



29 June 2016

The General Manager
Wollongong City Council
Locked Bag 8821
WOLLONGONG NSW 2500

Attn Andrew Carfield, Director Planning and Environment

Dear Andrew,

Public Exhibition of Draft Calderwood Section 94 Contributions Plan (2016)

We write in response to your letter dated 1 June 2016, and received by Lendlease Communities on 10 June 2016, regarding the public exhibition of the Draft Calderwood Section 94 Contributions Plan 2016 (Draft Plan).

Lendlease strongly objects to the Draft Plan for the reasons set out in this submission which has been prepared in conjunction with JBA Urban Development Services and Cardno. Both organisations have had a long history of involvement in the Calderwood Urban Development Project (CUDP). The submission prepared by JBA with Cardno is found at Attachment 1. We also enclose a letter from Addisons Lawyers at Attachment 2.

Lendlease would welcome the opportunity to meet with Council to discuss alternative mechanisms available for the delivery of local infrastructure contributions by Lendlease in the Wollongong local government area. Until such time as a meeting can take place and until Council has reconsidered the Draft Plan and the studies underpinning it, Lendlease requests that Council stop any further steps to adopt the Draft Plan.

Project Background

As Council is no doubt aware, Lendlease is managing the delivery of Calderwood Valley, a new master planned community located in the heart of the Illawarra region. Calderwood Valley will become a connected community that delivers essential facilities and services such as sporting facilities, recreational areas, education, retail and business.

As you know, the Minister for Planning approved the CUDP Concept Plan (MP09_0082) on 8 December 2010. The Concept Plan provides for the development of 700 hectares of land at Calderwood for approximately 4,800 dwellings and 50 hectares of mixed use / employment land. The Calderwood Project is to be developed in stages over an approximate 15-20 year period.

On 15 August 2013 the Land and Environment Court of NSW (LEC) upheld an appeal by Lendlease against the refusal of a Project Application for the first stage of the Approved Concept Plan (the Stage 1 Project). In granting approval to the Stage 1 Project, the LEC considered in detail the local contributions payable in respect of the Stage 1 development. In addition, the LEC clearly articulated the key principles upon which the determination of future local contributions should be based and set very strong guidance on the contributions to be levied across the whole site (4,800 lots). The specific reasons for the LEC reaching this conclusion are set out in full in the judgment, but especially at paragraphs 45 to 58.



The Minister for Planning executed a voluntary Planning Agreement (State VPA) with Delfin Lend Lease on 3 March 2011. The State VPA provides that the Developer make various contributions towards State infrastructure, comprising monetary contributions for transport and the dedication of land for schools.

There is also an executed voluntary Planning Agreement (Local VPA) between Lend Lease Communities and Shellharbour City Council dated 15 September 2014 for a range of local works and land dedications. These include local, district and city parks, and local community facilities, together with monetary contributions towards local roads, administration and other infrastructure.

In November 2014, Lendlease submitted a development application for subdivision that was accompanied with a formal offer to enter into a voluntary Planning Agreement with Wollongong City Council. The draft Local VPA outlined the delivery and maintenance of:

- Three (3) local parks;
- One (1) district park; and
- One (1) city wide park.

The draft VPA also provided a total monetary contribution for local roads to the value of \$6,336,000 (or \$1,320 per dwelling), plus indexation. Council refused the application on 10 June 2015 and subsequently refused the offer to enter into a voluntary Planning Agreement at the Council meeting on 14 September 2015.

Project status and public interest

To date, Lendlease has sold over 670 lots at Calderwood Valley including all lots in Stage 1, 2A and the majority of Stage 2B. Registration of Stage 1A occurred on 30 May and the first 75 lots are due for settlement by 30 June 2016. The first residents are expected to move in to their new homes by Christmas 2016. Public interest in Calderwood Valley remains extremely strong with over 4,000 people registering their interest to buy land or house and land packages.

The strong sales and level of interest in Calderwood Valley indicates that there is a clear public need for affordable housing with a range of housing types in the Wollongong / Shellharbour local government areas. Land prices start at approximately \$200,000, while the median price for vacant land in the Calderwood Valley 2527 postcode sits at \$262,500 (Calderwood Valley Property Fact Sheet, PRD March 2016). Buyers are mainly locally based owner occupiers (predominantly young families and young couples) with a small percentage of investors.

Construction works at Calderwood Valley commenced in mid 2015 and the temporary community facility, the builders display village, the sales and information centre, landscape works and the first local park are all due for completion by mid 2017. The first District Park will be delivered in two stages, with the first stage delivered by mid-2017. Works are also underway on the Macquarie Rivulet Bridge.

As the Calderwood Valley project will occur over a 15-20 year period, it will bring significant economic benefits to the local community plus a range of multiplier effects particularly in the construction and housing, retail and services sectors. It is estimated that more than 7,600 full time equivalent positions will be created during construction over the life of the project and that the project will inject some \$2.9 billion into the local economy during the construction period (Source: PwC Economic Impact Report, February 2010).



