Draft Large Display Commercial Policy

Summary of Submission Received and Council's General Counsel Response are outlined in the following table:

Summary of Submission	Council's General Counsel Response	Changes to document
Contrary to the requirement of clause 13(3) of SEPP 64, the draft policy is substantially inconsistent with the *Transport Corridor Outdoor Advertising and Signage Guidelines* (**Guidelines**) in that the Guidelines require that money collected to fund a public benefit works program developed in partnership with the RMS or TfNSW in relation to public transport matters. It appears that Council's intention is merely to allocate these funds to its general and community services which is in direct contravention of the Guidelines.	A public benefit works program developed in partnership with the RMS or TfNSW is required for up front and annual fees but not for in-kind contributions secured through a planning agreement. If Council adopts the policy, it should promptly move towards establishing a public benefits works program. Whilst not essential, for transparency and clarity, there would be benefit in referencing this to adopted program within the policy.	The policy has been amended as follows: *Consistent with the Guidelines, Council will develop public benefit works program in partnership with Roads and Maritime Services and / or Transport for New South Wales that sets priorities for the distribution and expenditure of revenue from the collection of up front and annual fees. As at the date of adopting this Policy, the works program was yet to be established.*
Nowhere in the draft policy is the making of a contribution linked to improvements in local community services and facilities as required by s.4.2 of the Guidelines, including benefits such as: (i) Improved traffic safety (road, rail, bicycle and pedestrian); (ii) Improved public transport services (iii) Improved public amenity within, or adjacent to, the transport corridor; (iv) Support school safety infrastructure and programs; and (v) Other appropriate community benefits such as free advertising time to promote a service, tourism in the locality, community information, or emergency messages.	For transparency and in furtherance of what I understand to an underlying purpose of the policy, there is utility in the policy being amended to more clearly identify the range of public benefits contemplated by SEPP and the policy.	The policy has been amended as follows: *Contributions are to be linked to improvements in local community services and facilities and may include, without limitation, benefits such as:* • *improved traffic safety (road, rail, bicycle and pedestrian);* • *improved public transport services;* • *improved public amenity within, or adjacent to, the transport corridor;* • *support school safety infrastructure and programs; and* • *other appropriate community benefits such as free advertising time to promote a service, tourism in the locality, community information, or emergency messages.*
There is no evidence that RMS or TfNSW were consulted in the	There is no obligation to consult with either agency for the preparation of the draft policy. No harm would and	The draft policy was placed on public exhibition in accordance with the Local Government Act 1993.

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preparation of the Draft Policy.	some benefit may arise from seeking their input.	However, RMS and/or TfNSW will be consulted in the development of a public benefit works program for up front and annual fees.
The circumstances where council would be the consent authority for signs directed towards passing traffic on the M4 are limited given that it is the Minister for Planning and Public Places who is the consent authority for advertisements displayed on transport corridor land for the M4 and associated road use land adjacent to the M4. In those cases, it would be the RMS who would collect the public benefit contributions. The policy should make clear that it is only in cases where local council are the consent authority that Council is entitled to require public benefit contributions.	The policy is a council policy and quite clearly will only apply when Council is the consent authority. I do not consider changes are required to make clear that obvious position. Commentary on the limited circumstances when Council will be the consent authority for signs near the M4 are noted and agreed with.	No changes to the policy.
The $50,000 / $10,000 contributions are arbitrary. The author of the submission expected to see a thorough economic analysis to justify the amounts and identification of the types of public benefits that the contributions will fund.	I understand that financial circumstances with all signs vary widely having regard to factors such as sign size, visibility, demographics, traffic volumes and traffic speed. In those circumstances, it is highly doubtful that any economic analysis could derive a certain, fair and accurate formula for determining an appropriate contribution value. The policy is just that, a policy. It need not be applied rigidly. If appropriate justifications arise, Council should apply the policy flexibly. That may include for example, adjusting the contribution amount. Whilst this position is no doubt self evident to Council and its staff, there is benefit in amending the policy to make that position apparent to the general public.	The policy has been amended as follows: *In some cases, circumstances may arise that justify varying the means prescribed in the Policy Statement below for realising the public benefit. If the proponent of an advertisement asserts that is the case, a full justification should be put with the application which will be considered by Council on its merits.*
The Guidelines are clear in that public benefits are to be negotiated and agreed upon between the consent authority and the applicant	The Guidelines require that the level of public benefit be negotiated and agreed upon but not the actual public benefit (for example precise traffic or transport improvement works). The policy gives notice of means by which Council will be satisfied that the level of public benefit will be achieved and in that context assists prospective developers in assessing the viability of	The policy has been amended as follows: *Applications not meeting the terms of this policy but which may warrant consideration for commercial or other reasons may be reported to the Council.* *Revenue collected from up-front and annual fees*

