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Levying developers for affordable housing – a resource paper

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The author will appreciate any corrections or updates about the issues discussed in this paper. Email: craig@shelternsw.org.au

Any opinions expressed in this resource paper are those of the author and do not necessarily reflect the views of Shelter NSW.

Contents

This resource paper is for community activists, nonprofit housing associations, local government staff and councillors who want to promote an active role by local governments in the financing and provision of affordable housing through developer contributions.

1. Introduction

There has been a mini-industry around the policy and practise of local government in supply of welfare and affordable housing, over the last two decades or so. The first state government program in New South Wales that focused on a housing role for local government was the Local Government and Community Housing Initiatives Program established under a Labor government in the mid 1980s (and disbanded by another Labor government in 2007). This program post-dated programs of direct provision and attempts at levying developers to finance social housing by local governments themselves, notably the Sydney City Council.

A number of documents trace the recent history of this involvement:

- Chris Purdon and Terry Burke, *Local government and housing*, National Housing Strategy background paper 6, November 1991
- Department of Immigration, Local Government and Ethnic Affairs, *Local housing action: an overview and guide to good practices*, Office of Local Government, c.1991
- Department of Urban Affairs and Planning, *Local government housing: information kit*, June 1996
- Local Government and Shires Associations of NSW, *NSW local government housing initiatives*, 1997
- Department of Urban Affairs and Planning, *Local housing initiatives*, 1998
- Local Government and Shires Associations, *What type of housing should NSW local government be encouraging?,* discussion paper, May 1998
- Nicole Gurran, *Housing policy and sustainable urban development: evaluating the use of local housing strategies in Queensland, New South Wales and Victoria*, Australian Housing and Urban Research Institute, Melbourne, June 2003

Broadly, these are the sorts of roles/strategies that local governments have assumed, or that have been advocated for them to assume:

- protecting existing supplies of affordable housing from loss, such as demolition, change of use, or change of socioeconomic status of residents;
- promoting supply of affordable housing by establishing appropriate zonings, and through research, information and advocacy, and
- producing affordable housing indirectly from council resources, alone or in partnership

This resource paper is about *one* of those strategies only – producing affordable housing through the development assessment process. And *specifically*, it is about how local governments could facilitate social/intermediate housing by acquiring cash and non-cash contributions from developers during the development assessment process.[1]

2. Action pathways

There are **three pathways** for local governments to use their land-use planning and development assessment powers to get dedications or contributions from developers for affordable housing:

1. a scheme that involves ad hoc negotiations with developers over particular developments that leads to conditions being imposed that are acceptable to the developer in return for which the developer does not necessarily get any development concessions, as provided by s.93F of the *Environmental Planning and Assessment Act 1979*;
2. a contributions scheme, under which contributions are imposed as conditions of consent, as indicated in s.94F(1)-(4) of the Act;
3. a scheme that involves incentives, under which conditions are imposed in exchange for the developer taking up certain development incentives.

The first and third pathways involve negotiation with developers on a one-to-one basis.

The second pathway allows for 'inclusionary zoning' approaches. Circumstances where inclusionary zoning is useful are in areas with high-growth areas, especially those where the zoning allows medium-density housing. To use this approach a council must cross a number of thresholds – not the least being state government approval of relevant provisions in a local environmental plan (LEP)[2] and state government authorization through a state environmental planning policy (SEPP).

The third pathway uses incentives rather than compulsion: developers are offered more favorable development conditions/concessions, e.g. site density (floor space bonuses), in return for dedications/contributions. In practise, following the introduction of section 93F into the Environmental Planning and Assessment Act in 2005, there seems to be a developing convergence between this approach and the first.

The term 'affordable housing scheme' is used in this document to refer to a dedications/contributions scheme that uses *any* of those pathways.

There are only 6 local government areas with operational affording housing schemes in New South Wales. Those are:

- **Sydney City**, which has inclusionary zoning for two major urban regeneration precincts;
- **Willoughby**, which has inclusionary zoning for the whole local government area;
- **North Sydney**, which links assessment of loss of affordable housing under State Environmental Planning Policy no.10 – Retention of Low-cost Rental Accommodation with a Section 94 contributions plan;
- **Waverley**, which uses density bonuses to developers who offer affordable housing units;
- **Randwick**, which has negotiated contributions of affordable housing though planning agreements around three major redevelopment sites;
- **Canada Bay**, which has negotiated contributions of affordable housing though a planning agreement around a major redevelopment site.

3. Planning agreements

While there was no formal regulatory framework for using planning agreements for affordable housing in New South Wales until July 2005, there was no formal barrier to them either.

Amendments to the Act made in 2002 stated that none of the provisions in section 94F about compulsory contributions 'prevents the imposition on a development consent of other conditions relating to the provision, maintenance or retention of affordable housing. Such conditions may require, but are not restricted to, the imposition of covenants (including positive covenants) or the entering into of contractual or other arrangements.' (s.94F(5)).

Waverley Council had a practice in the late 1990s of using planning agreements to finance affordable housing where developments led to loss of boarding houses and low-rent residential flat buildings.[3] The results of the negotiations were enforced through consent conditions.

Randwick Council has used planning agreements on three major, masterplanned sites, where contribution of a number of affordable housing units has been part of the works contribution by the developer. The council's Randwick Local Environmental Plan 1998 requires developers of sites needing a master plan to consider affordable housing.[4]

The pathway of planning agreements involves a greater element of negotiation before a formal development application is considered by the councillors in committee or council, than does negotiating density bonuses within the framework of a pre-existing, local government area-wide development control plan (DCP). So, this first pathway has more risks around lack of transparency and kickbacks/corruption than the second pathway. Moreover, in the absence of a policy framework as provided by a local government area-wide DCP, the risk to environmental amenity and the risk of developers winning negotiations because of political/financial influence could be greater.

The state government has attempted to address such concerns through legislation. The Environmental Planning and Assessment Amendment (Development Contributions) Act 2004 commenced on 8 July 2005. The Environmental Planning and Assessment Amendment (Development Contribution) Regulation 2005 was also gazetted on 8 July, and accompanying guidelines, called 'practice notes', were issued in July by the then Department of Infrastructure, Planning and Natural Resources (DIPNR) (now the Department of Planning).

The primary purpose of the Environmental Planning and Assessment Amendment (Development Contributions) Act 2005 was to revamp the way contributions are collected from developers for public infrastructure like sewerage and open space (under section 94 of the Environmental Planning and Assessment Act), but it also established a regulatory framework for voluntary agreements between local councils and developers that enables contributions for those purposes.

These planning agreements under section 93F can be used for the purposes that section 94 contributions have been collected. But, *in addition*, councils may use section 93F to negotiate for contributions for:

- provision of or the recoupment of the cost of providing affordable housing (s.93F(2)(b)); or
- the funding of recurrent expenditure relating to providing affordable housing (s.93F(2)(d)).

Affordable housing, in planning law, means housing for very low income households, low-income households or moderate-income households, being such households as are prescribed by the Environmental Planning and Assessment Regulation or an environmental planning instrument.[5]

Planning agreements must be voluntary on both sides, and councils will not be able to require developers to enter into one by using their (council) powers to prepare local environmental plans. Nor will councils be able to require developers to enter into a planning agreement as a condition of development consent. The council may require a developer to agree to a planning agreement, through conditions of consent, only if the consent requires an agreement *following an offer from the developer* (s.93I(3)). This clause does not prevent a council from initiating a planning agreement: it does prevent provisions in a council-initiated planning agreement being included as conditions of consent.[6]

Some relevant sections of the Act are on page 25.

The Department of Planning materials indicate that voluntary planning agreements are most likely to be useful for developments that:

- are large-scale;
- have longer timeframes;
- are likely to be developed in stages; and
- are developments where the developer has a key interest in delivering public infrastructure.[7]

The Department of Planning contrasts these scenarios with those where section 94 development contributions or section 94A levies could apply.[8] (Contributions for affordable housing are not possible under those sections of the Act.)

What is different about section 93F agreements, in contrast with section 94 contributions, is that they (a) extend to more public purposes; (b) apply to recurrent costs as well as capital costs; and (c) do not require a direct nexus to be established between the development and the purpose. Contributions from planning agreements follow from a general public interest; the guidelines say: 'Benefit to the developer is not a primary consideration.'[9] The developer's voluntary contribution to affordable housing is a contribution of part ('a reasonable share') of the development profit for a public purpose.[10]

For this reason, the guidelines state that planning agreements should be governed by 'the fundamental principle that planning decisions may not be bought or sold'.[11] The guidelines specifically state that developments that are not acceptable in planning terms should not be permitted just because the developer makes a contribution for

affordable housing (or other public purposes). We can infer that this does not mean that councils may not make concessions on development standards, but that the development must still meet satisfactory environmental criteria. Specifically, a planning agreement cannot be used to justify waiving of development standards under State Environmental Planning Policy no.1 – Development Standards.[12]

The guidelines also state that contributions from developers should not be encouraged if the purpose of the contribution is 'wholly unrelated to the development'.[13]

If a council makes a planning agreement (or a draft agreement) about affordable housing contributions with a developer, it must take it into consideration when assessing a development application where it is relevant to the proposed development.

While section 93F allows a contribution for recurrent costs of affordable housing that is not directly related to the development, the guidelines state that such a contribution should only be required until a public revenue stream is established to support the ongoing costs. [14] So, if a council wishes to use a planning agreement to contribute towards recurrent costs of providing affordable housing, the revenue from a developer contribution will be time-limited: if the affordable housing needs ongoing subsidy, the council will need to subsidize that from its own sources or seek other sources (e.g. state government).

The guidelines say that development contributions reached through planning agreements are not to be used as a form of taxation on development.[15]

The guidelines state that councils should have policy and procedures about use of planning agreements. Such a policy and procedures document should indicate:[16]

- the circumstances in which the council would ordinarily consider entering into a planning agreement (for affordable housing);
- the (affordable housing) matters ordinarily covered by a planning agreement;
- the form of development contributions ordinarily sought under a planning agreement (for affordable housing);
- whether the affordable housing sought involves a planning benefit;
- the method for determining the value of public benefits and whether there is a standard charging;
- whether the money paid under different planning agreements from different developers is to be pooled and progressively applied towards the provision of affordable housing;
- when, how and where the affordable housing is to be provided;
- the procedures for negotiating and entering into planning agreements (for affordable housing);
- the council's policies on other matters relating to planning agreements, such as their review and modification, the discharging of the developer's obligations under agreements, the circumstances (if any) in which refunds may be given, dispute resolution and enforcement mechanisms, and the payment of costs relating to the preparation, negotiation, execution, monitoring and other administration of agreements.

