

PLANNING SYSTEM

Payment of infrastructure contributions or levies prior to the issuing of an occupation certificate

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Payment of infrastructure contributions or levies prior to the issuing of an occupation certificate

This circular provides guidance on a new requirement to obtain a document from the local council or, where relevant, the Department of Planning, Industry and Environment, confirming that all relevant contributions or levies have been paid. This document is required before a certifier can issue an occupation certificate for certain types of development.

Introduction

From 8 July 2020, amendments to the *Environmental Planning and Assessment Regulation 2000* (EP&A Regulation) require certifiers to confirm that there are no outstanding infrastructure contributions or levies prior to issuing an occupation certificate.

If the certifier is an accredited certifier (rather than a council) an application for an occupation certificate must include a document from the relevant council or the Planning Secretary (where special infrastructure contributions are required) certifying that a contribution or levy under section 7.11, 7.12 or 7.24 of the *Environmental Planning and Assessment Act 1979* (EP&A Act):

- is not required at any time before the issue of an occupation certificate, or
- is required before the issue of an occupation certificate and the requirement has been met.

These new requirements only apply to developments with an estimated construction cost of \$10 million or more (as indicated in the development application).¹

These requirements support provisions in the following Ministerial Directions and Determinations which defer the payment of contributions under certain circumstances:

- *Environmental Planning and Assessment (Local Infrastructure Contributions – Timing of Payments) Direction 2020.*
- *Environmental Planning and Assessment (Special Infrastructure Contribution – Western Sydney Growth Areas) Amendment Determination 2020.*
- *Environmental Planning and Assessment (Special Infrastructure Contribution – Western Sydney Growth Areas) Direction 2020.*
- *Environmental Planning and Assessment (Special Infrastructure Contribution – Gosford City Centre) Amendment Determination 2020.*
- *Environmental Planning and Assessment (Special Infrastructure Contribution – Gosford City Centre) Amendment Direction 2020.*

These Ministerial Directions and Determinations relate to local contributions or levies (s7.11, s7.12) and to special infrastructure contributions (SICs) in the Western Sydney Growth Area and Gosford City Centre.

Background to changes

In May 2020, legislation was passed amending the EP&A Act to allow the Minister for Planning and Public Spaces to make directions regarding:

- the pooling of infrastructure contributions or levies paid for different purposes
- the time at which a monetary contribution or levy is to be paid.

¹ Whether or not these new requirements apply to a development, a certifier needs to be satisfied that the conditions of the development consent are met before an occupation certificate is issued.

These changes were made as part of a whole-of-government response to the economic downturn caused by the COVID-19 pandemic. This seeks to ensure the planning system continues to support productivity, investment and community wellbeing across the state.

Timing of payment of contributions or levies as a response to the COVID-19 pandemic

The new timing of payment Ministerial Directions and determinations mean that consent authorities cannot impose a condition that requires an infrastructure contribution or levy to be paid prior to just before the issue of an occupation certificate.

However, these directions only apply to developments with an estimated cost of \$10 million or more that require an occupation certificate.

The directions do not apply to development involving the subdivision of land, whether or not they also involve construction, or to complying development.

Development consents meeting the above criteria granted before the *Environmental Planning and Assessment (Local Infrastructure Contributions – Timing of Payments) Direction 2020* takes effect are also taken to be modified by way of section 7.17(1B) of the Act, to allow local contributions and levies (s7.11 and s7.12) to be paid before the issuing of the occupation certificate instead. However, this does not apply retrospectively to conditions for special infrastructure contributions.

If the monetary contribution or levy is payable in instalments under the consent, the unpaid instalments can be paid at the later stage in accordance with this direction.

The payment deferral is intended to assist developers with the cashflow required to start project construction sooner. This aims to generate jobs and help to stimulate the economy in response to the COVID-19 pandemic.

The Ministerial Direction applies from its publication in the Gazette until the COVID-19 prescribed period ends on 25 September 2020. If needed, a further regulation can extend the prescribed period until 25 March 2021.

The direction expires on the last day of the COVID-19 prescribed period but continues to have effect on relevant development consents granted before and during that period.

Conditions of consent (whether new or retrospective) that defer infrastructure contributions payments to before the first occupation certificate is issued do not expire with the direction.

However, the payment deferral arrangements cease to apply if a construction certificate has not been issued for the development by 25 September 2022.

After 25 September 2022, contributions must be paid before the issue of the first construction certificate.

The direction does not prevent entry into any deferred payment arrangements set out in council's contributions plans.

However, it does prevent councils from requiring the developer to enter into a deferred payment arrangement, including the provision of a bank guarantee to secure payment, before the occupation certificate stage.

Requirement to obtain a document as evidence of payment of contributions or levies prior to the issuing of an occupation certificate for any part of a development

From 8 July 2020, the *Environmental Planning and Assessment Amendment (Occupation Certificates) Regulation 2020* introduced ongoing requirements for the issuing of occupation certificates by certifiers for a new building or a building whose use has been changed.

These additional requirements only apply where the estimated cost of the development (at the time the DA is made) is \$10 million or more.

The requirements include:

- a) An application for an occupation certificate, if made to a private accredited certifier, needs to be accompanied by a certificate from the relevant council that any local infrastructure contributions or levies (under section 7.11 or s7.12 of the Act) have been made, if they are required to be made at any time before the issue of the occupation certificate.
- b) If the building for which an occupation certificate is sought is within a special infrastructure contributions area (where contributions for State or regional infrastructure contributions may be required), a similar document from the Planning Secretary is required, including where the application for the occupation certificate is made to the local council.
- c) Under the Regulation, a certifier must not issue an occupation certificate if the application is not accompanied by documents from the council or Planning Secretary (if required) as described above. The certifier will need to confirm that those documents are authentic, and also that no further contributions or levies are required to be made since the document was issued.

What information should the document contain?

The document should be a letter or email from the relevant council or the Planning Secretary, as applicable, certifying that a contribution or levy under section 7.11, 7.12 or 7.24 of the EP&A Act:

- is not required at any time before the issue of an occupation certificate, or
- is required and the requirement has been met.

What do these requirements mean for councils?

The objective of these new requirements is to increase certainty for councils and consent authorities that there are no outstanding infrastructure contributions or levies prior an occupation certificate being issued.

The changes require councils and the Department to set up permanent processes and procedures to support certifiers to obtain the required written confirmation there are no outstanding infrastructure contributions or levies prior to the issuing of an occupation certificate.

Councils can cover the costs associated with the ongoing administration and management of contributions plans through the levying of contributions, in accordance with the costing schedule outlined in the individual contributions plan.

What do these changes mean for certifiers?

As per section 6.10 of the EP&A Act, an occupation certificate must not be issued for any part of a development unless the conditions specified in the development consent have been complied with.

Certifiers will need to confirm documents provided by the consent authority that any required infrastructure contribution or levy has been paid prior to issuing an occupation certificate.

Accredited certifiers will be in breach of the EP&A Act if they issue the certificate and a contribution or levy that was required to be paid has not been paid.

Further Information

For further information please contact Service NSW on 13 77 18.

Department of Planning, Industry and Environment circulars are available at: planning.nsw.gov.au/Policy-and-Legislation/Planning-System-Circulars

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Important note: This circular does not constitute legal advice. Users are advised to seek professional advice and refer to the relevant legislation, as necessary, before taking action in relation to any matters covered by this circular.

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