



PERFORMANCE AUDIT

17 AUGUST 2020

Governance and internal controls over local infrastructure contributions

NEW SOUTH WALES AUDITOR-GENERAL'S REPORT

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In accordance with section 421D of the *Local Government Act 1993*, I present a report titled '**Governance and internal controls over local infrastructure contributions**'.

A handwritten signature in black ink, appearing to read 'Margaret Crawford'.

Margaret Crawford
Auditor-General
17 August 2020

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Auditor-General's foreword

This audit examined the effectiveness of governance and internal controls over local infrastructure contributions, also known as developer contributions, held by four councils during the 2017–18 and 2018–19 financial years. This performance audit was conducted with reference to the legislative and regulatory planning framework that was in place during that period.

Our work for this performance audit was completed at the end of March 2020 when we issued the final report to the four audited councils and the Department of Planning, Industry and Environment. We received their respective formal responses to the report's recommendations during April and May 2020.

Concurrently to this audit, we sought Crown Solicitor's advice (the 'Advice') regarding the use of local infrastructure contributions collected by local councils under the *Environmental Planning and Assessment Act 1979* ('the EPA Act') for our financial audit work. The Advice clarified the applicable legislative requirements with reference to the application, investment and pooling of local infrastructure contributions. The Advice is included in Appendix 2 of this report. The Advice has not impacted on the findings and recommendations of this report.

Section one

Governance and internal
controls over local
infrastructure contributions

Executive summary

Councils collect Local Infrastructure Contributions (LICs) from developers under the *Environmental Planning and Assessment Act (1979)*, the *Local Government Act (1993)* and the *City of Sydney Act (2000)* (EP&A Act, LG Act and City of Sydney Act) to fund infrastructure required to service and support new development. At 30 June 2018, councils across NSW collectively held more than \$3.0 billion in LICs collected from developers. Just over \$1.37 billion in total was held by ten councils. Councils collecting LICs must prepare a contributions plan, which outlines how LICs will be calculated and apportioned across different types of infrastructure. Councils that deliver water and sewer services prepare a development servicing plan (DSP) which allows them to collect contributions for water and sewer infrastructure.

Development timeframes are such that there is often several years between when LICs are collected and the infrastructure is required. Good governance and internal controls are needed over these funds to ensure they are available when needed and spent appropriately.

This audit assessed the effectiveness of governance and internal controls over LICs collected by four councils during the 2017–18 and 2018–19 financial years: Blacktown City Council, Central Coast Council, City of Sydney Council and Liverpool City Council. As at June 2018 these councils held the four highest LIC balances, each in excess of \$140 million.

Audit conclusion

Three of the four councils audited were currently compliant with legislation, regulations and Ministerial Directions regarding LICs. All had gaps in governance and controls over LICs which limited effective oversight.

Three of the councils included in the audit complied with legislation, regulations and Ministerial Directions relating to LICs. Central Coast Council breached the EP&A Act between 2001 and 2019 when it used LICs for administration costs. These funds were repaid in late 2019.

While controls over the receipt and expenditure of contributions funds were largely in place at all councils, there were some exceptions relating to valuing work and land delivered in lieu of cash. Three councils do not provide probity guidance in policies relating to LICs delivered through works-in-kind. Three of the councils had contributions plans that were more than five years old.

Staff at all four councils are knowledgeable about LICs but not all councils keep procedures up to date. Three councils' governance frameworks operate effectively with senior officers from across the council involved in decisions about spending LICs, entering into voluntary planning agreements (VPAs) and reviewing contributions plans.

Transparency over key information relating to LICs is important for senior management so they can make informed decisions, and for the community who pay LICs and expect infrastructure to be provided. During the period of the audit, none of the councils included in the audit provided sufficient information to senior management or their councillors about the projected financial status of contributions plans. This information would be valuable when making broader strategic and financial decisions. Information about LIC levies and intended infrastructure is available to the community but not always easy to find.

Key findings from the four audited councils

LICs were spent as intended at three of the four councils

Central Coast Council used LICs collected under the EP&A Act to pay for administration expenses under contributions plans. Administration expenses were paid using funds collected under 40 contributions plans inherited from Gosford City Council which had no allowance for administration. Central Coast Council repaid the LIC fund in late 2019.

The other three audited councils spent LICs in accordance with their relevant contributions plans.

All four councils had committees that provided oversight of LICs, three of which had senior representation to allow effective decision-making

All four councils had committees to manage LICs collected under the EP&A Act. The most effective LIC committees were at Blacktown City Council and City of Sydney Council where the committee membership included senior officers from across council who made decisions about spending LICs, reviewing contributions plans and negotiating VPAs.

Liverpool City Council had only recently established a LIC committee and it was too early to assess its membership or effectiveness. However, the LIC committee operated within a wider governance framework with other project committees that included senior officers from across council.

Central Coast Council's LIC committee did not have a sufficiently senior level of membership to be an effective decision-making body and did not address LICs collected for water and sewer under the LG Act.

Monitoring and reporting on future LIC cash flow was insufficient in all councils

None of the four councils regularly report to senior management or their councillors about the projected financial status of their contributions plans (or DSPs in the case of Central Coast Council). This means that management and the council are not able to include the projected financial status of LIC funds when considering broader strategic and financial issues.

Not all councils reviewed their contributions plans within the suggested timeframes

Blacktown City Council, Liverpool City Council and Central Coast Council all have contributions plans that have not been reviewed within the past five years, which is the timeframe suggested in guidance in the form of a Practice Note published in 2005 by the former Department of Infrastructure Planning and Natural Resources.

Reviewing contributions plans on a regular basis allows councils to reset assumptions underlying the plans and re-establish the basis for calculating contributions if necessary.

Not all audited councils' internal controls adequately addressed risks that can arise in the administration of LICs

A number of weaknesses were identified in internal controls at the four councils. These included:

- a lack of independence in valuations of works-in-kind and land at Central Coast Council and Liverpool City Council and in valuations of works-in-kind at Blacktown City Council
- a risk that security bonds paid by developers may be insufficient to cover the cost of undelivered or poor quality works-in-kind at Liverpool City Council and Central Coast Council
- a risk that LICs may not be collected at City of Sydney Council when accredited private certifiers issue construction certificates
- outdated policies and procedures at Central Coast Council and procedures at Blacktown City Council
- incomplete guidance relating to probity during negotiations with developers at Blacktown City Council, Central Coast Council and Liverpool City Council
- limited security over important data maintained in spreadsheets meaning that contributions calculations or credit and offset arrangements with developers could be manipulated.

Some good controls demonstrated included:

- City of Sydney Council independently values work and land offered by developers in lieu of cash contributions and Blacktown City Council independently values offers of land
- Blacktown City Council, Central Coast Council and Liverpool City Council check that LICs have been paid when construction certificates are lodged for complying developments and follow up with developers if LICs are outstanding
- City of Sydney Council recognises that security over works-in-kind may be insufficient due to the rising cost of work and incorporates into the Deed of Agreement the right to claim the difference from the developer
- Blacktown City Council requires security over works-in-kind of 125 per cent of the value of the work to ensure that sufficient funds are available if the value of the work has increased.

The LIC system is largely transparent, with some exceptions

A Practice Note published by the former Department of Infrastructure Planning and Natural Resources, and Determinations published by the Independent Pricing and Regulatory Authority (IPART) relating to water and sewer LICs, make reference to the importance of transparency over LICs.

Information about LICs collected and how they are spent is available to the public although contained in different documents and web pages. Plans to collect and spend LICs are included in contributions plans and Development Servicing Plans (DSPs) which are exhibited to the community prior to being adopted and are then available as public documents.

There is a lack of transparency over how cash collected under VPAs is spent. Information about the intended use of cash is available, but only Liverpool City Council publishes information about how LICs are actually spent.

Staff at all four councils were knowledgeable about LICs but not all councils kept procedures up to date

Staff and managers at all four of the audited councils were knowledgeable about LICs and the regulatory environment.

Blacktown City Council and Central Coast Council were heavily reliant on the knowledge of specific staff members due to outdated procedural documentation.

Insights for the Local Government sector

Governance of LICs

The councils that demonstrated good governance had effective LIC committees to oversee the collection, management and expenditure of LICs. Effective committees had a senior level of membership from across the councils and acted as a decision-making forum. The Practice Note contains guidance about the establishment of LIC committees.

Councils would benefit from understanding the projected financial status of their contributions plans and DSPs. Knowing if a contributions plan or DSP is on track to collect sufficient funds to deliver the required infrastructure would help senior management to know whether the contributions plans or DSPs need to be reviewed, alternative sources of funding need to be considered, or other council strategies or policies need to be revised.

Internal controls over LICs

Controls over LICs help to ensure that all LICs owing are collected, LICs are spent as intended and that the council does not over-pay for contributions delivered as works-in-kind or dedicated land. Controls also help to manage probity in dealing with developers and ensure that important information is protected.

Councils do not always obtain independent advice relating to the value of contributions in the form of works-in-kind and dedicated land. Councils that ask developers to pay for these valuations should conduct sufficient due diligence to be confident about the independence of the valuation.

Councils that rely on spreadsheets to manage important information should ensure that appropriate security is in place over the spreadsheets and the data.

Transparency over LIC information

Transparency over key information relating to LICs is important so that the community knows that the right amount of LICs is being collected and spent as it should. While most information about LICs is publicly available, it is not always easy to find. When presenting information to the public about capital works expenditure, councils should consider including information about the source of funding. This helps communities to understand how council's different funding streams are spent, including LICs and VPAs.

1. Introduction

1.1 Local infrastructure contributions

Activities that intensify the use of land, such as commercial or residential development, increase the need for infrastructure.

Property developers pay contributions to both the State Government and local councils to help with the cost of infrastructure required to service and support their developments. Special infrastructure contributions (SICs) are paid to the State Government to help fund state and regional roads and to purchase land for State Government services.

Local infrastructure contributions (LICs) are paid to local councils by property developers to meet the increased demand for basic, essential, and community infrastructure created by new development.

Exhibit 1: Developers pay infrastructure contributions to the State Government and local councils



Source: NSW Department of Planning, Industry and Environment.

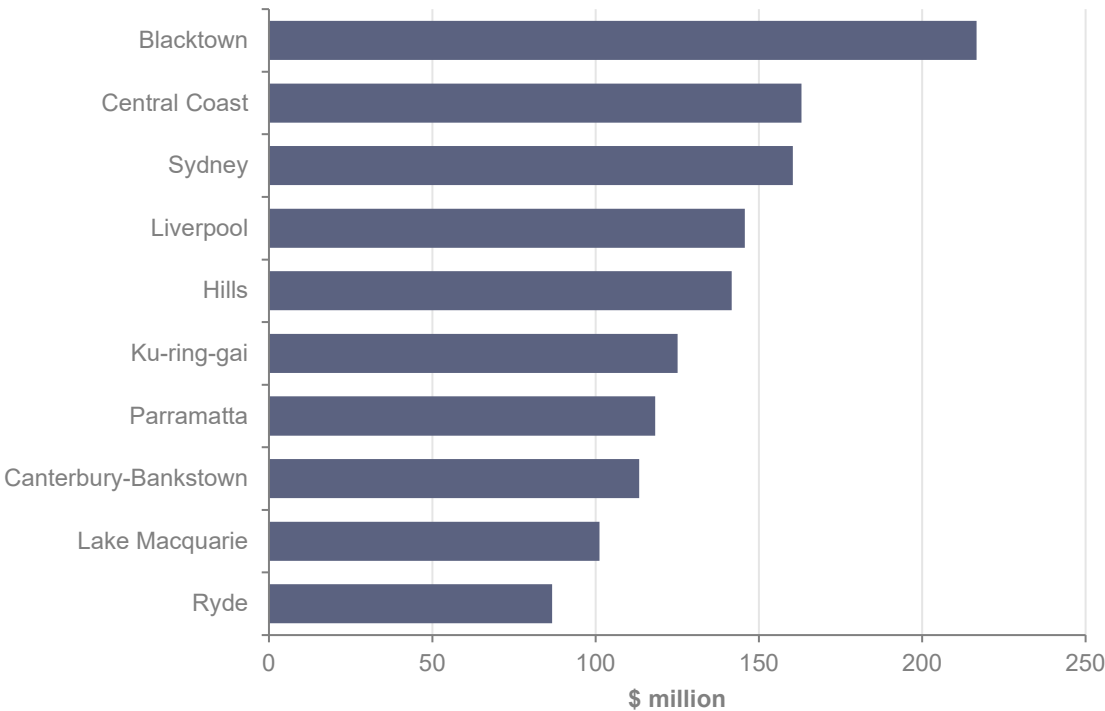
LICs are managed as restricted funds, meaning they can only be spent on the purpose for which they were collected.

When a development application is approved, payment of a LIC is included as a condition of consent. Councils have discretion to accept offers for developers to pay contributions in the form of cash, dedicated land, or works-in-kind.

LICs can be used to wholly or partly fund infrastructure, depending on the extent to which the development activity is expected to generate demand for the infrastructure.

At 30 June 2018, councils across NSW collectively held more than \$3.0 billion in LICs collected from developers. Just over \$1.37 billion in total was held by ten councils.

Exhibit 2: LICs held by ten councils with the largest LIC balances as at 30 June 2018



Source: Audit Office analysis based on 2018 audited councils' financial statements.

Large unspent balances of infrastructure contributions reflect infrastructure that has been paid for, but not yet delivered. This can be of concern to growing communities that require infrastructure to manage stormwater and drainage, keep traffic moving, and contribute to healthy and engaged populations through open space and recreational facilities.

While there may be sound reasons for large balances at times, strong governance and controls are required to ensure these funds are available when needed and spent as intended.

1.2 Regulatory environment for LICs

Legislation and regulations

Collection of LICs included in the scope of this audit is permitted under the EP&A Act, the LG Act and the City of Sydney Act.

Exhibit 3: Regulatory environment for collection of LICs

Type of LIC	Collected under (Act and Section)	Can be collected by	Referred to in this report as
Contributions for local infrastructure based on the scale of development	EP&A Act Section 7.11	All councils	S7.11
Contributions for local infrastructure based on development cost	EP&A Act Section 7.12	All councils except City of Sydney Council	S7.12
Contributions for local infrastructure based on development cost	CoS Act Section 61	City of Sydney Council	S61
Contributions for water and sewer infrastructure	LG Act Section 64	Councils that provide water and sewer services (only Central Coast Council in this audit)	S64
Contributions negotiated through a voluntary planning agreement	EP&A Act Section 7.4	All councils	VPA's or S7.4

Source: EP&A Act, the City of Sydney Act, and the LG Act.

The legislation is supplemented by the EP&A Regulation 2000, Developer Contributions Practice Notes (the Practice Note) published in 2005 by the former Department of Infrastructure Planning and Natural Resources, and Ministerial Directions. Guidance relating to the collection of S64 contributions by Central Coast Council is provided in Determinations published by the Independent Pricing and Regulatory Tribunal (IPART) (S64 Guidance). For all other councils that deliver water and sewer services, S64 guidelines are published by the former Department of Primary Industries.