The establishment of this regulatory framework for planning agreements presents an opportunity and a challenge to councils that want to promote affordable housing

through the development assessment process. The opportunity is in having a clear imprimatur for doing so given by the Parliament. The challenge is in the approach being inferior to that of inclusionary zoning, in its potential for ad hockery across sites in the local government area. In addition, it requires more skills needed in the art of negotiation, since councils are likely to be negotiating with 'imperfect knowledge' about the development's costs and council staff and councillors do not get training in negotiation.[17]

The advantage of a negotiated approach is in flexibility. Flexibility with development controls might not be acceptable to residents who oppose densification because of potential loss of quality in the built environment, aesthetic attachment to bungalows, loss of views, more traffic, etc., i.e. where the site's environmental capacity is greater than its economic capacity.

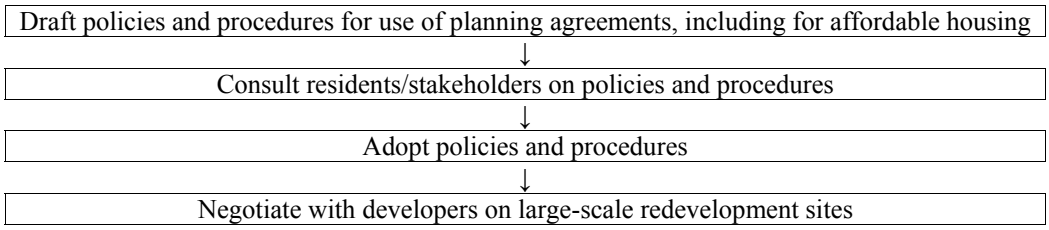
The risks in using a planning agreement approach for developer contributions, compared with an inclusionary zoning approach are:

- less transparency;
- potential for less accountability;
- greater need to manage kickbacks/corruption;
- more skills needed in the art of negotiation – the English experience has found that it is the skill and experience of negotiating parties determines the final quantity and tenure of affordable housing negotiated;
- councils are likely to be negotiating with 'imperfect knowledge' about the development's costs;
- addition of an extra factor into the development process could add a delay, which is something that councils are under heavy pressure to curtail; and
- potential for ad hockery across developments in the area.

A number of councils, e.g. Canada Bay and Waverley, have moved to ensure transparency by embedding their approaches to affordable housing in a generic policy document on planning agreements. Waverley Council has moved to embed its DCP-based density-bonus scheme (see page 14) into its planning agreement policy and the legal framework of Section 93F.

Note that planning agreements are not the same as 'satisfactory arrangement' clauses in local environmental plans, where negotiated agreements are enforced by a deed. Such provisions are not invalidated by section 93F.

FIGURE 1: STEPS TO SATISFY SECTION 93F



4. Inclusionary zoning

The legislative basis for use of inclusionary zoning is section 94F of the Act.

An inclusionary zoning approach typically prescribes a minimum proportion of affordable units to be provided in new housing developments in land zoned for residential purposes; the units to be provided are often referred to as 'set asides' in the USA, in the sense that a certain proportion of new units is set aside for affordable housing purposes. An inclusionary zoning approach does not necessarily require the need to establish a strict 'nexus' between a *particular* development and loss of affordable housing compared with, say, the nexus approach used in financing economic and social infrastructure under s.94 of the Act. Levies applied under inclusionary zoning are usually expressed as a proportion (percentage) of new units or an 'in lieu' contribution, rather than a flat rate.[18]

Section 94F enables, but also inhibits, local governments using the development assessment process to collect developer contributions using this method.

It *enables*, by providing legal authority for such action for planning powers ('A condition may be imposed under this section …').

It *inhibits*, because of the hurdles that a council must overcome to satisfy the provisions. (See below.)

Local governments' action using this section is also *thwarted* by the state government. That is because a council may not impose development conditions unless the planning minister approves certain matters: those matters are an authorization by provisions in a relevant state environmental planning policy as required by sections 94F(1) and (3)(a) of the Act. No planning minister has introduced or approved a state environmental planning policy to satisfy those two sections of the Act for all councils who might wish to use them, even though the Act was amended to allow for such development conditions in 2000. There is, as a result, a standoff between the Parliament – which introduced legal changes to enable such action, and the Government – which has not introduced necessary instruments to enable use of the Act.

The relevant section of the Act is on page 27.

Steps

Local councils who wish to levy developers for affordable housing during development assessment under section 94F may only do so if they meet various pre-conditions contained in the section. Those pre-conditions, or obstacles the council has to overcome/address, are seven:

- The council must be satisfied that the proposed development (i) will or is likely to reduce the availability of affordability housing within the local government area, or (ii) will create a need for affordable housing within the area, or (iii) is allowed only because of the initial zoning, or rezoning, of a site. (See s.94F(1)(a)-(c).)
- The consent conditions must be authorized by a local environmental plan or a regional environmental plan (REP). (See s.94F(3)(b).)

- The consent conditions must be authorized in accordance with a scheme for dedications or contributions that are set out or adopted in a local or regional environmental plan. (See s.94F(3)(b).)
- The consent conditions are reasonable having regard to the extent of the need in the area for affordable housing, the scale of the proposed development, and any other contribution the developer might be making under section 94F or section 94. (See s.94F(3)(c).)
- The consent conditions must consider any previous contributions the developer has made for affordable housing in the area that were not made as conditions of consent. (See s.94F(4).)
- A state environmental planning policy identifies there is a need for affordable housing in the local government area. (See s.94F(1).)
- A state environmental planning policy exists which has requirements for conditions of consent under this section of the Act. (See s.94F(3)(a).)

Local governments can move towards being able to levy developer contributions for affordable housing, by:
- preparing a housing needs/housing unaffordability study that identifies the local government area as one with a need for affordable housing – this is necessary to convince the state government to include the area in any state environmental planning policy satisfying s.94F(1), and it also is a logical precondition for preparing an affordable housing strategy;
- preparing an affordable housing strategy, if a study identifies your area as having a need for affordable housing; consideration of this strategy could consider the appropriateness and feasibility of seeking dedication of land and/or monetary contributions from developers as elements of the strategy;
- preparing an affordable housing scheme;
- amending your LEP to authorize conditions of consent for affordable housing in accordance with the affordable housing scheme;
- getting the minister for planning to agree to: (i) approve the amendments to your LEP; (ii) recognize (through a state environmental planning policy) your local government area as an area with a need for affordable housing; and (iii) make provisions (through a state environmental planning policy) for imposition of conditions of consent for affordable housing by your council.

Note that there are three matters where the planning minister's approval is necessary before you can start your affordable housing scheme. She/he must:
(i) approve your proposed amendments to your LEP (see s.70 of the Act);
(ii) recognize – through a state environmental planning policy – your local government area as an area with a need for affordable housing (see s.94F(1)); and
(iii) make provision – through a state environmental planning policy – for imposition of conditions of consent for affordable housing by your council (see s.94F(3)(a)).

Hurdles

The state government has not introduced an umbrella SEPP that would easily allow councils who wished to use the provisions of section 94F to do so. The absence of an appropriate SEPP has prevented at least one council (namely, Parramatta) from implementing its affordable housing scheme. It has also stopped other councils from seeking to propose amendments to their LEPs and develop a dedications/contribution

scheme (e.g. Newcastle[19]). It is difficult to estimate the number of councils who are being kept back at the gate by the absence of umbrella affordable housing SEPP; the historical record shows little interest in this type of intervention by local governments. Yet, there is an argument that there would be more interest by local governments if the state government was to introduce an umbrella affordable housing SEPP that would automatically authorize a scheme of any council that chose to develop one.

Amendments to the Act in 2000 which introduced s.94F anticipated an affordable housing–specific SEPP of some sort, as the section's wording indicates. Indeed, the likely implementation date was to be June 2002.

This date is evident from the provisions of the *Environmental Planning and Assessment Amendment (Affordable Housing) Act 2000*, which validated affordable housing schemes in the City of Sydney (Ultimo-Pyrmont), the former South Sydney (Green Square), Willoughby, North Sydney, Randwick and Waverley. The amendment Act stipulated that the validation provisions would be taken to be repealed on the second anniversary of the date of assent to the Act unless sooner repealed by an environmental planning instrument. The assent date was 5 June 2000, so the second anniversary date at which point the validation of the six schemes expired was 5 June 2002.

No umbrella SEPP was introduced, despite drafting of a SEPP by officials of the former Department of Urban Affairs and Planning.[20] However – just in time to preserve the legality of the schemes in Sydney, South Sydney and Willoughby – the state government introduced a state environmental planning policy which amended three environmental planning instruments by inserting relevant affordable housing provisions. The plans amended covered Ultimo-Pyrmont, the Green Square precinct, and Willoughby local government area. This *State Environmental Planning Policy no.70 – Affordable Housing (Revised Schemes)* (SEPP 70) commenced on 1 June 2002.

However, while the Environmental Planning and Assessment Amendment (Affordable Housing) Act 2000 had also validated affordable housing levies being applied under section 94 by North Sydney, Randwick and Waverley councils, SEPP 70 did not revalidate those three schemes. Randwick and Waverley councils stopped collecting the s94 contributions.

There is no umbrella SEPP to satisfy s.94F(1) and 94F(3)(a) for any other council thinking about a local affordable housing scheme.

In December 2003, Parramatta council adopted affordable housing amendments to its LEP and adopted an affordable housing scheme. It formally asked the planning minister to approve the changes and to authorize them under SEPP 70 or another SEPP. Parramatta council's case was innovative because it asked to have its provisions included in a SEPP whose purpose was to validate some pre-existing schemes (namely, SEPP 70), rather than wait for an umbrella affordable housing SEPP. The Department of Planning did not reply to the council's correspondence, and the council stopped pursuing the matter in 2007.

There are three ways out of this impasse – if the Government concedes that production of affordable housing is alright for councils to do – and those are:
(1) The planning minister could introduce an umbrella SEPP to satisfy s.94F(1) and 94F(3)(a).The structure of the current SEPP 70 could easily be used as a basis on which to draft such a SEPP, and the minister only need amend it from time to include ('identify') a local government area as an area with a need for affordable housing when so requested by the relevant council.
(2) Alternatively, the minister could amend SEPP 70 on request by individual councils to have their LEP affordable housing provisions included in that SEPP's schedule.
(3) Alternately, the Government could move in the Parliament that section 94F be amended be deleting the two references to a SEPP.
None of these is a difficult drafting challenge. It's a matter of political will.

Moving forward

There is a tactical case for councils who want to implement an inclusionary zoning scheme to take steps to satisfy two legislative preconditions (hurdles) for them doing so, namely, amend their area's LEP to give authority for imposing affordable housing conditions, and adopt a contribution scheme as part of the LEP. (See s.94F(3)(b) of the Act.)

