

**TITLE:** [EO-CM] Time of Payment - Contributions for Building Development

**SUBMITTED BY:** Planning and Infrastructure



**Civic Leadership**

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### **SUMMARY OF REPORT:**

The payment of contributions for building developments prior to the issue of Construction Certificates can be a financial impediment to the viability of some development proposals and have negative impacts on the economic development of Tweed Shire. It is proposed to amend the payment of contributions for building development to be prior to Occupation Certificate.

### **RECOMMENDATION:**

**That**

- 1. In regard to new development applications for building works, where there is a requirement for payment of Section 64 and Section 94 contributions, consent conditions for such payments will designate payment to be made prior to issue of Occupation Certificate.**
- 2. The draft 2013/2014 Fees and Charges are to require S64 contributions for building works be paid prior to issue of Occupation Certificate.**
- 3. Section 94 Contribution Plans (except CP 28 Seaside City) are to be progressively amended to mandate payment of contributions for building works prior to issue of Occupation Certificate.**
- 4. When the next review of "Developer Servicing Plans - Water Supply and Sewerage" is conducted, they are to be amended to mandate payment of contributions for building development prior to issue of Occupation Certificate**
- 5. In regard to existing development consents for buildings:**
  - a) Payment of contributions will continue to be required in accordance with the relevant condition of consent**
  - b) It is open to proponents with existing consents to submit a Section 96 application to amend the timing of payment of contributions to be prior to issue of Occupation Certificate**
  - c) Such applications will be favourably considered given the objective of economic stimulus for the Tweed**
  - d) Such applications are to be determined under delegated authority at the discretion of the General Manager in accordance with current delegations**

6. **In regard to existing complying development certificates for buildings, these are to be dealt with in accordance with the principles of 5 above.**

## REPORT:

### 1. Contribution Plans and Developer Servicing Plans

Council has a range of Section 94 Contribution Plans for General Fund facilities and Section 64 Developer Servicing Plans for Water Supply and Sewerage headworks.

Section 94 Contributions are payments made by developers to enable Council to provide public amenities and services required for new residents and businesses. Section 94 of the Environmental Planning and Assessment Act 1979 is the principal legislation enabling Councils to levy these contributions. They are imposed by way of a condition of development consent or complying development, and are mostly satisfied by payment of a monetary contribution at some specified hold point in the development approval process. In some cases dedication of land and/or provision of a material public benefit such as works in kind may also be involved.

Council currently has 23 active Section 94 Contribution Plans, approximately half of these apply to the whole shire, the rest are area-specific plans. The majority of plans levy contributions on residential and tourist development, while others, like the Road Contribution Plan (No 4) and Council Admin Facilities Plan (No 18), also levy contributions for commercial development.

Contributions for Water and Sewer infrastructure are not levied under S94 of the Environmental Planning and Assessment Act and do not require a S94 Contribution Plan, however they need a Development Servicing Plan prepared in accordance with the Department of Water and Energy Best-Practice Management of Water Supply and Sewerage Guidelines 2007 which is levied via S64 of the Local Government Act 1993.

### 2. Value of Contributions

The value of contributions over past years is summarised in the following table:

Period	Section 94 Contributions (\$M)	Section 64 Contributions Water (\$M)	Section 64 Contributions Sewer (\$M)
03/04	5.912	4.453	3.474
04/05	7.953	5.024	4.461
05/06	2.503	1.479	0.862
06/07	10.476	7.394	5.657
07/08	3.962	3.291	2.407
08/09	2.967	1.893	1.042
09/10	2.961	1.643	0.878
10/11	1.419	0.579	0.327
11/12	2.21	1.424	0.754
12/13 YTD	1.607		

### 3. Time of Payment - Developer Contributions

#### 3.1 Section 94 Contribution Plans

Clauses are not identical in every plan, but the majority are based on the latest Department of Planning and Infrastructure template for a Section 94 Contributions Plan and read as follows:

***"Timing of payment***

*A contribution must be paid to the council at the time specified in the condition that imposes the contribution. If no such time is specified, the contribution must be paid prior to the issue of a construction certificate.*

*Council's policy regarding the timing of payment of S94 contributions is as follows:*

- *DAs involving subdivision - prior to the release of the subdivision linen plan;*
- *DAs involving building work - prior to the release of approved building plans; and*
- *DAs where no building work involved - prior to occupation.*

*Bank guarantees in respect of the required money will generally not be acceptable, unless appropriate indexing is included."*

### **3.2 Section 64 Water and Sewer Developer Servicing Plans**

The clauses for time of payment in Council's current DSPs are:

