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**CIRCULAR NO. D6**

**Revised Issue  
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All Councils

**CROWN DEVELOPMENT APPLICATIONS  
AND CONDITIONS OF CONSENT**

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**BACKGROUND**

This circular replaces the previous Circular No. D6 which was issued by the Department of Planning on 28 April 1993. The previous circular advised councils of the appropriate contributions and conditions of consent on Crown development applications (Crown DAs) lodged under section 91A of the Environmental Planning and Assessment Act 1979 (EP&A Act). In particular, the circular dealt with Crown activities provided with an underlying philosophy of essential community service: education, health, community services, law and order, and some housing.

On 22 June 1994, Councils were notified in Circular No. A26 that the whole of section 91A had been repealed and replaced with a new section 91A under the Environmental Planning and Assessment (Amendment) Act 1994.

**SCOPE OF THIS CIRCULAR**

This circular:

- suggests procedures for Crown agencies to follow prior to lodging DAs;

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■ Our reference: S91/07224/008



- sets out the procedures for consent authorities to follow when determining Crown DAs under section 91A (as amended in May 1994);
- provides advice on the policy on conditions of consent appropriate for Crown DAs, particularly section 94 conditions on Crown activities provided with an underlying philosophy of essential community service;
- notes the availability of the provisions of sections 91(3A), 91(3B), 91AA and 91AB in relation to Crown DAs; and
- advises on the policy on inappropriate conditions of consent.

### **SUGGESTED PROCEDURES PRIOR TO LODGING A CROWN DA**

The following procedures are suggested to assist in ensuring that the lodgement and assessment of Crown DAs can be carried out as quickly as possible:

- (a) Prior to purchasing the site, the Crown should:
  - investigate as a matter of policy the likely extent of infrastructure needed with regard to all supply authorities; and
  - discuss the appropriateness of the site for the proposed development with the consent authority.
- (b) Prior to lodging the DA, discussions should take place between the Crown applicant and the consent authority to identify the issues to be addressed. This should include a discussion of the extent of the Crown activity's 'public benefit'.
- (c) Applications should be lodged sufficiently in advance of the desired construction start.

### **DETERMINATION OF CROWN DEVELOPMENT APPLICATIONS (SECTION 91A)**

Section 91A of the EP&A Act applies to development applications made by or on behalf of the Crown or a prescribed person. The subject developments of these applications are known as 'Crown activities'.

#### **"Prescribed persons" for the purposes of section 91A**

Clause 66 of the Environmental Planning and Assessment Regulation 1994 specifies who are "prescribed persons" for the purposes of section 91A of the EP&A Act. These persons are:

- (a) a public authority (not being a council);
- (b) a public utility;

- (c) an official university within the meaning of the Higher Education Act 1988;
- (d) a TAFE establishment within the meaning of the Technical and Further Education Commission Act 1990;
- (e) the Totalizator Agency Board.

Appendix A provides examples of Crown agencies and their status.

### **Section 91A procedure**

The Environmental Planning and Assessment (Amendment) Act 1994 repealed and replaced the whole of section 91A. Section 91A covers procedures for the determination of development applications for Crown activities under the EP&A Act. These procedures are illustrated at Appendix B and are explained below.

Section 91A limits the power of a consent authority to refuse or impose conditions of a development consent (not approved by the applicant) in respect of development applications for Crown activities, without the written approval of the Minister. There is a particular procedure by which a Crown DA may be referred to the Minister for determination.

### **'Trigger' mechanism for the referral of Crown DAs to Minister**

A 'trigger' mechanism ensures that there is a clear method to initiate the process under section 91A where a consent authority:

- wishes to refuse a development consent;
- wishes to impose conditions of consent not acceptable to the Crown applicant; or
- has taken no action after 60 days from the initial lodgement of the application.

After 60 days from the initial lodgement of an application, either the Crown applicant or consent authority can refer the application to the Minister for Urban Affairs and Planning for determination. (The option of the Crown applicant taking action in the Land and Environment Court remains open but it is an option not generally pursued).

### **Compulsory negotiation meeting**

Where a Crown DA is referred to the Minister by either the Crown applicant or consent authority in the above circumstances, a compulsory negotiation meeting between the two parties is required. The purpose of the meeting is to negotiate, as far as possible, a determination of the DA that is acceptable to both parties and in accordance with the EP&A Act.

The meeting is convened by the Director of Planning or a delegate of the Director. The procedures for the convening and conduct of this meeting are outlined in Appendix C.