The 'missing SEPP' is not a reason for councils who want to collect developer contributions for affordable housing from amending their LEPs and adopting a developer contribution scheme. Putting off doing the work on those two elements will delay the start time for those councils to collect contributions during development assessment as soon as the external conditions (i.e. a state government policy rethink) allow.

The key steps for councils who wish to use this section of the Act are:
- Prepare a housing needs/(un)affordability study.
- Prepare a housing strategy that includes a contributions scheme.
- Propose amendments to the area's LEP to provide for a contributions scheme.
- Adopt a developer contribution scheme (affordable housing scheme).
- Lobby the planning minister to: (a) approve your LEP amendments, and (b) introduce a state environmental planning policy (or amend an existing one) that recognizes your local government area as an area with a need for affordable housing need and set requirements for conditions of consent.

See Figure 2.

Examples of LEP provisions

The inclusionary zoning provisions for Ultimo-Pyrmont (within the City of Sydney) are contained in Sydney Local Environmental Plan 2005, which was introduced in December 2005 and incorporates provisions similar to those of the Sydney Regional Environmental Plan no.26 – City West (whose application to the City was revoked at the same time). The REP's provisions had been validated by the Environmental Planning and Assessment Amendment (Affordable Housing) Act in June 2000, and re-validated by SEPP 70 in June 2002.

The inclusionary zoning provisions apply to residential development in the relevant zones at a value equivalent of 0.8% of the floor space area of the development, as well as to development that is not exclusively residential, where the value equivalent for contributions is 1.1% of the floor space area.

Attachment 4: LEP provisions for Ultimo-Pyrmont gives an example of affordable housing provisions from Sydney Local Environmental Plan 2005, for a scheme that operates in the suburbs of Ultimo and Pyrmont.

Attachment 5: LEP provisions for Green Square gives the affordable housing provisions from the Green Square precinct within the City of Sydney (formerly in the City of South Sydney, before the incorporation of that city into the City of Sydney in 2004).

The provisions apply to residential development in the relevant zones at a value equivalent of 3% of the floor space area of the development, as well as to non-residential development, where the value equivalent for contributions is 4% of the floor space area. These provisions were validated by the Environmental Planning and Assessment Amendment (Affordable Housing) Act in 2000, and re-validated by SEPP 70 in 2002.

Willoughby Local Environmental Plan 1995 includes provisions (section 25B) for development within a 'local housing precinct', which are residentially-zoned land indicated in the LEP. Developer contributions towards the provision of affordable housing are at a value equivalent of 4% of the floor space area of the development. The provisions were validated by the Environmental Planning and Assessment Amendment (Affordable Housing) Act and re-validated by SEPP 70. Designation of land as a 'local housing precinct' is done when considering a proposed rezoning (Willoughby Development Control Plan 2006, section G.7.4(C)).

Attachment 6: Proposed amendments to Parramatta LEP gives an example of another example of affordable housing provisions, related to multi-unit development. These proposed amendments to the Parramatta LEP were adopted by Parramatta Council on 15 December 2003; they were not approved by the Department of Planning because of that department's opposition to council's having affordable housing provisions in their LEPs, notwithstanding the provisions of the Act and policy commitments such as those in the Sydney metropolitan strategy, *City of cities* (2005).

The Parramatta affordable housing provisions would have applied to development applications for multi-unit housing, residential flat buildings, high-density housing, and mixed-use development. They sought contributions towards the provision of affordable housing equivalent of 3% of the floor space area of the development.

Examples of LEP-based affordable housing schemes

The Act requires 'a scheme for dedications or contributions set out in or adopted by an local environmental plan' (s.94F(3)(b)).

Affordable housing schemes indicate:
- how the scheme is to be administered;
- arrangements about dedications or in lieu contributions;
- development standards for the affordable housing;
- payment arrangements for contributions; and
- management arrangements for the housing.

Such schemes include operational matters not appropriate for an LEP. The scheme document can take the form of:
- a policy document, e.g. Ultimo-Pyrmont, Waverley
- a stand-alone DCP, e.g. Green Square
- provisions in a whole-of-local government area DCP, e.g. Willoughby

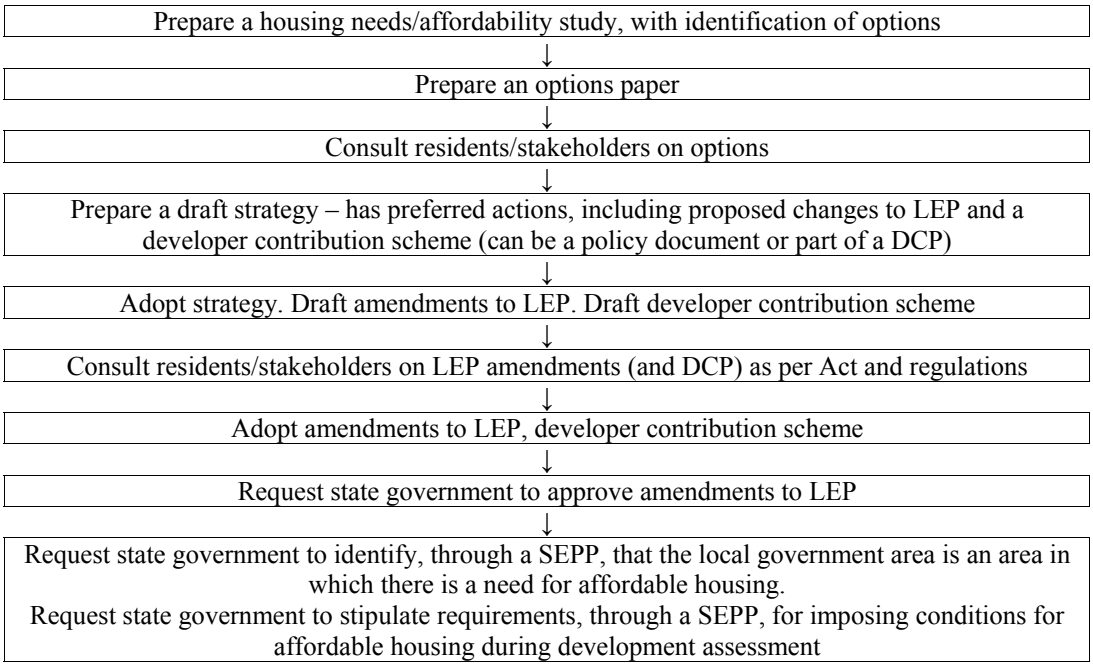
The Ultimo-Pyrmont scheme is an administrative program established by the Department of Planning and the scheme's 'instrument' is a policy document given status by the LEP.[21] The state government set up City West Housing Pty Ltd as an arms-length management organization to develop and manage affordable housing dwellings in these suburbs (initially), with the state government retaining ownership of the dwellings (by virtue of the state treasurer and the minister for housing being the two (and only) ordinary shareholders of the company). While the Sydney City Council is the consent authority in the precinct and a local environmental planning instrument applies (since December 2005), the scheme document is a state government document and the affordable housing agency is a state government entity.[22]

The Green Square scheme indicates a 'recommended affordable housing provider', and it is City West Housing. Any affordable housing units offered by developers are to be transferred (with title) to that provider; likewise, all monetary contributions received are forwarded to the provider.

The Willoughby scheme provides for the title of the housing to be retained by the council, with management (including tenancy management) to be undertaken by a community housing association nominated by the council. *Attachment 7: Willoughby affordable housing scheme* gives excerpts from the Willoughby affordable housing scheme (Willoughby Development Control Plan 2006). The scheme was adopted by the council on 8 March 1999 and took effect on 3 December 1999; it was amended on 4 September 2002, and incorporated into a whole-of-local government area DCP that came into effect on 21 August 2006.

The affordable housing schemes in Ultimo-Pyrmont, Green Square, Willoughby, Waverley and Randwick differ from social housing provided by the Department of Housing, or by community housing providers operating community housing under the Department's Office of Community Housing, in a significant regard. This is that the statutory definition of affordable housing allows for allocation of tenancies to a wider range of income groups than currently provided by the Department's allocation eligibility criteria.[23]

FIGURE 2: STEPS TO SATISFY SECTION 94F(1)-(3)



5. Development incentives

The Act says that none of the provisions in section 94F about compulsory contributions 'prevents the imposition on a development consent of other conditions relating to the provision, maintenance or retention of affordable housing. Such conditions may require, but are not restricted to, the imposition of covenants (including positive covenants) or the entering into of contractual or other arrangements.' (See s.94F(5).)

So, on what basis might those conditions be imposed? The obvious pathway is use of development control plans. The purpose of a DCP is to provide 'more detailed provisions than are contained in a local environmental plan'; it must be consistent with the provisions of the LEP (s.74C).

Development controls are made by councils themselves, without needing approval of the planning minister. (However, they must conform to the provisions of their LEP, which is determined by the planning minister, and may be overridden by a SEPP or REP, which are determined by the planning minister.[24])

To use a DCP for affordable housing purposes it makes sense for an LEP to have provisions on affordable housing – even if it does not have the specific provisions required by 94F(3)(b).

A few councils (e.g. Albury, Camden, Fairfield, Hawkesbury, Leichhardt, Marrickville, and Waverley) have promotion of affordable housing as a general aim in their LEP or its residential zones.

For example, section 3 of Waverley Local Environmental Plan 1996 states:

> In assessing any development application the Council shall take into consideration the following specific aims of this Plan:
> (1) The specific aims of this Plan in relation to affordable housing are:
> (a) to encourage the retention of existing affordable housing, including boarding houses and rental housing provided by residential flat buildings,
> (b) to encourage the development of new affordable housing in a variety of types and tenures for all income groups,
> (c) to facilitate the expansion of the Council's role in the provision of affordable housing in the public and private sectors, and
> (d) to promote the development of a broader and more appropriate range of affordable housing types in the private sector.

The Randwick Local Environmental Plan was amended on 19 August 2005 to:

- have as general aims –
  - encourage the provision of housing mix and tenure choice, including affordable housing,
  - encourage the retention of affordable housing in a variety of types and tenures;
- have an objective of enabling a mix of housing types to encourage housing affordability within the aims of specified land-use zones; and
- require masterplans for sites larger than 4,000 square meters to address 'provision of housing mix and tenure choice, including affordable housing'.

Using a DCP as a mechanism for affordable housing involves providing flexibility in the standards prescribed by the DCP. The council could consider that in specific circumstances there would be a net public benefit to allow a development go ahead according to standards that are weaker than the controls applicable to similar developments generally, in return for a compensating action (e.g. a contribution to a council affordable housing scheme). This approach uses a 'carrot' not a 'big stick'.