Lendlease is committed to ensuring that the investment in the Illawarra region as a result of the development of Calderwood Valley will provide economic and employment benefit to the local community. This will incorporate hiring local skilled employees and sub-contractors, apprentices and trainees and procuring local goods and services where possible.

In summary, Calderwood Valley is already successfully delivering multifaceted benefits to the Illawarra region, including:

- The timely delivery of affordable land and housing, with land prices starting at approximately \$200,000, well below the local average price;
- Local employment benefits and its multiplier effects, particularly in the construction, retail and services sector; and
- The coordinated delivery of infrastructure and services which would not otherwise be delivered to the community in the short to medium term.

Planning and Infrastructure Contributions Regime

Lendlease remains committed to working with Council to deliver contributions for the Calderwood Project (including roads, open space and community facilities). Despite numerous attempts to resolve the impasse between Lendlease and Council, the parties clearly remain far apart in their expectations. Our objective is to implement a workable mechanism to enable local infrastructure contributions to be paid to Wollongong Council.

In terms of monetary contributions towards local roads in Wollongong and consistent with the approved Calderwood Concept Plan and the LEC framework, Lendlease is willing to pay a total monetary contribution of \$6,336,000 or \$1,320 per dwelling, plus indexation (calculated from the date of the LEC judgment).

The Draft Plan seeks \$8,233.17 per dwelling for local roads and administration across the *entire Calderwood Release Area* and specifically excludes local open space and community facilities. If applied across the entire CUDP site, this equates to almost **\$40,000,000 payable to Council for local roads - a difference of over \$33,000,000**. This represents an **increase of more than 600%** over and above the contribution reasonably assessed by the LEC.

Lendlease believes that the contributions in the Draft Plan are both unjustified and unreasonable. The Draft Plan seeks a contribution of **\$756,915 per hectare of land** within the R1 General Residential zone (page 1 of the Draft Plan). Based on 15 dwgs / ha, this **equates to over \$50,000 per dwelling**, which is well above the cap for Section 94 contributions and if adopted, will cause upward pressure on land prices.

Our review of the Draft Plan shows it contains a number of major flaws, ambiguities and inconsistencies with the approved Calderwood Concept Plan, the adopted planning framework for the CUDP and the recognized principles of Section 94 and infrastructure contributions. JBA with Cardno has completed a review of the Draft Plan and have highlighted significant concerns in their submission (see Attachment 1). There is no reasonable basis for Council to adopt the Draft Plan. The letter from Addisons (see Attachment 2) addresses the requirement for Council to act reasonably in resolving to adopt a section 94 contributions plan and the potential legal consequences that may follow if the Draft Plan is adopted in its current form.

In simple terms, if approved as currently drafted, the adoption of the Draft Plan would undermine the commercial viability of Calderwood Valley. It would remove the largest (and only significant) supply of affordable land and housing land in the Illawarra Region. It would also prevent the delivery of the road network and other community infrastructure that Lendlease is committed to delivering as part of the CUDP. Such a proposition is totally unacceptable to Lendlease.

Way Forward

If Council is going to persist with the Draft Plan, then we are of the opinion that there is much work to be done to make it capable of being lawfully adopted by Council. The Draft Plan should be redrafted such that it is consistent with the principles established by the LEC and should have regard to the correspondence previously issued by the Minister for Planning in relation to this project (see correspondence at Attachment 3).

Given the amount of work required to address the failings of the Draft Plan and also the specific nature of the project we believe that the simplest and fastest way to resolve the issue of local contributions would be to negotiate a Voluntary Planning Agreement. It also presents a mechanism that is fair and justifiable and could potentially resolve the cross boundary issues identified.

Given the significance of the concerns raised, Lendlease intends to write to the Minister for Planning to invite the Minister to intervene to facilitate the most effective way forward between the parties within the parameters of the Concept Plan and within the scope of the guidance provided by the Court. Notwithstanding the above, Lendlease believes there is merit in engaging in further dialogue with Council to attempt to reach a timely resolution without the need for litigation.

Please feel free to contact me at any time on 9277 2663.

Yours sincerely

A handwritten signature in black ink, appearing to be "Robert Bennett", with a long horizontal line extending to the right.Handwritten initials "pr" in black ink.

Robert Bennett
State Planning Manager NSW & ACT, Communities

Cc The Secretary, Department of Planning and Environment

Attachment 1

**JBA Submission on the Draft Calderwood
Section 94 Contributions Plan 2016**



09077
28 June 2016

Mr David Farmer
The General Manager
Wollongong City Council
Locked Bag 8821
Wollongong DC NSW 2500

Dear Sir,

**DRAFT CALDERWOOD SECTION 94 DEVELOPMENT CONTRIBUTIONS PLAN (2016)
CALDERWOOD URBAN RELEASE AREA**

We refer to the Draft Calderwood Section 94 Contributions Plan 2016 which is on public exhibition until 30th June 2016 (Draft Section 94 Plan 2016). This submission is made on behalf of Lendlease Communities Pty Ltd (Lendlease) and has been written in consultation with Cardno who are the consulting engineers on the Calderwood project.