#### **Water Developer Servicing Plan 2007**

##### **"2.3 WHEN ARE DEVELOPER CONTRIBUTIONS PAYABLE?"**

*The contribution(s) will be assessed by Council and will apply for 12 months from the date of this approval. Contributions not received by Council within 12 months of the date of notice will be adjusted in accordance with the DSP charge current at the time of payment.*

*For the Subdivision of land, contributions are paid prior to the issue of the Subdivision Certificate.*

*For the erection or extension of commercial/industrial buildings or multiple residential dwelling units etc, contributions are paid prior to the issue of the Construction Certificate."*

#### **Sewer Developer Servicing Plan 2007**

##### **"2.3 WHEN ARE DEVELOPER CONTRIBUTIONS PAYABLE?"**

*The contribution(s) will be assessed by Council and will apply for 12 months from the date of this approval. Contributions not received by Council within 12 months of the date of notice will be adjusted in accordance with the DSP current at the time of payment.*

*For the subdivision of land, contributions are paid prior to the issue of the Subdivision Certificate.*

*For the erection or extension of commercial/industrial buildings or multiple residential dwelling units etc, contributions are paid prior to the issue of the Construction Certificate."*

### **3.3 Summary - Time of Contribution Payments**

The following table summarises the time of payment provisions in Council's various Contributions and Developer Servicing Plans:

Plan	Payment Time Clause	Does Plan enable Consent conditions to override payment time clause	Payment Time Subdivisions - prior to release of linen plan	Payment Time Building Work - prior to approval of construction certificate	Other development - prior to commencement of use or occupation	Other
<b>S64 Plans</b>						
Water DSP 2007	2.3	-	Yes	Yes	-	-
Sewer DSP 2007	2.3	-	Yes	Yes	-	-
<b>S94 Plans</b>						
S94 Plan No. 1 - Banora Point West/Tweed Heads South Open Space Contribution		-	-	-	-	-
S94 Plan No 2 - Banora Point West Drainage Scheme	5.4	-	Yes	Yes*	Yes	Yes - in advance of works
S94 Plan No 4 - Tweed Road Contribution Plan	2.7	Yes	Yes	Yes	Yes	Yes - heavy haulage annually
S94 Plan No 5 - Local Open Space	2.8	Yes	-	Yes**	-	-
S94 Plan No 7 - West Kingscliff	2.7	Yes	Yes	Yes*	-	Yes - where no building approval at time of development consent
S94 Plan No 10 - Cobaki Lakes	2.8.1	-	Yes	-	-	Yes 'in accordance with this plan'
S94 Plan No 11 - Libraries	2.8	Yes	Yes	Yes*	Yes	-
S94 Plan No 12 - Bus Shelters	2.7	Yes	Yes	Yes*	Yes	-
S94 Plan No 13 - Eviron Cemetery	2.7	Yes	Yes	Yes*	Yes	-
S94 Plan No 15 - Community Facilities	2.7	Yes	Yes	Yes*	Yes	-
S94 Plan No 18 - Council Admin Offices and Technical Support facilities	2.9	Yes	Yes	Yes*	Yes	-
S94 Plan No 19 - Casuarina Beach/Kings Forest	2.7	Yes	Yes	Yes	Yes	-
S94 Plan No 21 - Terranora Village Estate - Open Space and Community Facilities	2.7	Yes	Yes	Yes	Yes	-
S94 Plan No 22 - Cycleways	2.7	Yes	Yes	Yes	Yes	-
S94 Plan No 23 - Offsite Parking	2.8	Implied	-	-	-	-
S94 Plan No 25 - SALT Open Space and Associated Car Parking	2.8	Yes	Yes	Yes*	Yes	-

Plan	Payment Time Clause	Does Plan enable Consent conditions to override payment time clause	Payment Time Subdivisions - prior to release of linen plan	Payment Time Building Work - prior to approval of construction certificate	Other development - prior to commencement of use or occupation	Other
S94 Plan No 26 - Shirewide Regional Open Space	2.8	Yes	Yes	Yes	Yes	-
S94 Plan No 27 - Tweed Heads Master Plan - Local Open Space/Streetscaping	7.0	Yes	Yes	Yes	-	Yes - prior to issue of development consent
S94 Plan No 28 - Seaside City	2.5	Yes	Yes	Yes	Yes	Yes - within 30 days of commencement of erection of buildings

\* Plan states 'building application' or 'building approval' rather than construction certificate

\*\* or complying development certificate

#### 4. Discussion on Timing of Payments

##### 4.1 Subdivisions - No Change Proposed

The approval process for subdivisions has the following major milestones:

- Development Application Approved
- Construction Certificate (CC) Approved
- Subdivision Certificate (SC) Approved

The payment milestone is currently prior to issue of a subdivision certificate. At this milestone all subdivision works (roads, stormwater, water sewer, footpaths, kerb and gutter etc) are completed (or almost completed and remainder bonded) and there have been very few issues with this arrangement. The arrangement suits the developer as there are no cash flow impacts until all the works are completed and issue of title deeds is imminent. It also suits Council as there is a very secure, low risk hold point, as no payment means no release of subdivision plan and subsequent issue of new title deeds.