The standards that could be used are those about:

- lot sizes
- floor space
- building heights
- setbacks
- landscaping
- car-parking requirements

The standards trade-off that is usually referred to is the standard/control. The council could negotiate a contribution to an affordable housing scheme in exchange for allowing a more dense development. Density bonuses could be particularly useful in built-up areas with high land values, which are characterized by multi-unit and medium-density housing, and where there is little scope for upzoning because of the existing built-up nature of the area. The give-and-take is included in consent conditions on development approval.

They might not be acceptable to residents who oppose densification because of potential loss of quality in the built environment, esthetic attachment to bungalows, loss of views, more traffic, etc., i.e. where the site's environmental capacity is greater than its economic capacity.

Because this approach involves an element of negotiation before a formal development application is considered by the councillors in committee or council, there are risks around lack of transparency and kickbacks/corruption that need to be managed. The notion/practice of negotiating and agreeing to density bonuses is not, however, new and many councils have systems for managing these risks; moreover, the Independent Commission Against Corruption has regulatory oversight.

Examples

Three NSW councils have incorporated incentives for affordable housing in DCPs.

One of them, Waverley, has an active/operational, ongoing affordable housing scheme using this approach.[25] The Waverley Development Control Plan 2006 offers a relaxation of development controls in exchange for the provision of affordable housing, where the relaxation is able to be accommodated 'in a manner which maintains acceptable environmental amenity'. The DCP allows for increased floor space ratio within the existing building envelope, generally. The relaxation is not an 'as of right' variation. Moreover, the relaxation on floor space ratio is only given where affordable housing is provided. If the developer accepts the density bonus, some of the additional units must be affordable housing. The council is moving to integrate the scheme with a voluntary planning agreements policy and the provisions of section 93F.

Newcastle council provides for an additional floor space ratio of up to 0.25:1 for provision of affordable housing in the City East and City West precincts, through Newcastle Development Control Plan 2005.

Eurobodalla council provides for additional floor space ratio for provision of affordable housing, through its residential design code DCP (December 2004, effective 1 February 2005). The bonus would be up to the maximum amount of floor space ratio normally allowed for the site.

Moving forward

There are no formal obstacles to councils using DCPs for affordable housing purposes. The DCP-making process requires due democratic process and a policy framework that can give certainty for council, developers and residents.

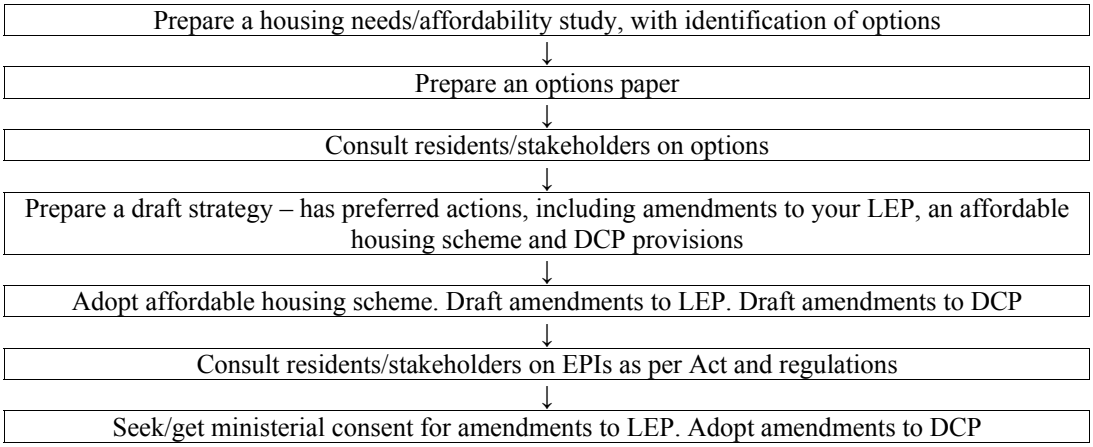
Note that in a statement on planning reform made on 30 September 2004, the planning minister indicated that DCPs should not cover matters covered by another planning instrument (e.g. an LEP), and should contain controls that are not mandatory.[26]

The key steps for councils who wish to use developer incentives through a DCP are:

- Prepare a housing needs/(un)affordability study.
- Prepare a housing strategy that includes an affordable housing scheme.
- Adopt an affordable housing scheme.
- Incorporate affordable housing objectives in your LEP.
- Amend a relevant DCP to provide for development incentives in exchange for contributions to your affordable housing scheme.
- Consider ways in which your DCP can be integrated with your council's policy on planning agreements.

See Figure 3.

FIGURE 3: STEPS TO USE A DCP FOR AFFORDABLE HOUSING



6. Use of section 94 and 94A

Sections 94 and 94A of the Act are not intended as a means of levying developers for affordable housing. Affordable housing is not a 'public amenity', a 'public service', or 'public infrastructure' in terms of planning law, though it is a 'public purpose' for which planning agreements may be entered into (see section 93F(2)).

Typically, most councils have used section 94 to finance economic infrastructure, though some councils have used it to finance social infrastructure. (Councils do not have to levy developers for public amenities and public services during the development assessment process: the Act says they 'may', and, as with section 94F which was modelled on it, the section imposes conditions on how it may be used.) The social infrastructure that councils have been using section 94 for have generally been labelled by them as 'community facilities' or 'community, cultural and recreational facilities'[27], and they reflect the activities envisaged in councils' social plans.[28]

These works are quite different from affordable housing. Indeed, the judgement in a 2000 court case between Meriton Apartments Pty Ltd and Minister for Urban Affairs and Planning stated that provision for low-income families was 'a purpose not contemplated by s94' and that the use of the section for such purpose was 'invalid'.[29]

When section 94 was introduced, some councils did use it to collect contributions for affordable housing.[30] Three councils with schemes under this section – North Sydney, Randwick, and Waverley – had them validated by amendments to the Act in 2000, a validation that expired in June 2002 (as indicated above, on page 9).

One Council – North Sydney – uses section 94 to levy funds to finance affordable housing to offset losses of affordable housing through the development process, linked to implementation of State Environmental Planning Policy no.10 – Retention of Low-cost Rental Accommodation.

The Council levies all development that will result in the loss of affordable bedspaces, whether the premises are vacant or tenanted, and all boarding houses are covered.[31] The Section 94 contributions plan establishes a nexus between the loss of affordable housing and the need for it, in the nature of the development process itself in sought-after, high land-value residential areas. The plan does not seek to replace all of the lost low-rent private dwellings on a one-for-one basis. Rather, the council's plan has the effect of ameliorating the negative impacts of the development process through a mitigation strategy, i.e. replacement of some of the lost stock through new stock financed by the levy. The plan aims to replace the bedspaces lost at a rate of 5% (i.e. for every 100 affordable bedspaces lost in the private rental market the council will replace them with 5 bedspaces in the social housing sector). The formula used to calculate the levy is based on historical and estimated acquisition costs of dwellings in the municipality.

The scheme is a policy document and was adopted by the Council on 13 November 1995, and validated retrospectively and for two years forward by the Environmental Planning and Assessment Amendment (Affordable Housing) Act in 2000.

7. Starting the process in your council

The first place to start is with a decision by your council that the extent and nature of housing unaffordability in its area is worthy of enquiry. The conventional way of doing this is through a housing needs or housing (un)affordability study. If the study identifies housing unaffordability as an issue of concern, and the council thinks there is a role for local government to play, then it considers options for action. Typically development of options is done as part of a needs study. Consideration of options leads to determination of appropriate and preferred strategies, which can include the pathways discussed in this resource paper.

Suggestions for how to do a housing strategy are given in a 'Local government housing kit' produced by Housing NSW, online at <www.housing.nsw.gov.au/Centre+For+Affordable+Housing/NSW+Local+Government+Housing+Kit/>.

Resolve to consider issues and options

Here is a draft of a motion that a councillor on your council could move to initiate a due process for an affordable housing strategy that includes an affordable housing scheme.

> That the Council prepare a housing needs study that considers the:
> - the number and types of households living in housing unaffordability in the area;
> - the impacts of the development process on housing unaffordability and loss of affordable housing;
> - the need for affordable housing;
> - the options for council to assist in facilitating greater housing affordability;
> - the options for council to promote affordable housing through the planning process, and in particular through an affordable housing scheme validated by a local environmental plan;
> - ongoing implementation issues for a housing strategy (including any affordable housing scheme); and
>
> that the housing strategy be informed by best practice models in New South Wales and be developed in consultation with local stakeholders.

Amend your local environmental plan

These suggestions will help in developing an inclusionary zoning scheme. The first three could be useful if you prefer to use planning agreements, since they send a policy signal to developers.

1. **Amend your area LEP to include this particular aim in the high-level aim of the LEP**:

> encourage the provision of a housing mix and choice including affordable housing in the area, and encourage the retention of affordable housing in the area in a variety of types and tenures

This will provide a surer basis for using the development assessment process for promoting, providing and/or protecting affordable housing in your area. It is probably critical if you want to include affordable housing provisions in a DCP (see section 74C

of the Act). It provides a clear policy signal to developers and the public for you to negotiate development contributions for affordable housing using the planning agreement framework provided by section 93F of the Act.

The wording recommended here (above) is taken from Randwick Local Environmental Plan 1998 (Amendment no.22, gazetted on 19 August 2005).

Note that 'provision and maintenance of affordable housing' is a high-level aim of the Act (see s.5(a)(viii)), and an environmental planning instrument may make provision for 'providing, maintaining and retaining, and regulating any matter relating to, affordable housing' (see s.26(1)(d)).

The Standard Instrument (Local Environmental Plans) Order 2006 gazetted on 31 March 2006 allows councils to insert particular aims in their LEP.[32]

2. **Amend your area LEP to include this objective in the objectives for residential and town center/commercial core zones**:

enable a mix of housing types to encourage housing affordability

This will provide a surer basis for using the development assessment process for promoting, providing and/or protecting affordable housing in your area. It is probably critical if you want to include affordable housing provisions in a DCP (see section 74C of the Act). It provides a clear policy signal to developers and the public for you to negotiate development contributions for affordable housing using the planning agreement framework provided by section 93F of the Act. The wording recommended here (above) is taken from Randwick Local Environmental Plan 1998 (Amendment no.22), gazetted on 19 August 2005.

The Standard Instrument (Local Environmental Plans) Order 2006 gazetted on 31 March 2006 allows councils to add local objectives to the core objectives of a land use zone.[33]

3. **Amend your area LEP to include this matter as a matter for development control plans for sites larger than 4,000 square meters**:

provision of housing mix and tenure choice, including affordable housing

Comment: This will provide a surer basis for using development assessment process for promoting and providing affordable housing in your area. It provides a clear policy signal to developers and the public for you to negotiate development contributions for affordable housing using the planning agreement framework provided by section 93F of the Act. The wording recommended here is taken from Randwick Local Environmental Plan 1998 (Amendment no.22, gazetted on 19 August 2005).