As the Council is aware, Lendlease is the proponent of the Calderwood Urban Development Project (the Calderwood Project).

On 8 December 2010 the Minister for Planning determined (with modifications) the Calderwood Urban Development Project Concept Plan (MP09_0082) (the Approved Concept Plan). The Approved Concept Plan provides for the development of 700 hectares of land at Calderwood (the Calderwood Project site) for approximately 4,800 dwellings and 50 hectares of mixed use / employment land. The Calderwood Project is to be developed in stages over an approximately 15 -20 year period. Following approval of the Concept Plan, on 14 January 2011 Schedule 3 of State Environmental Planning Policy (State Significant Precincts) 2005 (the State Significant Precincts SEPP) was amended and the Calderwood Project site rezoned. Together, the planning provisions at Schedule 3 of the State Significant Precincts SEPP and the Approved Concept Plan establish the statutory planning regime for the development of the Calderwood Project site.

In determining the Approved Concept Plan, the Minister for Planning considered in detail a series of Schedules setting out the human services, open space and transport contributions proposed by Lendlease to be made to both Shellharbour City Council and Wollongong City Council in respect of the overall Calderwood Urban Development Project.

The Minister subsequently imposed condition C12 on the Concept Plan setting out the general requirements for the contributions to be made by Lendlease towards local infrastructure provision for the whole of the Calderwood Urban Development Project including community facilities, open space and local roads.

On 15 August 2013 the Land and Environment Court of NSW (LEC) upheld an appeal by Lendlease against the refusal of a Project Application for the first stage of the implementation of the Approved Concept Plan (the Stage 1 Project). The Stage 1 Project site comprises approximately 127 hectares within the overall Calderwood Project site, of which physical works and subdivision is proposed over approximately 75 hectares and 50 hectares comprises a residue

lot. The approved Stage 1 subdivision (as modified) includes 239 residential lots (and 9 residue mixed use lots and 4 residue lots) and associated works.

In granting approval to the Stage 1 Project, the LEC considered in detail the local contributions payable in respect of the Stage 1 development including each infrastructure item identified at Condition C12 of the approved Concept Plan. In addition, the LEC clearly articulated several key principles upon which local contributions for all future stages of the proposed development should be based.

Further to the above Lendlease has entered into a Voluntary Planning Agreement (VPA) with Shellharbour Council which addresses contributions payable in the portion of the Calderwood site that is located within that local government area. The Shellharbour VPA relates to approximately 593 hectares (85%) of the total 700 hectare site.

JBA has reviewed the Draft Section 94 Contributions Plan 2016 in light of the above and the contributions framework that has been approved as part of the project to date. We have also reviewed the draft Section 94 Contributions Plan 2016 in relation to the directions provided by the NSW Department of Planning and Environment.

Fundamentally, the Draft Contributions Plan 2016 provides insufficient information in relation to a number of matters and fails to meet the minimum requirements set out at Clause 27 of the Environmental Planning & Assessment Regulation 2000 (EP&A Regulation).

As such, a full and proper assessment of the proposed contributions cannot be undertaken and the draft Plan could not be lawfully adopted in its current form.

The following submission therefore sets out our preliminary comments and identifies key matters that require further clarification and information by the Council.

1.0 APPLICATION OF CONCEPT PLAN

It is unclear which land the draft Section 94 Contributions Plan 2016 is intended to apply to and the anticipated development that it purports to relate to.

A fundamental confusion arises in the way that the Plan has been drafted. For example Section 2.3 appears to be contradictory within itself:

‘ This plan covers all land within the Calderwood Urban Release Area as identified in Figure 1... ’ (NB The Figure identifies the whole of the Urban Release Area as split between the two LGAs)

‘ This plan will only apply to land that forms part of the Calderwood Urban Release Area which is within the Wollongong Local Government Area. ’

The Plan also states (p.4) that *“this Plan seeks to levy development contributions from the portion of land within the Wollongong LGA, which will ultimately form the final stages (Part Stage 7 and Stage 8 of the Release Area”*.

It appears that the draft Plan may attempt to determine the amount of contributions payable towards new facilities and services to be provided in the Wollongong LGA on the basis of development that has already taken place (or is to take place) across the whole of the Calderwood Urban Release Area site, but to only levy such a contribution on development taking place within the Wollongong LGA (refer to p.1).

The Council cannot seek to levy contributions for approximately 4,800 dwellings at the time of granting development consent to 800 dwellings. This would not accord with the provisions of Section 94 of the EP&A Act. This is the case whether or not a cross boundary contributions plan is in existence.

The contribution rates listed in Tables 1.1, 1.2, 1.4 and 1.5 further add to the lack of clarity in the drafting of the Plan with respect to the area of land to which the Plan is intended to apply and also the extent of development (and thus incoming population) that has been used as the basis that might be used for consideration of nexus and apportionment.

