

OVERVIEW OF RECENT IMPLEMENTATION ISSUES WITH DEVELOPMENT CONTRIBUTION PLANS AND IMPOSITION OF CONDITIONS ON STRATA SUBDIVISION APPROVALS

Presentation by

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to

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INTRODUCTORY COMMENT

The advertised subject of my presentation was –

‘Recent implementation issues with Development Contribution Plans’.

I do intend to focus mainly on that topic, but I take this opportunity to remind LG planners of a very important issue related to strata subdivision, namely –

‘Problems with LGs imposing conditions on built strata subdivision applications’.

1 Emerging problems with Development Contribution Plans

- 1.1 Development Contribution Plans (**DCPs**), like Structure Plans, evolved in the 1990s from LG Development Schemes.
- 1.2 Development Schemes were the vehicle used in WA from 1967 through to the mid-1990s for the cooperative subdivision of greenfields areas in multiple ownerships.

1 Emerging problems with Development Contribution Plans (cont'd)

1.3 The essential elements of LG Development Schemes are:

(a) Scheme Map or Development Guide Plan showing the intended subdivision pattern and the associated planning structures.

(Equivalent to Local Structure Plan (**LSP**)).

(b) Identification of the Scheme Works necessary for the subdivision of the Scheme Area.

(One of the features of a DCP and DCPR).

(c) Identification of the Scheme Costs, being the cost of the Scheme Works.

(Another feature of a DCPR).

1 Emerging problems with Development Contribution Plans (cont'd)

- (d) Provision for apportionment and payment of Scheme Costs by the Scheme Owners.
(Another feature of a DCPR).
- (e) In the case of Council Development Schemes, provision for the allocation of a return or dividend from the development between participating owners, in the form of subdivided lots.

1 Emerging problems with Development Contribution Plans (cont'd)

1.4 In the mid-1990s, LG Development Schemes fell into disfavour for reasons related to the following:

- (1) Perception they slowed the development process.

(Delays were commonly due to the very long time it often took to settle on the form of Scheme Works, obtain designs, and obtain owner and agency approvals).

1 Emerging problems with Development Contribution Plans (cont'd)

- (2) Perception that Scheme Costs had become excessive.

(Scheme Costs had increased substantially between the 1980s and mid-1990s to a large extent due to WAPC routinely requiring regional roads and other regional infrastructure to be included in the Scheme Works and paid for in Scheme Costs).

East Wanneroo example.

- (3) Preference to leave the greenfields subdivision agenda with the WAPC rather than LGs.

1 Emerging problems with Development Contribution Plans (cont'd)

- 1.5 The solution favoured by developers and the WAPC was the combination of –
- (1) Structure Plans (replacing Development Guide Plans); and
 - (2) DCPs (replacing the identification of Scheme Works and Scheme Costs, and apportionment of liability for Common Infrastructure Costs between affected owners).

1 Emerging problems with Development Contribution Plans (cont'd)

1.6 It has taken 20 years for the penny to drop that:

- (1) the identification of Common Infrastructure Works; and
- (2) the reliable costing of the CIWs; and
- (3) the calculation of Development Cost Contributions by individual owners,

still takes about the same amount of time as it did under LG Development Schemes.

1 Emerging problems with Development Contribution Plans (cont'd)

- 1.7 The difference now is that developers and the WAPC control the first part of the agenda, ie –
- (1) The making and adoption of a Structure Plan, which can be done in a matter of months; and
 - (2) The approval of subdivisions in accordance with a Structure Plan.

1 Emerging problems with Development Contribution Plans (cont'd)

- 1.8 By any fair evaluation, a subdivision approval before a DCP is in place in the relevant LPS is premature.
- (1) The provision of the infrastructure necessary to make the subdivision consistent with orderly and proper planning is really the responsibility of the WAPC.
 - (2) WAPC should not endorse its approval on a Deposited Plan until all required infrastructure is in place and developer contributions have been completed.
 - (3) In ordinary circumstances the required infrastructure would not be in place until it had been paid for, but the involvement of LGs results in liberties being taken.