The Standard Instrument (Local Environmental Plans) Order 2006 gazetted on 31 March 2006 allows councils to include 'local provisions' in their LEP being 'provisions that reflect the outcomes of local strategic planning and consultation'.[34]

4. **Amend your area LEP to include these matters as matters for consideration in assessing development applications in residential zones:**

(1) A person must not do any of the following in relation to a boarding house or hostel:
(a) demolish the boarding house or hostel,
(b) alter or add to the structure or fabric of the inside or outside of the boarding house or hostel,
(c) change the use of the boarding house or hostel to another use (including, in particular, a change of use to backpackers accommodation),
(d) strata subdivide the boarding house or hostel,
except with development consent.
(2) A person must not do any of the following in relation to a residential flat building containing a low-rental dwelling:
(a) alter or add to the structure or fabric of the inside or outside of the residential flat building,
(b) strata subdivide the residential flat building,
except with development consent.
(3) In determining a development application required by this section, the consent authority is to consider the following in each case:
(a) the need to retain the particular type of housing in relation to any identified needs of the local area, and
(b) the accumulated impact that the loss of the housing will have on the supply of that type of housing in the local area, and
(c) any building and fire safety requirements, and
(d) whether arrangements have been made or will be made to assist residents who may be displaced by the development to find alternative comparable accommodation in the locality, and
(e) the availability of other buildings suitable for use as affordable housing, having regard to their location, type, size, rent levels and available services, and
(f) any adverse social and economic effects caused by the development on affordable housing stocks and on households in the local community on very low, low or moderate incomes who are spending 30% or greater of gross incomes on rent or home purchase expenses.

This will send a signal that loss of affordable housing is a matter of concern to the government. It reinforces use of State Environmental Planning Policy 10 (Retention of Low-Cost Rental Accommodation), which only applies to the Greater Metropolitan Region, and section 79C(1)(b) of the Act.

The wording recommended here is taken from provisions relating to loss of boarding houses in Randwick Local Environmental Plan 1998 (Amendment no.22, gazetted 19 August 2005) and from SEPP 10.

The Standard Instrument (Local Environmental Plans) Order 2006 gazetted on 31 March 2006 allows councils to include 'local provisions' in their LEP being 'provisions that reflect the outcomes of local strategic planning and consultation'.[35] The inclusion of a provision such as this in your LEP is predicated on this matter having been identified as an issue of concern in your housing needs/unaffordability study.

5. **Amend your area LEP to include these matters as matters for consideration in assessing development zone where caravan parks and manufactured home estates are permissible uses:**

(1) The objectives of this section are to:
(a) ensure the social and economic wellbeing of residents of caravan parks and manufactured home estates at risk of displacement due to redevelopment of caravan parks and manufactured home estates, and
(b) encourage the retention of caravan parks and other forms of low-cost accommodation on certain land in the local government area, and
(c) prevent development that would result in a loss of low-cost accommodation on that land unless sufficient comparable accommodation is available elsewhere in the local government area.
(2) This section applies to a development application for the carrying out of development on land to which this section applies other than:
(a) a caravan park, or
(b) a manufactured home estate, or
(c) a public utility undertaking, or
(d) development that is ancillary to a caravan park, manufactured home estate, or public utility undertaking.
(3) The consent authority must not grant consent to a development application to which this section applies unless it has taken into account the following matters in deciding whether to grant consent to the application:
(a) whether the proposed development is likely to reduce the availability of low-cost accommodation on the land to which the development application relates, and
(b) whether there is sufficient available comparable accommodation in the local government area to satisfy demand for such accommodation in that local government area, and
(c) whether the development, if carried out, is likely to cause adverse social and economic effects on the people who live on the land the subject of the application (if any), or on the general community, and
(d) whether adequate arrangements have been made to assist people who live on the land the subject of the application (if any), to find alternative comparable accommodation in the local government area, and
(e) whether the cumulative impact of the loss of low-cost accommodation in the local government area will result in a significant reduction in the stock of that accommodation.
(4) The consent authority must not grant consent to a development application to which this section applies unless satisfied that accommodation is available in the local government area that:
(a) is sufficient to accommodate the maximum number of people capable of being accommodated by existing development on
the land the subject of the development application at any point in the 12 months preceding the commencement of *[Name of local government area*] Local Environmental Plan [*Year*], and
(b) is comparable to the accommodation that was provided on that land in relation to price, facilities, services and type of tenure.

This will send a signal that closure of caravan parks and manufactured home estates is a matter of concern to the council. It reinforces use of section 79C(1)(b) of the Act.

The wording recommended here is taken from Gosford Local Environmental Plan 443.

The Standard Instrument (Local Environmental Plans) Order 2006 gazetted on 31 March 2006 allows councils to include 'local provisions' in their LEP being 'provisions that reflect the outcomes of local strategic planning and consultation'.[36] The inclusion of a provision such as this in your LEP is predicated on this matter having been identified as an issue of concern in your housing needs/unaffordability study.

6. **Amend your area LEP to include provisions that enable collection of developer contributions on an 'inclusionary zoning' basis**.

(1) The objectives of this section are:
(a) to ensure affordable housing is provided and managed in the area so that a socially diverse residential population representative of all income groups is maintained;
(b) to ensure affordable housing is provided and made available to a mix of households on very low, low and moderate incomes.
(2) Except as provided in subsection (3), development of any of the following types must contribute to the provision of affordable housing as set out in subsections (4) and (5):
(a) multi-unit housing;
(b) residential flat buildings; and
(c) mixed-use development.
(3) Development of the types described above is not required to contribute to the provision of affordable housing in any of the following circumstances:
(a) the proposed development will result in the creation of less than 200 square metres of additional gross floor area; or
(b) the development is for the purpose of social housing or a group home.
(4) This section authorises the consent authority to impose a condition that requires a contribution towards affordable housing on development of the type described in subsection (2). The terms of such a condition will be calculated in accordance with section (5).
(5) Contributions towards the provision of affordable housing will be the equivalent of a percentage, as determined by the consent authority from time to time, of the floor space area of the development.
(6) In the case of mixed use developments, only the residential component of the development will be included in the calculations.
(7) Contributions towards the provision of affordable housing will be made by the dedication of completed dwellings and/or payment of a monetary contribution at the discretion of the consent authority.
(8) Monetary contributions are determined by calculating the value of the floor space area referred to in (5) above using the most current median sales price of similar dwellings for the local government area as documented in the *Rent and Sales Report* published by the NSW Department of Housing or, if another document has been approved for that purpose by the Director-General, that document.
(9) Contributions towards affordable housing will be applied in accordance with the consent authority's scheme for dedications or contributions for affordable housing.

A local council needs provisions along these lines if it wants to use the provisions of section 94F of the Act (see s.94F(3)(b)).

The wording recommended here is taken from proposed changes to the Parramatta Local Environmental Plan made by Parramatta City Council on 15 December 2003. (See *Attachment 6: Proposed amendments to Parramatta LEP*.)

The Standard Instrument (Local Environmental Plans) Order 2006 gazetted on 31 March 2006 allows councils to include 'local provisions' in their LEP being 'provisions that reflect the outcomes of local strategic planning and consultation'.[37] The inclusion of a provision such as this in your LEP is predicated on need for affordable housing having been identified as an issue of concern in your housing needs/unaffordability study.

7. **Adopt a policy to establish and implement an affordable housing scheme**.

   Use the provisions of Willoughby Development Control Plan 2006 as a model. This is online at the Council's website at <www.willoughby.nsw.gov.au>. An excerpt is at *Attachment 7: Willoughby affordable housing scheme*, on page 36 of this paper. Customize it to your area.

You must have a scheme to satisfy section 94F(3)(b) of the Act. An affordable housing scheme establishes how you are going to use developer contributions, whether collected by inclusionary zoning or trade-offs of development standards. The scheme indicates how you are going to manage contributions or dedications of housing unit or land, and how you are going to arrange management of affordable housing dwellings. The Willoughby model, recommended here, retains council title of properties but vests property and tenancy management of them to a community housing association. This community housing association would be of your choice.

8. Attachments

Attachment 1: Section 93F of the Environmental Planning and Assessment Act
Attachment 2: Section 94F of the Environmental Planning and Assessment Act
Attachment 3: Affordable housing principles
Attachment 4: LEP provisions for Ultimo-Pyrmont
Attachment 5: LEP provisions for Green Square
Attachment 6: Proposed amendments to Parramatta LEP
Attachment 7: Willoughby affordable housing scheme

Attachment 1: Section 93F of the Environmental Planning and Assessment Act

93F Planning agreements

(1) A planning agreement is a voluntary agreement or other arrangement under this Division between a planning authority (or 2 or more planning authorities) and a person (the developer):
(a) who has sought a change to an environmental planning instrument, or
(b) who has made, or proposes to make, a development application, or
(c) who has entered into an agreement with, or is otherwise associated with, a person to whom paragraph (a) or (b) applies,

under which the developer is required to dedicate land free of cost, pay a monetary contribution, or provide any other material public benefit, or any combination of them, to be used for or applied towards a public purpose.
(2) A public purpose includes (without limitation) any of the following:
(a) the provision of (or the recoupment of the cost of providing) public amenities or public services,
(b) the provision of (or the recoupment of the cost of providing) affordable housing,
(c) the provision of (or the recoupment of the cost of providing) transport or other infrastructure relating to land,
(d) the funding of recurrent expenditure relating to the provision of public amenities or public services, affordable housing or transport or other infrastructure,
(e) the monitoring of the planning impacts of development,
(f) the conservation or enhancement of the natural environment.
(3) A planning agreement must provide for the following:
(a) a description of the land to which the agreement applies,
(b) a description of:
(i) the change to the environmental planning instrument to which the agreement applies, or
(ii) the development to which the agreement applies,
(c) the nature and extent of the provision to be made by the developer under the agreement, the time or times by which the provision is to be made and the manner by which the provision is to be made,
(d) in the case of development, whether the agreement excludes (wholly or in part) or does not exclude the application of section 94 or 94A to the development,
(e) if the agreement does not exclude the application of section 94 to the development, whether benefits under the agreement are or are not to be taken into consideration in determining a development contribution under section 94,
(f) a mechanism for the resolution of disputes under the agreement,
(g) the enforcement of the agreement by a suitable means, such as the provision of a bond or guarantee, in the event of a breach of the agreement by the developer.
(4) A provision of a planning agreement in respect of development is not invalid by reason only that there is no connection between the development and the object of expenditure of any money required to be paid by the provision.
(5) If a planning agreement excludes the application of section 94 or 94A to particular development, a consent authority cannot impose a condition of development consent in respect of that development under either of those sections (except in respect of the application of any part of those sections that is not excluded by the agreement).
(6) If a planning agreement excludes benefits under a planning agreement from being taken into consideration under section 94 in its application to development, section 94 (6) does not apply to any such benefit.
(7) Any Minister, public authority or other person approved by the Minister is entitled to be an additional party to a planning agreement and to receive a benefit under the agreement on behalf of the State.