Some of the contribution rates appear to relate to the broader Calderwood Release Area and some appear only to that portion of the land that is located in the Wollongong LGA. The basis of the calculation of the rates, and any differences in this basis for different items included in the draft Plan is not apparent.

It is also unclear where the figure of 609 hectares that has been used for the site area (as stated in the third paragraph of Part 1) is derived from. The Calderwood Urban Release Area has a total area of approximately 700 hectares (107 hectares in the Wollongong LGA & 593 hectares in the Shellharbour LGA). Clarification is required as to what the 609 hectares used in the Plan relates to.

The draft Plan states (p.1) that contributions for Stage 1 of the Calderwood development are excluded. The Stage 1 development relates to approximately 127 hectares of land, and provides for 239 residential lots.

In addition, Shellharbour Council has approved Stages 2A and 2B of the development relating to approximately 39 hectares of land and providing for 225 and 275 residential lots respectively.

Irrespective of the issue of what area of land the draft Plan may otherwise apply to, the Stage 1 2A and 2B areas (total 166 hectares) and approved 739 residential lots must necessarily be excluded from further consideration. The Council cannot seek Section 94 Contributions from development that has been consented to.

Clarification from Council is required as to the land to which the Plan is intended to apply and the basis upon which any land that is proposed to be included in the Plan has been determined.

It is also requested that Council clarify which area of land that is to be developed has been used as the basis for consideration of demand, nexus and apportionment.

Until Council has clarified which area of land and what assumed development the draft Section 94 Plan 2016 is intended to apply to, proper consideration and assessment of the nexus, apportionment and reasonableness of any proposed contribution cannot be undertaken.

2.0 CONTRIBUTION RATES

The draft Section 94 Plan 2016 fails to identify the basis upon which proposed contributions have been based or calculated.

There is no information presented that enables an appropriate consideration of the logic used to determine the contribution rates nominated in Tables 1.2, 1.4 or 1.5.

This is because:

- The draft Plan does not specify the land areas or dwelling densities or population projections used as a basis for determination of each of the different contribution rates.
- The draft Plan does not make it clear if demand, nexus and apportionment is based on the population generated by development of 4,800 dwellings or on the population generated by the 800 dwellings which are to be located in the Wollongong LGA only.
- The exclusion of Stage 1 from some calculations and not others, and the failure to exclude Stages 2A and 2B at all, further confuses the issue.

- The draft Plan states that it is based on a per hectare rate. It is not clear whether the hectare measurement is site area, gross developable area or developable area or how the per hectare rate relates to anticipated development and incoming population. Not all of the land is even zoned for urban development.

The draft Plan states that the contributions formula is set out at Section 2.22.4 of the draft Plan.

However, there is in fact no formula for calculation of contributions provided. All that is provided is a formula for calculating the indexation of contributions overtime. This is insufficient.

The draft Plan is required to set out the exact basis upon which each of the contribution rates outlined in Part 1 of the Plan are calculated and also to provide appropriate justification for these.

This matter requires clarification by Council.

In the absence of a properly constructed formula, the draft Plan fails to meet the requirements of the EP&A Regulation and cannot be adopted in its current form.

In relation to Table 1.4 an occupancy rate of 3 persons per dwelling is assumed. We question this given that the population data provided on Council's own website indicates that the average household size is currently 2.52 persons per dwelling and is forecast to decrease in size down to 2.49 persons in 2036. Lendlease have undertaken their own demographic research and believe that a more realistic number for the Calderwood development is approximately 2.6 persons per dwelling. With a total dwelling number of 4,800 this would equate to a population of 12,480.

3.0 NEXUS

In order for a contributions plan to be considered reasonable it must be demonstrated that the development to be subject to the contributions plan generates a demand for the public facilities that the plan is levying for.

In determining the Approved Concept Plan, the Minister for Planning considered, in full detail, a series of schedules setting out the human services, open space and transport contributions proposed by Lendlease in respect of the overall Calderwood Urban Development Project. The contributions proposed were based on the various studies prepared in support of the Concept Plan application.

The Minister subsequently imposed condition C12 which sets out the general requirements for the contributions to be made by Lendlease towards local infrastructure for the whole of the Calderwood Urban Development. The condition addresses public benefits and contributions to be delivered/paid in the both the Shellharbour and Wollongong Local Government Areas.

The issue of local infrastructure provisions was considered in more detail during the Land and Environment Court proceedings relating to the Stage 1 development.

The only contention dealt with during the Court proceedings for Stage 1 was the quantum of local infrastructure contributions payable by Lendlease. In granting approval to the Stage 1 development, the LEC therefore considered in detail the scope of contributions set out at Condition C12 of the Approved Concept Plan and scrutinised all aspects of the local contributions payable in respect of the Stage 1 development. In particular, the appropriateness and scope of each local infrastructure item identified at Conditions C12(a), C12(b) and C12(c) was examined in detail in relation to the full development potential of the project (i.e. all 4,800 dwellings and not just the dwellings proposed in the Stage 1 PA) and the resultant demand for human services, open space and local road infrastructure that it would generate, and the LEC also determined the total reasonable cost, relevant apportionment and timing for each of the local road works specified at Condition C12(c).

