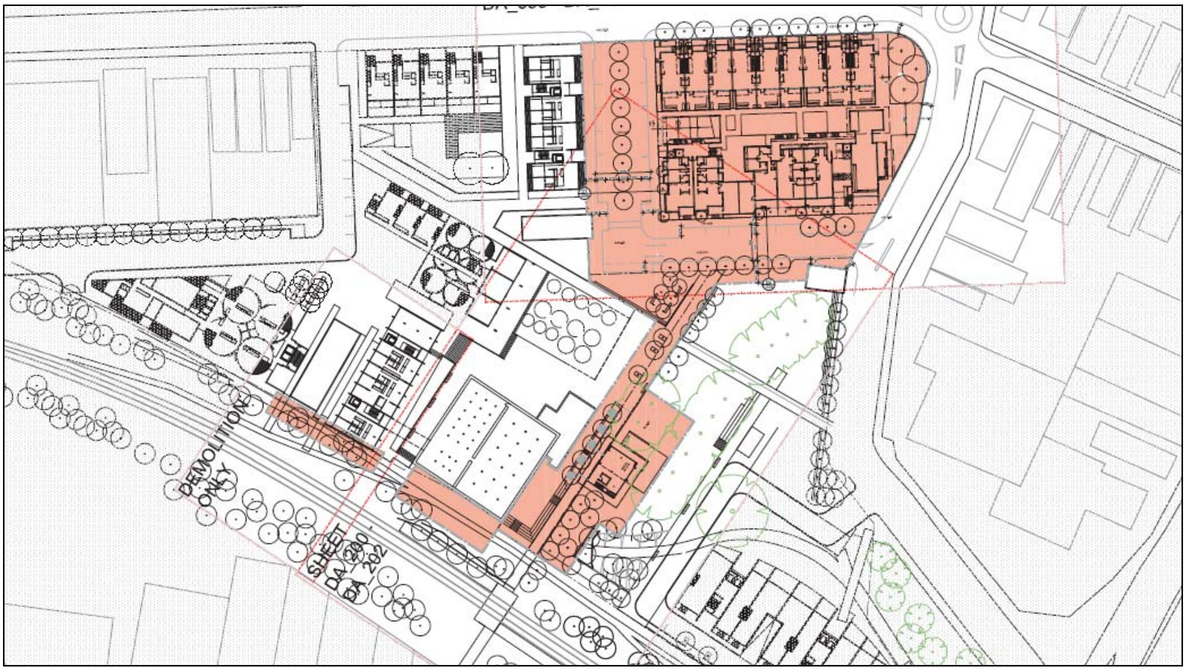
MODIFICATION REQUEST:

Project Application for Stage 1 Residential/Retail Development at the former Allied Mills, Summer Hill Flour Mill site, 2-32 Smith Street Summer Hill

MP10_0180 MOD1

Modification of Section 94 Contributions



Director-General's
Environmental Assessment Report
Section 75W of the
Environmental Planning and Assessment Act 1979

February 2014

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EXECUTIVE SUMMARY

EG Funds Ltd (the proponent) seeks approval to modify the approved Project Application (MP10_0180) relating to the mixed use development of the Allied Mills, Summer Hill Flour Mill site, pursuant to section 75W of the EP&A Act.

The subject site is located approximately 6 kilometres west of the Sydney CBD. The main portion of the site is located within the Ashfield LGA, while a small portion of the site is located within the Marrickville LGA.

The applicant seeks approval to modify condition C4 of the approved Project Application to reduce the overall section 94 contribution from $926,350.00 to $447,408.09 by applying a credit given for the existing commercial floorspace (to be demolished).

The modification request application was made publicly available on the department's website. A submission was received from Ashfield Council objecting to the proposal as it would result in credit being given for the existing commercial floorspace despite the residential development being a different use to the existing commercial floorspace. Council states that credits should only be granted on a like-for-like building type/use basis.

The department considers that the key issues of consideration relate to the principle of applying a credit for the existing commercial floor space and the calculation of a reasonable credit for the existing commercial floor space.

The department notes that there is no basis within the EP&A Act or within the Ashfield Section 94 Plan for limiting the application of contribution credits for existing development which has a use different to what is proposed. The department considers that the demand arising from the existing commercial floorspace should be taken into consideration when calculating a reasonable overall contribution for the development and in this instance it is appropriate to give credit for that existing floorspace.