(8) A council is not precluded from entering into a joint planning agreement with another council or other planning authority merely because it applies to any land not within, or any purposes not related to, the area of the council.
(9) A planning agreement cannot impose an obligation on a planning authority:
(a) to grant development consent, or
(b) to exercise any function under this Act in relation to a change to an environmental planning instrument.
(10) A planning agreement is void to the extent, if any, to which it requires or allows anything to be done that, when done, would breach this section or any other provision of this Act, or would breach the provisions of an environmental planning instrument or a development consent applying to the relevant land.
(11) A reference in this section to a change to an environmental planning instrument includes a reference to the making or revocation of an environmental planning instrument.

Attachment 2: Section 94F of the Environmental Planning and Assessment Act

94F Conditions requiring land or contributions for affordable housing

(1) This section applies with respect to a development application for consent to carry out development within an area if a State environmental planning policy identifies that there is a need for affordable housing within the area and:
(a) the consent authority is satisfied that the proposed development will or is likely to reduce the availability of affordable housing within the area, or
(b) the consent authority is satisfied that the proposed development will create a need for affordable housing within the area, or
(c) the proposed development is allowed only because of the initial zoning of a site, or the rezoning of a site, or
(d) the regulations provide for this section to apply to the application.

(2) Subject to subsection (3), the consent authority may grant consent to a development application to which this section applies subject to a condition requiring:
(a) the dedication of part of the land, or other land of the applicant, free of cost to be used for the purpose of providing affordable housing, or
(b) the payment of a monetary contribution to be used for the purpose of providing affordable housing, or both.

(3) A condition may be imposed under this section only if:
(a) the condition complies with all relevant requirements made by a State environmental planning policy with respect to the imposition of conditions under this section, and
(b) the condition is authorised to be imposed by a regional environmental plan or local environmental plan, and is in accordance with a scheme for dedications or contributions set out in or adopted by such a plan, and
(c) the condition requires a reasonable dedication or contribution, having regard to the following:
(i) the extent of the need in the area for affordable housing,
(ii) the scale of the proposed development,
(iii) any other dedication or contribution required to be made by the applicant under this section or section 94.

(4) A consent authority that proposes to impose a condition in accordance with this section must take into consideration any land or other sum of money that the applicant has previously dedicated free of cost, or previously paid, for the purpose of affordable housing within the area otherwise than as a condition of a consent.

(5) Nothing in this section prevents the imposition on a development consent of other conditions relating to the provision, maintenance or retention of affordable housing. Such conditions may require, but are not restricted to, the imposition of covenants (including positive covenants) or the entering into of contractual or other arrangements.

Attachment 3: Affordable housing principles

These principles are from State Environmental Planning Policy no 70 – Affordable Housing (Revised Schemes). The SEPP is published online by the Parliamentary Counsel's Office at <www.legislation.nsw.gov.au>.

1 Where any of the circumstances described in section 94F (1) (a), (b), (c) or (d) of the Act occur, and a regional environmental plan or local environmental plan authorises an affordable housing condition to be imposed, such a condition should be imposed so that mixed and balanced communities are created.
2 Affordable housing is to be created and managed so that a socially diverse residential population representative of all income groups is developed and maintained in a locality.
3 Affordable housing is to be made available to a mix of very low, low and moderate income households.
4 Affordable housing is to be rented to appropriately qualified tenants and at an appropriate rate of gross household income.
5 Land provided for affordable housing is to be used for the purpose of the provision of affordable housing.
6 Buildings provided for affordable housing are to be managed so as to maintain their continued use for affordable housing.
7 Rental from affordable housing, after deduction of normal landlord's expenses (including management and maintenance costs and all rates and taxes payable in connection with the dwellings), is generally to be used for the purpose of improving or replacing affordable housing or for providing additional affordable housing.
8 Affordable housing is to consist of dwellings constructed to a standard that, in the opinion of the consent authority, is consistent with other dwellings in the vicinity.

Attachment 4: LEP provisions for Ultimo-Pyrmont

These provisions are from Sydney Local Environmental Plan 2005 and relate to Ultimo and Pyrmont in the City of Sydney. The LEP is published online by the Parliamentary Counsel's Office at <www.legislation.nsw.gov.au>.

118 What are the "Affordable Housing Program" and "total floor area"?
In this Part:
Affordable Housing Program means the Affordable Housing Revised City West Housing program adopted by the Minister in May 2002, copies of which are available from the Department's Head Office.
total floor area means the total of the areas of each floor of a building. The area of each such floor is taken to be the area within the outer face of the external enclosing walls, but excluding:
(a) columns, fin walls, sun control devices, awnings and other elements, projections or works outside the general lines of the outer face of the external walls (other than balconies), and
(b) ancillary car parking required by the consent authority and any associated internal vehicular and pedestrian access to that car parking, and
(c) space for the loading and unloading of goods.

119 What are the affordable housing principles?
The affordable housing principles are set out in Schedule 2 to State Environmental Planning Policy No 70—Affordable Housing (Revised Schemes).

120 Matters for consideration by consent authority
Before granting consent to any proposed development of land in the Residential or Residential-Business zone within Ultimo-Pyrmont, the consent authority is to take into consideration the following:
(a) the planning principles for Ultimo-Pyrmont,
(b) the affordable housing principles,
(c) the need for development to provide different kinds of housing, including affordable housing, to ensure that very low, low and moderate income households may continue to afford to live in Ultimo-Pyrmont,
(d) whether land values in Ultimo-Pyrmont may reasonably be expected to rise when land in Ultimo-Pyrmont is developed in accordance with this plan and whether very low to moderate income households may continue to be able to live in Ultimo-Pyrmont,
(e) the impact of the proposed development on the existing housing within Ultimo-Pyrmont for very low, low and moderate income households,
(f) the impact of the proposed development on the existing mix and likely future mix of residential housing stock within Ultimo-Pyrmont.

121 Dedication or contribution for purpose of affordable housing
(1) Before granting consent to the carrying out of development (other than subdivision) on land in the Residential or Residential-Business zone within Ultimo-Pyrmont, the consent authority must consider whether an affordable housing condition should be imposed on the consent.
(2) The following are affordable housing conditions:
(a) A condition requiring the payment of a monetary contribution to the consent authority by the applicant to be used for the purpose of providing affordable housing in accordance with the Affordable Housing Program that is the value, calculated in accordance with that program, of the following total amount:
(i) 0.8% of so much (if any) of the total floor area to which the development application relates as is intended to be used exclusively for residential purposes, and

(ii) 1.1% of so much (if any) of that total floor area as is not intended to be used exclusively for residential purposes.
(b) If that total amount is sufficient, a condition requiring:
(i) the dedication in favour of the consent authority, free of cost, of land of the applicant comprised of one or more complete dwellings with a total floor area of not more than that total amount, each dwelling having a total floor area of not less than 50 square metres, and
(ii) if the amount of total floor area of the complete dwelling or dwellings is less than that total amount, the payment of a monetary contribution to the consent authority by the applicant that is the value, calculated in accordance with the Affordable Housing Program, of the total floor area equivalent to the difference between those amounts, to be used for the purpose of providing affordable housing in accordance with that program.
(3) To remove any doubt:
(a) it does not matter whether the floor area concerned was in existence before, or is created after, the commencement of this Part, or whether or not the floor area concerned replaces a previously existing area, and
(b) the demolition of a building, or a change in the use of land, does not give rise to a claim for a refund of any amount that has been contributed under an affordable housing condition.
(4) This clause authorises the imposition of an affordable housing condition when a consent authority grants consent to the carrying out of development (other than subdivision) on land in the Residential or Residential-Business zone within Ultimo-Pyrmont subject to section 94F (3) (c) and (4) of the Act and clauses 122 and 123.
(5) However, a consent authority is not authorised to impose an affordable housing condition unless at least one of the circumstances described in section 94F (1) (a)–(d) of the Act exists.
(6) This clause and any condition imposed under it are subject to section 94G of the Act.

122 Development excepted from this Part
This Part does not apply to the following development (or to so much of any mixed development that consists of the following development):
(a) development for the purpose of public housing,
(b) development for the purpose of affordable housing,
(c) development for the purpose of community facilities,
(d) development for residential purposes that will result in the creation of less than 200 square metres of total floor area,
(e) development for non-residential purposes that will result in the creation of less than 60 square metres of total floor area,
(f) development for the purpose of a public road, a light rail or railway undertaking or a public utility undertaking or facility.

123 Affordable housing conditions after initial development
This Part does not authorise an affordable housing condition to be imposed with respect to an amount of total floor area if the consent authority is satisfied that a condition of consent has previously been imposed pursuant to this Part or Sydney Regional Environmental Plan No 26—City West with respect to the same or an equivalent amount of total floor area.

Attachment 5: LEP provisions for Green Square

These provisions are from South Sydney Local Environmental Plan 1998 and relate to the Green Square precinct of the City of Sydney. The LEP is published online by the Parliamentary Counsel's Office at <www.legislation.nsw.gov.au>.

DIVISION 3 AFFORDABLE HOUSING AT GREEN SQUARE

27L Affordable housing aims and objectives
Because land values in Green Square may reasonably be expected to increase when land in the area is developed in accordance with this plan, development in Green Square should provide different kinds of housing, including affordable housing, to ensure that households on very low to moderate incomes may live in the area.
Development in Green Square should promote and retain a socially diverse residential population representative of all income groups.

27M Meanings of 'affordable housing', 'affordable housing provisions' and 'total floor area'
In this Division:
affordable housing has the same meaning as in the Act.
affordable housing provisions means the provisions of the *Green Square Affordable Housing Development Control Plan*, as in force from time to time, setting out a scheme for the provision and management of affordable housing in the Green Square area in accordance with the affordable housing principles. Copies of the development control plan are available from the Council's administrative offices.
total floor area means the total of the areas of each floor of a building. The area of each such floor is taken to be the area within the outer face of the external enclosing walls, but excluding:
(a) columns, fins, sun control devices, awnings and other elements, projections or works outside the general lines of the outer face of the external walls (other than balconies comprising the minimum balcony area required by the Council, and excluding any additional area), and
(b) the maximum ancillary car parking permitted by the Council and any associated internal vehicular and pedestrian access to that car parking, and
(c) space for the loading and unloading of goods.