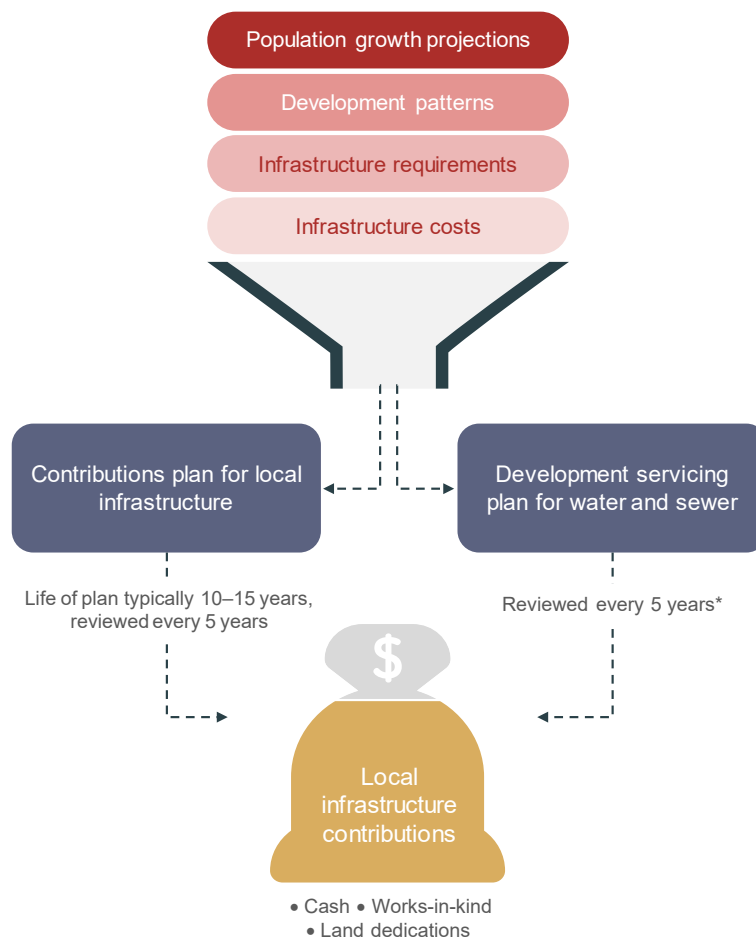
Contributions plans and DSPs

Councils wishing to levy LICs under the EP&A Act or City of Sydney Act must prepare a contributions plan, which outlines how contributions will be calculated and apportioned across different types of infrastructure.

Councils that provide water and sewer services must prepare a development servicing plan (DSP) which outlines the developer charges for water and sewer, the basis for those charges, and the planned expenditure, including timing, of funds collected.

Contributions plans for S7.11 funds and DSPs for S64 funds must demonstrate a 'nexus', or a direct relationship between expected development and the infrastructure required as a consequence of that development. Where demand for infrastructure is only partly derived from development, the contributions plan or DSP will indicate the portion of the infrastructure cost to be funded by LICs. The remaining cost will be funded through other council resources.

Exhibit 4: Contributions plans and DSPs are strategic documents



* IPART recommends review every five years, former Department of Primary Industries 2016 guidelines recommend review every 4–8 years.
Source: Audit Office Research.

Voluntary Planning Agreements

Voluntary planning agreements (VPAs) are arrangements between developers and either councils or the State Government for infrastructure contributions collected for purposes not covered by a contributions plan. Section 7.4 of the EP&A Act allows councils and developers to voluntarily agree to a contribution arrangement. Examples of this could include a developer paying an additional contribution in relation to a change to a planning instrument or contributing infrastructure that was not anticipated at the time the contributions plan was developed. Contributions collected under a VPA do not have to demonstrate the same direct support for the infrastructure needs associated with the development as those collected under a contributions plan, although they must be related to the development in some way.

Under the EP&A Regulation, councils are required to maintain a public register of planning agreements and make copies of the agreements available for public inspection. This contributes to transparency over VPAs which is discussed further in Chapter 4.

1.3 About the audit

This audit assessed the effectiveness of the governance and internal controls over LICs at the four councils with the largest cash balances at 30 June 2018. Blacktown City Council, Liverpool City Council, and City of Sydney Council are all Sydney metropolitan councils. Central Coast Council is a regional NSW council, located approximately 95 kilometres north of Sydney.

According to a 2016 report from the former NSW Department of Planning and Environment, these four Local Government Areas are among the fastest growing areas in NSW in terms of population. Central Coast is the fastest growing regional Local Government Area in the state.

The audit examined governance and internal controls over local infrastructure contributions during the two financial years 2017–18 and 2018–19.

The audit answered these questions:

- Do councils have effective governance arrangements and internal controls in place over the collection, management, and disbursement of local infrastructure contributions and which include accountability for each part of the process?
- Do councils regularly report to those charged with governance or other senior officers on the status, investment performance, and risks related to local infrastructure contributions?
- Can councils demonstrate that local infrastructure contributions have been spent on, or are being used for, their intended purpose as described in the development contributions plan?
- Are local infrastructure contributions managed by individuals with the appropriate knowledge and skills to perform their duties?

More information about the audit approach is in Appendix three.

2. Governance of LICs

A strong governance framework is important at each council to ensure that the funds are managed well, available when needed and spent as intended. The audit examined the following features of each council's governance framework as they apply to LICs:

- decision-making by councillors and council officers relating to LICs
- monitoring delivery of contributions plans and DSPs including:
 - reviewing assumptions underlying the plans
 - monitoring projected status of plans.

2.1 Decision-making

Councillors are involved in key decisions about LICs

Councillors are accountable to their communities through open and transparent decision-making as well as regular planning and reporting. The involvement of councillors in key decisions about LICs contributes to transparency over how LICs are collected, managed and spent.

At all four of the audited councils, councillors are involved in key decisions about LICs. The audit found that councillors are involved in the following decisions:



Amount to be levied

Councils approve and adopt the contributions plans and DSPs



Infrastructure to be provided

Councils approve and adopt the contributions plans and DSPs



Expenditure of LICs

Councils approve and adopt the annual capital works plan and approve land acquisitions and VPAs



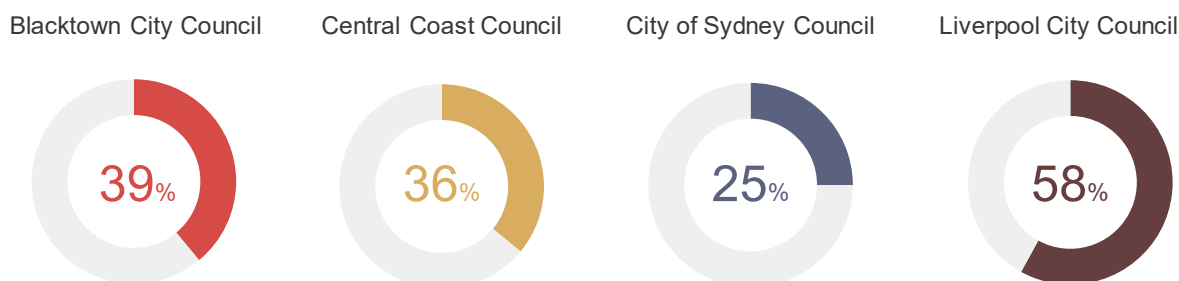
Management of funds

Councils monitor the performance of council's invested funds (which include unspent LICs)

Two of the audited councils had effective LIC Committees

LICs can represent a significant source of council's annual revenue and cash balance.

Exhibit 5: Cash LICs as a proportion of cash or cash-equivalent funds at each audited council



Source: Financial statements, averages over the 2017–18 and 2018–19 financial years.

Management of this asset and cash flow, and decisions about how and when the funds should be spent, requires the involvement of senior managers from across the council.

The Practice Note suggests that LIC Committees with senior officers from across the council included in the membership can be important forums for:

- managing LICs
- making decisions to spend LICs or enter into VPAs with developers
- monitoring work funded by LICs
- reviewing contributions plans
- coordinating different parts of the council organisation to ensure that infrastructure is delivered when needed.

Blacktown City Council and City of Sydney Council have effective LIC committees in place. Senior managers from across council meet regularly to make decisions about the collection, management and expenditure of LICs, and to endorse or reject land acquisitions and VPA proposals. Blacktown City Council has two LIC committees with slightly different membership, one that focuses on financial management of LICs and the other on more strategic planning matters.

Central Coast Council has a committee in place, but it has no formal charter, does not deal with S64 funds and senior officers do not regularly attend committee meetings. This limits the committee's decision-making capacity.

Liverpool City Council established a committee in April 2019 to manage contributions plans and support business units to initiate relevant infrastructure projects. The committee was too new to be assessed for effectiveness during the audit period 2017–18 and 2018–19. We note that this committee sits within an existing governance framework that includes three other committees, all with senior membership from across the council. In February 2019, following an internal audit that found weaknesses in LIC governance, these committees began monitoring and managing collection and expenditure of LICs.

2.2 Monitoring

The Practice Note recognises that a risk for councils is having insufficient funds available to provide required infrastructure when it is needed. Regular review of contributions plans and DSPs ensures that these plans reflect the latest planning assumptions and up-to-date costs of providing infrastructure.

Contributions plans and DSPs are akin to a long-term budget for delivering particular types of infrastructure. Regular monitoring of the current and projected financial status of these plans provides information about whether development activity is on track to deliver sufficient LICs to fund the required infrastructure. This information is important input into broader strategic and financial decisions.

Not all councils reviewed contributions plans within the suggested timeframes

The Practice Note and S64 Guidance indicate that contributions plans and DSPs should be reviewed at least every five years. City of Sydney is the only audited council that does not have contributions plans older than five years.

Regular review of contributions plans and DSPs provides an opportunity to realign the plans with any changes to council's own strategic plans and planning instruments and review and revise factors underpinning the plans such as:

- population estimates and council boundaries
- construction standards and costs
- land values and the cost of labour
- appropriateness of indexes used in the plan
- affordability of discounts and exemptions.

Exhibit 6: Review of contributions plans at the four audited councils

Blacktown City Council	Central Coast Council	City of Sydney Council	Liverpool City Council
reviews contributions plans for its five growth areas every two years. Two of 15 contributions plans are more than eight years old.	is currently reviewing and consolidating more than 50 contributions plans inherited through amalgamation, 47 of which are more than five years old, and completed a review of DSPs in 2019.	reviews plans every five years.	has a policy to review 'on a regular basis'. Two of six plans are more than ten years old.

Source: Audit Office analysis.

Older contributions plans and DSPs (more than five years old) may include outdated infrastructure costs or infrastructure that is no longer necessary or no longer aligned with council's latest strategies and planning instruments. This means councils may not be collecting sufficient LICs to fund required infrastructure or may be collecting LICs for infrastructure that is no longer needed.

Councils publish annual financial statements for their contributions plans

All of the audited councils provide a statement of developer contributions in their annual financial statements. This is a requirement in the Local Government Code of Accounting Practice and Financial reporting published by the former Office of Local Government.

This statement identifies how much has been collected and spent, and the overall balance for different categories of infrastructure, information which helps the community understand how council is using LICs to fund different types of infrastructure.

The statement also includes information about council's use of tools that help to manage LIC cash flow:

- pooling funds across contributions plans and infrastructure categories, a form of internal borrowing that must be repaid with interest
- non-cash contributions from developers (works-in-kind and land dedications).

None of the audited councils report regularly to management on the projected financial position of their contributions plans

LICs are only one source of funds available to councils for infrastructure. Other sources include:

- loans from financial institutions which are repaid using LICs
- other council funds
- leasing rather than building infrastructure
- partnering with private organisations to build infrastructure
- grants.

Selecting the most appropriate mix of infrastructure funding requires councils to understand the risks and availability of each funding source. With regard to LICs as a source of funds, none of the audited councils assess or report on the projected position of contributions plans or DSPs to senior management or the elected council. This means councils are not able to forecast the capacity of LICs to meet their infrastructure needs, and the potential requirement for alternative funding.

We note that Blacktown City Council is undertaking work to model future infrastructure funding requirements and Liverpool City Council has developed shortfall calculators for some contributions plans. In addition, after the audited period, Liverpool City Council provided its senior management and council with information about the projected status of some contributions plans.

Exhibit 7: Council reporting on financial positions of contributions plans and DSPs

	Where we are heading	Where we are now	Where we expect to be	Long-term plan
	❖ Contributions plan ❖ DSP (Central Coast Council)	❖ Financial statements ❖ Quarterly reports	❖ No reporting	❖ Strategic decisions*
Blacktown City Council	✓	✓	✗	○
Central Coast Council	✓	✓	✗	○
City of Sydney Council	✓	✓	✗	○
Liverpool City Council	✓	✓	✗	○

* Input into strategic decisions could be improved by including the projected financial position of contributions plans.

Source: Audit Office analysis based on contributions plans and financial statements 2017–18 and 2018–19.

Improved scrutiny over the projected financial position of contributions plans and DSPs would help each council to assess the most appropriate mix of funding sources for delivering infrastructure.

3. Internal controls

Internal controls over LICs are important to promote accountability, prevent fraud and deliver infrastructure to the required standard at the best possible price. If financial controls are weak or are not implemented well, there is a risk that LICs are misspent or that councils pay too much for infrastructure.

Not all councils' internal controls adequately addressed risks associated with the administration of LICs

The audit examined a number of internal controls that manage risks related to LICs. These included:

- financial controls over receipt and expenditure of LIC funds
- management of conflicts-of-interest when dealing with developers
- independent valuations of works-in-kind and dedicated land
- ensuring delivery and quality of works-in-kind, and obtaining security from developers in the event of non-delivery or poor quality work
- management of variations to VPAs and works-in-kind agreements.

We reviewed controls included in policies and procedures and then checked samples of work to ensure that controls were implemented. We found variation in the controls that councils implemented, and some weaknesses in controls. It is a matter for each council to assess their financial risk and develop internal controls that support the collection, management, and expenditure of LICs. However, councils must be able to assure their communities and developers that they are doing everything possible to collect all LICs owing and that work conducted by developers in lieu of cash payments is properly valued and carried out to the required standard.

Further information about audit findings in relation to internal controls for each council are included in chapters five to eight. The exhibit below demonstrates variation in several controls implemented in the audited councils.

Exhibit 8: Examples of internal controls specific to LICs

Risk	Expected controls	Audit finding
Works-in-kind and land are over-valued, reducing the cash contribution paid.	Councils obtain independent professional advice to value works-in-kind and land offered by developers.	City of Sydney and Blacktown City Councils obtain independent advice. Other councils ask the developer to provide the valuation.
Developers agree to deliver works-in-kind in return for a reduced cash contribution, then default or deliver poor quality work.	Councils require developers to pay a security bond or have some other form of security over work completed by developers.	Councils' policies require developers to pay a security bond. Blacktown City Council requires the bond to be greater than the value of the work to accommodate cost increases if the work is not delivered. City of Sydney Council incorporates the right to raise a debt for any cost difference into the Deed of Agreement.
Accredited private certifiers may issue a construction certificate before a LIC is paid. Councils may not be aware that the LIC is unpaid.	Councils have a process to check whether LICs have been paid when a construction certificate is registered.	Blacktown City Council, Central Coast Council* and Liverpool City Council manually check for unpaid LICs and contact developers directly if they are unpaid. City of Sydney Council reviewed and accepted this risk in 2014.

* Central Coast Council has this process in place for S7.11 and S7.12 LICs but not S64.

Source: Audit Office analysis.

Three of the four audited councils spent LICs in accordance with contributions plans and DSPs

In 2017–18 and 2018–19, three of the audited councils had spent LIC funds in accordance with the relevant contributions plans.

During the course of the audit, Central Coast Council told us that between 2001 and 2016 the former Gosford City Council, now merged into Central Coast Council, used funds collected under 40 S7.11 contributions plans to pay for administration expenses. This was a breach of the EP&A Act as these contributions plans made no allowance for administration expenses. Following amalgamation in 2016, this practice continued until 2019 under Central Coast Council.

The Council made an adjustment of \$13.2 million in the 2018–19 financial statements to reimburse the LIC fund from the general council fund. This adjustment includes interest foregone since 2001.

Council policies do not always require probity over negotiations with developers

When negotiating VPAs and works-in-kind arrangements with developers, councils need to be mindful of probity and the potential for staff to have conflicts of interest. The Practice Note provides guidance for councils negotiating VPAs. Some of the guidance is equally applicable to councils negotiating works-in-kind agreements with developers, especially where it relates to the potential for misuse of council's discretion when negotiating outcomes.

In line with the Practice Note, VPA policies and procedures at all four councils included in the audit address at least some of these risks and the councils have included guidance in their VPA policies such as requiring staff to consider separation of duties and conflicts of interest.

Works-in-kind policies at Blacktown City Council, Liverpool City Council, and the draft works-in-kind policy at Central Coast Council provide no guidance about how to declare and manage these risks. Blacktown City Council partially mitigates this risk by monitoring all works-in-kind arrangements through the S7.11 Committee.

Staff and management are knowledgeable about LIC regulations, but not all councils keep policies and procedures up to date

Staff and managers at all four of the audited councils are knowledgeable about LICs and the regulatory environment.