1 Emerging problems with Development Contribution Plans (cont'd)

- 1.9 Now that is where the LG becomes relevant. The WAPC passes to LGs the responsibility to ensure that premature subdivisions work out in the public interest and that –
- (1) The roads, drainage, POS and other essential infrastructure:
 - is in place by the time WAPC endorsement of the Deposited Plan allows developers to sell the subdivided lots, **OR** will be in place in the future; and
 - has been or will be paid for fairly as between the benefitting developers; and
 - (2) To ensure the DCP in regard to Common Infrastructure Costs is incorporated into the LPS.

1 Emerging problems with Development Contribution Plans (cont'd)

- 1.10 (1) Commonly all necessary infrastructure has not been identified, much less provided, by the time the WAPC endorses its approval on the Deposited Plan for the early subdivision.
- (2) In very few cases will a DCP have been incorporated in the relevant LPS by the time the Deposited Plan is endorsed by the WAPC.
- (3) LGs are expected to fill the gap with Contribution Agreements.

1 Emerging problems with Development Contribution Plans (cont'd)

1.11 The Contribution Agreements generally:

- (1) require the Developer to make an **Advance Contribution** towards Common Infrastructure Costs to the extent they can be estimated at the time of subdivision;
- (2) secure the payment of the **Balance Contribution** when the costs have finally been ascertained; and
- (3) involve much time (often many years):
 - negotiating what is to be included in the DCP works/costs;

1 Emerging problems with Development Contribution Plans (cont'd)

- arrangements for prefunding by owners and offsets against development contributions;
- design of the works, including approvals/endorsements by interested State Government agencies;
- establishment of final costs or reliable cost estimates and review of estimates from time to time;
- arrangement of contracts for works;
- carrying out works; and
- collection of **Balance Contributions** from owners.

1 Emerging problems with Development Contribution Plans (cont'd)

1.12 Then come the disputes.

1.13 Common dispute issues:

- (1) The delay in completing and gazetting the DCP.
- (2) Increases in actual costs above the levels guessed at the time Advance Contributions were settled for the Contribution Agreement.
- (3) Disputes on land valuation.
- (4) Disputes on costs and estimated costs.

1 Emerging problems with Development Contribution Plans (cont'd)

- (5) Disputes on incidental matters (eg. developer failure to execute the development agreement).
- (6) Attempts to free security land from the Absolute Caveat preventing dealings with the security land.
- (7) Arguments with purchasers of the subdivision project refusing to enter into Contribution Agreements, or refusing to allow an Absolute Caveat.

All of those areas of concern need to be carefully and resolutely handled by the LG.

1 Emerging problems with Development Contribution Plans (cont'd)

1.14 Delay in completing and gazetting the DCP

- (1) The WAPC has placed much reliance on the gazetting of a DCP before it can be enforced. Yet the WAPC does little to facilitate the process of settling a DCP.
- (2) To protect their interests, LGs must do everything possible to ensure that the delay between the date of the Contribution Agreement and the date of gazetting the DCP and notifying owners of their final development contributions is kept to the absolute minimum.

1 Emerging problems with Development Contribution Plans (cont'd)

- (3) If delay with a DCP cannot be avoided, then affected owners should be regularly informed of progress, and provided with explanations of the ongoing delays.
- (4) Wherever possible, owners should be informed of the anticipated costs above what had been guessed at the time of the Contribution Agreement.

1 Emerging problems with Development Contribution Plans (cont'd)

- (5) The complaint which developers frequently make here, and it is an understandable complaint, is that by the WAPC endorsing the Deposited Plan, developers are free to sell subdivided lots, and commonly they do so on the understanding that the Common Infrastructure Costs will be approximately what had been guessed at for the Development Agreement. However the final Common Infrastructure Costs will usually be substantially greater than the level guessed at the time of the Contribution Agreement. Owners complain then that they have no way of recouping those extra costs from the lot purchasers, and therefore are being asked to pick up a loss sometimes many years after the subdivision was completed and all lots sold. That of course assumes they sold their lots at a lesser price than they could have achieved if they had known their costs would be greater.

1 Emerging problems with Development Contribution Plans (cont'd)

- (6) LGs must do all they can to be sensitive to this problem, and at least keep owners informed from time to time of possible increases in the CICs.