- *If agreement is reached:*

If agreement on the determination of the Crown DA is reached at the meeting, the Director of Planning will provide a report of the agreement to the consent authority and the applicant in accordance with section 91A(7) and in line with the procedures given at Appendix C. The consent authority will then be obliged in accordance with section 91A(8) to issue a consent within an agreed period which will be specified in the Director's report. If the consent authority does not determine the DA within the agreed period of time, the consent authority will be taken to have determined the DA in accordance with the agreement reached.

- *If no agreement is reached:*

If no agreement is reached between the Crown applicant and the consent authority at the meeting convened by the Director, the application will be referred to the Minister for determination in accordance with section 91A(9) and in line with the procedures given at Appendix C. The Minister will then notify both the consent authority and Crown applicant that he either:

- (a) approves the refusal of consent;
- (b) approves the consent authority's proposed condition(s) of consent and gives a date by which the Crown DA is to be determined;
- (c) does not agree with the consent authority's proposed refusal and gives the authority 40 days to allow it to submit to the Minister any conditions it wishes to impose. At the end of the 40 days the Minister must, within a reasonable period of time, notify in writing the consent authority and applicant of:
  - any of the consent authority's conditions the Minister approves and, if so, which conditions; and/or
  - the other conditions with which the Minister is in agreement.
- (d) does not agree with the consent authority's conditions, but may notify other or different conditions with which he is in agreement, and gives a date by which the DA is to be determined.

- *If agreement is partially reached:*

Where agreement is partially reached, the issues which are agreed and disagreed will be reported to the Minister in line with the procedures given at Appendix C. The Minister will then determine those issues which have not been agreed upon and notify the consent authority and the Crown applicant in the same way as where no agreement is reached in (b) and (d) above.

### Failure of a consent authority to determine a DA in accordance with Minister's decision

In all instances, where the Minister gives a date by which an application is to be determined, the consent authority must determine the application by the date specified. If it does not, the consent authority is taken to have determined the Crown DA in accordance with the Minister's written notification.

### Modification of Crown development consents under section 102 of the EP&A Act

The Minister has the same power to approve a modification to a Crown development consent as for the original DA. The same procedures as outlined above may apply to modification of these consents.

## **CONDITIONS OF CONSENT APPROPRIATE TO CROWN DEVELOPMENT APPLICATIONS**

Delays in the determination of Crown DAs often occur due to the consent authority's desire to impose inappropriate conditions. Therefore, in considering Crown DAs, it is important that councils distinguish between the activities of Crown authorities when they are clearly providing a public service or facility and when they are acting as a commercial developer.

Councils should, as early as possible, notify Crown applicants of any conditions of consent it intends to impose. This will allow for early consultation over potentially contentious issues and may avert disputes at a later stage.

### **Section 91 conditions of consent**

Examples of categories of conditions of development consent which are usually considered justifiable in relation to Crown developments are:

- reinstatement of council roads and facilities damaged as a result of construction.
- stormwater discharge to a specification agreed between the authorities.
- direct connection to water, sewer, electricity and gas.
- erosion control measures both during and after construction.
- on-site carparking where the Crown authority considers it necessary.
- landscape requirements as agreed to between the council and the Crown.

### **Section 94 contributions**

Crown activities providing a public service or facility lead to significant benefits for the public in terms of essential community services and employment opportunities. Therefore, it is important that these essential community services are not delayed by unnecessary disputes over conditions of consent. These activities are not likely to require the provision

of public services and amenities in the same way as developments undertaken with a commercial objective.

The matrix on page 7 is a revised version of the one which appeared in the previous Circular No. D6. The purpose of the matrix is to provide a guide to councils and Crown agencies on justifiable categories of section 94 contributions towards off-site works for Crown developments that provide an essential community service. Councils are encouraged to use the matrix when assessing Crown DAs to ensure a quick and consistent assessment.

Where councils intend to levy contributions on Crown developments, they must be justified in a section 94 contributions plan. Consideration should also be given to the Crown's role in providing a community service, the cost of which is accountable to all taxpayers in the State. Accordingly, the matrix outlines which section 94 contributions are usually considered appropriate or inappropriate for Crown activities.

#### Contributions for drainage works

Both councils and Crown agencies are encouraged to apply techniques which ensure that development does not contribute additional run-off, particularly in established areas. This should be taken into account when councils levy contributions.

There will, of course, be instances where such techniques cannot be applied and contributions towards off-site drainage may then be sought. These contributions, as with any development, should be based on apportionment principles. That is, each development should only be required to contribute towards its 'share' of the cost of drainage works in the catchment.