The regulatory framework for LICs is complex and only limited training is available for planners in NSW. Staff interviewed during the audit demonstrated a good understanding of the requirements of the regulatory framework. Three of the four audited councils demonstrated use of external experts to assist with specific tasks and interpretations of the EP&A Act.

It is important that policies and procedures are kept up to date to support staff in their roles. Outdated or missing policies and procedures introduce the risk of inconsistent practices and staff making their own judgements about what to do. It also increases reliance on key staff and introduces key person risk as the council is overly reliant on particular individuals.

Policies and procedures at Central Coast Council have not been harmonised across the amalgamated council. In addition, the council has not developed policies or procedures relating to collection or expenditure of S64 LICs, nor the review of DSPs. Procedures at Blacktown City Council are out of date.

Councils do not always secure key information contained in spreadsheets

At all four councils, staff who manage LICs are reliant on spreadsheets to calculate contributions owed and, where applicable, manage credit banks.

Spreadsheets have no audit trail and data in them can be easily changed, overridden or accidentally lost. The Institute of Internal Auditors (IIA) provides guidance about managing risks associated with spreadsheets. The audit assessed five aspects of spreadsheet security suggested by the IIA and found varied use of spreadsheet controls at the four audited councils.

Exhibit 9: Use of spreadsheet controls at the four audited councils

	Blacktown City Council	Central Coast Council	City of Sydney Council	Liverpool City Council
Access to spreadsheets is restricted and monitored	✓	✓	✓	✓
Spreadsheets are stored safely and backed up regularly	✓	✓	✓	✓
Spreadsheets are password-protected	✓ ^a	✓	✓ ^a	✓
Management check the accuracy and completeness of the data	✗ ^b	✗	✗	✗
Changes to spreadsheets are logged	✗	✗	✓ ^c In part	✗

Notes:

- a Spreadsheets are not password protected, but they are kept on a shared drive with restricted access.
- b Spreadsheets are not checked for accuracy and completeness of the data, but they must balance with financial systems.
- c Saving a copy under a new name every quarter to create a partial audit trail.

Source: Audit Office analysis.

4. Transparency

In a 2018 report, the Independent Commission Against Corruption noted that 'the appetite for transparency is expanding in both the public and private sectors'.

The Practice Note and S64 Guidance refer to transparency, including the importance of transparency over:

- calculation and apportionment of LICs
- funding of infrastructure, including where and when infrastructure is delivered
- arrangements made with developers through VPAs.

The LIC system is largely transparent for community members who know where to look

Contributions plans and DSPs are public documents, exhibited to the public before being adopted by council. Councils included in the audit publish their contributions plans and DSPs on their websites and meet statutory requirements with regard to reporting and accessibility of information.

However, other public information relating to the LIC system is fragmented across different websites and reports and varies in detail across councils.

Exhibit 10: Published information about LICs at the four audited councils

	Blacktown City Council	Central Coast Council	City of Sydney Council	Liverpool City Council
Financial details about contributions collected and spent	Financial statements	Financial statements	Financial statements	Financial statements
Implementation plans for spending LICs	Contribution plans	S64 implementation plans in DSPs. S7.11 & S7.12 implementation plans developed annually within capital works plan	Contribution plans	Developed annually within capital works plan
Capital works underway or completed, funded by LICs	Capital works plan and annual report	Not published	Not published	Capital works plan

Source: Audit Office analysis.

The Practice Note states that councils are accountable for providing the infrastructure for which contributions are collected. Demonstrating that infrastructure has been provided is difficult with fragmented information. As an example of transparent reporting, Blacktown City Council's 2018–19 annual report includes information about infrastructure that has been delivered for every contributions plan, providing transparency over how LICs have been spent.

Use of LICs collected under VPAs is not always transparent

Contributions collected under VPAs are not required to demonstrate the same relationship to a development as LICs collected under section 7.11 of the EP&A Act. VPAs are often negotiated because a developer requests a change to a planning instrument, and it is important that these arrangements, and their outcomes, are transparent to the community.

The EP&A Regulation includes mechanisms to ensure that VPAs are partially transparent. VPAs are exhibited to the public and approved by the elected council. Councils must maintain a VPA Register and make the VPA Deeds of Agreement available on request. However, there is no obligation on council to report on the outcomes or delivery of developers' obligations under VPAs. The four audited councils vary in transparency and accessibility of information available about VPAs.

Exhibit 11: Published information about VPAs at the four audited councils

	Blacktown City Council	Central Coast Council	City of Sydney Council	Liverpool City Council
VPA Register	Council website and annual report	Annual report	Annual report	Council website and annual report
VPA Deeds of Agreement	Council website	Available on request	Available on request	Council website
Intended use of LICs collected under VPAs	In Deeds of Agreement	In Deeds of Agreement	In VPA register and most deeds of agreement	In VPA register and most deeds of agreement
Completion of work funded by cash collected under VPAs	Not published	Not published	Not published	Not published
Delivery of works-in-kind or land negotiated under VPAs	Not published	Not published	In VPA register	Not published

Source: Audit Office analysis.

The Practice Note suggests that councils incorporate the intended use of LICs collected under VPAs in the Deed of Agreement, but there is no guidance relating to transparency over where and when funds have actually been spent. There is merit in councils providing greater transparency over public benefits delivered through VPAs to give communities confidence in VPAs as a planning tool.

Credit arrangements with developers are not always well documented or monitored

When levying LICs, section 7.11(6) of the EP&A Act requires councils to take into account land, money, or works-in-kind that the developer has contributed on other development sites over and above their LIC obligations. This section of the EP&A Act allows a developer to offset a LIC owed on one site against land or works contributed on another. This leads to some developers carrying 'credits' for work delivered to councils, to be paid back by reduced LICs on a future development. Blacktown City Council and Central Coast Council allow developers to carry credits. Liverpool City Council and City of Sydney Council do not permit credits and instead pay the developers for any additional work undertaken.

Councils should formally document credit arrangements and have a robust process to validate and keep track of credit balances and report on them. Central Coast Council does not keep good track of credit arrangements and neither Blacktown City Council or Central Coast Council aggregate or report on outstanding credit balances.

5. Blacktown City Council

Blacktown City Council manages the largest LIC fund in NSW and negotiates more VPAs than any other council. Overall, Blacktown City Council demonstrates effective governance over the LIC funds but there is scope for improved oversight of the projected financial status of contributions plans and credit arrangements with developers. Blacktown City Council also needs to update its operating procedures relating to LICs and improve security over key information.

Blacktown City Council is managing areas with high growth. There is a risk that Blacktown City Council will be unable to collect sufficient LICs to fund the infrastructure required to support that growth. However, Blacktown City Council does not assess and report to senior management or its Audit, Risk and Improvement Committee about the projected financial status of contributions plans.

Blacktown City Council has policies in place to guide the management of LICs although management of credit arrangements with developers requires greater oversight. Policies relating to works-in-kind agreements provide no guidance about probity in negotiations with developers and valuations of works-in-kind are not independent as they are paid for by the developer. Blacktown City Council's S7.11 committee structure could act as a model for other councils. Blacktown City Council is spending LICs according to its contributions plans. Staff managing LICs demonstrate good knowledge of the regulatory environment. However, a number of administrative processes need attention such as outdated procedures, lack of security over key spreadsheets, and inappropriate retention of sensitive personal data.

Recommendations

By December 2020, Blacktown City Council should:

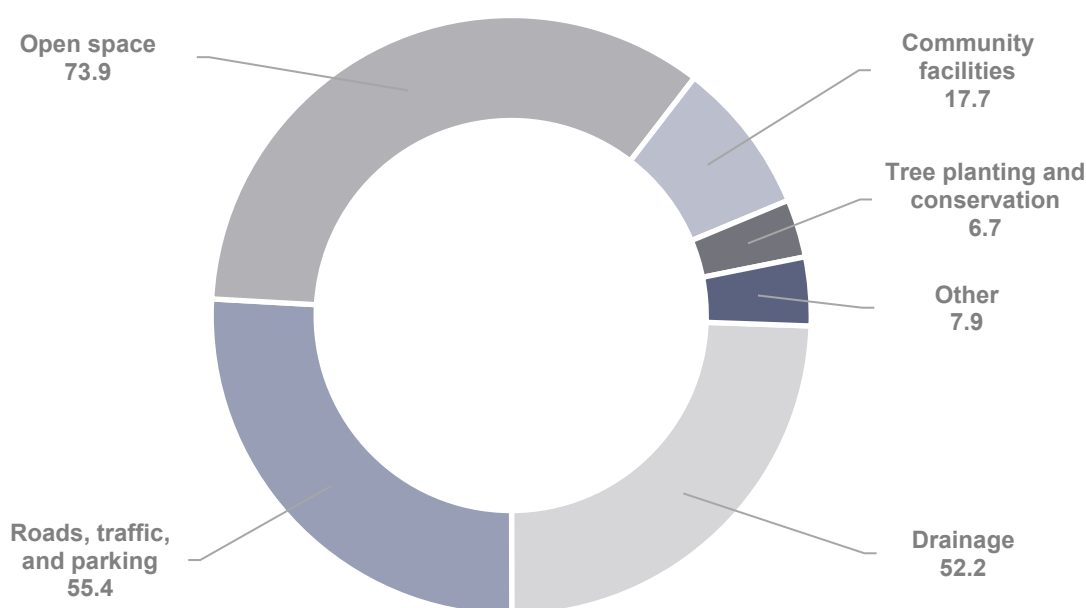
1. regularly report to senior management on the projected financial status of contributions plans
2. update council's works-in-kind policy to address probity risks during negotiations with developers
3. mitigate risks associated with lack of independence in valuations of works-in-kind
4. improve public reporting about expenditure of cash collected under VPAs
5. improve management oversight of credit arrangements with developers
6. update procedures for managing LICs
7. implement security measures over critical or personal information and spreadsheets.

5.1 LICs at Blacktown City Council

Blacktown City Council is a metropolitan council located approximately 44 kilometres north-west of the Sydney CBD. Between 2013 and 2018, the Blacktown Local Government Area experienced the third highest growth in NSW.

At 30 June 2019, Blacktown City Council was holding \$214 million in developer contributions collected under S7.11 and S7.4 of the EP&A Act. A breakdown of these funds apportioned across the infrastructure categories for which they were collected is shown at Exhibit 12.

Exhibit 12: Breakdown of LICs held by Blacktown City Council as at 30 June 2019 (\$ million)



Source: Audit Office analysis based on Blacktown City Council financial statements 2018–19.

5.2 Additional findings for Blacktown City Council

Findings in this chapter address only those not already addressed in Chapters 2–4.

Personal information is not managed in accordance with the *Privacy and Personal Information Protection Act 1998 (PIIP Act)*

Ratepayers sometimes ask council to acquire their land earlier than specified in a contributions plan on the grounds of hardship. Personal details are included in support of hardship claims. The audit found that Blacktown City Council distributes hardship claims via email to staff involved in determining the hardship claim and also retains the original claim in the records management system.

In line with council's own Privacy Management Plan, which references the PIIP Act and *Health Records and Information Privacy Act 2002 (HRIP Act)*, council should keep this personal information on file for no longer than the purpose for which it is required, dispose of it securely, and protect against loss, unauthorised access, use, modification, and disclosure.

6. Central Coast Council

Central Coast Council's governance and internal controls over LICs were not fully effective. Between 2001 and 2019, more than \$13.0 million in LICs was misspent on administration costs in breach of the EP&A Act. There is scope for improved oversight of the projected financial status of contributions plans and credit arrangements with developers. Policies and procedures from the two former councils are not aligned.

In May 2016, the newly amalgamated Central Coast Council inherited 53 contributions plans from the former Gosford City and Wyong Shire Councils. Managing this number of contributions plans fragments the available funds and increases complexity. Central Coast Council is currently working on consolidating these plans. Between June 2016 and June 2019, its LIC balance doubled from \$90.0 million to \$196 million. Central Coast Council does not assess and report to senior management or its Audit, Risk and Improvement Committee about the projected financial status of contributions plans. Central Coast Council has a LIC committee but it has no formal charter and senior officers do not regularly attend meetings. This limits the committee's effectiveness as a decision-making body. A draft policy relating to works-in-kind agreements provide no guidance about probity in negotiations with developers. Valuations of works-in-kind and land dedications are not independent as they are paid for by the developer.

Central Coast Council has adjusted its accounts in 2018–19 by \$13.2 million to repay the LIC fund for administration expenses that were not provided for in 40 contributions plans.

Recommendations

By June 2020, Central Coast Council should:

1. obtain independent validation of the adjustment made to the restricted asset accounts and general fund to repay LICs spent on administration, and adjustments made to each infrastructure category within the contributions plans
2. publish current contributions plans from the former Gosford City Council on the Central Coast Council website.

By December 2020, Central Coast Council should:

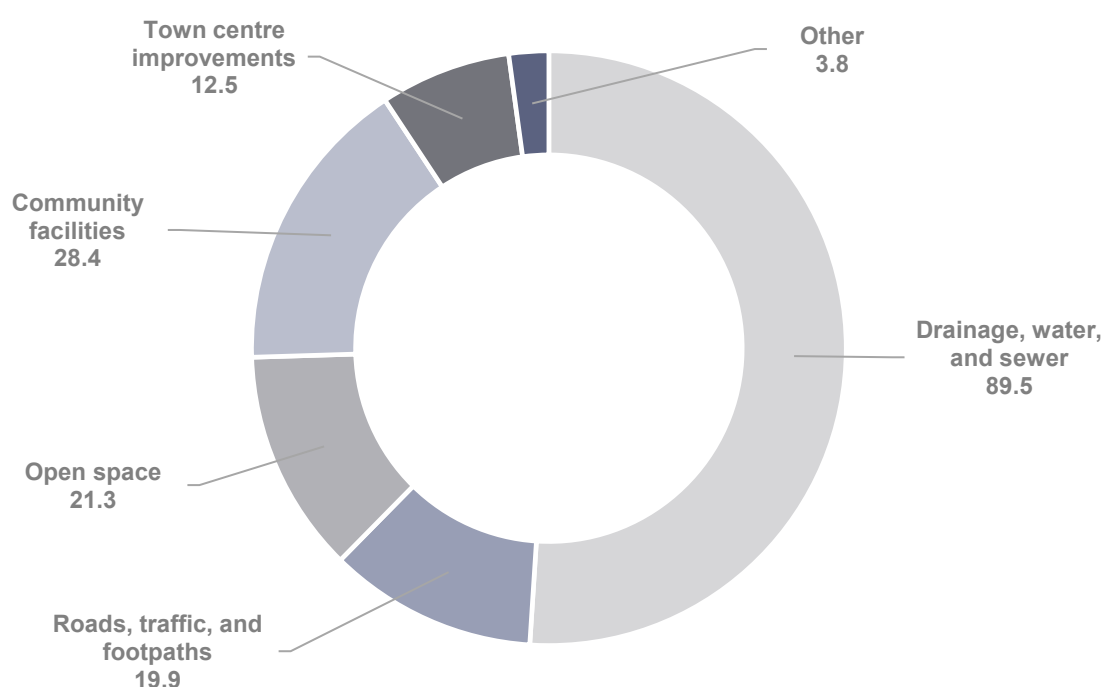
3. regularly report to senior management on the projected financial status of contributions plans
4. increase transparency of information available to the public about LIC works planned and underway, including intended use of contributions collected under VPAs
5. consolidate existing plans, ensuring the new contributions plans includes a regular review cycle
6. develop a formal charter for the developer contributions committee and increase the seniority of membership
7. complete and adopt council's works-in-kind policy currently under development, ensuring it addresses probity risks during negotiations with developers
8. mitigate risks associated with lack of independence in valuations of works-in-kind and dedicated land
9. improve public reporting about expenditure of cash collected under VPAs
10. improve management oversight of credit arrangements with developers
11. implement security measures to ensure the integrity of key spreadsheets used to manage LICs
12. align policies and procedures relating to LICs across the amalgamated council including developing policies and procedures for the management of S64 LICs
13. update council's VPA policy to address increased or indexed bank guarantees to accommodate cost increases.

