

2008 LOCAL GOVERNMENT ACT 2002 (DEVELOPMENT CONTRIBUTIONS) POLICY STATEMENT

COMPLIANCE AND LEGISLATION

Policy Objectives

1. To promote a policy and regulatory environment that ensures that territorial authorities use development contributions for the sole purpose of recouping the costs of growth related capital expenditures.
2. To champion the development of and adherence to development contributions policies that are underpinned by rigorous cost allocation and cost recovery methodologies.
3. To promote an environment that is sympathetic to the view that capital expenditure, land and asset development is an essential component of economic development, job creation, personal and collective wealth, and the elimination of social deprivation.

Application

Property Council New Zealand will advocate for outcomes that are consistent with the objectives of this policy.

Rationale

Development contributions are emerging as an important funding mechanism available to territorial authorities. Development contributions can be charged in accordance with the Local Government Act 2002 (the “Act”). The Act allows territorial authorities to formulate and apply a development contributions policy, but the non-prescriptive nature of the statutory provisions does not necessarily constrain the scope and application of this funding mechanism.

The majority of territorial authorities have adopted a development contributions policy, which enables those authorities to recoup the costs of growth-related expenditures from property developments (the developers of which then pass on the cost to future residential and commercial property owners). Many territorial authorities have elevated development contributions to become the main source of funding for future asset development and an increase in the capacity of existing assets. This preference does not give adequate recognition to the benefits of capital expenditure which will accrue to existing ratepayers as improved levels of service and through extending infrastructure life. It consequently loads a disproportionately high share of costs onto residential and business growth. Property Council supports a regulatory environment that forces territorial authorities to demonstrate that their development contributions policy –

- (a) correctly allocate the costs of the territorial authority's asset development programme, between growth (new) and deferred capital expenditure (catch-up); and
- (b) spread the costs of growth-related capital expenditures so as to ensure that those who benefit from improved levels of service and infrastructure, pay for that service and infrastructure.

Development contributions will always be a compliance cost, which will be passed on to the property owner. However Property Council considers that development contributions have a wider economic and social impact, which is manifest in terms of –

- (a) housing affordability, particularly for younger people (who are sensitive to changes in the cost of housing);
- (b) demand for transport infrastructure as people seek affordable housing in remote locations, often far removed from paid employment; and
- (c) the inflationary impact of more expensive housing and increased transport costs (resulting from development contributions).

Property Council considers that territorial authorities, when drafting a development contributions policy, should evaluate and take into account –

- (a) the economic and social benefits and costs of the policy, as well as the rules and methodology that shall apply;
- (b) the benefits and costs of requiring development contributions to fund capital expenditures *vis-à-vis* other funding mechanisms (e.g. debt funding and rates); and
- (c) the benefits of a development, which offset the costs of a development.

An evaluation of the benefits and costs of the policy as well as development contributions as the preferred funding mechanism should be available for public inspection.

Concurrent to any statutory provision that enables a territorial authority to charge a development contribution, should be a statutory provision that enables the right of review and appeal by any person or persons who are charged a development contribution. This right should be explicit in the Act and codified in any development contributions policy adopted by any territorial authority.

Policy Requirements

Policy on development contributions

The Act should enable a territorial authority to require a development contribution. The territorial authority should only require a development contribution pursuant to a policy adopted by that territorial authority under section 102(4)(d) (**Funding and financial policies**) of the Act.

Property Council considers that city and district territorial authorities are the owners and providers of capital expenditure. Those functions require the territorial authorities to adopt, from time to time, funding policies that enable the charging of a development contribution.

Due to the particularity of the role of city and district territorial authorities, Property Council considers that only those authorities should be entitled to charge a development contribution. Regional authorities, council-controlled organisations, Transit New Zealand, Land Transport New Zealand (LTNZ), and Watercare Services Limited should not be entitled to charge a development contribution. In the view of Property Council –

- (i) the function of regional authorities is to act as an environmental regulator. Regional authorities are not the owners of capital expenditure;
- (ii) territorial authorities should apply principles of **causation** and **benefits received** when considering whether a project is a development against which a development contribution should be charged. The territorial authority should recover the ‘growth’ component of a project cost if it can demonstrate that the cost recovery reflects only the marginal cost of growth.

