

Submission of the Society of Local Government Managers on the Productivity Commission's Draft Report on Housing Affordability

Introduction

- 1) The New Zealand Society of Local Government Managers (SOLGM) thanks the Productivity Commission for the opportunity to comment on the Housing Affordability Draft Report (the report) issued in December 2011.
- 2) The focus of this submission is solely on chapter 8 - Charging for Infrastructure. We are aware the Local Government New Zealand will be making a submission canvassing other aspects of the report.
- 3) SOLGM is the association of managers in New Zealand local authorities. We do not speak for individual local authorities and do not seek to address the specific issues and circumstances of individual districts. Our perspective is at an overview national level, and our focus is a practical and managerial one.
- 4) This submission is focused solely on chapter 8 - Charging for Infrastructure, and the findings recommendations and questions set out in that chapter.

Summary

- 5) In summary our key views on the findings, recommendations and questions in this section are:
 - We agree with the general assessment expressed on page 22 which we interpret as being that infrastructure contributions may have had some impact on housing affordability but that in the bigger picture this does not appear to have been a major factor.
 - We agree that there would be value in the review and enhance the sector wide good practice guidance on development and financial contributions. We are interested in participating in any future process to develop this.
 - However, we find the wording of recommendation unclear in its intentions. It refers both to good practice guidance, and to material being added into Schedule 13 of the LGA. Once material is incorporated in statute it is, of course, not guidance but is law. Clarification of which the Commission means would be helpful. We also agree with the recommendation 8.2 relating to the provision of training based on good practice guidance and are interested in participating in the development and delivery of any such training.

- The initial statement in Finding 8.2 that contributions are most likely to be justified for major items of infrastructure, especially network infrastructure, appears to us to largely reflect the predominant pattern of their current use (as evidence by the data in the report).
 - We are unclear as to the intended effect of the finding, however. Is it simply a view expressed with a view to influencing future decision making at the local level, or is it an implied suggestion that the legislation should be amended to narrow the range of purposes for which contributions can be used. Again clarification would be helpful.
 - We see the relevance of the reference to whether the infrastructure “*justifies public supply*” as extraneous and irrelevant.
- We do not see additional appeal rights as warranted. If wider appeal rights are to be considered, then careful attention would need to be paid to be grounds for appeal. Avoiding the creation of scope for tactical litigation is likely to be very difficult. We see the possible grounds for appeal discussed in the paper as straying well into the realm of inappropriately casting the judiciary into a policy making role.
- We do not see reporting to Government to demonstrate compliance as usefully adding value. The contributions policies themselves are already public documents. Any Government agency that is interested is already perfectly free to scrutinize these from whatever perspective it wishes.
 - In addition we note that the information and assumptions underpinning contributions policies are already effectively subject to audit by the Audit Office as part of the audit of the draft LTP. If there were to be any extension of the scope of audit, we would see this also as a role for such an independent Parliamentary Office, rather than the Executive arm of Government.
- Viewing the recommendations as a set we wonder whether the Commission is at risk “piling one possible solution on top of another”, where one might be sufficient. We would support the redevelopment of good practice guidance and supporting training as the preferred response.
- We see the portion of the chapter raising questions about the role of local authorities in the governance of infrastructure as having questionable relevance to the subject of housing affordability.

General Comment

6) The Commission’s findings in relation to infrastructure charges outlined on page 122 as follows:

“... there is debate about the impacts of financial and development contributions”

“upfront charges should not have a substantial effect of housing affordability compared to charges that are spread over time (quoting the Australian Productivity Commission) ..”

“... while the implementation of development contributions in 2002 contributed to the increase in house prices, the increase in development charges is not large enough to explain the increase in house prices in the early 2000s”

and summarised in recommendation 8.1:

F8.1 Infrastructure charges, especially development contributions, can be difficult and costly to implement. While housing affordability may be diminished, infrastructure has to be paid for. If implemented well, the charges will reflect the incremental costs of necessary infrastructure, and can encourage more efficient investment and location decisions.