Further, notwithstanding that the appeal related to the determination of local contributions to be paid in respect of the Stage 1 Project Application only (as this was the subject of the DA before the Court for determination), the LEC provided strong guidance as to the way in which future

local infrastructure contributions are to be levied across all remaining stages of the Calderwood Project.

It appears that Council has accepted Condition C12 of the Approved Concept Plan and the findings of the NSW LEC in respect of all infrastructure items other than road infrastructure.

In respect of road infrastructure, the draft Section 94 Plan 2016 ignores both Condition C12 and the NSW LEC findings in 2013 and seeks to levy for infrastructure that is additional to that which has previously been established as being required to support the Calderwood Development. In particular, a new local road linking Marshall Mount Road and Yallah Road and NR1,2 & 3 extending Yallah Road to the N/W to Avondale Road is identified in the draft Contributions Plan. In addition to this, Yallah Road is now proposed to be 4 lanes, whereas to date it has been established that a 2 lane road would be sufficient to service the needs of the Calderwood development. Cardno has reviewed the new road layout and cannot see any reason why a resident of Calderwood would need to use the NR1 to NR3 connection heading towards Avondale Road.

No justification has been provided as to how the Calderwood Development generates a demand for these new roads or increased infrastructure requirements. No information supporting nexus has been detailed or exhibited with the draft Plan. Cardno has advised that TRACKS is outdated and inappropriate software for estimating capacity requirements and therefore apportionment of costs. Cardno recommend undertaking an Aimsun meso / micro model to replace TRACKS.

Lendlease requests that the traffic modelling be provided for review in order to understand how Council has come to the conclusion that the listed infrastructure is required. It would also like to understand what demand is generated by Calderwood versus the broader West Dapto Release Area and in particular the Yallah-Marshall Mount release area.

As a result of the above lack of information to demonstrate that there is a reasonable demand for the proposed local infrastructure, the Plan fails to adequately demonstrate a clear nexus between the Calderwood Development and the Transport Facilities identified in Table 4.1 of the draft contributions plan.

The Plan as currently drafted and exhibited is unreasonable and fails to include particulars with respect to the relationship between the expected development and the demand for additional public amenities and services to meet that development. It does not therefore meet the provisions of the EP&A Regulation and cannot be adopted in its current form.

4.0 APPORTIONMENT

Assuming a nexus between development and the items proposed to be included in the Plan is adequately documented and demonstrated, a contributions plan must then also clearly set out the costs of the proposed local infrastructure and how this cost is to be apportioned between the existing and future populations.

In this instance the draft Plan sets out that the cost of the provision for the roads and bridges to be delivered under the plan is to be apportioned between the residents of the Calderwood Urban Release Area and those of the West Dapto Urban Release Area.

No estimate of existing or future population is provided.

Section 3.3.3 of the draft Contributions Plan addresses the issue of apportionment. However:

- The plan does not detail what percentage of the proposed infrastructure is to be apportioned to Calderwood and what percentage is to be apportioned to the West Dapto release area; and
- The plan does not outline what assumptions have been made to divide the costs between the different release areas.

Consequently, the draft plan fails to adequately demonstrate fair and equitable apportionment between the Calderwood Urban Release Area and the broader West Dapto Urban Release Area. It does not therefore meet the provisions of Section 94 of the EP&A Regulation and cannot be adopted in its current form.

5.0 COST ESTIMATES

No cost estimates have been included in the plan, as an appendix to the plan, nor have any been publicly exhibited with the plan.

There is therefore no ability to review how the cost estimates have been arrived at.

Lendlease requires the opportunity to review and comment on the cost estimates to review and verify the assumptions made. This is particularly important as it appears in the list of supporting documents in Part 5 of the plan date back to 2010 and 2015. It is also important as the costs as currently proposed appear to be significantly inflated from the costs established in the 2013 court case.

For example:

LEC determined 2 Lane Road - 2013 – Rate per lineal metre for Pavement = \$2,800 (approx.) vs WCC 2016 = \$7,200 (approx.)

There is no explanation for the above discrepancy.

The Plan also appears to be overly conservative noting that:

- A 15% contingency has been placed on the base cost of all works (page 16); and
- A construction contingency of 20% has also been applied.

Both of these combined have a significant impact of the cost of the proposed infrastructure and contribution rates.

6.0 TIMING OF THE PLAN

It is not clear what the lifespan of the Contributions Plan is. Nor are there any details presented as to when the various items of local infrastructure are required to be delivered.

Rather than requiring a per lot contribution it is considered more prudent to set out the timing of payments for the identified infrastructure as set out in the following draft condition proposed by Lendlease in the Calderwood Concept Plan modification application which is currently being considered by the Department of Planning and Environment (replicated below).