Defining development

Before commencing the formation of any development contributions policy, each territorial authority should first be statutorily required to assess whether each of the projects codified in its Long Term Council Community Plan (LTCCP) and Asset Management Plan (AMP) is a “development” as defined by the Act¹. If a project is not deemed to be a “development” as defined by the Act then the territorial authority should not require the payment of a development contribution.

When assessing whether a project is a development pursuant to the definition of the Act, the territorial authority should also be statutorily required to determine whether any defined development generates growth-driven demand. If the territorial authority cannot demonstrate how a development creates growth-driven demand then no development contribution should be levied against the property owner or developer.

Developments that do not generate growth-driven demand (e.g. developments that treat and dispose of stormwater or wastewater onsite) should not be liable to pay a development contribution. Any policy endorsed by a territorial authority should give clear guidance that developments that do not create a growth-driven demand should not trigger the requirement to pay a development contribution.

When requiring the payment of a development contribution, the territorial authority should be statutorily required to provide to the property owner or developer with written information advising –

- (a) why the project is a development;

¹ Pursuant to s197 of the Act, a development means: (a) any subdivision or other development that generates a demand for reserves, network infrastructure, or community infrastructure; but (b) does not include the pipes or lines of a network utility operator.

- (b) what steps were undertaken by the territorial authority to determine that the project is considered to be a development; and
- (c) what steps were undertaken by the territorial authority to determine how the development generates growth-driven demand (either generally or for derived infrastructure necessary to address the consequences of growth-driven demand).

This information should be subject to a review and appeal in the event that the property owner or developer disagrees with the territorial authority's decision.

Reserves

Territorial authorities should be statutorily required to establish a standard for reserves. The standard should determine how much reserve land the territorial authority requires to meet the demands of its current and projected future population. This standard should be subject to review every three years concurrent to the adoption of each territorial authority's Long Term Council Community Plan (LTCCP) pursuant to section 93 of the Act.

Equitable allocation of cost

Property Council considers that section 102 (**Funding and financial policies**), and section 199 (**Basis on which development contributions may be required**) of the Act should be amended to require a territorial authority to analyse a funding methodology and the basis for requiring a development contribution to contemplate the equitable allocation of cost. An equitable allocation should take into account –

- (i) **Causation principle** – costs should be allocated to those who cause them to be incurred. This ensures that the resource implications of people's decisions are correctly signalled and, in the absence of any externalities, promote economic efficiency;
- (ii) **Benefits Received principle** – costs should be allocated to those people who benefit from them. This is particularly important where externalities are present, as cost causation fails to produce purely equitable outcomes²; and
- (iii) **Benefit Cost principle** – the benefits of the new asset or the expanded capacity of the existing asset arising from the development should be taken into account against the cost of the development contribution.

Section 201 (**Contents of development contributions policy**) and section 202 (**Contents of schedule to development contributions policy**) of the Act should be amended to specify –

² Covec 2005: *Development Contributions Policy Design Issues*, The 8th Annual Local Government Finance Forum (proceedings).

- (i) that the principles of **causation** and **benefits received** will be considered when formulating a policy (or amendment to an existing policy) on development contributions; and
- (ii) how the principles of **causation** and **benefits received** will apply with respect to development contributions calculated, in each case, in accordance with the methodology in respect of –
 - reserves;
 - network infrastructure; and
 - community infrastructure.

Schools significantly contribute to the demand for new infrastructure or an increase in the demand for existing infrastructure. Property Council therefore considers that the Ministry of Education and Boards of Trustees mandated by pursuant to section 93 of the Education Act 1989, shall be liable to pay a development contribution for capital work that contributes to growth-driven cost incurred by a territorial authority. The calculation and methodology applied by a territorial authority when considering a development contribution charged against a school should take into account the principles of **causation** and **benefits received**.

Consideration of alternatives, benefits and costs

Property Council considers that territorial authorities regard development contributions as a funding windfall. This windfall allows territorial authorities to transfer the funding burden onto future property owners through development contributions, and away from existing property owners through rates.

While the financial benefit of development contributions is evident, the **opportunity cost** of development contributions is neither explicit or implicit to any –

- (i) development contributions policy; or
- (ii) Long Term Council Community Plan (LTCCP).

