94(3) of the EP&A Act, Council may seek a contribution towards the 'recoupment of the cost of providing the public amenities or public services' (being the cost as indexed in accordance with the *Environmental Planning & Assessment Regulation 2000* (NSW) ('the Regulations')).
- 2.5 In light of the decision in *Allsands Pty Limited v Shoalhaven City Council* (1993) 78 LGERA 435 and clause 25I of the Regulations, when seeking to recover costs under s94(3), Council is limited to recovering the amount paid out at the time for capital costs as indexed, together with the costs of borrowings.
- 2.6 We have reviewed the relevant portions of the IPART reviews for Blacktown City Council's Contribution Plans 20, 21 and 22. We note that IPART has taken the view that it is open to Council to include land already purchased by it through Council's general funds, in the Contribution Plan based upon a current market value (p35, *Assessment of Blacktown City Council's Section 94 Contribution Plan No20*), where the land was acquired prior to being zoned for a public purpose.
- 2.7 However, in two subsequent assessments of *Blacktown City Council's Draft Contributions Plan Nos 21 & 22*, the value of land already acquired and to be included in the contributions plans was calculated by Council by including the purchase price as indexed. IPART held that the CPI (All Groups) for Sydney as opposed to the CPI (Housing) for Sydney was the appropriate index to use. In both of these cases the relevant land had been purchased by Council after the land had been rezoned for a public purpose.
- 2.8 We have also had the benefit of perusing the advice provided by Mr Lindsay Taylor on 26 February 2010 which sets out why, in his opinion, it is both lawful and reasonable to include land already acquired by Council at a value based upon its current market value.
- 2.9 The key point in Mr Taylor's advice is that s94(3) refers to amenities and services already provided and as such, the decision in *Allsands* is limited to such amenities and services. Although the land which Council proposed to include in the s94 Contributions Plan was already acquired, he took the view that it had not been provided for the public purposes specified in the draft contributions plan. He was further of the view that as it would be open to Council to acquire other land for the public purpose and fund that cost through the contribution rate, as such costs would be at current market prices, the proposed methodology was reasonable.
- 2.10 We agree with his analysis and consider that it is applicable in the present instance. We note, however, that the point is not beyond doubt (as is clear from the fact that the Department takes a different view) and if Council adopts this approach there may be a greater risk that a developer may challenge the reasonableness of a contribution levied pursuant to the plan once adopted. (We assume for the purposes of this advice that the land in question is not subject to a cap on the amount of the contribution as it is land specified within Schedule 1 of the s94E Direction dated 21 August 2012. If this is not the case, please let us know, as any condition which seeks payment of a monetary contribution above the specified cap will require the written agreement of the applicant for consent and the approval of the Minister.)

3 Site 1a

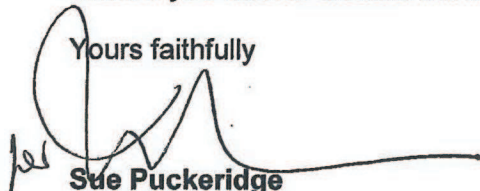
- 3.1 It follows from the discussion in section 2 above that we consider it reasonable and legal for Council to value Site 1a by reference to its market value arrived at by an independent valuer.

4 Site 1b

- 4.1 We understand that Site 1b was purchased in full from funds received from s94 contributions.
- 4.2 Section 94 is focused upon the basis on which a developer can be asked to provide a contribution towards public amenities and services. While the Regulations impose specific accounting obligations on a Council in respect of s94 contributions they do not deal with this specific circumstance where a Council validly uses those funds but in the exercise of its discretion decides to sell the asset acquired with those funds.
- 4.3 We are unaware of any statutory provision, or proposition of law or authority which supports a contention that land acquired by the use of s94 funds cannot thereafter be dealt with by a Council including by way of sale or transfer. Although there are difficult questions as to the interaction between the developer contribution scheme under the EP&A Act and chapter 6 of the *Local Government Act 1993*, there is authority which recognises the potential for a form of statutory trust to arise in certain circumstances. Accordingly, we consider it entirely appropriate that the Council reimburse the s94 Fund.
- 4.4 In our opinion, whether or not the amount of that reimbursement should be calculated using a 'recoupment of costs' methodology similar to that under s94(3) of the EP&A Act or on a current market value assessment, is in the absence of any statutory obligation, a matter for the discretion of Council having regard to what is reasonable. A key matter which should govern the exercise of that discretion is that Council's general fund should not be enriched at the expense of the s94 Fund. If the purchase of the land is analysed as if it were an investment of contributions, the s94 Fund should receive the benefit of the investment. We understand that the current market price for the land would be greater than the purchase price for the land (being an increase above CPI) and in these circumstances we are of the opinion that provided an independent professional valuation is obtained, Council's proposed course of action is reasonable and lawful.

We trust this answers the questions you have raised, please do not hesitate to contact the writer if you wish to discuss the matter further.

Yours faithfully



Sue Puckeridge
Special Counsel
T 9806 7477 | F 9633 9400
suep@matthewsfolbigg.com.au