- 7) We note the rather tentative wording of the finding that housing affordability “*may be diminished*”, and believe that this cautious tone is fully warranted. We commented previously that we saw parts of the issues paper losing sight of the broad definition of housing affordability which the Commission itself had proposed, and drifting to a narrower focus simply on the purchase price of new houses. It seems to us that this is still the case in parts of the draft report.
- 8) These charges may indeed have had some impact in the cost of new housing. However, as your report itself acknowledges, “*infrastructure has to be paid for*”, and the costs will ultimately find their way back to households one way or another.
- 9) In practice the available alternatives are for infrastructure costs to be collected by user charges, targeted rates on the properties concerned or general rates across the district. The effect of substituting any of these options is not primarily to increase or reduce the level of cost, but simply to move the incidence of the cost. In some cases this will be by moving it forward in time to become part of the ongoing costs of occupation of the house, and in others it will be by diffusing the cost across households throughout the district to become, in effect, a subsidy by existing households to the new ones. Hence to the extent that any such costs are not met from contributions they will still for the most part land within the broader net of “the costs of being housed” one way or another.

Complexity

- 10) We agree with the Commission’s view that the design and implementation of development contributions is complex. This complexity arises from the legislative requirements, and reflects policy decisions made in the design of those provisions. These require the compilation of a relatively large body of information in order to establish at a level of detail the nexus between the infrastructure needs and the likely impacts of a development. Much of the information involved will, however, have been drawn from a council’s LTP and sources of supporting information such as asset management plans.

- 11) From a normative perspective it would seem appropriate to put a significant burden of proof on local authorities to justify the charges they impose. This inevitably however drives the process in the direction of detail and complexity, and the production of documents that as a result seem opaque to the lay reader (although they are not of course designed for a lay audience).
- 12) An alternative approach to the design of the legislation might have been a more generalized, standard or broad brush system of charges which might be simpler, more predictable and capable of being implemented more cheaply and easily with lower transaction costs all around. The trade-off would have been a less accurate assessment of charges, which would inherently be less efficient in a broad resource allocation sense, but might nonetheless have been closer to an efficient result than the alternative of rates funding. This was however a choice made in the course of the design of the provisions. There is a trade-off between the aspirations to rigour on the one hand, and simplicity on the other.

Implementation

- 13) Given the complexity of the legislative requirements and the relatively light level of implementation support provided following their enactment, it does not seem to us surprising that there may have been instances where things “*were not got right*”. While the report repeats a variety of assertions made by other submitters of seemingly inappropriate use of contributions, no specifics are disclosed. This makes it rather difficult to offer any comment on them. It also means that it is not clear how far these refer to historic events during the initial implementation as opposed to relating to recent or current practice. Our perception would be along the same lines of the earlier submissions from the DCWG, that there may well have been some less than perfect implementation in the initial period but that we believe practice has evolved considerably since.
- 14) We would however repeat the point made in our earlier submission that a number of these assertions are about matters that clearly provide grounds for judicial review under the existing provisions. The fact that the existing avenues for legal redress have not been used inevitably invites a degree of skepticism.

A Best Practice Guide to Development Contributions

R8.1 That the Government update the Best Practice Guidelines to Development Contributions, based on a process that takes account of the experience of both councils and the industry. The principles in the guidelines might be given statutory status by being incorporated into Schedule 13 of the LGA. When Should Development Contributions Be Used

- 15) Given that a body of experience has now been developed in this area we believe that the redevelopment of good practice guidance would be appropriate.

- 16) SOLGM has taken a role in developing good practice guidance in a number of areas of local authority responsibility. Most notably we maintain a substantial body guidance around the Long Term Planning process, which along with guidance on asset management developed by NAMS, provides part of the underpinnings of the audit of draft Plans by the Audit Office, and are also key inputs into the design of contributions schemes. . We can confirm that we interested playing a positive role along with other stakeholder in any effort to develop revised and improved guidelines on development and financial contributions. We understand that Local Government New Zealand is keen to work with us on this, and we would also expect that other sector groups such as NAMS and the DCWG would be willing contributors. We would also hope that some representatives of the development industry might also be willing to contribute. Issues about the resourcing of the work would of course need to be addressed.
- 17) The wording of the recommendation however is unclear as to whether or not it actually is the development of guidance that the Commission has in mind. On the one hand it refers to the updating of best practice guidelines, on the other it suggest that these be given statutory status by incorporation into Schedule 13 of the Act. Guidance and legislation are distinctly different mechanisms.
- 18) Practice guidelines, are usually developed through processes lead by and drawing on the experience of practitioners, often in collaboration with other stakeholders. They generally operate as a tool to drive continual improvement. They have the advantages of being readily updated to reflect the evolution of practice, innovation and improvement, and of offering scope for their detailed application to be tailored to specific local circumstances. Generally, however, they have only the status of professional standards and as such are only “softly” enforceable.
- 19) The incorporation of material in legislation, however, is not guidance: it is regulation. The purpose of stating standards in law is not to achieve improvement but to require compliance. Such legal rules tend to be relatively inflexible (“one size fits all”) and to be relatively static, since legislation is generally revised and updated only at relatively long intervals. It would be helpful for the Commission to clarify what sort of mechanism it has in mind.
- 20) If what the Commission intends is the incorporation of legally binding rules in legislation one would normally expect proposals to be developed through Government policy processes by the responsible Minister and Government agency. Whilst we would as an interested stakeholder, expect to have some input in such a process, this would be a different role and form of engagement from that in reviewing practice guidance.
- 21) We also note the reference in the text of the report to the possibility of capping development contributions. This is clearly a different proposition again. Capping would of course inevitably move the level of contributions away from what might be regarded as the efficient level of charge in any case. This seems to sit rather oddly alongside the concerns expressed elsewhere in the chapter about the need for charges to be set at levels that are, in a normative sense, efficient.