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	proposals. Further, the policy allows for negotiation and agreement via a planning agreement process. As previously stated, there is benefit in making clear to the public that the policy will not necessarily be applied in a rigid fashion and that the level of benefit can be adjusted from the means contemplated by the policy, when warranted.	*shall be put to improvements in local community services and facilities. In expending funds, regard shall be had to any public works program developed with Roads and Maritime Services and / or Transport for New South Wales.*
The policy does not refer to the dispute mechanism included within the Guidelines.	The Guidelines include a dispute resolution process whereby if contributions cannot be agreed upon, either party may refer the matter to the Secretary of the Department of Planning who may either facilitate a conciliated outcome or make a binding decision on the Council. The existence of that process is unaffected by Council's policy. Council's policy references the Guidelines. There is no need to repeat the Guidelines' process within Council's policy.	No changes to the policy.
The payment of upfront fees as referred to in the Guidelines does not mean at the time of making a development application but rather at some time after consent is granted, for example prior to the issue of a construction certificate. Requiring payment by a deed prior to the grant of development consent could give rise to a reasonable perception of bias and provide a cause for challenging the validity of a consent.	Without conceding any form of actual bias, I agree that payment of a fee at the time of lodging the DA could result in some members of the public perceiving that bias may play a part in Council's decision making process. That prospect should be avoided. The policy has given 3 options for contribution provision consistent with the Guidelines (i.e. upfront fees, annual fees and in-kind contributions). In practice, I do not expect any developer to opt to pay the upfront fee. It makes little or no economic sense to make a lump sum payment upfront if that financial burden can be spread across some greater time period up to the life of the sign. The requirement for an upfront fee payable prior to the issue of a construction certificate would overcome uncertainty as to its value (as Council will know by then the number of years for which approval will be granted), avoid the need for a deed, negate the need for refunding overpaid fees and help avoid perceptions of bias.	The policy has been amended as follows: *The fee shall be payable prior to the release of a construction certificate.* The following paragraph was deleted from the policy: ~~*In either case, a deed shall be entered into for the payment which requires payment notwithstanding any provision the Environmental Planning and Assessment Act 1979 may make with respect to the maximum fees payable for a development application. The deed shall further provide for a full refund of fees by Council if the Council refuses to grant development consent and for a partial refund of fees if the Council grants development consent for a lesser number of years than that sought by the proponent. Where a partial refund is required, the refund shall ensure that the fee retained by Council is equivalent to $50,000 multiplied by the number of years for which development consent is granted for that are signs directed towards passing traffic on the M4 Motorway and $10,000 per year for other signs.*~~

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Council's third means of achieving public benefits going to in-kind contributions is unclear. It contemplates monetary contributions but it should be limited to means other than monetary contributions.	The third means involve a planning agreement or offer to enter a planning agreement. Any such offer must be voluntarily made by the developer. Section 7.4 of the *Environmental Planning and Assessment Act 1979* contemplates contributions being made by dedicating land free of cost, payment a monetary contribution, provision of any other material public benefit or any combination of such contributions. It may be that some particular work, for example the provision of a pedestrian safety island or crossing, does not of its own realise the provision of an appropriate level of public benefit. In that circumstance, it would be reasonable and appropriate that the work be supplemented or topped up by a monetary contribution to ensure that the overall contribution achieved an appropriate level of public benefit. These are matters that can be resolved in the negotiation process and voluntary commitments offered by the developer.	No changes to the policy.
A voluntary planning agreement should be required for all public benefit options (i.e. upfront payment, annual payment of in-kind contributions) identified in the draft policy given that: (a) a contributions plan has not been prepared. Section 4.17(1)(h) permits a consent authority to impose conditions for the payment of a development contribution. Absent a contributions plan, a condition cannot lawfully be imposed if it requires contributions to be paid in connection with a development. (b) Council has not included such purported fees in its annual fees and charges schedule made under the *Local Government Act 1993*.	Section 4.17(1)(h) authorises the imposition of conditions of development consent going to section 7.11 and s.7.12 developer contributions and other matters not relevant here. Section 4.17(1)(a) also empowers Council to impose a condition of development consent if it relates to any matter referred to in s.4.15(1) of the Act that is of relevance to the development. Section 4.15(1) requires the Council to consider the provisions of any environmental planning instrument. That includes SEPP 64. SEPP 64 expressly contemplates provision of public benefits and by way of the Guidelines, the provision of upfront fees, annual fees or in-kind contributions. Arguments could therefore be made that Council has power to impose the condition via section 4.17(1)(a) notwithstanding that power does not arise under section 4.17(1)(h). Inclusion of the fee in Council's schedule of fees and charges is impractical noting that the policy allows for flexibility as to both the value of the fee and the means of payment.	No changes to the policy.