##### 4.2 Change of Use Development - No Change Proposed

This type of development may not require a CC. Examples are when a factory unit changes from a warehouse to a manufacturing facility or a shop changes to a restaurant. In these cases the demand for facilities and services (water, sewerage, road capacity needed for additional traffic generation, parking etc) may rise requiring the payment of contributions, but there may be no building changes requiring a CC. In these cases contributions are generally required prior to Occupation Certificate and no change is proposed.

##### 4.3 Building Work - Case for Deferring Payments to Prior to Occupation Certificate

The approval process for building works has the following major milestones:

- Development Application Approved
- Construction Certificate (CC) Approved
- Occupation Certificate Approved

The payment milestone prior to CC for buildings is more onerous than the subdivision case. At the time of CC approval there is still a considerable time lapse before a developer can derive income from the development and during this period cash flow and financing issues

are critical. There have been a number of occasions when developers have requested changes to this time for payment of contributions because of cash flow/finance issues.

This report has been compiled to explore the option of changing the contribution payment milestone for building work from prior to CC to prior to Occupation Certificate. There have been representations to Council on a number of occasions arguing that the prior to CC milestone is unnecessarily onerous on developers, for reasons including:

- Financers may be unwilling to lend for contributions at this stage
- Interest payments on loans for contributions at this early stage add significantly to the overall cost of the project
- At the CC milestone there is no demand for the additional facilities and services (to be funded by the contributions) therefore there no "nexus" to justify payment of contributions at this time.
- It is inequitable to require developers of building works to pay contributions at the CC milestone when subdividers are permitted to pay at the much later SC milestone.
- The onerous requirement for payment prior to CC makes some projects impossible to finance and are therefore will not proceed. This can have a significant negative impact on Tweed's economic development.

#### **4.4 Council Risk Relating to Time of Payment of Contributions Subdivisions**

The current SC contribution payment milestone for subdivisions has been very secure for Council as up to now Council has been the Principal Certifying Authority (PCA) for all subdivisions. This is now changing as under Part 3A approved subdivisions, it is possible under the Environmental Planning & Assessment Act to designate a suitably qualified private certifier as the PCA, and it is the PCA who issues the Subdivision Certificate. The PCA is still obliged to comply with the conditions of consent and the condition relating to payment of contributions will designate prior to SC as the payment milestone. The risk is, what if the private PCA makes a mistake and issues the SC without prior payment of the contribution, how in this circumstance will Council recover the debt?

#### **Change of Use Development**

The current prior to Occupation Certificate contribution payment milestone is not particularly secure as the buildings are already occupied and non issue of an Occupation Certificate is not a significant practical barrier in some situations. Also this is an area where change of use can occur without any submission of Development Application through either ignorance or neglect of this requirement. Changes to the contribution payment milestone for change of use development is not further explored or proposed in this report.

#### **Building Work**

The current prior to CC contribution payment milestone for building work, presents a greater risk to Council than the current subdivision case. Since the 1998 amendments to the EP&A Act it has been possible for suitably qualified private certifiers to issue CCs for building works (and indeed subdivision works), therefore there is a greater risk that the private certifier may issue a CC without ensuring that the required contribution has been made. In practice a significant proportion of Building CCs are now issued by private certifiers and there have been few instances of non payment of contributions at the required time.

If the contribution payment milestone is shifted to prior to Occupation Certificate, the likelihood of a private certifier failing to ensure the contribution payment is made would be

no higher, however the consequences would be greater. Recovering a missed contribution payment at "prior to CC" milestone would be more certain as the approval process and eventual occupation have still some way to go. Recovering a missed contribution payment after issue of an Occupation Certificate would be more difficult because there are no more approval milestones and court action to restrain use of the site (for non compliance with DA condition to pay contributions) would be more complex with persons/tenants/strata owners etc in occupation of the building. However recovery through court action would be an available remedy.

#### **4.5 Impact of Time of Payment of Contributions on Council Finances**

If contributions for building development are shifted from prior to CC to prior to Occupation Certificate, then the income cash flow to Council will be delayed. This would not have a significant impact on financing the works that are funded by contributions because in reality there is always a considerable lag between collection of contributions and expending these funds. The normal practice is for these funds to be invested and earn interest in the period between collection and expenditure (all interest on S94 Contributions are retained within the Contribution Plan for which they were levied). A deferral in the collection milestone would negatively impact on the level of interest earned by Council and the corresponding Contribution Plans for this period.