#### Water and sewerage facilities

Levying for contributions towards water and sewerage facilities fell under section 94 of the EP&A Act when the previous Circular No. D6 was issued in April 1993. Section 94 has since been amended through the Local Government (Consequential Provisions) Act 1993 so that under section 94(9), levying for water and sewerage facilities was removed.

This amendment was in response to the decision of *Allsands Pty Ltd v. Shoalhaven City Council*, which raised concerns that section 94(2A) is too narrow for levying for complex long-life facilities like water and sewerage. While councils can still levy contributions towards the provision of water and sewerage facilities, this is now done under division 2 of part 3 of the Water Supply Authorities Act 1987 and not under the EP&A Act. (Refer to Circular No. A21, issued 30 June 1993).

**MATRIX: SUMMARY GUIDELINES FOR APPROPRIATE CATEGORIES OF CONTRIBUTIONS TOWARDS OFF-SITE WORKS FOR CROWN DEVELOPMENTS PROVIDING AN ESSENTIAL COMMUNITY SERVICE UNDER SECTION 91A (see text for further details)**

|  | PUBLIC SERVICE/AMENITY |                         |         |          |             |   |                                    |  |
|--|------------------------|-------------------------|---------|----------|-------------|---|------------------------------------|--|
| CROWN<br>ACTIVITY  | Open Space             | Community<br>Facilities | Parking | Drainage | Local Roads | Sub-Arterial<br>Non-classified<br>Roads | Arterial<br>(classified)*<br>Roads | Upgrading of<br>Local Roads<br>Local Traffic<br>Management** |
| Educational<br>Services                                      | No                     | No                      | No      | Yes      | No          | No                                      | No                                 | Yes<br>(including bus<br>bays)                               |
| Law/Order<br>Services  | No                     | No                      | No      | Yes      | No          | No                                      | No                                 | Yes  |
| Health<br>Services   | No                     | No                      | No      | Yes      | No          | No                                      | No                                 | Yes  |
| Housing:   |                        |                         |         |          |             |   |                                    |  |
| - SEPP 5 (Aged<br>& Disabled<br>Persons)<br>(s94A direction) | No                     | No                      | No      | No       | No          | No                                      | No                                 | No   |
| - Medium<br>density infill***                                | Yes                    | Yes                     | No      | Yes      | No          | No                                      | No                                 | Yes  |

**NOTE 1:** All 'yes' entries rely on the contributions being justified by the council.

**NOTE 2:** Contributions towards water supply and sewerage facilities can no longer be levied under section 94.

**NOTE 3:** Landcom have not been included in the above matrix, as Landcom has indicated that it will generally no longer operate under the provisions of section 91A.

**NOTE 4:** The Minister for Urban Affairs and Planning will consider waiving the section 94A Direction on SEPP 5 developments in cases where councils can show good cause.

\* Where council is the construction authority.

\*\* Works associated with the site entrance.

\*\*\* "Medium density infill" refers to dual occupancy development, townhouses, villas and walk-up flats in established areas, but does not include high rise development.



### Arterial roads

Arterial roads are generally provided and maintained by the RTA. Therefore, section 94 contributions are not normally applicable. However, in some cases there may be particular agreements establishing a shared formal responsibility for arterial roads between the RTA and the council. In these circumstances council can levy contributions towards costs incurred by the RTA. Once contributions are paid, the council may do the road works itself or it may hire contractors or even the RTA to carry out the necessary roadworks on the council's behalf.

### Local area traffic management measures required as a direct consequence of development

These may include contributions for bus lay-bys and towards the cost of kerb, gutter and footpath construction associated with the site entrance. It may also include traffic management facilities directly required to ensure safe access for the public. In some cases a contribution for half of the cost of roadworks relating to the site entrance to the Crown development may be required, but there will be no contributions towards the widening of roads or other general traffic management improvements.

### Housing developments by Crown authorities

The following section 94 contributions are usually considered appropriate in relation to housing developments by Crown authorities:

- Open Space: Contributions towards the acquisition of new, or embellishment of open space.
- Community facilities.
- Drainage.
- Construction of local and sub-arterial roads in new release areas (i.e., non-established areas): It is considered inappropriate for such contributions to be levied on medium density infill developments because these developments can capitalise on existing road capacity.
- Local area traffic management measures.