- *Marshall Mount Road (TMAP items 22, 23, 24 and 36 and Section 11 bus stops and bus shelters) contribution amount: \$5,702,400*
- *Yallah Road contribution amount: \$633,600*
- *With the total \$6,336,000 to be paid on the basis of four equal payments of \$1,584,000 prior to the release of the relevant residential subdivision certificate for the following:*
 - *200th residential lot (as developed in Wollongong LGA) (i.e. 25%);*
 - *400th residential lot (i.e. 50%)*
 - *600th residential lot (i.e. 75%); and*
 - *800th residential lot (i.e. 100%)*

Indexation is to be applied annual in accordance with the Chain Price Index for Non Dwelling Building and Construction (CPI), published by the Australian Bureau of Statistics.

7.0 SUPPORTING DOCUMENTS

Part 5 of the draft contributions plan outlines that the plan is supported by various documents.

None of these supporting documents were publicly exhibited with the plan and we request that access be provided so that we are able to review the assumptions presented in those documents.

8.0 CREDITS FOR EXISTING DEVELOPMENT

Section 2.18 of the draft contributions plan states that Council 'will determine' any applicable credit(s)... this terminology is ambiguous. It is suggested that the section be redrafted to something like the following:

"So as to ensure that contributions are reasonable, an amount equivalent to the contribution attributable to any existing (or approved) development on the site of a proposed development will be allowed for (credited) in the calculation of contributions for that proposed development."

Following on from above we note that the following paragraph is included in Section 2.14 of the draft contributions plan:

"For each stage, the calculation of the number of lots/dwellings for which contributions are payable will count any residue lot as a single lot."

No objection is raised to the above, provided that any contributions paid in relation to the residual lot are credited against any future/further subdivision of the residual lot.

9.0 CALCULATION OF CONTRIBUTIONS

There appears to be some inconsistency between *Section 2.22.2 Land Acquisition Index* and *Section 2.22.4.2 Contribution rates for works schedule items involving land yet to be acquired* as different indexing methods are proposed i.e. Established House Price Index v Land Index Values.

It is requested that the Council confirm to Lendlease the basis on which it is proposed that the Council will index land values.

10.0 CONCLUSION

We are of the opinion that the draft Calderwood Contributions Plan 2016 as currently drafted does not meet the requirements of Section 94 of the EP&A Act and the EP&A Regulation and is unreasonable for the following reasons:

- The draft plan does not clearly identify the land or development to which it relates, nor the resulting population that is to be used as the basis of determining demand;
- The draft plan fails to demonstrate adequate nexus between the Calderwood Urban Release Area and the infrastructure to be levied for under the draft plan, or to explain or justify why the infrastructure the Council believes is necessary to adequately cater for the demand generated by the proposed development within the Wollongong LGA would differ from that determined by the NSW LEC in 2013 when no aspect of the approved development has otherwise changed;
- The draft plan does not outline how the infrastructure levies are to be apportioned between the Calderwood Urban Release Area and the broader West Dapto Urban Release Area;
- The costs included within the draft plan appear inflated and significantly in excess of that which is likely to be required and also depart in a substantial manner from the cost assumptions that were determined by the NSW LEC to be appropriate for use in determining the appropriate contributions payable in relation to the Calderwood Project;

- There is insufficient information available to review and verify the assumptions and calculations made within the plan; and
- The plan fails to acknowledge the extensive assessment of local infrastructure demands generated by the Calderwood development as undertaken by both the Department of Planning and Environment and the Land and Environment Court.

In light of the above failings we request that Wollongong City Council does not adopt the draft Calderwood Section 94 Contributions Plan in its current form.

If Council is going to persist with the draft Plan, then we are of the opinion that there is much work to be done to make the plan capable of being lawfully adopted by Council. The Plan should be redrafted such that it is consistent with the principles established by the Land and Environment Court and should have regard to the correspondence previously issued by the Minister for Planning in relation to this project (see attached).

Given the amount of work required to address the failings of the draft contributions plan and also the specific nature of the project we believe that the simplest and fastest way to resolve the issue of local contributions would be to negotiate a Voluntary Planning Agreement. It also presents a mechanism that is fair and justifiable and could potentially resolve the cross boundary issues identified.

I trust the above provides Council with sufficient information in relation to this matter, however should you have any queries or require further information, please do not hesitate to contact me on 9956 6962 or lbull@jbaurban.com.au.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'Lesley Bull', with a stylized flourish at the end.

Lesley Bull
Director

Attachment 2

Advice from Addisons Lawyers

28 June 2016

Our Ref: HSK:NER:SAM: LEN008/4003

The General Manager
Wollongong City Council
Locked Bag 8821
Wollongong NSW 2500

Dear Sir

Draft Calderwood Section 94 Contributions Plan 2016

We act for Lendlease Communities in relation to the Calderwood Valley Urban Development Project (**Calderwood**). We refer to the Draft Calderwood Section 94 Contributions Plan 2016 (**Draft Plan**) prepared by Council and placed on public exhibition.