27N Green Square affordable housing principles
The *Green Square affordable housing principles* are as follows:
(a) affordable housing should be provided and managed in the Green Square locality so that a socially diverse residential population representative of all income groups is created and maintained,
(b) affordable housing that is provided is to be made available to a mix of households on very low, low and moderate incomes,
(c) affordable housing that is provided is to be rented to eligible households at an appropriate rate of gross household income,
(d) dwellings provided for affordable housing are to be managed so as to maintain their continued use for affordable housing,
(e) affordable housing is to consist of dwellings constructed to a standard which in the opinion of the Council is consistent with other dwellings in the Green Square locality.

27O Matters for consideration by consent authority
Before granting consent to any proposed development of land within Green Square in Zone No 10 (a), 10 (b), 10 (c), 10 (d) or 10 (e), the consent authority is to take into consideration the following:
(a) the aims and objectives of this Division,

(b) the Green Square affordable housing principles,
(c) the affordable housing principles set out in Schedule 2 to *State Environmental Planning Policy No 70—Affordable Housing (Revised Schemes)*,
(d) the need for development to provide different kinds of housing, including affordable housing, to ensure that households on very low, low and moderate incomes may be able to afford to live in Green Square,
(e) the impact of the proposed development on the existing mix and likely future mix of residential housing stock within Green Square.

27P Affordable housing conditions
(1) Before granting consent to the carrying out of development (other than subdivision) on land in Green Square within Zone No 10 (a), 10 (b), 10 (c), 10 (d) or 10 (e), the consent authority must consider whether an affordable housing condition should be imposed on the consent.
(2) The following are *affordable housing conditions*:
(a) A condition requiring the payment of a monetary contribution to the consent authority by the applicant to be used for the purpose of providing affordable housing in accordance with the Green Square affordable housing principles and the affordable housing provisions that is the value, calculated in accordance with those provisions, of the following *total amount*:
(i) 3% of so much (if any) of the total floor area to which the development application relates as is intended to be used exclusively for residential purposes, and
(ii) 1% of so much (if any) of that total floor area as is not intended to be used exclusively for residential purposes.
(b) If that total amount is sufficient, a condition requiring:
(i) the dedication in favour of the consent authority, free of cost, of land of the applicant comprised of one or more complete dwellings with a total floor area of not more than that total amount, each dwelling having a total floor area of not less than 50 square metres, and
(ii) if the amount of total floor area of the complete dwelling or dwellings is less than that total amount, the payment of a monetary contribution to the consent authority by the applicant that is the value, calculated in accordance with the affordable housing provisions, of the total floor area equivalent to the difference between those amounts,
to be used for the purpose of providing affordable housing in accordance with the Green Square affordable housing principles and the affordable housing provisions.
(3) To remove any doubt:
(a) it does not matter whether the total floor area concerned was in existence before, or is created after, the commencement of this Division, or whether the area concerned replaces a previously existing area, and
(b) demolition of a building or a change in the use of land does not give rise to a claim for a refund of any amount that has been contributed under this clause for use for affordable housing.
(4) This clause authorises the imposition of an affordable housing condition when the consent authority grants consent to the carrying out of development (other than subdivision) on land in Green Square within Zone No 10 (a), 10 (b), 10 (c), 10 (d) or 10 (e), subject to section 94F (3) (c) and (4) of the Act and clauses 27Q and 27R.
(5) However, a consent authority is not authorised to impose an affordable housing condition unless at least one of the circumstances described in section 94F (1) (a)–(d) of the Act exists.
(6) This clause and any condition imposed under it are subject to section 94G of the Act.

27Q Development exempted from affordable housing conditions
This Division does not authorise an affordable housing condition to be imposed in the case of a development application seeking consent for development:
(a) for residential purposes, if the proposed development will result in the creation of less than 200 square metres of total floor area, or

(b) for non-residential purposes, if the proposed development will result in the creation of less than 60 square metres of total floor area, or
(c) for the purpose of public housing, or
(d) for the purpose of affordable housing, if the applicant for consent is a community housing or non-profit organisation, or
(e) for the purpose of community facilities, or
(f) for the purpose of a public road, or a public utility undertaking or facility,
and for no other purpose.

27R Affordable housing conditions after initial development
An affordable housing condition is not authorised to be imposed with respect to an amount of total floor area if the consent authority is satisfied that a condition of consent has previously been imposed pursuant to this Division with respect to the same or an equivalent amount of total floor area.

Attachment 6: Proposed amendments to Parramatta LEP

These proposed amendments to the Parramatta Local Environmental Plan were adopted by Parramatta Council on 15 December 2003. They were not approved by the Department of Planning.

PART XX AFFORDABLE HOUSING

XXA What are the objectives of this Part?

The objectives of this part are:

(a) to ensure affordable housing is provided and managed in Parramatta so that a socially diverse residential population representative of all income groups is maintained;

(b) to ensure affordable housing is provided and made available to a mix of households on very low, low and moderate incomes;

(c) to ensure affordable housing that is provided is rented to eligible households at an appropriate rate of gross household income;

(d) to ensure dwellings provided for affordable housing are managed to maintain their continued use for affordable housing;

(e) to ensure affordable housing consists of dwellings constructed to a standard which in the opinion of the Council is consistent with other dwellings in the locality.

XXB What types of development must contribute to the provision of affordable housing?

(1) Except as provided in sub-clause (2), development of any of the following types must contribute to the provision of affordable housing as set out in clauses XXC and XXD:

(a) multi-unit housing;

(b) residential flat buildings;

(c) mixed-use development; and

(d) high density housing.

(2) Development of the types described above is not required to contribute to the provision of affordable housing in any of the following circumstances:

(a) the proposed development will result in the creation of less than 200 square metres of additional gross floor area;

(b) the development is for the purpose of public housing; or

(c) the applicant is a community housing or non-profit organisation.

XXC How will contributions be made towards the provision of affordable housing?

(1) This clause authorises the consent authority to impose a condition that requires a contribution towards affordable housing on development of the type described in clause XXB.

(2) The terms of such a condition will be calculated in accordance with clause XXD below.

XXD How are contributions towards the provision of affordable housing calculated?

(1) Contributions towards the provision of affordable housing will be the equivalent of 3 per cent of the floor space area of the development.

(2) In the case of mixed use developments, only the residential component of the development will be included in the calculations.

(3) Contributions towards the provision of affordable housing will be made by the dedication of completed dwellings and/or payment of a monetary contribution at the

discretion of the consent authority and having regard to the principles outlined in the Parramatta Affordable Housing Scheme.

(4) Monetary contributions are determined by calculating the value of the floor space area referred to in (1) above using the most current median sales price of similar dwellings for the Parramatta local government area as documented in the *Rent and Sales Report NSW* published by the NSW Department of Housing or, if another document has been approved for that purpose by the Director-General, that document.

XXE How will contributions towards affordable housing be applied?

Contributions *towards* affordable housing will be applied in accordance with the Parramatta Affordable Housing Scheme.

New Definitions:

affordable housing has the same meaning as in the Act.

affordable housing provisions means the provisions of the *Parramatta Affordable Housing Scheme*, as in force from time to time, setting out a scheme for the provision and management of affordable housing in Parramatta in accordance with the affordable housing principles.

Attachment 7: Willoughby affordable housing scheme

Willoughby's affordable housing scheme takes the form of provisions in a whole-of-local government area DCP (Willoughby Development Control Plan 2006). These excerpts do not include the DCP's provisions that replicate those of the Local Environmental Plan or primarily serve an information purpose. The full text is online at the Council's website <www.willoughby.nsw.gov.au>.

WILLOUGHBY DEVELOPMENT CONTROL PLAN 2006 PART G.7 – WILLOUGHBY LOCAL HOUSING

The purpose of Part G.7 is to outline the Willoughby Local Housing Program, which aims to provide housing for special needs housing groups in Willoughby City. This Part of WDCP should be read in conjunction with WLEP 1995 Clause 25B and the Willoughby City Housing Policy. Part G.7 of this Plan applies to land identified in Clause 5(1) of Willoughby Local Environmental Plan 1995 under the definition of Willoughby Local Housing Precinct.

The principal aims and objectives of Part G.7 of this Plan are:
– To encourage the development of new housing to meet the housing requirements of special needs groups within the City of Willoughby;
– To assist in promoting the Council's role in facilitating housing for special needs housing groups within the City of Willoughby;
– To provide clear guidance to the community and the development industry regarding the provision of Willoughby Local Housing; and
– To outline the obligations relating to the ongoing management of Willoughby Local Housing.

G.7.1 What is Willoughby Local Housing?

Willoughby Local Housing means affordable housing that is rented housing occupied by people from special needs housing groups within the City of Willoughby, at rents which do not exceed a benchmark of 30% of their actual household income.

G.7.2. Exemptions

The following development (or so much on any mixed development that consists of the following development) is exempt from providing on site or the in lieu monetary amount:
a) Development for the purpose of public housing;
b) Development for the purpose of community housing.

C Consideration of all proposed rezonings as Willoughby Local Housing precincts
Before resolving to rezone land, Council is to consider regarding the inclusion of the subject land as a Willoughby Local Housing Precinct under clause 25B of Willoughby Local Environmental Plan 1995.
By including the subject site as a Willoughby Local Housing Precinct, 4% of the accountable total floor space to which the development application relates, must be utilised exclusively for the purpose of providing Willoughby Local Housing in accordance with the Willoughby Local Housing Program outlined in WLEP 1995 Clause 25B. …

G.7.5. Management and Administration

A. Administration

Council's Housing Policy Officer will undertake the administration of the Program. The dwellings provided under the Willoughby Local Housing Program will be managed by a Community Housing Operator nominated by Council at a rental that does not exceed a benchmark of 30% of actual household income. Rental income will be used to meet management and maintenance costs and all rates and taxes payable in connection with the dwelling/s. All rental received by or on behalf of Council, after deduction of normal landlord's expenses, will be transferred to the Willoughby Local Housing Program to be used only for the purpose of improving, replacing or providing additional Willoughby Local Housing stock within the City of Willoughby.

B. Options for providing Willoughby local housing

All developments within the Willoughby Local Housing Precincts are to be assessed under Clause 25B(3) of Willoughby LEP 1995 to determine if a condition of consent will be imposed regarding the provision of Willoughby Local Housing.

Three options exist for the provision of Willoughby Local Housing:

– Provision of dwellings for the purpose of Willoughby Local Housing on-site;

– Provision of dwellings for the purpose of Willoughby Local Housing off-site; or

– Payment of an in lieu monetary contribution.

The process for collection and payment of Willoughby Local Housing is outlined in Attachment 8.

The intention is to provide dwellings for the purpose of Willoughby Local Housing on-site as part of all new developments in Willoughby Local Housing Precincts. It should be noted that incorporating dwellings on-site is the preferred course of action. In certain circumstances, negotiation may take place at development application stage to discuss providing appropriate dwellings off-site, or payment of a monetary payment in lieu. Determining which option is most appropriate in the context of the development will be negotiated between the applicant and Council at development application stage, and the agreement reached will form a condition of development consent.