The department notes that the Ashfield Section 94 Plan levies services and amenities for proposed residential and commercial development and these levies are based on similar criteria. The department also notes that whilst a credit has been applied in the existing approval for MP10_0180 for the existing commercial floorspace, this only amounts to 1.8% of the value of the actual Section 94 contribution that would apply to the same quantum of new commercial floorspace. The department does not consider it reasonable in this instance that different methodologies be adopted for calculating contributions for new commercial floorspace and crediting existing commercial floorspace.

The department therefore considers it reasonable to grant a credit for the existing commercial floorspace equivalent to the contribution that would be required if that floorspace were proposed as new.

The department recommends that the proposed modification to condition C4 of the Project Application be approved. The Planning Assessment Commission is to determine the application as Ashfield Council has objected to the proposal.

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1. BACKGROUND

The purpose of this report is to assess a request to modify condition C4 'Section 94 Contributions' of the approved project application (MP 10_0180) pursuant to section 75W of the *Environmental Planning and Assessment Act 1979* (EP&A Act).

The modification seeks to reduce the nominated contribution from $926,350.00 to $447,408.91, including associated alterations to the apportionment of the contribution.

1.1 Site Description

The subject site, 2-32 Smith Street, Summer Hill, is the former Allied Mills, Summer Hill Flour Mill site and fronts Edward, Smith and Longport Streets and Old Canterbury Road. The main portion of the site lies within the Ashfield LGA, while a small portion of the site east of Hawthorne Canal is within the Marrickville LGA. The Lilyfield/Dulwich Hill light rail corridor adjoins the eastern boundary of the site.