22) We support the redevelopment of good practice .

Encouraging Conformity with the Guidelines

R8.2 That the Government leads training to enable councils to enhance their skills in implementing the proposed Best Practice Guidelines for Development Contributions.

23) If there is to be development of good practice re, then it seems to us fairly obvious that there some form of supporting training or information programme would be a desirable part of the package. This has usually been done in other areas where we have been involved in developing good practice guidance. Consistent with our interest in the development of good practice re we would also be interested in playing a positive role in developing and delivering any such training.

When Should Development Contributions Be Used

F 8.2 Development contributions are most likely to be justified only for major items of infrastructure, especially network infrastructure, where closed or partially-closed access enhances the ability to charge the beneficiaries, and which justify public supply (Box 22). Observing these criteria mean that offsite water, wastewater, stormwater, and roads are the categories best suited for funding through development contributions.

24) It is not clear who the intended audience for this finding is, and what action the Commission expects them to take in response to it. Is it intended to influence the decisions of local authorities in what they apply development contributions to? Alternatively is it intended to suggest to Government that the legislation to limit the range of infrastructure for which contributions can be sought? Clarification would be appreciated.

25) On the surface the statement that *“Development contributions are most likely to be justified only for major items of infrastructure, especially network infrastructure, ...”* seems merely to endorse the observed practice in that development contributions are, as the report records, predominantly used for these things.

26) The addition of words about *“closed or partially closed access”*, however, rather cloud the issue. Is the intended meaning that contributions ought only to relate to purely local networks rather than including the flow-ons into broader networks? Clarification would be appreciated.

27) The further addition of the words *“and which justify public supply”* and the preceding bullet (*“Is the council or a council agency the appropriate supplier?”*) look to us presume the outcomes of an altogether separate debate into the discussion. The question of what is and is not appropriate for public ownership is itself a large and controversial debate on which opinions differ. This debate is

only tenuously related to the issue of housing affordability. We do not see it is appropriate for somebody's idea of what the outcome of such a debate might be to be inserted into the detail of a discussion about detail of provisions relating to the use of a particular funding mechanism.

28) The purpose of the development contributions regime is to provide a source of funding towards addressing the impacts of developments on local infrastructure. We would suggest that the fact that the infrastructure exists and is in public ownership, can for all practical purposes be taken as signifying a lawful decision by the elected representatives of the local community that public ownership is appropriate.

R8.3 That as part of the process of updating the Best Practice Guidelines to Development Contributions, the Government:

- **identify information that councils would need to provide in regular reports to demonstrate compliance with the Guidelines**
- **develop a process for regular auditing of councils to assess their adherence to the Guidelines.**

29) The implications of this recommendation depend rather on the clarification of recommendation 8.1. If what the Commission intends is that material be inserted into 13 Schedule of the Act then that material is law and the mechanism for ensuring compliance with the law is the Court system.

30) We do not see reporting to Government to demonstrate compliance as usefully adding value. The contributions policies themselves are already publicly available documents. Any Government agency that is interested is already perfectly free to scrutinize these from whatever perspective it wishes. Requiring councils to file reports seems to us to simply amount to an additional bureaucratic compliance requirements to no obvious purpose.

31) We are conscious that to a large degree the information and assumptions underpinning contributions policies are already effectively subject to audit as part of the audit of the draft LTP by the Audit Office. Where, as is sometimes the case, policies are adopted or amended as part of the LTP process then our understanding is that the Audit Office already has the ability to include them in the scope of the audit. We are not clear about the extent to which they do in practice. This is something that the Commission might usefully seek to clarify directly with the Office of the Auditor General.