6.1 LICs at Central Coast Council

Central Coast Council is a regional NSW council, located approximately 95 kilometres north of Sydney. It was formed in 2016 due to the amalgamation of the former Gosford City and Wyong Shire Councils.

At 30 June 2019, Central Coast Council was holding \$189 million in contributions collected under S7.11 and S7.12 of the EP&A Act and S64 of the LG Act. An additional \$5.5 million had been collected under VPAs. A breakdown of these funds apportioned across the infrastructure categories for which they were collected is shown at Exhibit 13.

Exhibit 13: Breakdown of LICs held by Central Coast Council as at 30 June 2019 (\$ million)



Note: Drainage, water, sewer category includes funds collected under both S7.11 of the EP&A Act and S64 of the LG Act.

Source: Audit Office analysis based on Central Coast Council draft financial statements 2018–19, not including funds collected under VPAs.

6.2 Additional findings for Central Coast Council

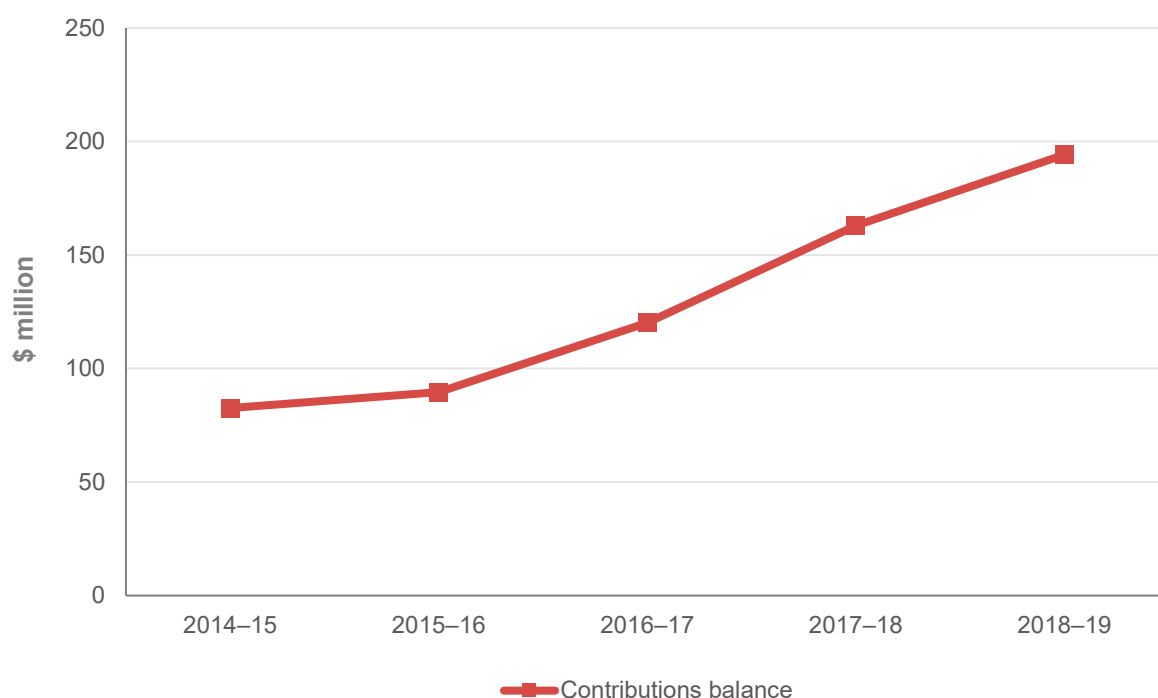
Findings in this chapter address only those not already addressed in Chapters 2–4.

The balance of LICs at Central Coast Council has increased in recent years

Upon amalgamation in May 2016, Central Coast Council inherited a combined LIC balance of \$89.6 million from the former two councils. Since amalgamation, the balance has been increasing and at 30 June 2019 had reached \$194 million.

During that period, LIC contributions collected (including works-in-kind and land) have averaged \$33.0 million per year against average expenditure of \$7.0 million per year. An increasing balance with relatively low expenditure represents infrastructure that developers have paid for, but which the community has not received.

Exhibit 14: Increasing balance of LICs at Central Coast Council



Source: Audit Office analysis based on financial statements. Data for 2014-15 and 2015-16 is aggregated from financial statements for the former Wyong Shire and Gosford City councils.

Central Coast Council is managing a large number of contributions plans

Upon amalgamation in May 2016, Central Coast Council inherited a large number of contributions plans from the former Gosford City and Wyong Shire councils, many covering relatively small geographic areas. The fragmented nature of the plans means that in some cases quite small balances can remain unused for a long time while council waits for sufficient contributions to build up so that infrastructure specified in the contributions plans can be delivered. Multiple plans covering small areas, some overlapping, makes it difficult for developers to know which contributions plan applies and how much they must pay.

In addition, 47 of Central Coast Council's contributions plans are more than five years old.

Exhibit 15: Contributions plans managed by Central Coast Council

Type of CP	Former Gosford City Council	Former Wyong Shire Council	Total CPs managed by Central Coast Council
S7.11 plans	41	10	51
S7.12 plans	1	1	2
Total contributions plans	42	11	53

Source: Audit Office analysis.

In August 2017, Central Coast Council engaged expert assistance to consolidate these plans and develop a framework and policies for the amalgamated council going forward. The new consolidated contributions plan is not expected to be ready until the middle of 2021 at the earliest.

We note that the 42 contributions plans for the former Gosford City Council are not published on Central Coast Council's website. These should be added to the website so that developers know what contributions plans apply to areas they are considering developing and what levies they are expected to pay, and the public knows what infrastructure is planned.

There are weaknesses in financial controls over funds and transactions, and spreadsheets

A review of financial controls over LICs found weaknesses including:

- lack of evidence that reconciliations were independently reviewed
- no records of reconciliations between the general ledger and subledgers
- staff approved expenditure without appropriate delegation as the delegations in the financial system were incorrect
- reviews of access to the two financial systems, Authority and Pathways were not systematically conducted.

In addition, when Central Coast council reviewed its 2014 DSPs not all existing water and sewer infrastructure was identified for inclusion in the revised 2019 DSP. This meant that S64 funds could not be collected to pay for that infrastructure.

At the conclusion of the financial audit for 2018–19, the Audit Office provided Central Coast Council with a management letter containing details of the control weaknesses. Such controls are critical to ensuring the integrity of the LICs fund as, without adequate controls, records can be manipulated, and contributions funds erroneously spent on items not included in contributions plans.

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7. City of Sydney Council

City of Sydney Council manages a complex development environment across the Sydney CBD and inner suburbs. Overall, governance and internal controls over LICs are effective although there is scope for improved oversight of the projected financial status of contributions plans.

City of Sydney Council maintains a large balance of LICs, although not excessive relative to the annual level of LIC expenditure. Unspent contributions are largely associated with open space infrastructure that cannot be delivered until suitable land is available. Thirty per cent of cash contributions are collected under VPAs and there is limited transparency over how these funds are spent. City of Sydney Council does not assess and report to management or its Audit, Risk and Compliance Committee about the projected financial status of contributions plans.

In 2017–18 and 2018–19, LICs were spent in accordance with the corresponding contributions plans. City of Sydney Council staff are knowledgeable about the regulatory environment and are supported by up-to-date policies and procedures.

Recommendations

By December 2020, City of Sydney Council should:

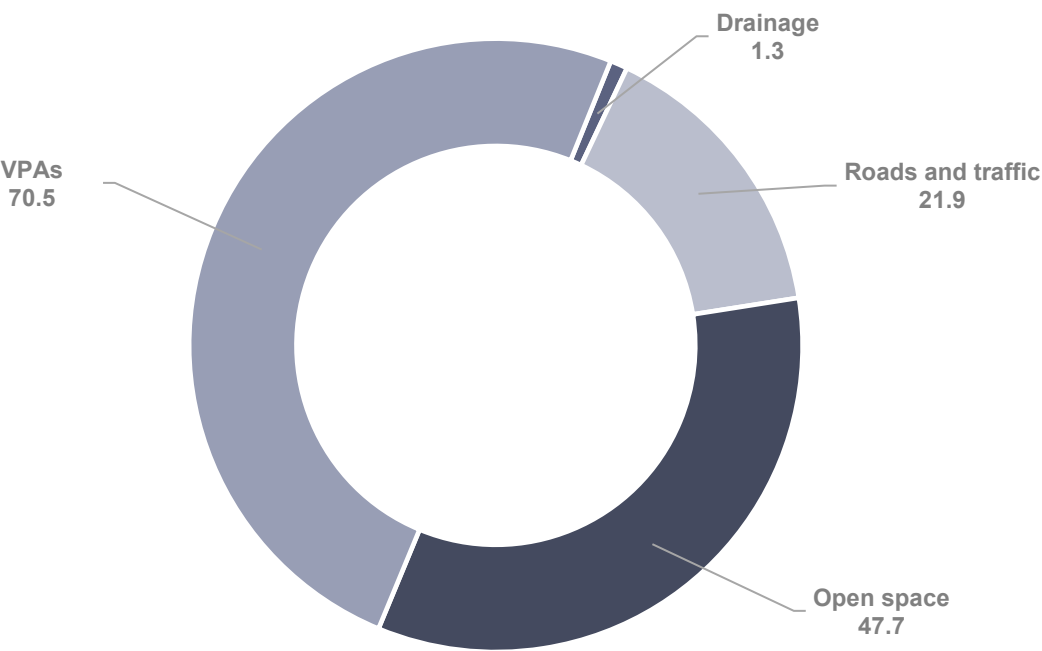
1. regularly report to senior management on the projected financial status of contributions plans
2. improve public reporting about expenditure of cash collected under VPAs
3. periodically review the risk of unpaid LICs associated with complying development certificates and assess whether additional controls are required
4. implement security measures to ensure the integrity of key spreadsheets used to manage LICs.

7.1 LICs at City of Sydney Council

City of Sydney is the Local Government Area that covers the Sydney central business district and surrounding inner city suburbs. Much of the development in the City of Sydney is commercial and high-density residential with some urban renewal. The planning environment is complex due to parts of the CBD being managed by the State Government, a large number of heritage-listed sites and a complex mix of commercial, residential and open space development.

At 30 June 2019, City of Sydney Council was holding \$71.0 million in contributions collected under S7.11 of the EP&A Act and S61 of the City of Sydney Act. A further \$70.5 million had been collected under VPAs. A breakdown of funds collected, apportioned across the infrastructure categories for which they were collected, is shown at Exhibit 16.

Exhibit 16: Breakdown of LICs held by City of Sydney Council as at 30 June 2019 (\$ million)



Source: Audit Office analysis based on City of Sydney Council financial statements 2018–19.

7.2 No additional findings for City of Sydney Council

All findings have been addressed in Chapters 2–4.

8. Liverpool City Council

During the audit period 2017–18 and 2018–19, Liverpool City Council did not have effective governance and internal controls over LICs. Liverpool City Council is addressing deficiencies and risks identified through an internal audit published in December 2018 although further work is required. There is scope for improved oversight of the projected financial status of contributions plans.

In the two years to 30 June 2019, the balance of unspent LICs increased by more than 60 per cent against a relatively low pattern of expenditure. Prior to an internal audit completed in late 2018, there was no regular reporting on the status of LICs and a lack of transparency when prioritising the expenditure of LIC funds. During 2019, and following the internal audit, Liverpool City Council engaged additional skilled resources to improve focus and accountability for LICs. A LIC committee has been established to manage contributions plans and support business units to initiate relevant infrastructure projects, although it is too early to assess whether this committee is operating effectively. From February 2019, Liverpool City Council commenced monthly reporting to its Chief Executive Officer (CEO) about the point-in-time status of LIC funds, and to its Audit, Risk and Improvement Committee about risks associated with LICs and the implementation of internal audit recommendations. There is limited reporting to senior management about the projected financial status of some contributions plans. Our audit found no evidence of misuse of funds during the audited period. Methods for valuing work and land are not aligned with policies and procedures and are implemented inconsistently. In addition, valuations of works-in-kind and land dedications are not independent as they are paid for by the developer. The policy relating to works-in-kind provides no guidance about managing probity risks when negotiating with developers.

Recommendations

By December 2020, Liverpool City Council should:

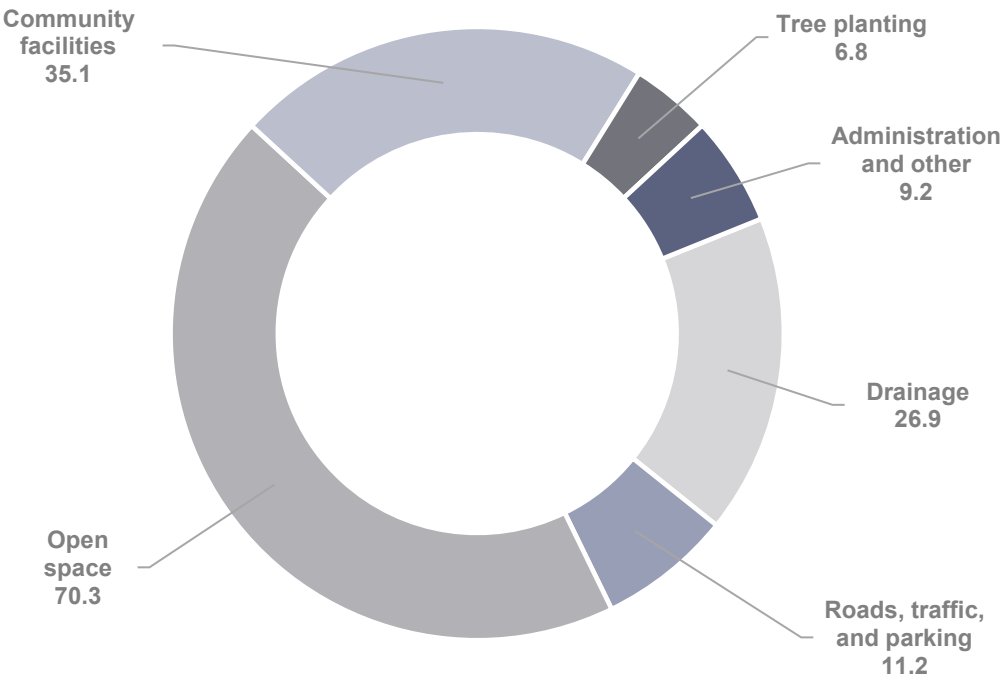
1. regularly report to senior management on the projected financial status of contributions plans
2. update council's policies and procedures to provide consistent guidance about how works and land offered by developers should be valued
3. update council's Works-in-Kind and Land Acquisition Policy to address probity risks during negotiations with developers
4. improve public reporting about expenditure of cash collected under VPAs
5. mitigate risks associated with lack of independence in valuations of works-in-kind and dedicated land
6. implement security measures over critical or private information.

8.1 LICs at Liverpool City Council

Liverpool City Council is a metropolitan council located approximately 40 kilometres south-west of the Sydney CBD. The Local Government Area is expected to experience substantial population growth over the next 20 years, driven by development of Sydney's second airport at Badgerys Creek within the Liverpool Local Government Area and recognition of Liverpool city centre as one of Sydney's future central business districts.

At 30 June 2019, Liverpool City Council was holding \$160 million in developer contributions collected under S7.11 and S7.12 of the EP&A Act. A breakdown of these funds apportioned across the infrastructure categories for which they were collected is shown at Exhibit 17.

Exhibit 17: Breakdown of LICs held by Liverpool City Council as at June 2019 (\$ million)



Source: Audit Office analysis based on Liverpool City Council financial statements 2018–19.