1 Emerging problems with Development Contribution Plans (cont'd)

1.15 Increases in actual costs above the levels guessed when Advance Contributions were set for the Contribution Agreement

- (1) There is little a LG can do to avoid increasing costs. The mere passage of time is likely to result in increasing costs.
- (2) The least the LG can do is to make sure owners at the time of entering into the Contribution Agreement are well aware of the fact that the CICs could increase substantially by the time the final contribution is determined.

1 Emerging problems with Development Contribution Plans (cont'd)

- (3) Again LGs should endeavour to keep owners aware of changes in the CICs that may affect their Balance Contributions.
- (4) LGs should ensure that they have security for the payment of the Balance Contributions, and that the security is either in the form of a bank guarantee or bond, or a charge on land secured by Absolute Caveat.

1 Emerging problems with Development Contribution Plans (cont'd)

1.16 Disputes on land valuation

- (1) Commonly, disputes on land valuation affect owners more than they affect the responsible LG. For instance some owners provide no or little land for POS and drainage, while other owners over-contribute substantial land for POS and drainage. If a non-POS contributing owner challenges the official valuation, any reduction in the value is likely to impact on the owners who over-contributed POS and expect to be compensated for the value of the additional land contributed.

1 Emerging problems with Development Contribution Plans (cont'd)

- (2) If a valuation dispute arises, LGs should ensure that the owners on the other side of the ledger are involved in the dispute, and have the opportunity to protect their interests.

A LG which does not ensure that both ownership interests are involved in the dispute may ultimately end up carrying the responsibility for the difference in valuation where the disadvantaged owner had no opportunity to participate in the dispute.

1 Emerging problems with Development Contribution Plans (cont'd)

1.17 Disputes on costs and estimated costs

- (1) Remember that LGs are not generally beneficiaries in the DCP arrangements. Often LG management of DCPs is provided as a community service. Consequently LGs should not accept an inappropriate widening of cost disputes.

1 Emerging problems with Development Contribution Plans (cont'd)

- (2) The draft provisions for DCPs seem to emphasise the possibility of reviews of estimated costs. LGs should resist the pressure by owners to bring into dispute costs which have been incurred and paid. LGs should resist attempts by owners to agitate disputes on paid costs as opposed to estimated costs. An unsuccessful outcome on a paid costs dispute is likely to involve a burden on the municipal fund, whereas changes upon review of estimated costs should be picked up by the owners in the Development Contribution Area through variations in cost contributions.

1 Emerging problems with Development Contribution Plans (cont'd)

1.18 Disputes on incidental matters

LGs should be careful to avoid the possibility of disputes on incidental matters, such as where a developer may 'forget' to execute a Development Agreement, and subsequently refuse to acknowledge the document reflected an agreement actually reached between the developer and the LG.

1 Emerging problems with Development Contribution Plans (cont'd)

1.19 Attempts to avoid absolute caveats

- (1) LGs and their legal representatives commonly face bitter arguments by developers that the LG should lodge only a 'subject to claim' Caveat rather than an 'absolute' Caveat to protect the LG's interest in the security under the Contribution Agreement.

1 Emerging problems with Development Contribution Plans (cont'd)

- (2) The LG should ensure that either a bank guarantee or bond is given as security in a sufficient amount, or land with a sufficient value is taken as security for payment of the Balance Contribution when ascertained, and in that case the LG should insist upon the lodgement of an Absolute Caveat as the only way of ensuring that the project will not be disposed of to a party who has not entered into the same contractual obligations as the original developer.

2 Problems with LGs imposing conditions on built strata subdivision applications

At the time of preparing my paper for this seminar, I rather sanguinely anticipated that I would have time to deal with another pressing problem for local governments, namely local governments attempting to impose conditions on built strata subdivision applications.

Notwithstanding this is a pressing problem, I did not have time to make the presentation, and the presentation is needed to make sense of the abbreviated comments in the paper. I have therefore thought it appropriate to withdraw the part of my paper dealing with problems with local governments imposing conditions on built strata subdivision applications, and that can be left as a topic for another day.



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