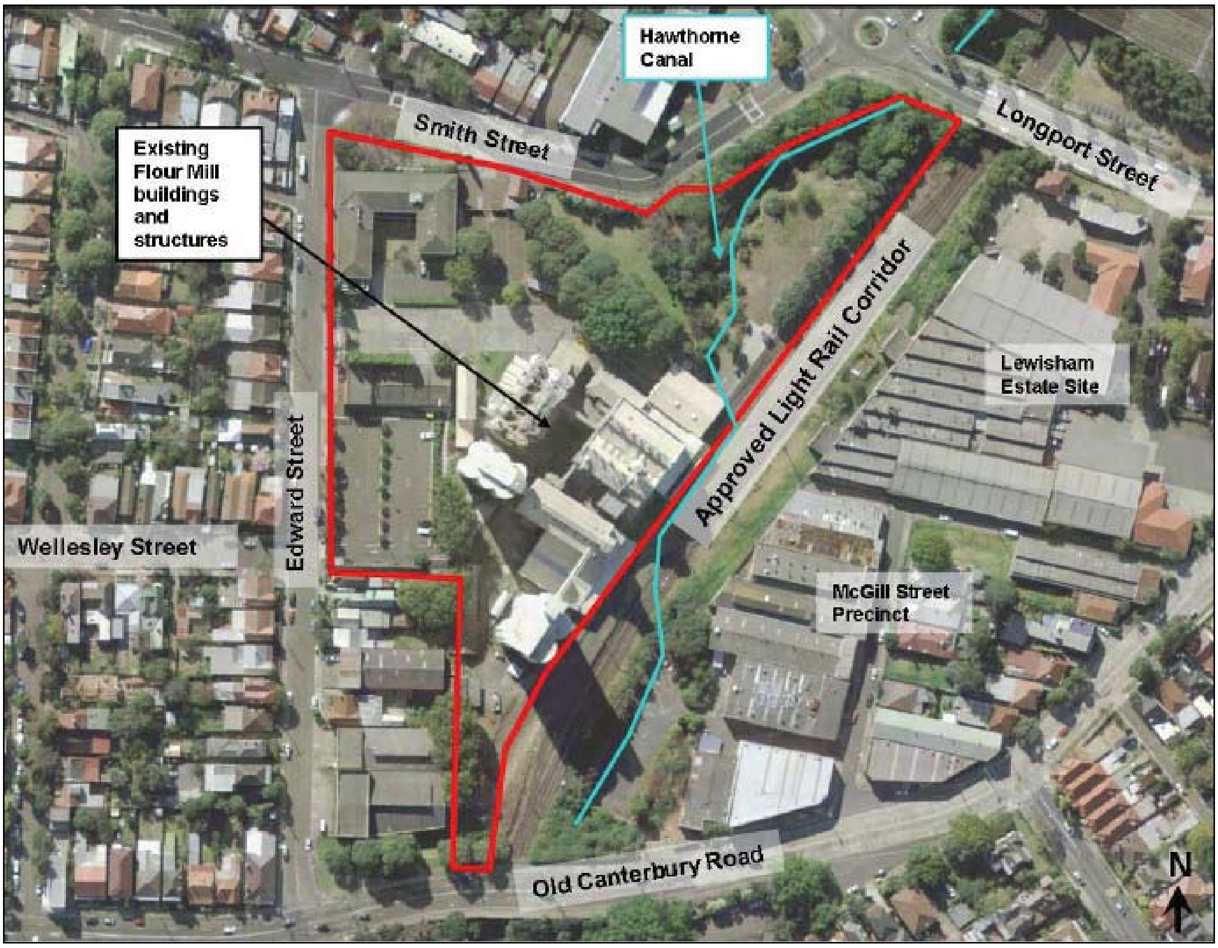

Figure 1: Aerial photograph of the site. The portion of the site within Marrickville LGA is to the east of the Hawthorn Canal (Source D-G's Assessment Report MP 10_0155).

Figure 2: Stage 1 Project Approval location within the site and context with subsequent stages (Source EA MP 10_0180).

1.2 Previous Approvals

On 7 December 2012, the Planning Assessment Commission approved a Concept Plan (MP 10_0155) for the redevelopment of the site for a mixed use development.

On 11 July 2013, the Executive Director of Development Assessment Systems and Approvals granted approval to a Project Application (MP 10_0180) for the Stage 1 of the development, including:

- demolition of existing structures;
- construction of 44 dwellings and 443m^2 commercial / retail space;
- two new roads and basement car parking for 53 vehicles;
- pedestrian and cycle access to the Lewisham West light rail stop; and
- subdivision and dedication of road reserves and open spaces to Council.

Condition C4 of this approval detailed the required Section 94 contributions, being a total of $926,350. This contribution amount was based on Ashfield Council's Section 94 contribution calculator.

2. PROPOSED MODIFICATION

The proposal seeks to modify condition C4 of the approved Project Application to reduce the total Section 94 contribution from $926,350.00 to $447,408.91 (a reduction of $478,941.09), including associated alterations to the apportionment of the contribution.

Specifically, the modification seeks to increase the credit given for the existing 1,674.5m^2 commercial floorspace (to be demolished) above what was generated by the Council's Section 94 contribution calculation, which forms the basis of the contribution requirement of condition C4.

Further details of the proposed modification are provided at **Appendix A**.

3. STATUTORY CONTEXT

3.1 Continuing Operation of Part 3A to Modify Approvals

In accordance with clause 3 of Schedule 6A of the EP&A Act, section 75W of the EP&A Act as in force immediately before its repeal on 1 October 2011 and as modified by Schedule 6A, continues to apply to transitional Part 3A projects.

Consequently, this report has been prepared in accordance with the requirements of Part 3A and associated regulations, and the Minister (or his delegate) may approve or disapprove of the carrying out of the project under section 75W of the EP&A Act.

3.2 Modification of a Minister's Approval

The modification application has been lodged with the Director-General pursuant to section 75W of the EP&A Act. section 75W provides for the modification of a Minister's approval including *'revoking or varying a condition of the approval or imposing an additional condition on the approval'*.

The Minister's approval for a modification is not required if the project as modified will be consistent with the existing approval. However, in this instance, the proposal seeks to modify a specific condition of the approval, which requires further assessment and therefore approval is required.

3.3 Environmental Assessment Requirements

Section 75W(3) of the EP&A Act provides that the Director-General may notify the proponent of Director-General's Requirements (DGRs) with respect to the proposed modification that the proponent must comply with before the matter will be considered by the Minister.

In this instance, following an assessment of the modification request, it was not considered necessary to notify the proponent of DGRs pursuant to section 75W(3) with respect to the proposed modification, as suitable information was provided to the department to consider the application.

3.4 Delegated Authority

In accordance with the Minister's delegation of 14 September 2011, the Planning Assessment Commission may determine the application as Council objected to the proposal.