We have reviewed the Draft Plan and considered the appropriateness and reasonableness of the Draft Plan in light of the Calderwood development, Concept Plan 09_0082 (**Concept Plan**), the history of litigation and the guidance provided by the Land and Environment Court in *Lend Lease Communities (Australia) Limited v Minister for Planning and Infrastructure, Shellharbour City Council and Wollongong City Council* [2013] NSWLEC 1153 (**Calderwood Judgment**).

Requirement for Part 4 approvals to be “generally consistent” with the Concept Plan

Clause 3B(2)(d) of schedule 6A of the *Environmental Planning & Assessment Act 1979* (**EP&A Act**), provides that, in relation to a transitional Part 3A development such as the Calderwood project, “a consent authority must not grant consent under Part 4 for the development unless it is satisfied that the development is generally consistent with the terms of the approval of the concept plan”. Accordingly, any development application lodged by Lendlease with Wollongong Council under the Concept Plan at Calderwood must contain conditions in relation to development contributions that are generally consistent with the approval of the Concept Plan.

We also note that Section 94B of the EP&A Act provides that “a consent authority may impose a condition under section 94 or 94A only if it is of a kind allowed by, and is determined in accordance with, a contributions plan (subject to any direction of the Minister under this Division)”. We note that section 93F of the EP&A Act also allows for local infrastructure contributions to be delivered pursuant to a planning agreement.

By seeking to adopt the Draft Plan which would result in the imposition of conditions of consent that are arguably not “generally consistent” with the terms of the Concept Plan, Council is operating in a way that actively seeks to prevent Lendlease from obtaining development consent that complies with clause 3B(2)(d) of schedule 6A and section 94B of the EP&A Act. Accordingly, Council is arguably seeking to undermine and frustrate Lendlease’s ability to obtain development consent and to deliver the Calderwood project.

The Land and Environment Court in considering a Class 1 appeal in relation to the Planning Assessment Commission’s refusal of Lendlease’s Stage 1 major project application, considered appropriate development contributions to be delivered by Lendlease to Wollongong Council over the whole of the Calderwood development. We note that Lendlease has prepared and lodged Modification

1 to the Concept Plan to seek to amend Condition C12 to bring it in line with the guidance provided by the Land and Environment Court in the Calderwood Judgment (**Modification 1**).

Irrespective of whether Modification 1 is approved, if the Draft Plan is adopted by Council in disregard of the Calderwood Judgment, it has the potential to frustrate the ability of Lendlease to obtain a development consent for which conditions relating to the provision of local development contributions are generally consistent with the terms of the Concept Plan and also within the terms of the Draft Plan.

Deficiencies in the Draft Plan

Clause 27 of the *Environmental Planning & Assessment Regulation 2000* (**EP&A Regulation**) sets out prescriptive requirements as to what a contributions plan must contain. These requirements have not been met in the current formulation of the Draft Plan. The JBA submission clearly identifies a number of deficiencies in the Draft Plan including (but are not limited to):

- failure to clearly identify the land to which the Draft Plan is intended to apply;
- failure to clearly identify which area of land that is to be developed has been used as the basis for consideration of demand, nexus and apportionment;
- failure to identify the basis upon which proposed contributions have been based or calculated;
- failure to present information as to the rationale used to determine the contribution rates nominated in Tables 1.2, 1.4 or 1.5;
- failure to specify land areas or dwelling densities or population projections used as a basis for determination of each of the different contribution rates;
- the Draft Plan does not make it clear if demand, nexus and apportionment is based on the population generated by development of 4,800 dwellings or on the population generated by the 800 dwellings which are to be located in the Wollongong LGA only;
- failure to include a formula for calculation of contributions provided;
- failure to make documents referenced in Part 5 as supporting material publically available; and
- failure to reasonably establish a nexus between the Calderwood development and demand created for public facilities and infrastructure required to be delivered pursuant to the Draft Plan.

Failure to include the particulars required by clause 27 of the EP&A Regulation amounts to a clear breach of the statutory requirements and frustrates the ability of the public to meaningfully engage and make submissions in relation to the Draft Plan. This is contrary to the clear requirement for public participation prior to the adoption of a section 94 contributions plan in clauses 28, 29 and 30 of the EP&A Regulation.

Reasonableness of the Draft Plan

The general requirement at law for administrative decisions, such as the decision to adopt a section 94 contributions plan, is that an administrative decision must be a reasonable exercise of the administrative function conferred upon the decision maker.

In *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (**Wednesbury**)¹, Lord Greene MR stated that a decision-maker will fall into error where they remain within the "four corners of the matters which they ought to consider, [but] have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it"². In our view, the decision to adopt the Draft Plan in its current form would amount to a decision that is so unreasonable that no reasonable authority could have come to it (including for the reasons and deficiencies identified above).

¹ [1947] EWCA Civ 1; [1948] 1 KB 223 234.