8.2 Additional findings for Liverpool City Council

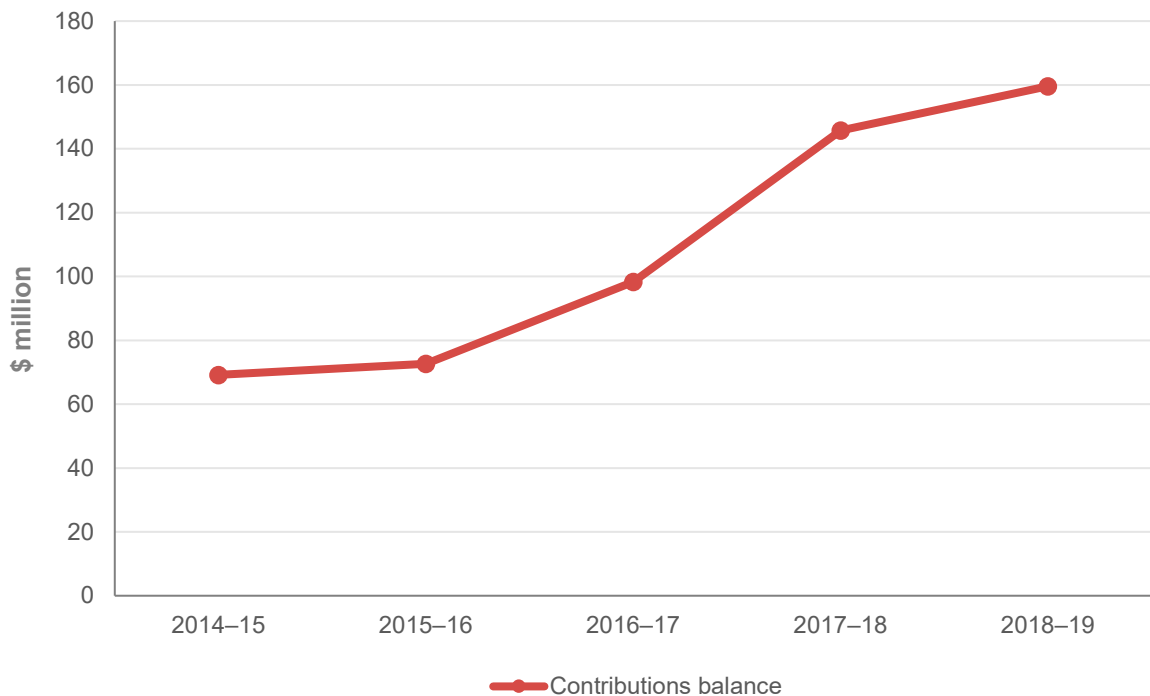
Findings in this chapter address only those not already addressed in Chapters 2–4.

The balance of LICs at Liverpool City Council has increased in recent years

The balance of local infrastructure funds at Liverpool City Council has increased by more than 60 per cent from \$98.3 million to \$159.6 million since the start of the 2017 financial year. Expenditure over that same period averaged \$23.0 million per year. An increasing balance with relatively low expenditure represents infrastructure that developers have paid for, but which the community has not received. The audit examined expenditure during the 2017–18 and 2018–19 financial years and found no evidence of mis-spending.

The reduced rate of increase in the 2018–19 financial year is due to both a decrease in LICs received and increased expenditure by council.

Exhibit 18: Increasing balance of LICs at Liverpool City Council



Source: Audit Office analysis based on Liverpool City Council financial statements.

Valuation of works-in-kind at Liverpool City Council is inconsistent

When developers offer to deliver works-in-kind or dedicate land in full or partial payment of their LIC, councils must agree a value for that work or land with the developer. If work or land is over-valued, the reduction in contributions is greater than necessary.

Similarly, when VPAs are arranged with developers, work or land contributed by developers as part of those agreements must be appropriately valued.

The council advised that it requires developers to provide quotes from three contractors for all works-in-kind. However, we found that this requirement was not always enforced. Developers had not provided three quotes in either of the two samples we reviewed. In addition, Liverpool City Council's revised policy for valuing works-in-kind, adopted in February 2019, does not require three quotes, nor does its process map for arranging works-in-kind.

Similarly, the policy for valuing land dedications requires the developer to provide a valuation from a registered land valuer. Staff provided an example where a land valuation had been used, but other samples we reviewed used alternative methods to value land. These included:

- latest Average Estimated Land Acquisition Cost per square metre (published by council)
- value of recent adjoining land acquisitions.

Personal information is not managed in accordance with the *Privacy and Personal Information Protection Act 1998 (PPIP Act)*

Ratepayers sometimes ask council to acquire their land earlier than specified in a contributions plan on the grounds of hardship. Personal details are included in support of hardship claims. The audit found that Liverpool City Council retains the original claim and personal details in its records management system.

In line with council's own Privacy Management Plan, which references the PPIP Act and *Health Records and Information Privacy Act 2002 (HRIP Act)*, council should keep these personal details on file for no longer than the purpose for which it is required, dispose of it securely, and protect against loss, unauthorised access, use, modification and disclosure.

Section two

Appendices

Appendix one – Responses from councils and the Department of Planning, Industry and Environment



File no: C19/40267

20 April 2020

Ms Margaret Crawford
Auditor-General of NSW
GPO Box 12
SYDNEY NSW 2000

Dear Ms Crawford,

Performance Audit – Governance and internal control over local infrastructure contributions

Thank you for the opportunity to respond to this audit for incorporation into the final tabled report for parliament.

Blacktown City is the largest council in NSW and also has arguably the largest developer contributions system. As we are continuously refining our systems of governance and internal controls across all areas of Council, we welcomed this audit.

We support the approach taken to write a local government sector report. By identifying common gaps with the 4 audited councils and providing recommendations, other councils will be able to assess and determine if there are gaps in their own internal controls and governance over developer contributions and other restricted funds.

We were however, disappointed that the objective and scope of the audit, as stated in the Audit Plan, did not or could not, question the merits of NSW Government policy objectives. Our strong view is that this was an opportunity to examine and address a number of serious deficiencies in NSW Government policy objectives surrounding developer contributions.

Our particular concern is the provision of essential local infrastructure to communities, not only in Blacktown City, but across NSW.

Unfunded community facility buildings

Blacktown City has since 2011, advocated strongly to all levels of the NSW Government that community facility buildings are vital to the health and well-being of new communities.

The government's decision to not list community facility buildings on the Government's 'Essential Works List (EWL)' for contributions plans assessed by IPART, will see an incoming population of more than 150,000 people in Blacktown City alone, have no libraries, no swimming pools, no youth centres and no community meeting spaces.

Connect - Create - Celebrate

Council Chambers - 62 Flushcombe Road - Blacktown NSW 2148

Telephone: 02 9839 6000 - DX 8117 Blacktown

Email: council@blacktown.nsw.gov.au - Website: www.blacktown.nsw.gov.au

All correspondence to: The Chief Executive Officer - PO Box 63 - Blacktown NSW 2148

The funding required for these facilities, at a standard which was permitted by the Government up until 2011, (i.e. not gold plated), is conservatively estimated at \$390M (delivery 2026).

Local Infrastructure Growth Scheme

The Local Infrastructure Growth Scheme (LIGS) has evolved from the previous Priority Infrastructure and the Housing Acceleration funds.

LIGS subsidises Section 7.11 contributions imposed on development consents which exceed the Section 7.11 caps placed on development (at \$30,000 per lot/dwelling for greenfield development and (\$20,000 per lot/dwelling for infill development). This funding is conditional subject to IPART assessment.

LIGS was announced by the NSW Government as an interim measure, but it was later advised that the fund would continue pending the outcome of the 2012/2013 green and white paper review: 'A New Planning System for NSW'. This review was discontinued.

To enable a predictable cash flow, Council, in discussions with the Department of Planning, Industry and Environment over several years, has unsuccessfully sought regular quarterly funding rounds.

Blacktown City supported the phasing out the S7.11 cap, as it gave developers greater certainty when estimating feasibility for development projects. However, we requested that the NSW Government confirm that LIGS funding be made available to Blacktown and relevant councils for Development Applications approved in LIGS transition areas up to 1 July 2020. This request has not been confirmed.

IPART / Department of Planning, Industry and Environment assessment time for contributions plans

One of the Auditor-General's key findings was that 3 of the 4 audited councils did not review their contributions plans within suggested timeframes. The process set-up by the NSW Government to review and assess 'IPART assessed contributions plans' takes more than 2 years. This means that the new revised contributions rates, even if approved by IPART, are 2 years out of date before they can be levied legally. The NSW Government should review this process to minimise the revenue loss to councils.

Auditor-General report recommendations for Blacktown City Council

1. Regularly report to senior management on the projected financial status of contributions plans

Council's Strategic Section 7.11 Committee identified the need for a financial forecasting model well before this audit. We appreciate that the audit identified work that we are currently undertaking to model the long-term projected financial status of our Section 7.11 contributions plans.

We are well advanced in developing this model and plan to 'go live' by 31 July 2020. The model will provide current and forecasted financial scenarios for our North West Growth Areas contributions plans. The information will assist us in identifying potential long-term shortfalls in Section 7.11 revenue, so that mitigation measures can be put in place.

2. Update council's works-in-kind policy to address probity risks during negotiations with developers

We will update our Works-in-Kind Agreements (WIKAs) policy to make clear how probity is addressed when dealing with developers. We note that this is already addressed in our VPA policy.

3. Mitigate risks associated with lack of independence in valuations of works-in-kind

To be clear, our officers do not 'negotiate' the value of works. Our WIKAs policy states that developers are entitled to the full value stated in a contributions plan if they complete the full work.

If a developer applies to construct part of a Section 7.11 work, they are required to provide detailed cost estimates. These estimates are assessed by our asset and construction section against industry rates, before being reported to our Section 7.11 Finance Committee. The committee then either, accepts or rejects the developer's estimate based on the assessment.

Notwithstanding, we will review our process to ensure there are better controls to ensure the valuation is as independent as possible.

4. Improve public reporting about expenditure of cash collected under VPAs

We note the Auditor-General's comments that there is no guidance in the Department of Planning, Industry and Environment's Practice Note about transparency over where and when cash contributions from VPAs have actually been spent. We also note that all of the 4 councils audited include the intended use of contribution, in their VPAs.

We agree that there is merit in councils providing greater transparency over public benefits delivered through VPAs, to give communities (and developers) greater confidence in VPAs as a planning tool.

We will examine ways to implement this recommendation.

5. Improve management oversight of credit arrangements with developers

Blacktown City Council has successfully managed a number of 'credit bank' arrangements with developers, particularly for large subdivision developments. The arrangements provide flexibility for both parties and work very efficiently. The terms of the arrangements are somewhat detailed in the respective VPA. However, administration, governance and controls are not always addressed.

We intend to develop a suite of controls and administration measures to address the oversight, independence and transparency of these arrangements.

6. Update procedures for managing LICs

We maintain a Section 7.11 procedures manual on our intranet site that sets out procedures for dealing with local infrastructure contributions. We agree with the findings that some aspects of the manual are outdated and need to be amended.

We will address this matter as recommended.

7. Implement security measures over critical or personal information and spread sheets.

The audit found that we distribute via internal email, sensitive personal information regarding applications for land acquisition under the hardship provisions of the *Land Acquisition (Just Terms Compensation) Act 1991*. The audit also found that we retain this information in our records data management system. These details are emailed to committee members of our Section 7.11 Finance Committee as part of the agenda papers for each meeting.

We have ceased emailing this information to our committee and will ensure that security measures are implemented with our electronic data management system to address this recommendation.

If you would like to discuss this matter further, please contact our Manager Developer Contributions, Dennis Bagnall on 9839 6461.

Yours sincerely,



Kerry Robinson, OAM
Chief Executive Officer



29 April 2020

Ms Margaret Crawford
Auditor-General for NSW
GPO Box 12
SYDNEY NSW 2001

Dear Ms Crawford

Performance Audit – Governance and internal controls over local infrastructure contributions

Thank you for your letter of the 30 March 2020 and the final audit report which was attached.

Central Coast Council welcomes the findings of the audit and recognises the benefits in implementing the various recommendations.

As you are aware, Central Coast Council is a merged Council and has been working hard to review and consolidate the existing Developer Contribution Plans of the two (2) former Councils. This will also provide the local community and developers with confidence and a level of transparency that the developer contributions are being appropriately managed in terms of their collection and expenditure. In addition, the recommended transparency and governance model is consistent with the Council actions in reviewing the contribution plans.

At present, Council's development contributions work program includes:

- A new 7.12 Central Coast Plan
- A review of the existing adopted Warnervale District Contributions Plan (Council's major land release precinct underway)
- Review of existing 54 Contributions Plans
- The establishment and administration of a Central Coast Developer Contributions Committee
- Development of a new Works-In-Kind Policy

Council staff have begun to implement the recommendations; however, I would like to provide some comment in relation to the recommendations as they appeared in the final audit report as follows:

By June 2020

- 1 *obtain independent validation of the adjustment made to the restricted asset accounts and general fund to repay LICs spent on administration, and adjustments made to each infrastructure category within the contributions plans*

Accept recommendation

Comment

As the financial audit addressed the overall amount of the adjustment but did not include a review of adjustments made for each infrastructure category (purpose) Council will engage an external consultant for an independent validation of the adjustments made to restricted assets to reimburse the contribution plans for the amounts previously charged for administration fees and investment losses including lost interest income by purpose within the contributions plans.

- 2 *publish current contributions plans from the former Gosford City Council on the Central Coast website*

Accept Recommendation

Comment

The current contributions plans of the former Gosford City Council have been on Council's website since the merger of the former Councils' websites into Central Coast Council's website.

Council's website was established with a system which provides information based upon the postcode of the user. This was to reduce confusion in the community as to the relevant planning instruments, strategies and policies that were applicable to their land until such time as all documents could be consolidated for the entire Central Coast.

The web page for contributions plans and associated contributions information has also been sorted according to Postcode to reflect the former Council areas for ease of use for the community. To access the contributions plans for the former Gosford City Council, the web page prompts the user for a postcode and when that is selected for the former Gosford Council area, the contribution plans appear.

The following link provides access to the former Gosford City Council Contributions Plans:

<https://www.centralcoast.nsw.gov.au/plan-and-build/planning-controls-and-guidelines/development-contributions>

When the postcode prompt appears, please enter 2250 for the former Gosford LGA contribution plans.

It is acknowledged that this approach can be confusing and Council staff are working with our website provider to change the layout and provide all the contributions plans in the same web page to provide an improved customer outcome.

Section 64 Contributions Plans are also currently available on Council's website at the following link

<https://www.centralcoast.nsw.gov.au/plan-and-build/plumbing-and-sewage/water-and-sewer-development>

By December 2020

- 3 *regularly report to senior management on the projected financial status of contributions plans*

Accept Recommendation

Comment

It is acknowledged that there should be regular reporting of the financial status of each of the contributions plan to senior management on a regular basis to determine whether the financial assumptions of the contributions plan are being achieved.

All new contributions plans to be adopted by Council are required to have a financial impact statement to address the extent of the financial impact on the Council. This has been undertaken in respect of Council's new draft contributions plans that have been prepared i.e. Section 7.12 Contributions Plan and the Warnervale District Contributions Plan.

The draft Section 7.12 Contributions Plan will cover the entire Local Government Area and is scheduled for consideration for adoption by Council at its Ordinary meeting of 27 April 2020.

Council has, in conjunction with consultants, reviewed the Warnervale District Contributions Plan and it is expected to be considered by Council by early June 2020 to enable exhibition of the draft contributions plan.

The review of the existing contributions plans has commenced which requires a significant amount of work to be undertaken in respect of the existing contributions plans of the former Wyong Council to enable reporting to senior management of the projected financial status of a number of the existing contributions plans. This work may not be able to be completed by the December 2020 deadline, given the high volume of work required to be undertaken in reviewing the existing contributions plans, as well as preparing a new Local Government Wide Section 7.11 Contributions Plan and responding to the developers and the community in respect of the ongoing operational work required in administering the contributions plans.

As such, Council would request an extension of time to the December 2020 deadline in which to undertake regular reporting of the existing contributions plans of the former Wyong Shire Council to December 2021.

Regular reporting on all other existing contributions plans can be achieved by the December 2020 deadline.

- 4 *increase transparency of information available to the public about LIC works planned and underway, including intended use of contributions collected under VPAs*

Accept Recommendation

Comment

Council provides details of its planned expenditure of Local Infrastructure Contributions in its Operational Plan, which includes the Capital Works Program. The Capital Works Program does acknowledge the different source/s of funding for projects to be undertaken.

Information has been included in the monthly capital status reports on funding sources at a high level.