4. CONSULTATION AND SUBMISSIONS

4.1 Exhibition

Under section 75X(2)(f) of the EP&A Act a request to modify an approval does not require public exhibition. However under section 75X(2)(f) of the Act the Director-General is required to make modification requests publicly available. The department has made the modification request publicly available on its website.

The department referred the application to Ashfield Council for comment. The application was also made publicly available on the department's website.

Ashfield Council
Council objected to the proposed modification of condition C4 for the following reasons:
- Council's Section 94 calculator uses a formula that only credits 'like-for-like' building types/uses. Stage 1 contains only residential and retail uses and is a different building use to the existing commercial building;
- applying a non-like-for-like criteria to larger existing commercial sites, theoretically, could result in a scenario where no developer contributions would be required;
- like-for-like credits could be applied to other stages (e.g. Stages 2 and 3) of the development;
- Stage 1 has a small amount of open space and therefore future residents from this stage will put pressure on existing open space facilities. Therefore the 'normal outcome' of the Section 94 contribution is necessary to counter this;
- the proponent agreed within the Statement of Commitments to the Section 94 Plan rates; and
- credits should not be given for abandoned existing commercial floorspace.

Proponent's Response to Submissions
On 16 October 2013 and 25 November 2013 the proponent submitted a response to Council's comments, which included further analysis of the policy context and requirements of Section 94 contributions.

The department has considered the issues raised in submissions in its assessment of the proposed modification.

5. ASSESSMENT

The department considers that the key issues for consideration are:
- the principle of applying a credit for existing commercial floorspace; and
- the calculation of a reasonable credit amount for existing commercial floorspace.

5.1 The principle of applying a credit for existing commercial floorspace

In consideration of the application of Section 94 credits for the existing commercial floorspace the department has examined the relevant policy context.

Ashfield Council Section 94 Development Contribution Plan (the s94 Plan) was adopted on 9 November 2010. The s94 Plan forms the basis of the nominated contribution, apportionment (and credit) within condition C4 of MP10_0180 (refer to **Table 2**).

It is noted that the department's Development Contributions Practice Note 2005 recommends that Councils have a specific policy on credits within their s94 development contributions plan. The Ashfield s94 Plan at section 2.8 'Allowances for Existing Development' states that contributions will be taken in response to the estimated increase in demand. Furthermore, an allowance will be made for existing development on the site to a value equivalent to the contribution attributed to any proposed new development. This is consistent with accepted practice that a credit equal to that of the existing development can be taken into consideration in determining s94 contributions.

The relevant s94 Plan rates (as at 19 August 2013) are provided in **Table 1** below. The department notes that the contribution rate for 1m^2 of new commercial floorspace is $291.36.

Table 1: Relevant s94 Plan rates as at 19 August 2013 (source proponent's EA)

Element	Contribution Rate per unit type
Residential Dwelling < 60m^2	$9,527.28
Residential Dwelling Between 60-84m^2 GFA	$14,613.25
Residential Dwelling > 60m^2 GFA	$20,813.53
Retail GFA (per m^2)	$190
Commercial GFA (per m^2)	$291.36

Condition C4 states that a credit has been given for the 1,674.5m^2 existing two storey commercial building, which would be demolished as part of Stage 1. The department has calculated that a credit of $5.34 per m^2 ($8,941.23 in total) has been applied to the existing commercial floorspace. This however equates to only 1.8**%** of the applicable $291.36 per m^2 (refer to **Table 2**), which is a numerically insignificant credit when compared with the s94 Plan contribution rate for new commercial floorspace.

Table 2: Comparison between the proposed, approved and a notional no credit rate/contribution scenarios.

		Proposed Contribution		Approved Contribution	
Element	**Net Difference**	**Rate per unit type ($)**	**Contribution ($)**	**Rate per unit ($)**	**Contribution ($)**
Residential Dwelling < 60m^2	+3 Dwellings	9,527.28	28,581.84	9,527.28	28,581.84
Residential Dwelling between 60-84m^2	+5 Dwellings	14,613.25	73,066.25	14,613.25	73,066.25
Residential Dwelling > 84m^2	+36 Dwellings	20,813.53	749,287.08	20,813.53	749,287.08
Retail GFA (per m^2)	+443m^2	190	84,356.06	190	84,356.06
Commercial GFA (per m^2)	-1,674.5m^2	291.36	- 487,882.32	-5.34	-8,941.23
Total			**447,408.91**		**926,350.00**

Council objects in principle to the proposal, particularly on the grounds that credits should only be granted on a like-for-like building type/uses basis and also that the like-for-like concept forms part of the formula in the Council's s94 Plan calculator. Council also raised concern regarding the potential application of the non-like-for-like approach to other sites with a much larger existing commercial component, which theoretically could lead to a scenario where no developer contributions would be required if that site was developed for residential purposes.