² Ibid 234 (Somervell LJ and Singleton J concurring).

In the more recent Australian case, *Minister for Immigration and Citizenship v Li (Li)*³, the High Court of Australia expanded the notion of legal unreasonableness and endorsed a more flexible, contextual approach to legal unreasonableness in Australia. In *Li*, the High Court also adopted an approach where a proportional analysis of the decision making process may be appropriate in determine whether or not a decision was unreasonable. Hayne, Kiefel and Bell JJ stated "Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification"⁴.

In our view, considered in the whole of the relevant circumstances, including the Concept Plan, the impasse between the parties, the Calderwood Judgment and the application for Modification 1, it would be unreasonable for Council to resolve to adopt the Draft Plan given the deficiencies identified above (and in the other submissions on behalf of Lendlease). We also consider that the Draft Plan is not a proportionate response to the need for development contributions to be delivered at Calderwood having regard to the scope and purpose of the discretionary power of Council.

In our view, any decision by Council to adopt the Draft Plan would amount to legal unreasonableness having regard to both the *Wednesbury* and *Li* lines of authority.

Draft Plan is susceptible to judicial review

As detailed above, the Draft Plan does not comply with the requirements of the EP&A Act or EP&A Regulation and if adopted would seek to frustrate Lendlease's ability to obtain a development consent that provides for development contributions that are both generally consistent with the Concept Plan and in accordance with the Draft Plan. To do so could unreasonably frustrate the delivery of a major residential land release project that would deliver innumerable public benefits to the community through the delivery of infrastructure as contemplated pursuant to the Concept Plan. The development is also important to the delivery of affordable land and housing in the Illawarra area and the generation of local employment.

In December 2013, the Hon Brad Hazzard MP, the Minister for Planning and Infrastructure at the time, wrote to Shellharbour City Council in relation to a proposal by Shellharbour Council to adopt a section 94 plan. The previous Minister requested that Council demonstrate that it had taken into account, the Calderwood Judgment including its guidance on how contributions should be set for the remainder of the Calderwood development. We submit that the same approach should be taken by Council in relation to the Draft Plan.

Any decision by Council to adopt the Draft Plan would in our view be susceptible to a judicial review challenge in relation to the validity of Council's process in preparing, publicly exhibiting and adopting the Draft Plan. In our opinion, considering the deficiencies in the Draft Plan and failure to comply with statutory requirements, it is both beyond power for Council to resolve to adopt the Draft Plan and any resolution adopting the Draft Plan would be considered unreasonable from a legal standpoint having regard to the *Li* and *Wednesbury* authorities.

Way forward

It is submitted that, the Draft Plan cannot be lawfully adopted in its current form. Amongst other things, Council will need to consider and respond to the Calderwood Judgment in any reformulation of the Draft Plan.

In the interests of the broader community and given the nature of the Draft Plan and the Calderwood project, we submit on behalf of our client that a voluntary planning agreement will be the most appropriate and timely mechanism for the levying of contributions in the context of the Calderwood development.

³ [2013] HCA 18

⁴ *Ibid* 76.

We look forward to receiving confirmation that the Draft Plan will not be progressed in its current form.

Yours sincerely



Harshane Kahagalle

Partner

Direct Line: +61 2 8915 1096

Direct Fax: +61 2 8916 2096

Email: harshane.kahagalle@addisonslawyers.com.au

Natalie Rodwell

Senior Associate

Direct Line: +61 2 8915 1069

Direct Fax: +61 2 8916 2000

Email: natalie.rodwell@addisonslawyers.com.au

Attachment 3

**Correspondence from the former Minister for
Planning
The Hon. Brad Hazzard MP**



The Hon Brad Hazzard MP
Minister for Planning and Infrastructure
Minister Assisting Premier on Infrastructure NSW

Mr Michael Willis
General Manager
Shellharbour City Council
Locked Bag 155
SHELLHARBOUR CITY CENTRE NSW 2529

Dear Mr Willis

I understand that Council will shortly consider the adoption of the draft Shellharbour Section 94 Plan 2013 (7th Review).

I also understand that Council resolved to exhibit the draft of this development contribution plan prior to the Land and Environment Court decision of *Lend Lease Communities (Australia) Ltd v Minister for Planning and Infrastructure & Ors*.

As a party to these proceedings, I would like to ensure that the adopted contribution plan is prepared in accordance with the court determination and the Environmental Planning and Assessment Act (1979).

I therefore request that, prior to Council adopting the plan, Council demonstrates that it has taken the court's determination into account, including its guidance on how contributions should be set for the remainder of the Calderwood development. Please ensure that the draft plan is provided to the Department of Planning and Infrastructure for consideration.

It is my view that Council should comply with the decision of the court and avoid any unnecessary delay and cost which is not in the interest of the local community.

If you wish to discuss this matter further, please contact Andrew Jackson, Executive Director, Strategies and Infrastructure on (02) 9228 6445.

Yours sincerely

HON BRAD HAZZARD MP
Minister

6. 12. 13