28 May 2021

Jeremy Bath
Chief Executive Officer
City of Newcastle
Attention: Johannes Honnef
PO Box 489
NEWCASTLE NSW 2300

By email: mail@ncc.nsw.gov.au; jhonnef@ncc.nsw.gov.au

Dear Jeremy,

RE: Draft Community Infrastructure Incentives Policy

The Urban Development Institute of Australia NSW (UDIA) is the peak industry body representing the leading participants in urban development in NSW. Our more than 500 member companies span all facets of the industry from developers, consultants, local government and state agencies. We are proud to count the City of Newcastle (CN) as a valued member of the organisation. UDIA advocates for the creation of Liveable, Affordable and Connected Smart Cities.

UDIA welcomes this opportunity to comment on the Draft Community Infrastructure Incentives Policy (draft Policy) currently on exhibition.

We appreciate CN's efforts to enhance the delivery of community infrastructure to support urban renewal in the City of Newcastle. We acknowledge the opportunities to enrich the liveability of the city, particularly in areas targeted for increased density, by working with the development industry through an incentives regime.

To achieve the intended beneficial outcomes, the Policy must get the incentives right. UDIA submits that the draft Policy misses key opportunities and adds to the uncertainty facing the development industry when considering high potential sites in the Newcastle local government area (LGA). Our submission explains our concerns. In summary, if CN is to proceed with the Policy, then UDIA offers the following recommendations:

1. **The Policy should only apply where there is additional FSR – not height.**
2. **The Policy should make clearer that it is not a 'value capture' mechanism.**
3. **The Policy should apply the same rigour to setting the Incentive GFA Rate, as it is required to apply to the setting of other development contributions.**
4. **The Policy should make clear that it does not preclude the consideration of proposals that are inconsistent with the Policy.**
5. **CN should complete robust local character statements, and clearly define the term 'net positive benefit to the local community' to provide more certainty and avoid conflicts.**
6. **The Policy should commit to the delivery of infrastructure at the earliest available opportunity and include a clear and transparent process for utilising the contributions collected.**

Value Capture

The draft Policy appears to be intended to replace the 'value capture' regime that had been foreshadowed, but not properly implemented, in the Wickham Master Plan. It also appears directed at addressing the Planning Agreement Practice Note issued by the NSW Department of Planning Industry and Environment (DPIE) on 12 February 2021 (Practice Note) which would effectively prohibit that 'value capture' regime.

UDIA believes the value capture mechanism in the Wickham Masterplan has been poorly executed and implemented. It has created material uncertainty for the development industry and has stifled development at Wickham.

The Practice Note prevents the use of planning agreements for the primary purpose of value capture as it leads to the perception that planning decisions can be bought and sold and that planning authorities may leverage their bargaining position based on their statutory powers.

If CN is of the view that parts of its local government area are appropriate for additional development, then CN should identify those areas and incorporate the necessary infrastructure into its development contributions regime. Having a policy that effectively requires the making of payments to access additional development potential that CN is already likely to find acceptable from an urban planning point of view, appears to be value capture using a different mechanism and does not address the issue that the Practice Note is trying to address.

UDIA submits that the draft Policy acts similarly to "value capture" and remains inconsistent with the principles in the Practice Note.

Increased Development Potential

UDIA supports increasing certainty for the development industry when considering the potential for additional height and density in key areas. Unfortunately, what is proposed in the draft Policy does not provide any certainty and is unnecessarily complicated. The draft Policy is vague in that it does not allow developers to understand the likely additional cost to access 'additional' development potential. Although the draft Policy has not done so, the final Policy could use Wickham as a 'worked example' to give the development industry some indication of the kind of additional cost to be expected.

From the development industry's perspective, one of the flaws in the Wickham Masterplan model, was that it proposed additional contributions for both extra height and FSR. In many cases the additional height resulted in a better built form but no additional floor area (and therefore no additional demand on public infrastructure and services). The development industry does not see extra height, where there is no change in the FSR control, as an 'extra development potential' incentive. For that reason, if the Policy is to proceed, UDIA recommends that the Policy should be linked only to increased development potential, i.e., FSR.

Clarifying Local Intent and Benefits

We note clause 6.1.1 which states that the Policy would apply where potential development outcomes 'reflect the envisaged character and scale of the local area'. UDIA points out that this will rely on CN establishing robust future character statements for areas where future growth is already enabled or otherwise preferred. To date, CN's Development Control Plan (DCP) has not adequately provided this information which has led to the involvement of the courts. We urge CN to complete this important work, in order to provide more certainty to industry and the community.