The proponent argues that there is no basis in the EP&A Act or within the s94 Plan for the application of a like-for-like only approach to applying credits for existing development. Furthermore, the proponent notes that the existing commercial building and mill operations were significant generators of traffic and public transport movements and local amenity impacts. It is the proponent's view that it is reasonable to credit the demand from the site's past operation and use.

The department agrees that s94 does not limit the granting of credits for existing development to only a like-for-like building use/type basis. Furthermore, s94 (1) of the EP&A Act confirms that contributions taken must relate to a resultant increase in demand for public amenities and services within the area (arising as a result of the proposed development).

It is acknowledged that section 2.8 'Allowances for Existing Development' of the s94 Plan forms the Council's specific policy on credits. However, section 2.8 does not make the distinction between like-for-like or non-like-for-like developments with regard to credits for existing development. Section 2.8 confirms that:

- contributions are levied according to the increase in demand; and

- credits would be given 'equivalent to the contribution attributable to any existing development on the site of a proposed new development'.

Consequently, the department does not consider that such an approach reasonably accords with the requirements of the EP&A Act and the s94 Plan. In this instance, the department considers that the demand arising from the existing commercial floorspace should be taken into consideration when calculating a reasonable contribution for the Stage 1 development. Refer to **Section 5.2** for further discussion on this matter.

The department notes Council's concern in relation to the hypothetical situation regarding a larger existing commercial development. However, the department is persuaded that reasonable allowances should be given in acknowledgement of existing development and that any nominated contribution is focused on an increase in actual demand. Furthermore, the department notes that the development contribution system is broader than s94 Plan contributions and includes the potential for alternative levies and planning agreements to fund local infrastructure where appropriate.

The department also notes that s94 conditions will be imposed on any development consent for future project applications for Stages 2 and 3. The s94 Plan confirms that the new commercial floorspace contained within those stages would generate a contribution at a rate per square metre as noted in **Table 1**. The department does not concur with the Council's view that a like-for-like only approach to credits is appropriate. Therefore the department does not consider it necessary to reserve any credit arising from existing commercial floorspace within Stage 1 until later stages containing proposed new commercial floorspace.

With regard to Council's comments about open space, it is noted that section 2.8 of the s94 Plan states that all estimates of future development have been calculated allowing for existing development and therefore the estimates of growth only relate to the additional development projected by the LGA.

The department therefore considers that the s94 Plan includes within its baseline calculations all existing demand on local amenities and services as at the time of its adoption, which would logically therefore include the subject site in a (pre-concept plan) fully occupied/operational state. The department considers that this is further justification for credit to be given for the existing commercial floorspace. Notwithstanding this, the department notes that additional open space (public and communal) will be provided within future stages (particularly Stage 2) of the development. Whilst these spaces may not be available at the same time as the first occupation of Stage 1, such a delay is not an uncommon occurrence within large development schemes due to the necessities of construction and funding scheduling.

The department acknowledges that the Statement of Commitments commits to provide relevant s94 contributions in accordance with the s94 Plan. However, as noted above, the department considers that the credit as calculated does not reasonably accord with section 2.8 of the s94 Plan. This being the case, the department considers the proposed modification does not conflict with the approved Statement of Commitments.

Finally, the department notes that there is no requirement within the EP&A Act or the s94 Plan that prevents credits applying to existing vacant or 'abandoned' commercial floorspace. The department therefore does not agree with Council's recommendation that credits should not be given on this basis.

5.2 Calculation of a reasonable credit amount for existing commercial floorspace

As indicated in **Table 2** and contrary to Council's submission (which advocated credits based only on a like-for-like building use/type criterion), condition C4 includes an insignificant credit ($8,941.23) for the existing 1,674.5m^2 floorspace to be demolished in Stage 1. It is unclear how the Council's s94 calculator generated this credit amount or why the credit was apportioned in this manner.