32) If there were to be any extension of the scope of audit, we would see this also as a role for the Audit Office as the appropriate independent Parliamentary Office, rather than the Executive arm of Government.

Should There Be Enhanced Opportunities for legal Challenge

Q8.1 What would be the advantages of making decisions about development contributions contestable through changes to the Local Government Act that would enable a merits based test?

- 33) The effects of extended legal challenge would, of course, depend on the scope of the grounds for challenge. The suggested grounds outlined in the preceding section of the report are extremely broad. We believe a right of appeal of such scope would be both inappropriate in principle, and practically unworkable. The role of the Courts is to judge compliance with the law, and the reasonableness of the exercise of decision-making powers by public officials exercising statutory powers.
- 34) The grounds suggested in your report go way beyond this, effectively casting the Courts into a role of second guessing policy decisions that had been properly made through legally mandated democratic processes. Whether an infrastructure project is justified is simply not an issue readily settled as a question of law. It is a policy matter on which different people will have different views. In a democracy questions of policy are usually decided by democratically elected representatives rather than the judiciary. We believe this is as it should be.
- 35) We would suggest that any move to provide for appeal on the sorts of grounds suggested in your report would simply import into the area of development contributions the same issues of delay that are identified as problematic elsewhere in the report in relation to the operation of the RMA. We would also note that there is no appeal, and the Commission does not seem to envisage any, in relation to the levels of rates or user charges that might be used to fund the same local infrastructure.

Q 8.2 What mechanisms could be used to discourage frivolous litigation?

- 36) In dealing with issues in which there are large financial stakes and hence strong incentives to litigation, it is always difficult to prevent frivolous (perhaps better described as tactical) appeals. You will be aware that one of the ongoing strands of debate around the RMA concerns precisely this issue. The amount of such scope will be related very much to the breadth of the grounds states as a basis for appeal. We note that the sorts of possible grounds outlined in your report are extremely broad, and to some extent almost read as an invitation to tactical use of litigation.

How Many Solutions? – What is the Problem?

- 37) The chapter canvasses a range of possible matters of concern and suggests several different possible solutions. We believe that the aim should be the solution that best addresses the problem. There are always the risks of being attracted to a variety of measures and ending up trying to solve the problem several times over, or “solutions in search of a problem”.
- 38) It seems to us that the critical submissions discussed in the report boil down to two areas of concern. The first is with whether the actual practice of the use of contributions has been fully in accord with the letter and spirit of the legislation. The obvious lever to address practice issues is the enhancement of practice guidance and training. The Commission recommends this and we have already recorded our support for this, and our willingness to play a constructive part in any future process to put these in place.
- 39) The other main focus of complaint seems to us to come down to disagreements about the underlying decisions about the nature of infrastructure being provided and the level of these services (suggestions of “green plating” and gold plating”). In some cases these concerns then seem to generalize into a degree of hostility towards the local democratic processes through which these decisions are made. We would suggest that differences of opinion on these sorts of matters are not unexpected given the different interests and different time horizons of different parties.
- 40) A property developer has an intense interest in a property up to its point of first sale, and will obviously have an intense interest in things as they affect the price and profitability of that transaction. They have no ongoing relationship with future owners and occupiers, or with others in the community who may feel their interests to be affected. Given that narrow interest and those short time horizons, it is entirely to be expected that their opinions about level of infrastructure needed would tend to be towards minimal and perhaps even under provision. The local authority however will have an ongoing long term relationship with all future occupants and residents, and will be held accountable for its decisions to existing as well as new residents. There is a broader and longer term interest. The fact that the differing interests of different parties will be reflected in differing views seems to us to simply be an unremarkable “fact of life” rather than “a problem” capable of being solved by some intervention.
- 41) In our view the focus is good practice development is all that is warranted at this time.

Other Material

42) A significant portion of the discussion in this chapter is devoted to a rather speculative and highly normative discussion leading to the suggestion that there is something inherently problematic about the role played by local authority in the governance of local infrastructure. This appears only rather tenuously relevant to the issue of housing affordability. After all, the report has already concluded that neither of the two mechanisms by which local infrastructure is funded (rates and development contributions) has been a major factor in declining affordability of housing.

Karen Thomas

A handwritten signature in black ink that reads "K Thomas". The signature is written in a cursive, flowing style.

Chief Executive
New Zealand Society of Local Government Managers