Section 7.5 provides for flexibility to enter into individual Planning Agreements. UDIA supports the opportunity for the consideration of alternative scenarios. This Section would be improved by a clear definition in the glossary of the parameters around the term 'net positive benefit to the local community', including examples that can be used as a basis for comparison in future projects. A clear definition is required to provide certainty and avoid conflict between the community and developer.

Incentive GFA Rate

Section 6.4 of the draft Policy outlines that the 'Incentive GFA Rate' under the draft Policy will be determined having regard to the following:

6.4.1 The estimated cost for providing identified community infrastructure within the identified urban renewal area, expressed in dollars.
6.4.2 The potential incentive GFA that will be made available within the identified urban renewal area, expressed in square meters.
6.4.3 The Incentive GFA Rate, being the proportion calculated by dividing the cost of community infrastructure projects (in 7.4.1) by the total GFA uplift in the urban renewal area (in 7.4.2) and expressed as dollars per square metre.
6.4.4 Feasibility testing to compare likely development scenarios using a feasibility modelling approach, to determine if the proposed 'Incentive GFA rate' enables a more viable outcome than the current LEP development standards to an extent where the outcome represents an incentive worth pursuing when weighed up against the potential additional risk.
6.4.5 Where feasibility testing determines the incentive to be unviable, CN may review the priority or scope of potential community infrastructure projects.
6.4.6 Despite the above, in certain circumstances CN may identify that an increase in density does not equate to improved development feasibility outcomes, regardless of the Incentive GFA Rate. In such circumstances the envisaged development outcomes may require further consideration to determine if increased density is warranted under current property market conditions.

An incentive will only work if the rate is feasible and set in a timely manner. In a situation where a development would rely on more development potential than the LEP incentives limit allows, there may be no incentive at all, and the proposed community infrastructure would be jeopardised.

The Incentive GFA Rate is a 'charge' at full cost recovery for a 'service' (provision of community infrastructure) where provided on behalf of the development seeking to access available incentive density on land. The Council proposes to review and index the Incentive GFA Rate annually (clause 7.4 of the draft Policy). UDIA submits that this Incentive GFA Rate regime has the structure of an additional development contributions regime but does not have the rigour or certainty of the usual s7.11 and s7.12 regime. We are concerned that the regime will lack transparency and accountability.

We are also concerned that the draft Policy might lead to a 'double dip' of infrastructure funding between the s7.11/s/7.12 regime and the incentives policy. Clause 6.2 describes the scope of 'community infrastructure' outcomes, including outcomes that will 'expedite implementation of actions identified within an adopted plan or strategy'. This would theoretically include a project that entirely delivers a line item in a Public Domain Plan. The draft Policy is confusing on this point and should be transparent that where the Policy results in delivery of an item from a contributions plan, appropriate s7.11/s7.12 credit is applied.

What CN is endeavouring to achieve by the draft Policy is already capable of being delivered through the development contributions regime or the use of planning agreements and clause 4.6 objections (which has been the approach in Wickham to date). In the context of the Practice Note, UDIA questions whether there is any particular benefit to the Policy and the proposed LEP amendment it foreshadows. Where a proposal seeks to exceed a planning control on the basis of the community benefit that the proposed development will provide, then that can adequately be dealt with on its merits as part of consideration of a planning agreement (and any required clause 4.6 objection).

If the Council is to proceed with the Policy, and Council wishes to make sure it is not seen as 'value capture' by another means, then the Council should consider amending the Policy to clearly state that:

A. the main consideration for Council is whether adequate public benefits will be provided to meet demand created by the likely future development given the increased development potential of land, and to offset impacts of unanticipated increases in density; and

B. the estimated value of the contributions in comparison with the uplift in value of the land is not considered beyond ensuring the development is feasible when negotiating a planning agreement. Put another way, Council should not be requiring additional public infrastructure just because it thinks the development can afford it.

Utilisation of Contributions

The draft Policy allows for the incentive to be provided in the form of land, works, a monetary contribution, or a combination. It does not, however, outline any mechanism that ensures that CN will use any cash contributions on the items for which they are collected or in a timely manner. UDIA is concerned about an accumulation of unspent developer contributions levied by CN and not delivering the promised infrastructure or maintenance of public assets. The Policy should outline that it will use any collected funds for the provision of public infrastructure at the earliest available opportunity and include a clear and transparent process for utilising the contributions collected.

Conclusion

UDIA is grateful for the opportunity to offer our comments to the draft Community Infrastructure Incentives Policy. The UDIA Hunter Chapter looks forward to discussing our comments in more detail at its upcoming scheduled stakeholder engagement meeting with CN staff. Should you have any further questions, please contact UDIA Regional Manager Elizabeth York at eyork@udiansw.com.au or 0434 914 901.

Kind Regards,

Steve Mann
Chief Executive
UDIA NSW