Provision of Willoughby local housing

Where Willoughby Local Housing is proposed for on site provision, the applicant must transfer title of the Willoughby Local Housing dwellings to Council free of cost. The dwelling(s) to be dedicated to Council as Willoughby Local Housing must be identified on development application plans. The standard of dwelling construction, fittings and finishes must be to the satisfaction of Council, in accordance with the provisions of Willoughby LEP 1995 Clause 25B. As a guide, the standard should be similar to that of other dwellings within the development.

Where dwellings are to be provided off-site, the standard of dwelling construction, fittings and finishes must be to the satisfaction of Council, in accordance with the provisions of Willoughby LEP 1995 Clause 25B. Also, Council must agree that the provision of dwellings off-site is the best outcome for the provision of Willoughby Local Housing in that case.

Prior to lodgement of the construction certificate, the applicant is to submit to the Council details of all internal fittings and finishes of the dwellings for approval. An agreement to transfer title to the Council must be finalised to the satisfaction of Council and evidence of the transfer provided to Council prior to the granting of a construction certificate. The requirement for the provision of Willoughby Local Housing will be satisfied when the title of the dwelling(s) is transferred to Council.

The applicant must not lodge an application for an Occupation Certificate and will not permit the occupation of the development until such time as the dwelling(s) have been transferred into the ownership of Council. The applicant must also agree to pay the Council's reasonable legal costs of the Council satisfying itself that the agreement is appropriate.

The transfer of title must occur within two months of the registration of any strata subdivision for the development.

Monetary or in lieu provision

Following negotiation with Council, alternate arrangements may be made such that an in lieu monetary payment may be provided so that Willoughby Local Housing can be provided elsewhere within the City of Willoughby. The amount of the payment would be equivalent to the market value of the dwellings that would otherwise be required. The equivalent market value is determined by the most current median sales price for similar sized dwellings for the Willoughby local government area as documented in the Rent and Sales Report NSW or an equivalent document.

Prior to the granting of a construction certificate, the principal certifying authority must require the following evidence to be submitted to ensure that the condition of development consent relating to Willoughby Local Housing will be satisfied:

– Evidence that payment of the in lieu amount has been made to Council; or lodgement of a satisfactory bank guarantee with Council to the value of the required amount (see Bank Guarantees below).

Prior to granting an occupation certificate for the development, the principal certifying authority is to ensure that the in lieu monetary contribution has been paid in full.

Bank guarantees

Any bank guarantee taken out to provide evidence to Council that an in-lieu monetary payment for Willoughby Local Housing will be paid must be in a form acceptable to Council. Council will generally require a bank guarantee:

– To be issued by an Australian bank

– To require the bank to pay the guaranteed amount unconditionally to Council where it so demands in writing, after which Council is able to grant the first Occupation Certificate or where no occupation certificate is required, the occupation of the development;

– To prohibit the bank from having recourse to the applicant or other person entitled to act upon the consent before paying the guaranteed amount;

– To provide that the bank's obligations will be discharged only when payment is made according to the terms of the bank guarantee, if the consent lapses, or if Council notifies the bank in writing that the bank guarantee is no longer required. The bank guarantee will otherwise have no date of termination;

– To require the bank to pay the guaranteed amount, notwithstanding any notice to the contrary by the applicant or other persons entitled to act upon the consent; and

– To provide that the maximum payable, if not paid in the same financial year as the development consent to which it relates, shall be indexed annually on March 1 on the basis of the Established House Price Index for Sydney for the preceding year (December to December- using arithmetic averages of the quarterly index numbers) as published by the Australian Bureau of Statistics (Cat. No. 6416.0).

Endnotes

[1] This paper does not consider how councils can thwart or mitigate the loss of affordable housing in the private market through using s.79C(1)(b) of the Act, or State Environmental Planning Policy 10. While it considers methods by which councils might raise finance for affordable housing, this discussion should not be inferred to argue that the responsibility for provision of affordable housing is a primary role for local government rather than the state government.
[2] An LEP is 'made' by the planning minister, on the basis of a plan submitted by a local council (s.70 of the Act).
[3] Craige Wyse, 'Waverley Council's approach to affordable housing', paper to Affordable Housing Symposium, University of Technology Sydney, March 2000, p.6.
[4] Randwick Local Environmental Plan 1998 requires master plans or sites larger than 4,000 square meters to 'address, illustrate and explain, where appropriate, proposals covering the following range of matters (but is not limited to them): … (u) provision of housing mix and tenure choice, including affordable housing' (section 40A(5)).
[5] Environmental Planning and Assessment Act 1979, s.4(1).
[6] A registered planning agreement is binding on, and enforceable against, the owner of the land even if there is a change of land owner (s.93H(3)).
[7] Department of Infrastructure, Planning and Natural Resources, 'Changes to the development contribution system in NSW', DIPNR Circular PS 05-003, 14 June 2005, p.1.
[8] Department of Infrastructure, Planning and Natural Resources, 'Development contributions: practice notes – July 2005', DIPNR Circular PS 05-004, 8 July 2005, Introduction to the practice notes, p.4.
[9] Department of Infrastructure, Planning and Natural Resources, 'Development contributions: practice notes – July 2005', DIPNR Circular PS 05-004, 8 July 2005, Planning agreements, p.6.
[10] Department of Infrastructure, Planning and Natural Resources, 'Development contributions: practice notes – July 2005', DIPNR Circular PS 05-004, 8 July 2005, Planning agreements, p.7, 9.
[11] Department of Infrastructure, Planning and Natural Resources, 'Development contributions: practice notes – July 2005', DIPNR Circular PS 05-004, 8 July 2005, Planning agreements, p.7.
[12] Department of Infrastructure, Planning and Natural Resources, 'Development contributions: practice notes – July 2005', DIPNR Circular PS 05-004, 8 July 2005, Planning agreements, p.9. The provisions of SEPP 1 are to be incorporated into a standard template for local environmental plans, according to a government proposal announced on 20 September 2005 (see <www.planning.nsw.gov.au/planning_reforms/index.asp>).
[13] Department of Infrastructure, Planning and Natural Resources, 'Development contributions: practice notes – July 2005', DIPNR Circular PS 05-004, 8 July 2005, Planning agreements, p.12.
[14] Department of Infrastructure, Planning and Natural Resources, 'Development contributions: practice notes – July 2005', DIPNR Circular PS 05-004, 8 July 2005, Planning agreements, p.10, 12.
[15] Department of Infrastructure, Planning and Natural Resources, 'Development contributions: practice notes – July 2005', DIPNR Circular PS 05-004, 8 July 2005, Planning agreements, p.9.
[16] Department of Infrastructure, Planning and Natural Resources, 'Development contributions: practice notes – July 2005', DIPNR Circular PS 05-004, 8 July 2005, Planning agreements, p.8. The policies and procedures suggested in the guideline are generic; this paragraph applies them to affordable housing contributions.
[17] A system of development contributions for affordable housing is in place in England, established pursuant to section 106 of the Town and Country Planning Act 1990 and bolstered by a policy guidance (2000) and a circular (1998) issued by the national government. A review of the scheme undertaken by academics from Cambridge University following ten years operation (Terry Crooks and others, *Planning gain and affordable housing: making it count*, Joseph Rowntree Foundation, York, 2002; online at <www.jrf.org.uk/bookshop/eBooks/1842631128.pdf>).
[18] See Gary Cox and Stacey Miers, *Retention of low cost housing: options for state and local governments*, Shelter Brief, Shelter NSW, 1998.
[19] Newcastle City Council, 'Affordable housing strategy', Newcastle, February 2005, p.9.
[20] The government's plans at the time are outlined in Neil Howie, 'New planning legislation – the possibilities for affordable housing' and Helen O'Loughlin, 'Towards an affordable housing SEPP', in

People, plans and places – the new affordable housing system, NCOSS and Shelter NSW, September 2000.
[21] The scheme document is referred to in the LEP as *Affordable housing revised City West affordable housing program* adopted by the Minister [for Planning] in May 2002, copies of which are available from the Department's head office.
[22] The NSW Parliament has also enabled the use of s94F for 'State significant development' in Redfern-Waterloo and the former Carlton United Brewery site at Broadway, Sydney, under the Redfern-Waterloo Authority Bill Act. Contributions will be paid into a Redfern-Waterloo Fund under the control of the Redfern-Waterloo Authority.
[23] See s.1 of the Act and s.8 and schedule 2 of SEPP 70.
[24] See s.36 of the Act.
[25] Waverley had applied affordable housing provisions under section 94 from 22 September 1998. The provisions of its contributions plan were validated retrospectively and for two years forward by the Environmental Planning and Assessment Act (Affordable Housing) Act 2000, expiring in June 2002.
[26] Department of Infrastructure, Planning and Natural Resources, 'Improving the NSW planning system', Sydney, September 2004, p.8.
[27] A 'community facility' is 'a building or place owned or controlled by a public authority or nonprofit community organization that is used for the physical, social, cultural, or intellectual development or welfare of the community' (Standard Instrument (Local Environmental Plans) Order 2006).
[28] The *Social and community planning and reporting manual* published by the Department of Local Government (Nowra, December 2002) makes no mention of affordable housing or social/welfare housing, though it mentions housing targeted to frail older people and people with disabilities.
[29] Meriton Apartments Pty Ltd v Minister for Urban Affairs and Planning & Or [2000] NSWLEC 20 (18 February 2000), online at <www.austlii.edu.au/au/cases/nsw/NSWLEC/2000/20.html>, viewed 31 October 2004. This judgment stated: 'New legislation will be required if it is sought to maintain a scheme for affordable housing'. The state parliament subsequently enacted the Environmental Planning and Assessment Amendment (Affordable Housing) Act 2000 to validate six affordable housing planning schemes.
[30] See Cox and Miers, pp.15-18.
[31] North Sydney, 'North Sydney section 94 contributions plan', 2004 (updated July 2006).
[32] See clause 2(2) of the Standard Instrument.
[33] See Department of Planning, Standard Instrument (Local Environmental Plans) Order 2006, Planning Circular PS 06-008, issued 3 April 2006, p.2.
[34] See Department of Planning, Standard Instrument (Local Environmental Plans) Order 2006, Planning Circular PS 06-008, issued 3 April 2006, p.3.
[35] See Department of Planning, Standard Instrument (Local Environmental Plans) Order 2006, Planning Circular PS 06-008, issued 3 April 2006, p.3.
[36] See Department of Planning, Standard Instrument (Local Environmental Plans) Order 2006, Planning Circular PS 06-008, issued 3 April 2006, p.3.
[37] See Department of Planning, Standard Instrument (Local Environmental Plans) Order 2006, Planning Circular PS 06-008, issued 3 April 2006, p.3.