The absence of analysis of **opportunity cost** undermines any notion that territorial authorities address derived problems pertaining to development contributions.

Property Council considers that territorial authorities, when drafting a development contributions policy, should evaluate and take into account issues such as:

- (i) how development contributions load the cost of asset development onto future property owners;
- (ii) how development contributions affect housing and business affordability;
- (iii) how development contributions contribute to inflationary pressure.

Property Council considers that a new section of the Act is necessary to require a territorial authority to issue and consult on a benefits and costs analysis of its development contributions policy (including any amendment to the policy). This analysis will consider, but not be restricted to –

- (a) the economic and social benefits and costs of the policy, as well as the rules and methodology that shall apply; and
- (b) the benefits and costs of requiring development contributions to fund capital expenditures *vis-à-vis* other funding mechanisms (e.g. debt funding and rates).

Any development contributions policy should include a benefits and costs analysis, which underpins the assumptions and principles that justify the policy. This analysis should be regularly reviewed by the territorial authority as part of the triennial review of the LTCCP.

Property Council notes that the need for a benefits and costs analysis is a requirement of the Resource Management Act 1991 (section 32). The Local Government Act 2002 would be enhanced if a similar provision – such as that advocated by Property Council – was included in a future amendment.

Review Rights

The Act does not provide for the developer or the property owner to be able to review and appeal the requirement to pay a development contribution. Property Council considers that the non-existence of appeal rights is not appropriate as it allows territorial authorities to apply a policy with the comfort that any such application is unlikely to be subject to legal challenge.

The lack of review rights allows territorial authorities to sit in judgement of their own policy and how it is applied when calculating a development contribution. The property owner can end up paying tens of thousands of dollars (and the developer can pay millions of dollars), but the person who pays does not have the right to seek relief in the event that the policy and its application is subject to dispute.

To address this situation, Property Council supports the inclusion of an independent appeal process, against which a decision issued by a territorial authority pursuant to a development contributions policy can be reviewed. The statutory review provision should include –

- (i) the establishment of an Independent Development Contributions Appeal Authority (the “Authority”). The Authority should be chaired by a retired judge and include (a) a representative with a background in local government, and (b) an accredited representative from the development community;
- (ii) the entitlement of the property owner or developer to file an application to review a territorial authority’s decision pertaining to a development contribution, with the Authority;
- (iii) the grounds on which the review can be lodged and (if known) the relief sought by the applicant property owner or developer;

- (iv) the requirement for the Authority to convene hearings that provide an opportunity for both the applicant and the territorial authority to present arguments pertaining to the disputed development contribution;
- (v) the requirement that the appellant shall be liable for any costs associated with the procurement of professional services to assist with the presentation of arguments; and
- (vi) provision for the Authority to award the applicant costs and expenses, if the Authority makes a review decision fully or partly in favour of the applicant.

Property Council considers that any appellant property owner or property developer should have the statutory right to file an application to review a territorial authority's decision pertaining to a development contribution in terms of –

- (a) the process undertaken by the territorial authority in determining the development contribution to be paid; and
- (b) the quantum of contribution levied by the territorial authority.

The Authority should be statutorily entitled to review these matters and rule on each case accordingly.

Appeal Rights

The only possible legal remedy currently available to developers and property owners is judicial review through the High Court. Due to the prohibitive cost of judicial review proceedings, justice is literally unaffordable to the vast majority of potential appellants at present.

Property Council proposes that the establishment of an Authority would enable applicants to firstly seek relief through a comparatively inexpensive review process. However, in the event that **either** the appellant or the territorial authority is dissatisfied with the outcome of the review proceedings, a statutory provision should allow for either party to appeal to the High Court against –

- (i) a review decision; or
- (ii) a decision to award costs and expenses pertaining to a review.

Property Council considers that the Act must provide for the court to determine an appeal by –

- (i) dismissing the appeal;
- (ii) modifying the review decision; and
- (iii) quashing the review decision.

If the court quashes the review decision, it must indicate the effect clearly. The effect may be, for example, to –

- (i) endorse the territorial authority's decision;
- (ii) require the territorial authority to take the action the court specifies in relation to the territorial authority's decision;
- (iii) require another review to be conducted in accordance with directions the court gives

Property Council supports the ability of developers and property owners to appeal to the High Court and the Court of Appeal on questions of law.