LOCAL GOVERNMENT NSW

LGNSW Submission to the NSW Department of Planning and Environment on 'Improving Voluntary Planning Agreements'

January 2017

LOCAL GOVERNMENT NSW
GPO BOX 7003 SYDNEY NSW 2001
L8, 28 MARGARET ST SYDNEY NSW 2000
T 02 9242 4000 F 02 9242 4111
LGNSW.ORG.AU LGNSW@LGNSW.ORG.AU
ABN 49 853 913 882

LOCAL GOVERNMENT NSW

Opening

Local Government NSW (LGNSW) is the peak body representing the local government sector in NSW. Our members include general-purpose councils, special-purpose county councils and the NSW Aboriginal Land Council. LGNSW facilitates the development of an effective community based system of local government in the State.

Purpose and Background

LGNSW thanks the NSW Department of Planning and the Environment (DPE) for the opportunity to comment on the proposed update of the policy framework for Voluntary Planning Agreements (VPAs).This submission provides a response to the overall policy framework for VPAs that is being put forward by the NSW Government. LGNSW interprets the changes being proposed in relation to VPAs as comprising not only the three draft documents (i.e. draft Ministerial Direction, draft Practice Note and draft Planning Circular) but also proposed amendments (announced in early January 2017) to the *Environmental Planning and Assessment (EP&A) Act 1979,* which relate to the execution of planning agreements.

In proposing an updated framework, the State Government is reaffirming the legitimacy and importance of VPAs in the planning system. This is reassuring given the unwarranted criticism of VPAs by sections of the development sector and the State Government's previous proposals in the 2013 Planning White Paper to specifically reduce the opportunity for councils to be able to use VPAs.

LGNSW is strongly supportive of the principles and policies contained in the draft Practice Note, but has concerns about the Draft Ministerial Direction and proposed Act amendments.

General Observations

Importance of VPAs

It is timely that that State Government is taking steps to introduce greater clarity into the VPA process and to provide for increased consistency and transparency. The original practice note was produced in 2005 and requires updating to deal with the increased use of VPAs and the variety and complexity of modern developments. As noted above, local government is reassured by the State Government's recognition of the vital role of VPAs in providing public benefits by capturing a portion of the value uplift (unearned increments) arising from a planning proposal.

VPAs offer a means of promoting innovation and facilitating better planning outcomes tailored to specific and individual circumstances. From a local government perspective, they provide an appropriate voluntary mechanism for councils to negotiate a range of development outcomes which provide a variety of community benefits. It is important to emphasise that VPAs are voluntary for all potential parties - councils, developers and property owners, and that they come into play where a developer wants to go beyond prevailing limits.

The principle of value capture

LGNSW supports the principle of 'value capture' and is pleased that it remains embedded in the draft Practice Note through statements including the following:

- "Planning agreements facilitate the provision of planning benefits by developers by contributing part of the development profit for a public purpose."[1]

[1] Draft Practice Note - Planning Agreements, January 2017, p.7

- "The provision of planning benefits for the wider community through planning agreements involves capturing part of development's profit."[2]
- "The provision of planning benefits through planning agreements necessarily involves an agreement between a developer and a planning authority to allow the wider community to share in part of the development profit to achieve specified public benefits."[3]

However, there is some potential for confusion in the draft Practice Note between the principle of allowing councils to capture a share of the developer's profit from the value uplift resulting from a decision on a planning proposal and statements that councils should not use VPAs to capture windfall gains[4]. The draft Practice Note needs further clarification and LGNSW notes that IPART also recommends that further information be provided on what may be a difficult concept to grasp.

LGNSW also notes that IPART recommends using a rate of 50% of the value uplift as a starting point for negotiations[5].

There are many difficulties in negotiating VPAs, but in spite of more than a decade of a formalised system of VPAs, the draft Practice Note misses an opportunity to enhance the 2005 Practice Note by introducing more practical guidance. The content of the draft Practice Note appears to be much the same as that of the existing 2005 Practice Note, setting out the principles, basic steps and procedures for entering a VPA, and outlining an expectation on councils to publish their policies and procedures concerning the use of VPAs. For example, while VPAs need to be designed to respond to individual circumstances, there is no guidance in the draft Practice Note about possible methodologies that could be used to measure value uplift and 'public benefits'.

VPAs and probity

LGNSW agrees that VPAs must not be a mechanism for buying and selling planning decisions. Planning proposals that involve VPAs should be assessed on their merits and the outcomes should enhance established strategic objectives. They should not detract from development standards. They must not be driven by ad hoc opportunities to maximise the revenue of the planning authority.

VPAs and public participation

LGNSW strongly supports public engagement in the VPA process. It is essential to the community is advised and consulted on new VPA proposals and any material changes to existing proposals. Community participation is key to ensuring sound agreements that deliver real public benefit. It also delivers transparency and reinforces probity. Given the complex legalistic nature of VPAs, it is important that information is presented to the public in a manner friendly to the layperson and that the information is readily accessible.

VPAs in the rural and regional context

There appears to be a bias in the draft Practice Note towards urban circumstances, with little reference to rural and regional settings. It is unclear if this is an oversight or whether there is a deliberate focus on the challenges and opportunities being presented by growth and development in urban areas.