#### **5. Recent Past Practice**

On 17 April 2012 Council approved a change in timing for the Super GP Clinic at Tweed Heads South (DA11/0499.01), whereby it was resolved to defer Tweed Road Contribution Plan, Section 94 payments as follows:

- 25% prior to CC;
- 50% at completion of the construction of the building; and
- the remaining 25% prior to Occupation Certificate.

#### **6. Options - Timing of Contributions for Building Development**

The options considered are:

Option 1 - Defer contribution payments from prior to CC to prior to Occupation Certificate

Option 2 - Defer contributions to:

- 25% prior to CC;
- 50% at completion of the construction of the building; and
- the remaining 25% prior to Occupation Certificate.

Option 3 - Keep the current prior to CC contribution payment milestone, but consider applications for deferral on the merits of each case.

Option 4 - Do nothing, the status quo

In considering these options:

Option 1 is the preferred option.

- It is simple and comparable in administration effort to the current prior to CC arrangement,
- It reduces costs and financing problems for developers thereby encouraging development and economic activity,
- It is a reasonable approach and the timing is better aligned with the temporal nexus between demand created by development and provision of the additional facilities to service that demand.
- It carries very little increased risk of non payment
- It is equitable compared with the timing of contributions for subdivisions

Option 2 is consistent with a previous Council decision for the Tweed Heads South Super GP Clinic. However, this model is:



- administratively more complex than Option 1
- has reduced financial benefit to developers
- reduced positive benefits for stimulus to the Tweed economy
- the timing compared with Option 1 is not as well aligned with the temporal nexus between demand created by development and provision of the additional facilities to service that demand.

Option 3 would be difficult to administer with each application for deferral needing to be individually assessed (by Council or under delegated authority?). Criteria would also need to be established so there was some consistency in decision making. Even with objective criteria being established there would be a high level of uncertainty for developers and each decision could be open to a charge of unfairness.

Option 4 is not favoured. There are clear indicators that the current timing of contribution payment is discouraging some development. Continuing with requiring payment prior to CC is difficult to justify in terms of the temporal nexus between demand created by development and provision of the additional facilities to service that demand. It is also difficult to justify continuation of Council being the beneficiary of interest on contribution payments paid before they are needed.

## **8. Implementation**

The following actions are recommended for implementation of Option 1:

New development applications for building works

- Insert consent condition requiring payment of Section 64 and Section 94 contributions prior to issue of Occupation Certificate. For staged development align apportionment of contributions in terms of occupation of each stage.

2013/14 Fees and Charges

- Amend the 2013/14 Fees and charges to require S64 contributions for building works be paid prior to issue of Occupation Certificate.

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Section 94 Contribution Plans

- Progressively amend each Contributions Plan (except CP 28 Seaside City) to mandate payment of contributions for building works to prior to issue of Occupation Certificate. Note: CP28 is a unique plan, subject to a Land and Environment Court judgement and associated voluntary planning agreement that cannot be unilaterally amended by Council.

Developer Servicing Plans - Water Supply and Sewerage

- Amend timing of payment of contributions for building development to prior to issue of Occupation Certificate when next review of DSP is conducted.

Existing Development Consents for Buildings

- Payment of contributions will continue to be required in accordance with the relevant condition of consent
- It is open to proponents with existing consents to submit a Section 96 application to amend the timing of payment of contributions to being required prior to issue of Occupation Certificate
- Such applications will be favourably considered given the approved.

Existing Complying Development Certificates for buildings are to be dealt with in accordance with the principles for Existing Development Consents for Buildings above.

**COUNCIL IMPLICATIONS:**

**a. Policy:**

Proposed amendments to administration of Section 94 Contribution Plans, Water Supply and Sewerage Development Servicing Plans, Fees and Charges.

**b. Budget/Long Term Financial Plan:**

See body of report.

**c. Legal:**

It is open to Council to amend the timing of payment of development contributions.

**d. Communication/Engagement:**

**Inform** - We will keep you informed.

**LINKAGE TO INTEGRATED PLANNING AND REPORTING FRAMEWORK:**

- 1 Civic Leadership
- 1.2 Improve decision making by engaging stakeholders and taking into account community input
- 1.2.3 Financial requirements and the community's capacity to pay will be taken into account when meeting the community's desired levels of service
- 1.2.3.3 Developer Contribution (s94) Plans

**UNDER SEPARATE COVER/FURTHER INFORMATION:**

Nil.

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