Council has included information on LICs since the Q2 Budget Review Report (December 2019).

It is acknowledged that this could be more specific and could reference the individual contributions plans or Developer Servicing Plans, as well as including details of the use of contributions collected under VPAs.

In addition, projects that are identified in Councils contribution plan are to be included in the adopted 4 and 10 year Delivery Plans. This will enable greater transparency in the ability to identify and monitor the progress of capital projects in line with the implementation of the relevant contribution plans.

- 5 *consolidate existing plans, ensuring the new contributions plans includes a regular review cycle*

Accept Recommendation

Comment

Council has been undertaking a staged review, including the preparation and exhibition of a draft Section 7.12 Contributions Plan which will cover the entire Local Government Area and is scheduled for consideration for adoption by Council at its Ordinary meeting of 27 April.

Council has, in conjunction with consultants, reviewed the Warnervale District Contributions Plan and it is expected to be considered by Council by early June 2020 to enable exhibition of the draft contributions plan.

The review of the existing contributions plans has commenced which requires a significant amount of work to be undertaken both in house and in the engagement of external consultants in preparation of Local Government Area wide supporting studies to provide justification for works to be included in the new contributions plan. These studies include social infrastructure assessment to provide minimum planning standards for open space and community facilities as well as a traffic model that will identify the priority roads and traffic works needed to support growth, including apportionment of costs between different development areas and land uses.

The studies will identify the gaps in the provision of open space, community facilities and traffic due to future population increases and would require at least six months to be undertaken. The traffic model is anticipated to identify significant gaps with traffic counts necessary and assessment of the data collected and already held by Council. Traffic modelling is based on normal everyday traffic movements and is to be undertaken over a six-month period to enable the collection of accurate data.

Given the current public health orders in relation to COVID 19 and the uncertainty of when social distancing requirements will be completely lifted, any traffic modelling undertaken would not be representative of normal traffic movements. As such, Council would request an extension of time to the December 2020 deadline in which to complete the comprehensive Local Government Area wide contributions plan to December 2021.

Section 64 Developer Contribution Plans for both former Councils (Wyong and Gosford) were consolidated in 2014 in preparation for a proposed independent Water Authority. In 2019, further reviews were completed to remove the Gosford CBD DSP due to grant funding. IPART sets the ongoing Water and Sewer review cycles in their periodic determinations on Developer Charges.

- 6 *develop a formal charter for the developer contributions committee and increase the seniority of membership*

Accept Recommendation

Comment

A revised charter / Terms of Reference is to be listed for discussion at the next Developer Contributions Committee, including the membership of the committee to incorporate Senior Management representatives.

- 7 *complete and adopt council's works-in-kind policy currently under development, ensuring it addresses probity risks during negotiations with developers*

Accept Recommendation

Comment

Council will include probity provisions into the draft Works-in-Kind Policy to address these concerns. It is anticipated the adoption of the policy will meet the determined deadline.

- 8 *mitigate risks associated with lack of independence in valuations of works-in-kind and dedicated land*

Accept Recommendation

Comment

Advice will be sought within Council on the approach to either ensure that risks are appropriately mitigated, or external independent experts are engaged.

- 9 *improve public reporting about the expenditure of cash collected under VPAs*

Accept Recommendation

Comment

Council has included information on LICs in operational plan reporting since the Q2 Budget Review Report (December 2019). Additional information will be reported on VPAs in future Quarterly Budget Review Reports which are presented to Council within 2 months post quarter end in accordance with *Local Government (General) Regulation 2005*.

- 10 *improve management oversight of credit arrangements with developers*

Accept Recommendation

Comment

This matter will be discussed at Council's Developer Contributions Committee as options will be presented based on advice sought from key internal staff.

Council is currently reviewing all policies in respect to LICs and Works-In-Kind agreements and will incorporate improved management of these matters.

Council will also undertake a review of Council Officer delegations in respect to approval of LICs, Works-In-Kind and other matters relating to approvals of LIC matters.

- 11 *implement security measures to ensure the integrity of key spreadsheets used to manage LICs*

Accept Recommendation

Comment

Internal stakeholder advice has been sought to ensure that procedures are to be implemented to maintain and manage the integrity of LICs organisational documentation. Once determined, these will be implemented accordingly.

- 12 *align policies and procedures relating to LICs across the amalgamated council including developing policies and procedure for the management of s64 LICs*

Accept Recommendation

Comment

Policies and procedures relating to LICs are being reviewed which will result in new policies and procedure being adopted for Council.

- 13 *update council's VPA policy to address increased or indexed bank guarantees to accommodate cost increases.*

Accept Recommendation

Comment

Council is currently reviewing its Voluntary Planning Agreement Policies to provide for a single policy which will include provisions addressing increased or indexed bank guarantees to accommodate cost increases.

Page 10
Auditor General for NSW

Council appreciates the opportunity to provide feedback on the final Performance Audit Report - Governance and Internal Controls over Local Infrastructure Contributions.

Should you wish to discuss this matter further please do not hesitate to contact me on 4350 1662.

Yours faithfully

A handwritten signature in black ink, appearing to be 'Gary Murphy', with a stylized flourish at the end.

Gary Murphy
CHIEF EXECUTIVE OFFICER

23 April 2020

Our Ref: 2020/159907
File No: 2020/159907

Ms Margaret Crawford
NSW Auditor General
Audit Office of New South Wales,
GPO Box 12
Sydney NSW 2001

Dear Ms Crawford,

I write in response to your letter of 1 April 2020, regarding the recent performance audit of Local Infrastructure Contributions (LIC), to provide the City's response to the final report and recommendations as they pertain to the City of Sydney.

The report reflects the City of Sydney's efforts to manage development contributions within a complex development environment, across the Sydney CBD and inner suburbs, and acknowledges the effectiveness of our governance and internal controls. It notes that while the City holds a total of \$71.0 million in unspent developer contributions, \$47.7 million (or 67%) is held pending the availability of suitable vacant land for open space.

I was encouraged that the report recognises the City's strong governance structure with an effective Executive Steering Committee, where senior officers across council make decisions about spending contributions, reviewing plans and negotiating VPAs. Developer contributions are spent as intended, senior management and staff are knowledgeable about the plans and the regulatory environment, and our policies and procedures are all current. The City also demonstrates good financial controls including the independent valuation of work and land developers offered in lieu of monetary contributions, and Deeds of Agreement that provide adequate security to mitigate the risk of rising works-in-kind costs.

The four recommendations for the City of Sydney and our responses are provided below.

Recommendation 1. Regularly report to senior management on the projected financial status of contributions plans

In accordance with the Local Government Act, and the Integrated Planning & Reporting requirements, the City publicly exhibits its annual budgets and ten year long term financial plan each year. These documents inform the community of our short, medium and long term operational and capital expenditure plans, and how they will be funded.

Within these plans, the City's annual and long term capital works program is developed with consideration for a number of factors including community need, asset management priorities, risks and opportunities, other stakeholder projects, and the development cycle. The current ten year program totals \$1.7 billion, funded from the City's operational and accumulated surpluses, including residual developer contributions that are held over as restricted funds while the facilities and works are being delivered.

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The City budgets, forecasts and reports against all major income and expenditure sources on a monthly basis through its Executive, including developer contributions. Quarterly public reviews are provided to the Council, to ensure they have a thorough understanding of any major financial risks to its plans and operations, and these reviews are also presented to the City's Audit Risk and Compliance Committee.

There are significant challenges to accurately projecting income from developer contributions plans over a short timeframe. General development sector trends are monitored through Development Application lodgements and approvals, to provide a guide to significant changes in the development cycle. The City tracks major developments and publishes a yearly audit of the developments approved, under construction and completed, however this assessment shows developers consistently hold many more approvals in the pipeline than what they actually construct. Projections as to which developments will actually commence construction at a time would be highly speculative, as individual decisions are made by developers for a range of reasons.

Strategic land use planning processes recognise the challenges of predicting development, infrastructure needs and financial contributions over longer timeframes. Contribution plans are therefore typically revised at five year intervals to provide high level assurance over the broader development conditions, any changes to our infrastructure requirements, and associated financial considerations. These periodic reviews provide an opportunity for the community to review that our plans align with their expectations, current levels of growth and local infrastructure contributions.

The City adequately projects future contributions from its plans, at an aggregate level, to enable informed decisions on our capital works program. We will however further strengthen our internal reporting and understanding by ensuring that the Executive Steering Committee - Developer Contributions and Planning Agreements, are informed as to the projected financial status of our contributions plans throughout the year. This will include a quarterly update on the income received, expenditure attributed and unspent balance of each plan, along with any outstanding VPA contribution amounts.

Recommendation 2. Improve public reporting about expenditure of cash collected under Voluntary Planning Agreements

The City publicly reports all contributions offered and accepted within individual Voluntary Planning Agreements however accepts that it would be difficult for the general public to review all Agreements to gain a collective understanding of the contribution benefits to the community.

The City will investigate the optimal approach to improve public reporting of cash received under Voluntary Planning Agreements, including an overview of projects committed and delivered, within the City's Annual Report.

Recommendation 3. Periodically review the risk of unpaid LICs associated with complying development certificates and assess whether additional controls are required

The risk in relation to complying development certificates varies across our local government area due to the difference in applicable planning controls between Central Sydney and other parts of the City. The Central Sydney planning controls allow for a wider range and higher value threshold of development under the complying development certificates, than the outside central Sydney area. As a result the City has focussed on

improving these internal control processes particularly in the context of complying development certificates issued in Central Sydney.

In the 12 months to April 2020, the City received over 250 complying development certificates including multi-million dollar commercial office and retail premise fit outs. A review of these 250 certificates, which are currently subject to the Central Sydney s61 Contributions Plan, found just one unpaid contribution to a value of around \$8,000.

It is acknowledged that as the City reviews its planning controls and development patterns change, there will be a greater opportunity for development outside of Central Sydney to occur under the complying development certificate process. The City will therefore be reviewing complying development certificates for works outside central Sydney, and will continue to investigate the introduction of a more efficient and effective process, to ensure all contributions are identified and paid for complying developments.

Recommendation 4. Implement security measures to ensure the integrity of key spreadsheets used to manage LICs (and management oversight).

The financial position of the City's contributions plans are reported externally in the annual financial statements, and will also be reported internally to the Executive Steering Committee - Developer Contributions and Planning Agreements on a quarterly basis to ensure greater management oversight during the course of the year.

The City notes the detailed background in Chapter 3 of the Report regarding the effectiveness of the City's existing security measures, and as such, the City does not propose any additional security measures.

The City recognises that developer contributions are a significant source of funding for essential infrastructure, to support sustainable growth within the Sydney local government area, and to enable improved outcomes for the community. This is why we have continued to improve and strengthen our governance and internal controls over the planning, charging, receipt, safeguard and utilisation of these contributions.

I appreciate that the performance audit, notwithstanding the minor improvement recommendations above, has validated and recognised our efforts in this regard.

The implementation of the above recommendations will be incorporated into the City's Internal Audit program, with the findings of the audit reported to the senior management and Audit Risk and Compliance Committee.

Thank you for the opportunity to respond.

Yours sincerely



Monica Barone
Chief Executive Officer

The Audit Office of New South Wales

Ms. Margaret Crawford

Auditor General

Level 19, Tower 2 Darling Park,

201 Sussex St,

SYDNEY NSW 2000

susan.loane@audit.nsw.gov.au, claudia.migotto@audit.nsw.gov.au

Dear Ms Crawford

Re: D2003686 Performance Audit – Governance and internal controls over local infrastructure contributions

Thank you for the opportunity to provide a response to this report. Firstly, I would like to acknowledge the Audit Office's work and professionalism during all phases of the Performance Audit. We always seek to continuously improve and therefore we welcome both the findings and recommendations.

Developer contributions are a complex area and Council, particularly over the last two years, has invested a lot of time and resources to improve processes, compliance and better manage inherent risk. The significant inroads Council have made, have been well acknowledged in the report.

Overall, we believe the report reflects accurately both the challenges the sector faces in managing and collecting developer contributions and at a local level the improvement opportunities identified for Liverpool City Council.

Council has considered the six recommendations, as outlined in appendix A, that relate to our processes and provides the following comments and actions to address these. Council will assign appropriate dates for implementing the actions outlined, which will be tracked and monitored through to completion.

If you have any questions please do not hesitate to contact myself or George Hampouris, Acting Director City Corporate, 8711 7776.

Yours sincerely



Kiersten Fishburn
Chief Executive Officer



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Appendix A:

Response to the recommendations in relation to the Performance Audit – Governance and internal controls over local infrastructure contributions.

1. Regularly report to senior management on the projected financial status of contributions plans

Council has a mature and embedded risk management process where key strategic risks are reported to the senior management at least bi-annually. As a top 10 strategic risk, Council has identified the risk that Council will not spend its S7.11 funds on a timely basis. As such, there are a number of controls and processes already in place to manage this risk. This risk and others are monitored and reported at multiple levels including to Council's Audit, Risk and Improvement Committee (ARIC). In addition, management have a clear roadmap to address the recommendations outlined in an Internal Audit report that was undertaken in 2018 relating to developer contributions. Both the Executive and the ARIC are provided with a quarterly status of management's progress to implement these recommendations.

Notwithstanding this, there are opportunities to enhance the reporting of the financial status of S7.11 funds with the establishment of dashboard reporting. We are therefore proposing to adjust both the governance and enhance the reporting of both quantitative data and trend analysis. This is in relation to both S7.11 monies collected and rate of expenditure. The intention is that this will be reported to Council's Contribution Committee on a quarterly basis with detailed minutes being submitted to Council's Executive Team.

Action:

- a) There will be a staged approach to the deployment of reporting to senior management. Initially, monthly updates on the income and expenditure across all plans will be provided to all members of executive and the Contributions Committee.
- b) Work will then continue on the establishment of a quarterly dashboard reporting of S7.11 monies collected and expenditure levels (at a contribution plan level) for the Contributions Committee's oversight and monitoring.
- c) Detailed minutes of the Contributions Committee to be circulated to Council's Executive Team thereafter.

2. Update council's policies and procedures to provide consistent guidance about how works and land offered by developers should be valued

Council has acknowledged the comments from the report and notes that work has already commenced on WIK procedures to ensure transparency of WIK applications.

It is proposed to create a specific application process within Council's enterprise application management system to effectively manage WIK applications like a DA and Subdivision Certificates. This would be achieved by creating workflows on key hold points in the processing of WIKs to ensure each key step in a WIK application is monitored and a record of the progress of such applications is easily accessible.

Action:

Continue to deploy WIK as an application type in Council's enterprise system and develop necessary workflows to support the operation of the system based on the adopted WIK policy.

3. Update council's Works-in-Kind and Land Acquisition Policy to address probity risks during negotiations with developers

With regards to the current practice of WIK's, Council adheres to the current policies and legal requirements to ensure that matters are handled ethically and morally in the public sector. In saying this, there are opportunities to better align Council's WIK policy with the conflict of interest and land use planning and development assessment provisions in Council's Code of Conduct and design the policy to mitigate other probity risks associated with these activities.

Action:

Council's Legal Department be engaged to review the WIK and Land Acquisition Policy to address probity risks during negotiations with developers.

4. Improve public reporting about expenditure of cash collected under VPAs

Liverpool City Council currently details a significant amount of information regarding VPAs on its website, including a VPA register and a map-based search. As identified in the Audit Report, Council is well positioned when it comes to publishing information on VPAs. Notwithstanding, there is a opportunity to improve the publicly available information to include a more detailed breakdown of cash contributions and how they are spent. This addition will align directly with Council's desire for more open governance.

Action:

Council will expand its current VPA register to include additional details relating to cash payments as a part of the VPA process. This will include payments identified within the VPA and also payments required as a part of the dispute settlement process. The VPA register will be updated, at a minimum, to include:

- Value of cash contribution/s (eg: Schedule 3 Item 1: \$350,000)
- Purpose of payment (short description of what the contribution is going to be used for)
- Status of payment (eg: outstanding/received/expended)

5. Mitigate risks associated with lack of independence in valuations of works-in-kind and dedicated land

Council has mitigated the risk associated with the lack of independence in valuations of WIK by ensuring that all valuations of proposed works have been cross referenced/checked with rates published by IPART. These rates have been used as the base rates on all Contribution Plans that have been adopted by Council. The rates adopted have gone through a stringent process by ensuring that they are equivalent to the current market rates. Other than increases in CPI, Council typically adheres to the rates provided in the Contribution Plan.