### *Dual occupancy developments:*

Dual occupancy developments can be levied for contributions, providing these contributions are justified in councils' section 94 Contribution Plans. (Refer to Circular No. D3, issued 31 August 1993). Therefore, in order to levy contributions, councils must prove the nexus between such development and the increased need for services in the area in a Contributions Plan. (Refer to Circular No. D16, issued 25 November 1993). As indicated in the matrix, contributions towards the provision of parking, local roads, sub-arterial and arterial roads are generally considered inappropriate in relation to medium density infill (including dual occupancy development).

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*SEPP 5 developments:*

No section 94 contributions can be levied on SEPP 5 developments as there is a section 94A Direction restricting this. However, the Minister for Urban Affairs and Planning will consider submissions on waiving the Direction for particular SEPP 5 developments where a council can show good cause. (Refer to Circular No. D3, issued 31 August 1993).

**DETERMINATION OF CROWN DEVELOPMENT APPLICATIONS UNDER SECTIONS 91(3A), 91(3B), 91AA AND 91AB OF THE EP&A ACT**

Section 91 of the EP&A Act has been amended to introduce various provisions for the determination of development applications:

- Section 91(3A) - *Operational Consent with an Ancillary Matter to be Finalised* (Refer to Circular No. A21, issued 30 June 1993).
- Section 91(3B) - *Performance Based Conditions of Consent* (Refer to Circular No. A26, issued 22 June 1994).
- Section 91AA - *Deferred Commencement* (Refer to Circular No. A21)
- Section 91AB- *Staged Development* (Refer to Circular No. A21).

Where appropriate, these provisions may apply to Crown DAs as for any other type of DA. Conditions of consent imposed under any of these provisions are of course subject to the agreement of the Crown applicant or the approval of the Minister. If the Crown applicant does not agree to the conditions, it may refer the application to the Minister in accordance with the procedure outlined previously in this circular.

**INAPPROPRIATE CONDITIONS OF CONSENT FOR CROWN DEVELOPMENTS**

**Irrelevant conditions**

Some councils seek to impose a number of standard conditions, not all of which are necessarily relevant to a particular application. Any condition which is not of relevance to a particular application, and does not relate to the activities associated with that development, is not authorised under section 91 and will not be approved by the Minister. Examples of irrelevant conditions include:

- conditions which require that a particular development be used only for the purpose sought.

- conditions which seek to restrict the hours of operation or the use of a building to be used solely for residential or tertiary education purposes.

### **Uncertain conditions**

All conditions of consent require certainty of outcome for the applicant and should be specific and easy to understand. Uncertain conditions can delay the approvals process in situations where the applicant is not in a position to commence the development as soon as the consent is issued.

For example, deferred commencements under section 91AA of the EP&A Act provide that a consent does not operate until the applicant satisfies the consent authority in relation to a particular matter. If a consent authority imposes a vague or inexact condition, it will be difficult for the applicant to illustrate compliance and this will delay both the determination of the application and the commencement of the development. Under such circumstances, the Crown agency is unlikely to accept and the Minister unlikely to approve such conditions.

### **Superfluous conditions**

Examples of superfluous conditions would be conditions indicating that the proposed development be carried out in accordance with the development application or conditions requiring, for example, car parking when the applications already provides for these things.

### **Unenforceable conditions**

Unenforceable conditions generally relate to activities which are beyond the control of the developer and unenforceable in practice. Examples include 'no reversing of vehicles across footpath'.

### **Conditions relating to subdivision**

The Crown is not bound by Part XII of the *Local Government Act 1919*, which deals with subdivision. Part XII is in operation until new subdivision controls are brought wholly under the EP&A Act.

For those councils currently requiring development consent for subdivision under the EP&A Act, the provisions of section 91A of the Act and the advice contained in this circular apply as for any other type of development.

Councils will be notified of the new system of subdivision control, including any provisions relating to Crown subdivision applications, upon its introduction under the EP&A Act.

### **Conditions relating to detailed building requirements**

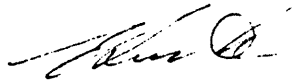
The Crown is not required to obtain approval under section 68 of the Local Government Act 1993 from a council:

- to erect a building;
- to demolish a building; or
- to do anything that is incidental to the erection or demolition of a building.

Therefore, it is not appropriate for councils to impose detailed building requirements as conditions of development consent in relation to Crown activities.

#### **FURTHER INFORMATION**

For further information, contact the Planning Systems Management Branch or the relevant Regional Office of the Department of Urban Affairs and Planning.



E. Smith  
Secretary