---

[2] Ibid, p.14
[3] Ibid, p.24
[4] Ibid, pp.14-15
[5] IPART, *Submission to the Draft Voluntary Planning Agreement Policy*, December 2016

Councils in rural and regional NSW subject to major developments such as mining and renewable energy projects have been negotiating VPAs, as they are in the city, for some years. The draft Practice Note should therefore include a section providing guidance on these types of development, or explicitly make it clear that the Practice Note is only applicable to urban development. It is acknowledged that the value uplift proposition for mining and renewable energy type developments is quite different from that of commercial and residential development. A separate Practice Note may be warranted.

Involvement of independent third parties

LGNSW agrees there is a place for the involvement of expert independent third parties in the VPA process. IPART has put its name forward for this. LGNSW acknowledges that IPART is eminently qualified for this role, however, there are many other well-qualified parties. LGNSW does not support mandating IPART or any other body as the independent third party for VPAs. LGNSW also submits that the need for independent third parties may vary with factors such as the:

- size and complexity of the development
- nature of the planning proposal
- different components of the VPA
- number of parties to the VPA and their respective expertise and resources.

LGNSW agrees that an independent third party is required where a council or other planning authority has a conflict of interest, for example, where the planning authorities have a direct interest in the development as a joint venture partner or land owner.

Independent third parties would also play a role in dispute resolution.

Draft Ministerial Direction and EP&A Act Amendments

An area of considerable concern for LGNSW is the proposed use of a Ministerial Direction to impose statutory force to the VPA Practice Note, coupled with proposed amendments to the *Environmental Planning and Assessment (EP&A) Act* relating to the use of VPAs.

The inclusion of the draft Ministerial Direction in the exhibited material raises concern for local government. If adopted, this direction effectively elevates the standing of the draft Practice Note from a guidance document to a mandated set of considerations and actions applicable to all NSW councils.

The effect of the Ministerial Direction is to compel all councils to “have regard to” Part 2 and Part 3 of the draft Practice Note. LGNSW maintains that the use of Ministerial Direction in this manner is heavy-handed and unnecessary. Further discussion with the sector is recommended.

Coupled with the draft Ministerial Direction, LGNSW notes that proposed amendments to the EP&A Act (which currently are also on exhibition), include a proposal to expand section 93K which would allow the Minister to make determinations or give directions about “the method of determining the public benefit provided by a developer under a planning agreement”[6]. It is dangerous to vest such power wholly and solely in the Planning Minister, particularly when this power relates to determining or directing councils about the method they should use for calculating the public benefit relevant to a VPA. This is a challenging and often controversial

[6] *Environmental Planning and Assessment Amendment Bill 2017*, Schedule 7, 7.1[2]

matter and should be the subject of independent assessment, not directed by a Minister. At the very minimum, there must be checks and balances to uphold the principles of probity and transparency that are a key element in the draft Practice Note. LGNSW will be reiterating this key concern in its submission on the draft Bill.

Another matter of equal concern that LGNSW will be questioning further in its submission on the draft Bill is the proposal to allow planning agreements to be entered into for complying development. By its nature, complying development is development that falls within the existing planning rules and would be subject to section 94 or 94A contributions, whereas the practice of using VPAs has been for development resulting from decisions on planning proposals that seek to change existing planning instruments and hence would not be 'complying'.

Another question this raises for LGNSW relates to the actual execution and enforcement of a VPA that has been entered into for a complying development. By its nature, complying development is permitted by a certifier, not the council, and councils by and large have little to do with this approval pathway. However, where complying developments attract section 94 contributions, councils already report difficulties in securing payment. LGNSW would expect these issues to be resolved through step changes in the planning system, before the floodgates are opened to allow complying development to proceed on the basis of certifier-approved VPAs. It is clear that this proposal in the draft Bill raises many questions about the use of VPAs, and requires much greater scrutiny and serious qualifications of its use, if it is to be pursued.

Conclusion

VPAs are a valuable planning tool that have been used by councils and other planning authorities for many years as a means of promoting innovation and facilitating better planning outcomes. LGNSW welcomes the confirmation of their legitimacy and importance and in particular, the recognition of the principle of value capture in the draft Practice Note. LGNSW considers that the draft Practice Note could be enhanced by including some additional new practical guidance, especially around how to measure or determine the value of value uplift and public benefits. LGNSW also supports making provision for the involvement of expert independent third parties under certain circumstances in the VPA process.

While LGNSW welcomes the ongoing use of VPAs, we express considerable concern about the apparently heavy-handed nature of the statutory framework that is being contemplated, with the addition of the Ministerial Direction and proposed amendments related to VPAs in the draft EP&A Bill.

We seek an undertaking that the DP&E will work closely with LGNSW and councils to ensure their valuable practical experience with the workings of VPAs are taken into account.
We are available to provide further comment. Please contact Shaun McBride on 02 9242 4072 or shaun.mcbride@lgnsw.org.au or Jane Partridge on 02 9242 4093 or jane.partridge@lgnsw.org.au.