In addition, Council's current practice requires the developer to provide three quotations in accordance with Section 55 of the Local Government Act 1993 and Council's tendering policy for works in excess of \$150,000. This is requested to ensure the developer has ensured that they have followed a similar process that Council would have undertaken if it was to undertake these works.

With regards to Land Valuations – Land Under Road is calculated as per the rates in the Contribution Plan and adjusted to the current Land Value Index (LVI). Other land identified in the plan for Open Space or Drainage are referred to Council's Property Section for assessment and an offer is made to developer based on the current market rate valuation. With the exception of land under roads, independent valuers are engaged by Council to determine the current market valuation of land proposed to be dedicated to Council.

Action:

As the creation of a specific application process within Council's enterprise application management system is currently being undertaken, there will be automated steps to be followed from lodgement to finalisation of a WK established. One of the processes will be to ensure all valuations have been cross referenced with the IPART rates and relevant contributions plans.

6. Implement security measures over critical or private information.

Council will further its protection measures over sensitive information associated with hardship applications, such as an applicant's medical and financial details by further restricting its record access.

In relation to security of critical information, Council currently uses a range of tools to ensure the integrity of the contributions system. This includes network level solutions and password protected files. It is acknowledged that there are risks associated with Council's current system, which is why Council have already commenced the process of reviewing our digital systems and understanding the flow of information, data and finances throughout the contributions system.

As it stands, Council performs periodic reconciliations to maintain the integrity, accuracy and completeness over the complex financial files that calculate, aggregate and track contributions. Any exceptions are immediately investigated and resolved.

There is no system currently available, or as seen by Council staff or its partners, that can wholly replace our existing system to better automate this process.

Council will continue its work on exploring the digital solutions to support the way contributions should be conducted.

Action:

- a) Implement a new system that at a minimum removes the reliance on MS Excel and includes the ability to audit any changes to files.
- b) That secure record containers with limited access be created and appropriately disposed of for sensitive, private and commercial information as required.



Ms Margaret Crawford
Auditor-General for NSW
GPO Box 12
SYDNEY NSW 2001

Dear Ms ^{Marg}Crawford

Thank you for forwarding the Audit Office's final report on the *Performance Audit – Governance and Internal Controls over local infrastructure contributions* for a formal response from the Department of Planning, Industry and Environment.

Fixing the uncertainty of developer contributions to boost investment was one of four major planning reforms announced by the Premier in November last year. The report includes valuable information to support the Department to improve the infrastructure contributions system in New South Wales.

It is pleasing to see that for the four councils audited and the matters investigated, the report finds there was reasonable compliance with relevant legislative and policy requirements including the *Environmental Planning and Assessment Act 1979*, *Environmental Planning and Assessment Regulation* and Ministerial Directions and other relevant legislation.

The report also indicates scope to improve certain aspects of the system including administration by councils and transparency and accountability requirements for receipt and expenditure of contributions. This is in line with recommendations made in recent Government reviews including the Kaldas report (*Review of Governance in the NSW Planning System* (December 2018)).

On 15 April 2020 the Minister for Planning and Public Spaces released a package of proposed improvements to the contributions system for public comment and is available on our website at planning.nsw.gov.au/News/2020/Pathway-forward-for-contributions-reform.

These address some of the Report's findings including strengthening reporting by councils on how infrastructure contributions are spent and making it easier for councils to review contributions plans.

The Minister also announced a wider review of the contributions system by the Productivity Commissioner to see if it meets the objectives of certainty and efficiency, while delivering public infrastructure to support development.

The Report will inform the review of the system and the Department will use the Report in working with councils to address the issues raised in the audit.

If you have any more questions, please contact Kate Speare, Director Infrastructure Funding and Public Space Policy, at the Department of Planning, Industry and Environment on 9274 6230.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jim Betts'.

Jim Betts
Secretary

Appendix two – Advice from the Crown Solicitor

Sensitive: Legal

ADVICE



Crown
Solicitor's
Office

COUNCIL USE OF LOCAL INFRASTRUCTURE CONTRIBUTIONS

Executive summary

1. You seek my advice regarding the use of local infrastructure contributions collected by local councils under the *Environmental Planning and Assessment Act 1979* ("the *EPA Act*").

Question 1 – application of monies collected under ss. 7.11 and 7.12 of the *EPA Act*

2. Contributions received by a council under s. 7.11 of the *EPA Act* and levies imposed under s. 7.12 (collectively, "ss. 7.11 and 7.12 monies") must only be expended for the purpose for which the payment was required, subject to the ability to pool monies under s. 7.3(2).
3. These monies may nonetheless be invested pending expenditure. However, the following practices do not amount to an "investment":
 - (a) expenditure on general operations, with a later, notional "return" to the pool of ss. 7.11 and 7.12 monies; and
 - (b) "internal loans" within a council.

Question 2 – use of pooled contribution funds

4. While it is attended by considerable doubt, I prefer the view that:
 - (a) section 7.11 and 7.12 funds which are "pooled" under s. 7.3(3) may only be expended on items identified in the works schedule in a relevant contributions plan;
 - (b) where a contributions plan is silent as to whether pooled s. 7.11 and 7.12 monies may be pooled and applied progressively, such pooling is precluded;
 - (c) where a contributions plan permits the pooling of ss. 7.11 and 7.12 monies, those monies may not be used to fund works under another contributions plan, unless this is permitted by a Ministerial direction made under s. 7.17 of the *EPA Act*.

Note

5. My advice on questions 1, 2(a) and 2(c) was previously provided on 16 July 2020. This advice consolidates that previous advice, along with my answer to the subsequently-raised question 2(c).

Prepared for: AUD018 Audit Office of NSW
Client ref: Liz Basey
Author: Michael Granziera

Date: 5 August 2020

Sensitive: Legal

202001931 D2020/606872

Analysis

Question 1 – Whether councils permitted to use money collected under ss. 7.11 and 7.12 for purpose other than that for which it collected

6. The financial management of local councils is addressed in Pt 3 of Ch.13 of the *Local Government Act 1993* ("the *LG Act*"). Relevantly, for present purposes:
 - (a) All money and property received by a council must be held in the council's consolidated fund, unless it is required to be held in the council's trust fund under s. 411 (s. 409(1)).
 - (b) Money and property held in the council's consolidated fund may be applied towards any purpose allowed by the *LG Act* or any other Act (s. 409(2)). However, money "that is subject to the provision of [the *LG Act*] or any other Act (being provisions that state that the money may be used only for a specific purpose) may only be used for that purpose" (s. 409(3)(b)).
 - (c) A council may invest money that is not, for the time being, required by the council for any other purpose, but only in a form of investment notified by order of the Minister administering the *LG Act* published in the Gazette (s. 625(1) and (2)).
7. Division 7.1 of the *EPA Act* provides for the imposition of development contributions in connection with development consents. A consent authority, including a local council,¹ may impose a condition on a development consent requiring, relevantly:
 - (a) under s. 7.11(1)(b) – the payment of a monetary contribution, where the consent authority is satisfied that development for which 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. That contribution may be imposed to require "a reasonable... contribution for the provision, extension or augmentation of the public amenities and public services concerned" (per s. 7.11(2));
 - (b) under s. 7.11(3) – the payment of a monetary contribution towards recoupment of the cost of providing public amenities or public services, where the development will benefit from the provision of those amenities and services, and they were provided by the consent authority within the area in preparation for, or to facilitate the carrying out of development in the area; or
 - (c) under s. 7.12(1) – a levy of the percentage (authorised by a contributions plan) of the proposed cost of carrying out the development.

Money paid under s. 7.12(1) is, subject to any relevant provisions of the applicable contributions plan, "to be applied towards the provision, extension or augmentation of public amenities or public services (or towards recouping the cost of their provision, extension or augmentation)" (per s. 7.12(3)).
8. Section 7.3 provides:

¹ See generally, s. 4.5 of the *EPA Act*

“7.3 Provisions relating to money etc contributed under this Division (other than Subdivision 4) (cf previous s 93E)

- (1) A consent authority or planning authority is to hold any monetary contribution or levy that is paid under this Division (other than Subdivision 4) in accordance with the conditions of a development consent or with a planning agreement for the purpose for which the payment was required, and apply the money towards that purpose within a reasonable time.
- (2) However, money paid under this Division (other than Subdivision 4) for different purposes in accordance with the conditions of development consents may be pooled and applied progressively for those purposes, subject to the requirements of any relevant contributions plan or ministerial direction under this Division (other than Subdivision 4).
- ...
- (4) A reference in this section to a monetary contribution or levy includes a reference to any additional amount earned from its investment.”

9. The effect of s. 7.3 is that monetary contributions made under ss. 7.11 and 7.12 must be held and applied by a council for a public purpose, as required by the relevant provisions of the *EPA Act* (*Frevcourt v Wingecarribee Shore Council* (2005) 139 LGERA 140 at 150 per Beazley JA, Ipp and McColl JJA agreeing, considering the predecessor to ss. 7.13 and 93E). Such monies must therefore be spent for the purpose for which payment was required, subject to the provision for pooling in s. 7.3(2).
10. While these monies might be characterised as being held subject to what is sometimes termed a “trust for statutory purposes” (*Toadolla Co Pty Ltd v Dumaresq Shire Council* (1992) 78 LGERA 261 at 267 per Pearlman J; *Engadine Area Traffic v Sutherland County Council* (2004) 134 LGERA 75 at 83 per Pain J), they are not held subject to a trust as it is understood at general law (*Frevcourt* at 150). Moreover, even if the monies are held subject to the former species of “trust”, I do not think that they are monies which must be held in a council’s trust fund under s. 411 of the *LG Act*. Amongst other matters, and as observed in *Frevcourt* (at 148-150) and *Engadine* (at 82, 83), the *Environmental Planning and Assessment (Contributions Plans) Amendment Act 1991* expressly amended s. 94(3) of the *EPA Act*, predecessor to s. 7.3(2), to remove the qualification that such monies are held “in trust”, for the purpose (disclosed in the second reading speech for the relevant Bill) of enabling councils to hold these monetary contributions in their general fund rather than in a separate trust.
11. It follows that a local council must hold ss. 7.11 and 7.12 monies in its consolidated fund subject to the limitations imposed by s. 7.3 of the *EPA Act*. The effect of these limitations is reflected in s. 409(3)(b) of the *LG Act*, which acknowledges that such money may only be “used” for those purposes, as opposed to any other purpose permitted by the *LG Act*.
12. It is nonetheless open to a local council to invest ss. 7.11 and 7.12 monies pending their application for a permitted purpose in accordance with s. 625 of the *LG Act*. The possibility of such investment is expressly acknowledged by s. 7.3(4) of the *EPA Act* (quoted above).
13. Each of the *LG Act* and the *EPA Act* draws a distinction between the “use” or “application” of funds, on the one hand, and “investment”, on the other, without specifically defining the latter

concept. The term "invest" and related parts of speech in each relevant provision will therefore bear its ordinary and natural meaning, having regard to the context in which it appears and the purpose of those provisions (*CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384). In this regard, I can see no reason to treat the term as having different meanings in the *LG Act* and *EPA Act*, respectively.

14. The ordinary meaning of the terms "invest" and "investment" have been considered in a number of decided cases, typically concerning investments of trust monies. For example, in the oft-quoted decision *In re Wragg* [1919] 2 Ch 58, Lawrence J approached the meaning of those terms as follows (at 64-65):

"Without attempting to give an exhaustive definition of the words 'invest' and 'investment', I think that the verb 'to invest' when used in an investment clause may safely be said to include as one of its meanings 'to apply money in the purchase of some property from which interest or profit is expected and which property is purchased in order to be held for the sake of income which it will yield...'"

15. Similarly, *In the Will of Sheriff, In the Will of Lawson* (1971) 2 NSWLR 438, Helsham J indicated (at 442) that:

"Investment of trust funds will ordinarily mean the laying out of trust moneys in acquisition of property with the object or purpose of obtaining some return by way of income or pecuniary return for the benefit of those ultimately entitled. In its dictionary meaning the word "invest" in relation to its monetary context is, in the revised third edition of the Shorter Oxford Dictionary, given a primary meaning as follows: 'To employ (money) in the purchase of anything from which interest or profit is expected.' There is added a colloquial meaning: 'to lay out money.'"

16. Notwithstanding that ss. 7.11 and 7.12 monies are not held subject to a trust at general law, they are analogous in the sense of being held subject to a requirement for their disposition for particular purposes. As is the case with trusts, the holder's power of investment enables monies not required for the time being to be applied in way that both preserves those monies (the capital) on the account of the holder, while also generating a financial return to the pool of funds, which is itself referable to that application of money. The discussion of the ordinary meaning of that term in the cited cases is therefore instructive as to the meaning of the terms "invest" and "investment" as they appear in the *EPA Act* and the *LG Act*.
17. These cases do also suggest that investment does not have a fixed meaning, and may be more or less expansive depending on the context in which it is used. In terms of the meaning that the word "invest" may bear, the *Macquarie Dictionary* defines the term to mean, relevantly, "to put (money) to use, by purchase or expenditure, in something offering profitable returns", suggesting that "investments" may not be limited to the purchase of property and securities, but may also extend to the application of money for other income-baring purposes (such as deposit in an interest-bearing bank account).
18. Taking these matters into account, there appear to me to be four important features of "investing" and "investments" of money, for present purposes:

-
- (a) Investment of money within the meaning of the *EPA Act* and the *LG Act* contemplates the application of capital for a purpose which generates a return in the form of income or some other increase in value of the amount.
 - (b) It involves the investor (that is, the council) holding some form of asset referable to the monies so invested. This distinguishes it from ordinary expenditure (in the sense of "use" or "application", as referred to in s. 7.3 of the *EPA Act* and s. 409 of the *LG Act*).
 - (c) The increase in value or income is referable to that asset.
 - (d) Investment is *by* the local council holding the money. It must therefore involve a return to the local council as the investor.
19. I now turn to the two specific examples of "investment" identified in your instructions:
- (a) "Self-investment" in general operations earning a return**
20. I understand that there are (or have been) several practices amongst local councils involving the "self-investment" of s. 7.11 and 7.12 funds. In general terms, I understand these to involve:
- (a) expenditure of those funds on general council operations, such that monies are "temporarily" expended out of the pool of s. 7.11 and 7.12 funds held by the council in question, followed by
 - (b) a subsequent repayment of an equivalent amount of money to the pool of ss. 7.11 and 7.12 funds, along with an additional amount or amounts paid by the council in question as a "return" on the "self-investment".
21. I do not regard these practices as involving an "investment" of funds for the purposes of either the *LG Act* or the *EPA Act*. Relevantly:
- (a) The council has expended the money, and does not retain the money or any asset referable to it.
 - (b) On my instructions, there is no income or increase in value that is directly referable to application of the money.
 - (c) There is no return to council in the form of income or profit generated by that capital. The "return" instead appears to be a mere accounting allocation of the council's money from one body of funds it holds to another (namely, the pool of ss. 7.11 and 7.12 monies which it holds under statute).
- I do not think that it matters that, from an accounting or perspective, this arrangement might result in an increase in hypothecated ss. 7.11 and 7.12 monies. Investment involves a return to the investor – in this case, the council – and not merely a notional "return" to one particular set of accounts amongst several that the "investor" holds.
22. Assuming that the expenditure of funds is not for a purpose permitted by s. 7.3 of the *EPA Act*, such a practice instead involves an impermissible expenditure of funds which is precluded by that section.

23. For completeness, I note that I have reviewed the Ministerial Investment Order of 12 January 2011 ("the Order") made under s. 625 of the *LG Act*. These practices do not fall within any of the five categories of investment that a council is able to undertake by virtue of that order.