The proponent notes that as the s94 Plan levies residential and commercial development, the Plan recognises that commercial development places a demand on facilities relating to local roads, public transport, open space and recreation and s94 Plan administration. The proponent considers that as the development site is occupied by existing development that would, if being proposed as a new development, generate a s94 contribution, the value of that existing relevant demand on existing community infrastructure should be calculated as a credit (based on the s94 Plan rate) and apportioned accordingly.

Table 3: Comparison of s94 Plan levies on residential and commercial development

Residential Development	Commercial Development
Local Roads	Local Roads
Public Transport	Local Public Transport
Open space and recreation	Local open space and recreation
Community facilities	Plan administration
Plan Preparation/Administration	

The department notes that the s94 Plan acknowledges that different types of development may have different demand impacts on public amenities and services. However, it is the department's view that the types of services and amenities levied for residential and commercial land use/development are reasonably similar and therefore it is fair to accept credits for existing commercial development where it is being replaced by residential development. In this instance, the department does not consider that the adoption of different methodologies for calculating contributions (and apportionment) for new commercial floorspace and crediting existing commercial floorspace is justified.

In light of the above assessment, the department considers that it is reasonable to grant a credit for the existing commercial floorspace equivalent to the contribution that would be required if that floorspace were proposed as new. The following table therefore indicates the department's calculated contribution and apportionment.

Table 4: Proposed contribution credit and contribution apportionment

Community infrastructure Type	Proposed Contribution Apportionment (without credit)	Credit for existing 1.674.5m^2 commercial floorspace	Proposed Contribution Apportionment
Local Roads	$15,497.23	$5,332.39	$10,164.84
Public Transport	$43,025.60	$11,563.19	$31,462.40
Car Parking Facilities	$0.00	$0.00	$0.00
Open Space and Recreation	$795,868.65	$450,534.14	$345,337.10
Community Facilities	$44,744.42	$0.00	$44,744.42
Plan Preparation/Admin	$36,155.33	$20,455.19	$15,700.15
Total	**$935,291.23**	**$487,882.32**	**$447,408.91**

6. CONCLUSION AND RECOMMENDATIONS

The purpose of this application is to reconsider the total section 94 contributions associated with project approval MP 10_0180.

The proposed modification falls within the scope of section 75W of the EP&A Act and does not alter the original assessment as to the site's suitability for the approved development.

In assessing this application, the department has reviewed the proponent's application and submission dated 26 August 2013, Council's submission and the proponent's Response to Submissions.

The department considers that credit should be granted for the existing commercial floorspace that is to be demolished as part of Stage 1 of the development. Furthermore, the department considers it reasonable in this instance that the credit is equivalent to the contribution that would be required if that floorspace were proposed as new (this would increase the credit from $8,941.23 to $487,882.32). The department recommends that condition C4 be amended accordingly.

It is recommended that the Planning Assessment Commission consider the report and its findings and approve the modification request under section 75W of the EP&A Act, by signing the attached modifying instrument.

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Endorsed by

7/2/14

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Executive Director
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APPENDIX A RELEVANT SUPPORTING INFORMATION

The following supporting documents and supporting information to this assessment report can be found on the Department of Planning and Infrastructure's website as follows:

1. Environmental Assessment

   http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=6118

2. Submissions

   http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=6118

3. Applicant's Response to Submissions

   http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=6118

APPENDIX B APPORTIONMENT

The department has undertaken some analysis to calculate apportionment scenarios for the development (as they were at the time of the approval). **Table 5** gives a comparison between the apportionment scenarios both without and with credit. The difference between the two scenarios determines the apportionment of the credit given to the existing commercial floorpsace by community infrastructure type.

Table 5: Comparison between contribution apportionment scenarios without and with credit and the apportionment of the credit given

Community infrastructure Type	Contribution Apportionment (without credit)	Contribution Apportionment (with credit)	Apportionment of condition C4 credit for commercial floorspace
Local Roads	$15,497.23	$10,125.38	$5,371.85
Public Transport	$43,025.60	$42,858.63	$166.97
Car Parking Facilities	$0.00	$0.00	$0.00
Open Space and Recreation	$795,868.65	$792,780.17	$3,088.48
Community Facilities	$44,744.42	$44,570.79	$173.63
Plan Preparation/Admin	$36,155.33	$36,015.03	$140.30
Total	**$935,291.23**	**$926,350.00**	**$8,941.23**

APPENDIX C RECOMMENDED MODIFYING INSTRUMENT