



Department of Planning & Infrastructure  
GPO Box 39  
Sydney NSW 2001

Attn: Mark Brown

16 October 2013

**Re: MP10\_0180 – Project Application – Stage 1 Summer Hill Flour Mill Site Section 75W modification**

Dear Mark,

I refer to your email of 9 October 2013 and the attached response from Ashfield Council to the Section 75W modification request lodged seeking the adjustment of the Section 94 contributions to be paid for Stage 1.

Council's submission identifies that only "like for like" offsets should be given a credit towards Section 94 contributions. Indeed the submission identifies that Council's Section 94 calculator is programmed towards the "like for like" concept.

We have reviewed in detail Council's adopted Section 94 Contribution Plan and in no instance are we able to ascertain where the "like for like" concept is explained or detailed within the Section 94 Contribution Plan.

The *Development Contributions Practice notes – July 2005* published by the then Department of Infrastructure, Planning and Natural Resources deals with credits for existing development and identifies that in all cases, council should have a specific policy on credits in the s94 development contributions plan. The Ashfield Section 94 Development Contributions Plan includes a provision dealing with credits for existing development. The policy for credits for existing development is provided at part 2.8 of the plan.

The policy states (with emphasis added):

**2.8 Allowances for existing development**

*Contributions will be levied according to the estimated increase in demand. An amount equivalent to the contribution attributable to any existing development on the site of a proposed new development will be allowed for in the calculation of contributions.*

*All estimates of future development within this Plan have been calculated allowing for existing development. That is, estimates of growth only relate to the additional development projected for the LGA.*

This is consistent with the wording of Section 94 of the *Environmental Planning and Assessment Act 1979*, (the Act) which states (with emphasis added):

#### **94 Contribution towards provision or improvement of amenities or services**

*(1) If a consent authority is satisfied that development for which development consent is sought will or is likely to require the provision of or increase the demand for public amenities and public services within the area, the consent authority may grant the development consent subject to a condition requiring:*

- (a) the dedication of land free of cost, or*
- (b) the payment of a monetary contribution, or both.*

There is no basis in the Act or Council's own Section 94 Contribution Plan for the application of the "like for like" approach to applying credits for existing development as outlined in Council's submission.

Accepted practice, as provided for in Council's own contributions plan is that a credit be given for existing development on a site. The only credit sought for the Summer Hill flour mill site relates to the former commercial administration building. No credit is or has been sought for the balance of the development located on the site, despite the fact that an argument exists for this to be pursued.

The Ashfield s94 plan collects funds for the provision of and augmentation of:

- Local roads
- Local public transport facilities
- Local open space and recreation facilities
- Local community facilities; and
- Plan preparation and administration.

The requested credit of \$291.36 per m<sup>2</sup> of the existing commercial building reflects that non-residential floor space only attracts a levy towards local roads, local public transport facilities, local open space and recreation facilities and plan preparation and administration. The approach taken in the s75W submission seeking the adjustment to the contributions reflects this approach, as only a credit equivalent to the existing commercial floor space is sought.

The existing commercial building, as well as the mill operations were significant generators of traffic movement and therefore demand upon local roads and public transport facilities in particular. It is therefore entirely appropriate that a credit for the inherent demand from the sites past development and use be reflected in any s94 development contribution levied.

The Act is also explicit in embracing this principle at s94(1) where it specifically identifies (with emphasis added) that a contribution may be levied where development:

*"...will or is likely to require the provision of or increase the demand for public amenities and public services within the area,"*

That is, the ability to levy or require a contribution only relates to the increase in demand arising from a development over the current circumstance. The existing demand for these public amenities and services must relevantly be considered in determining any s94 contribution levied.

The requested s75W Modification is also consistent with the findings of Commissioner Morris in the decision of *Olsson v Ashfield Municipal Council* [2012] NSWLEC 1073 where the Commissioner states:

- 42. The Council does not dispute that the quantum should be reduced to reflect the approved floor space of the existing building and that such would be consistent with the provisions of its s 94 Plan. What is in dispute is the amount that the contribution should be.*

43. *Having regard to the evidence of Mr Fletcher and Mr Mackay, I prefer the evidence of Mr Fletcher that the existing built form should be applied when calculating the credit he attributed to floor space of the whole of the building. That is based on survey data that was not refuted and more recent approvals than those relied on by Mr Mackay. Accordingly, I agree that the contribution to be levied under condition C(11) should be \$1,555,504.96 based on rates calculated as at 1 July 2011.*

The judgement then amended the s94 contribution to reflect the allowance of existing site development. This was found to be consistent with the application of clause 2.8 of the s94 contributions plan and was for a development involving the demolition of an existing commercial building and the construction of a mixed use building.

Virtually identical circumstances apply in this instance and clause 2.8 of the s94 development contributions plan should be applied accordingly.

Council's submission raised five final points relating to the application, each of which is addressed below.

- Future non-residential space

The Concept Plan includes up to 4,000m<sup>2</sup> of non-residential space for the development. The contribution calculations prepared for the s7W include a contribution generated by the proposed retail space. Subsequent stages will also be levied accordingly for any residential and non-residential floor space provided.

It is prudent to address any off-sets in the first stage to simplify the management of the contributions for the site. This is especially important given that stage 4 is located in a separate council area. Further as stated in the s75W, there are no further existing elements currently on the site that would attract a s94 contribution, therefore there are no future credits to be sought under clause 2.8 of the Ashfield Section 94 Development Contributions Plan.

- Future "like for like" credits

As detailed in this submission the Ashfield Section 94 Development Contributions Plan, the Act or the Regulations do not provide or detail any "like for like" off-set concept. The only stage which includes floor space that would generate a s94 contribution is the commercial building in Stage 1 to be demolished. Stage 1 is therefore the only logical stage to address the single element of the site which generates a s94 contribution credit. The Mungo Scott building for example is industrial in use and would not generate a contribution under Ashfield Section 94 Development Contributions Plan. As such and in accordance with clause 2.8 of the plan this building would not generate a s94 development contribution credit.

- Communal open space provision

The submission ignores the fact that the development is dedicating a minimum of 4,806m<sup>2</sup> of public open space and providing a minimum of 5,287m<sup>2</sup> of publicly accessible communal open space. The direct provision of these areas is in addition to any s94 Development contributions levied. The development is making a substantial contribution to open space for future residents as well as the broader community.

- Statement of Commitments

The Statement of Commitments states:

*Section 94 Contributions relevant to the proposal will be made in accordance with the Section 94 Contribution Plans for Ashfield and Marrickville Council as applicable, consistent with the rates detailed in the Environmental Assessment.*

The credit sought for the existing commercial building on the site is in accordance with clause 2.8 of the Ashfield Section 94 Development Contributions Plan and is therefore consistent with the commitment.

- Abandoned floor space

Similar to the concept of “like for like” the relevant legislation does not reference or consider the concept of abandoned floor space. The credit system established in clause 2.8 of the Ashfield Section 94 Development Contributions Plan simply considers existing development and provides for a credit in accordance with the contribution that would otherwise be levied upon that quantum of floor space. The s75W submission is simply seeking to apply the s94 contribution plan in a manner that is enshrined within the document.

We trust that this has addressed the matters raised in the submission and will facilitate the Department proceeding with the assessment of the s75W application. If there are any further matters you require, please do not hesitate to contact me on (02) 9380 9911 or by email at sbarwick@sjb.com.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Scott Barwick', with a stylized flourish at the end.

Scott Barwick  
Associate Director