(b) Internal loans for works and services

24. The concept of a council "lending" money to itself creates a conceptual difficulty, as a monetary loan ordinarily involves the provision of money by one person to another, with the possibility of a financial return to the lender. An "internal loan" of this kind by a council would instead appear to involve providing money from one body of council funds (ss. 7.11 and 7.12 monies) to a second for expenditure on works and services, on the premise that the "loan" would be repaid to the first body of funds (potentially with interest).
25. There is therefore no relevant return to the council from the application of the funds, such that it amounts to an investment of ss. 7.11 and 7.12 monies for the purposes of either the *EPA Act* or the *LG Act*. It is instead an expenditure of those funds, and impermissible unless done for a purpose identified in s. 7.3.
26. I nonetheless note that the Order permits councils to invest in "any debentures or securities issued by a council" (at para. (d)). I do not think that this addresses loans of the present kind. Relevantly:
- (a) I doubt, in principle, that an entity may issue a security or debenture to itself; and
 - (b) in any event, I take para. (d) to refer to debentures and securities issued by *other* councils, consistent with the proposition that under s. 625 of the *LG Act*, an investment must involve a return to the investing party (which could not be the case with any "self-issued" securities or debentures).

Question 2 – Permitted use of pooled funds

27. It is convenient for me to answer sub-question (b) first.

(b) Position where council's contributions plan does not specifically authorise pooling of funds

28. Section 7.3(2) of the *EPA Act* (cited at [8] above) permits the pooling by a consent authority of ss. 7.11 contributions and 7.12 levies imposed for different purposes, and their "progressive application" for those purposes. Such pooling is "*subject to* the requirements of any relevant contributions plan or Ministerial direction [under Div.7.1]".
29. The term "subject to" is commonly used in legislative drafting to indicate which provision takes precedence in the event of a conflict (*C&J Clark Ltd v Inland Revenue Commissioners* [1973] 1 WLR 905 at 911 per Megarry J; see also, *Newcrest Mining (WA) v The Commonwealth* (1997) 190 CLR 513 at 580-1 per Gaudron J; and *Macleay Shire Council v Nungera Co-operative Society Ltd* (1995) 86 LGERA 430 at 433). On this orthodox construction, to say that a thing which may be done under one provision ("Provision A") is "subject to" another ("Provision B") does not

automatically mean that that thing may only be done under Provision A where Provision B permits or authorises it to be done. That requirement would need to arise elsewhere – for example, under the Division, the regulations, or a relevant contributions plan itself.

30. Neither Div. 7.1, nor regulations made under the *EPA Act*, expressly provide that a council (as a consent authority) may only pool ss. 7.11 or 7.12 funds when authorised to do so by a contributions plan. The Division nonetheless contemplates a contributions plan regulating Council collection and use of such contributions in several respects:
 - (a) Per s. 7.13(1), a council may only impose a condition requiring a contribution under ss. 7.11 or 7.12 where it is of a kind “allowed by, and is determined in accordance with, a contributions plan”.
 - (b) In the case of s. 7.11, the contribution must be “a reasonable... contribution for the provision, extension or augmentation of the public amenities and public services concerned” (per subs. (2)). There is therefore an implied connection between the purpose of collection of funds, which may only occur, in the case of a council, under a contributions plan, and their application.
 - (c) In the case of s. 7.12, the application of money levied under that section is expressly “subject to any relevant provisions of the contributions plan” (subs. (3)).
31. Division 7.1 therefore makes it clear that the ability of a council to impose contributions and levies will depend on what is permissible under a contributions plan, and that a contributions plan may affect their subsequent application by the council (including with respect to pooling). However, I do not think that these matters themselves rise, by implication, to making the authority of a contributions plan a prerequisite to subsequent pooling of those funds.
32. However, cl. 27 of the *Environmental Planning and Assessment Regulation 2000* (“the *EPA Regulation*”) relevantly provides:

“27 What particulars must a contributions plan contain? (cf clause 26 of EP&A Regulation 1994)

 - (1) A contributions plan must include particulars of the following—

...

 - (h) a map showing the specific public amenities and services proposed to be provided by the council, supported by a works schedule that contains an estimate of their cost and staging (whether by reference to dates or thresholds),
 - (i) if the plan authorises monetary section 7.11 contributions or section 7.12 levies paid for different purposes to be pooled and applied progressively for those purposes, the priorities for the expenditure of the contributions or levies, particularised by reference to the works schedule.

...
 - (3) A contributions plan must not contain a provision that authorises monetary section 7.11 contributions or section 7.12 levies paid for different purposes to be pooled and applied progressively for those purposes unless the council is satisfied that the pooling and progressive application of the money paid will not unreasonably

prejudice the carrying into effect, within a reasonable time, of the purposes for which the money was originally paid..."

(My emphasis)

33. The underlined passages of cl. 27 accordingly assume that a contributions plan will address whether the pooling of levies and contributions is "authorised". In circumstances where:
- (a) a contributions plan is a prerequisite to a council requiring payment of contributions or levies in the first place,
 - (b) the plan is to be prepared and approved "subject to an in accordance with the regulations" (s. 7.18(1)), and those regulations may make provision for and with respect to their subject matter (s. 7.18(3)), and
 - (c) the regulations contemplate that a plan will provide that a plan "must" contain express reference to expenditure priorities for pooled funds, where authorised, and that a council will actively turn its mind to whether pooling is permitted before authorising it in the plan,

it seems to me that a given plan would need to be interpreted in light of these requirements, on the basis that it is presumed to comply with them. Accordingly, were the plan to be silent as to whether pooling is permitted, the better interpretation would be that it impliedly prohibits pooling.

34. This view is nonetheless subject to considerable doubt, resting as it does on implications drawn from the way in which the regulations contemplate that a valid contributions plan will be drafted.

(a) Whether pooled funds restricted to financing items identified in the council's contributions plan

35. Nothing in Div. 7.1 expressly limits the expenditure of pooled funds to items identified in the council's contributions plan. Clause 27(1) of the *EPA Regulation* nonetheless requires a contributions plan to:
- (a) identify the specific amenities and services proposed by a council, supported by a works schedule that contains an estimate of their cost and staging (para. (h)); and
 - (b) identify the "priorities" for expenditure of pooled ss. 7.11 and 7.12 monies, those priorities being particularised by reference to the works schedule (para. (i)).
36. It should be borne in mind that cl. 27 specifies the contents of a contribution plan, which would in turn regulate expenditure of pooled funds, rather than directly regulating the use of those funds. The paragraphs cited above do not expressly provide that a contributions plan must be drafted as an exhaustive statement of the works on which pooled monies may be spent or, more broadly, that pooled monies may only be expended on works identified in the plan. Furthermore, while a contributions plan must identify "priorities" for the expenditure of pooled funds, this language has an aspirational, rather than a directory, flavour.

37. Against this, the Regulation requires a degree of particularisation of works in a contributions plan, and, in turn, ties priorities to the application of funds to particular works. This is against a background whereby (for the reasons stated previously) the authority to pool funds must derive from a contributions plan itself, and pooling is an exception which allows ss. 7.11 and 7.12 monies to be used for purposes other than those for which they were received. These matters suggest that it may nonetheless be appropriate to read a contributions plan as an exhaustive statement of the matters on which pooled funds may be expended, on the basis that:

- (a) it is intended to closely regulate this practice, such that
- (b) "priorities" for expenditure of pooled funds tied to particular items in a works schedule connotes an exhaustive set of priorities.

38. These matters are finely balanced. However, in light of the need for expenditure of pooled funds to be particularised by reference to a works schedule, I lean towards the view a contributions plan should be construed on the basis that it limits expenditure of pooled funds to items particularised in the works schedule. This view is, again, subject to considerable doubt.

(c) Whether councils may pool funds across multiple contributions plans

39. You ask whether, where a council has more than one contributions plan in place, funds may be pooled such that they can be spent under different contributions plans. You have identified the example of a council which has different contributions plans for different geographical parts of a local government area.

40. The pooling of ss. 7.11 and 7.12 monies is subject to the requirements of "any relevant contributions plan" (per s. 7.3(2)). While for the reasons stated previously, a contributions plan is not a prerequisite to pooling of these monies, the fact that:

- (a) these monies cannot be levied in the absence of an applicable contributions plan;
- (b) that contributions plan should be read as then precluding their pooling, unless pooling is specifically authorised; and
- (c) where pooling is authorised, expenditure of pooled funds is limited to items particularised in the works schedule;

does not appear to leave any room under a given contributions plan for pooled funds which it regulates to be spent under a second plan. This view is nonetheless attended by same caveats expressed in respect of questions 2(a) and (b).

41. The Minister administering the *EPA Act* may nonetheless direct a consent authority (including a council) as to "how money paid under [Div. 7.1] for different purposes in accordance with the conditions of development consents is to be pooled and applied progressively for those purposes" (s. 7.17(1)(g)). A consent authority must comply with the direction in accordance with its terms (s. 7.17(2)).

42. Pooling of ss. 7.11 and 7.12 monies is subject to any relevant contributions plan *or* ministerial direction (per s. 7.3(2)). While the Division does not establish an express hierarchy in respect of the regulation of pooling, I nonetheless think it clear that as a contributions plan emanates from a council,² and the council must itself comply with a direction concerning pooling, the terms of a direction concerning pooling would prevail over the contributions plan to the extent of any inconsistency.
43. Accordingly, were a direction given under s. 7.17 to require or authorise pooling of ss. 7.11 and 7.12 monies across contributions plans, such pooling would be permissible, notwithstanding the restrictions that would otherwise apply by virtue of the applicable contributions plan.



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² Or councils - see s. 7.18(1).

Appendix three – About the audit

Audit objective

This audit assessed the effectiveness of governance and internal controls over local infrastructure contributions (LICs) collected by councils.

Audit criteria

We addressed the audit objective by answering the following questions:

1. Are effective governance arrangements and internal controls in place over the collection, management and disbursement of local infrastructure contributions including accountability for each part of the process?
2. Do councils regularly report to those charged with governance or other senior officers on the status, investment performance and risks related to local infrastructure contributions?
3. Can councils demonstrate that local infrastructure contributions have been spent or are being used for their intended purpose, as described in the development contribution plan?
4. Are local infrastructure contributions managed by individuals with appropriate knowledge and skills to perform their duties?

Audit scope and focus

In assessing the criteria, the audit focused on the 2017–18 and 2018–19 financial years and the four councils that had the largest balances of local infrastructure contributions at 30 June 2018: Blacktown City Council, City of Sydney Council, Central Coast Council, and Liverpool City Council. We included all developer contributions reported in the financial statements note for the four councils. These comprise financial contributions collected under:

1. Section 7.11 of the EP&A Act
2. Section 7.12 of the EP&A Act
3. Section 7.4 of the EP&A Act
4. Section 61 of the City of Sydney Act (City of Sydney Council only)
5. Section 64 of the LG Act (Central Coast Council only).

In February 2019, the then Department of Planning and Environment re-numbered the EP&A Act and EP&A Regulation. The Practice Note and Ministerial Directions still refer to the old numbering. New numbering is used throughout this audit report.

Old number	New number
Section 93F	Section 7.4
Section 94	Section 7.11
Section 94A	Section 7.12

Audit exclusions

The audit did not:

- replicate the work of financial auditors
- examine financial planning and budgeting processes for local infrastructure contributions
- validate the calculation of contributions collected from developers
- examine the preparation and negotiation of planning agreements
- question the merits of government policy decisions.

Audit approach

Our procedures included:

- interviewing staff at councils included in the audit
- consulting with other stakeholders
- examining documents relating to governance and controls of LICs. These included:
 - strategies and statutory reporting
 - policies and procedures
 - local infrastructure contribution expenditure for 2017–18 and 2018–19
 - minutes of meetings
 - management reporting as well as reporting to Audit, Risk and Improvement Committees, councillors and the public
 - relevant internal audit reports
 - samples of work
 - position descriptions and organisation charts
 - delegations manuals.

The audit approach was complemented by quality assurance processes within the Audit Office to ensure compliance with professional standards.

Audit methodology

Our performance audit methodology is designed to satisfy Australian Audit Standard ASAE 3500 Performance Engagements and other professional standards. The standards require the audit team to comply with relevant ethical requirements and plan and perform the audit to obtain reasonable assurance and draw a conclusion on the audit objective. Our processes have also been designed to comply with requirements specified in the PF&A Act and the LG Act.

Acknowledgements

We gratefully acknowledge the cooperation and assistance provided by staff at the four audited councils, IPART, and the Department of Planning, Industry and Environment.

Audit cost

The audit cost is \$486,000 including travel and expenses.

Appendix four – Performance auditing

What are performance audits?

Performance audits determine whether State or Local Government entities carry out their activities effectively, and do so economically and efficiently and in compliance with all relevant laws.

The activities examined by a performance audit may include a government program, all or part of an audited entity, or more than one entity. They can also consider particular issues which affect the whole public sector and/or the whole Local Government sector. They cannot question the merits of government policy objectives.

The Auditor-General's mandate to undertake performance audits is set out in section 38B of the PF&A Act for State Government entities, and in section 421D of the LG Act for Local Government entities.

Why do we conduct performance audits?

Performance audits provide independent assurance to the NSW Parliament and the public.

Through their recommendations, performance audits seek to improve the value for money the community receives from government services.

Performance audits are selected at the discretion of the Auditor-General who seeks input from parliamentarians, State and Local Government entities, other interested stakeholders and Audit Office research.

How are performance audits selected?

When selecting and scoping topics, we aim to choose topics that reflect the interests of Parliament in holding the government to account. Performance audits are selected at the discretion of the Auditor-General based on our own research, suggestions from the public, and consultation with parliamentarians, agency heads and key government stakeholders. Our three-year performance audit program is published on the website and is reviewed annually to ensure it continues to address significant issues of interest to Parliament, aligns with government priorities, and reflects contemporary thinking on public sector management. Our program is sufficiently flexible to allow us to respond readily to any emerging issues.

What happens during the phases of a performance audit?

Performance audits have three key phases: planning, fieldwork and report writing.

During the planning phase, the audit team develops an understanding of the audit topic and responsible entities and defines the objective and scope of the audit.

The planning phase also identifies the audit criteria. These are standards of performance against which the audited entity, program or activities are assessed. Criteria may be based on relevant legislation, internal policies and procedures, industry standards, best practice, government targets, benchmarks or published guidelines.

At the completion of fieldwork, the audit team meets with management representatives to discuss all significant matters arising out of the audit. Following this, a draft performance audit report is prepared.

The audit team then meets with management representatives to check that facts presented in the draft report are accurate and to seek input in developing practical recommendations on areas of improvement.

A final report is then provided to the head of the audited entity who is invited to formally respond to the report. The report presented to the NSW Parliament includes any response from the head of the audited entity. The relevant minister and the Treasurer are also provided with a copy of the final report. In performance audits that involve multiple entities, there may be responses from more than one audited entity or from a nominated coordinating entity.

Who checks to see if recommendations have been implemented?

After the report is presented to the NSW Parliament, it is usual for the entity's audit committee to monitor progress with the implementation of recommendations.

In addition, it is the practice of Parliament's Public Accounts Committee to conduct reviews or hold inquiries into matters raised in performance audit reports. The reviews and inquiries are usually held 12 months after the report received by the NSW Parliament. These reports are available on the NSW Parliament website.

Who audits the auditors?

Our performance audits are subject to internal and external quality reviews against relevant Australian and international standards.

The Public Accounts Committee appoints an independent reviewer to report on compliance with auditing practices and standards every four years. The reviewer's report is presented to the NSW Parliament and available on its website.

Periodic peer reviews by other Audit Offices test our activities against relevant standards and better practice.

Each audit is subject to internal review prior to its release.

Who pays for performance audits?

No fee is charged for performance audits. Our performance audit services are funded by the NSW Parliament.

Further information and copies of reports

For further information, including copies of performance audit reports and a list of audits currently in progress, please see our website www.audit.nsw.gov.au or contact us on 02 9275 7100.

OUR VISION

Our insights inform and challenge government to improve outcomes for citizens.

OUR PURPOSE

To help parliament hold government accountable for its use of public resources.

OUR VALUES

Pride in purpose
Curious and open-minded
Valuing people
Contagious integrity
Courage (even when it's uncomfortable)

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