

17 August 2012

Dalton Power Project

Planning Agreement

The Upper Lachlan Shire Council

AGL Energy Ltd

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Planning Circular

Planning Agreement

Date ►

Between the parties

The Upper Lachlan Shire Council

ABN 81 011 241 552 of 44 Spring Street, Crookwell NSW 2583
(Council)

AGL Energy Ltd

ACN 115 061 375 of Level 21, 101 Miller Street, North Sydney NSW
2060
(Company)

Recitals

- 1 The Development is a project to which Part 3A of the EPA Act applies.
 - 2 The Company lodged an application seeking Part 3A Approval for the Development on 25 March 2010.
 - 3 Part 3A Approval was granted for the Development on 19 July 2012.
 - 4 Condition B16 of the Part 3A Approval requires the Company to, within 12 months of the date of the Part 3A Approval, unless otherwise agreed by the Director-General, enter into a planning agreement with the Council to provide contributions to the Council for a Community Enhancement Fund.
 - 5 This deed satisfies condition B16 of the Part 3A Approval.
 - 6 If the Development proceeds to Stage 1, the Company has agreed to pay to the Council's Community Enhancement Fund the amount of 0.833% of Stage 1 Capital Expenditure over a period of 40 years on the terms set out in this deed.
 - 7 If the Development proceeds to Stage 2, the Company has agreed to pay to the Council's Community Enhancement Fund the amount of 0.833% of Stage 2 Capital Expenditure over a period of 40 years on the terms set out in this deed.
 - 8 The Council agrees to distribute the Monetary Contributions in accordance with the terms of the Community Enhancement Fund.
-

The parties agree as follows:

1 Definitions and interpretation

1.1 Definitions

The meanings of the terms used in this deed are set out below.

Term	Meaning
Approved Local Project	Local Project recommended by the Committee and approved by Council for funding from the Community Enhancement Fund in accordance with this deed.
Auditor	an appropriately qualified accountant appointed by the Council.
Committee	a formal committee of Council, constituted pursuant to section 355 of the <i>Local Government Act 1993</i> (NSW), established to administer the Community Enhancement Fund in accordance with the DCP.
Community Enhancement Fund	the fund of the same name established and administered by the Council in accordance with the DCP.
Construction Certificate	has the meaning contained in the EPA Act.
Costs	includes costs, charges and expenses, including those incurred in connection with advisers.
DCP	the <i>Upper Lachlan Development Control Plan 2010</i> as amended from time to time.
Development	the construction and operation of the Dalton Power Project on the Land, being a gas fired power station built in two stages with Stage 1 comprising between two and four open cycle gas turbines with a capacity of up to 750 megawatts and Stage 2 comprising a facility with up to six open cycle gas turbines with a capacity of up to 1,500 megawatts, and construction of a gas pipeline, access road and transmission line connection.
Development Cost	The value of works must be provided by the applicant at the time of request with adequate supporting documentation, and must be independently certified by a Quantity Surveyor who is registered with the Australian institute of Quantity Surveyors or a person who

Term	Meaning
	can demonstrate equivalent qualifications in accordance with the definition of 'Quantity Surveyor'.
EPA Act	<i>Environmental Planning and Assessment Act 1979 (NSW).</i>
Funding Application	has the meaning given in clause 6.2.
Government Agency	any government or governmental, administrative, monetary, fiscal or judicial body, department, commission, authority, tribunal, agency or entity in any part of the world.
Index Number	the Consumer Price Index for Australian (All Groups Index for Capital Cities) as published by the Australian Bureau of Statistics.
Land	<p>the site of the Development, being the land contained in the following property titles:</p> <ol style="list-style-type: none"> 1 Lots 115, 249, 252, 253, 305 and 307 in DP754111 ("The Elms"); 2 Lots 14, 183, 184, 187, 200, 283 and 306 in DP754111 and Lots 1 and 2 in DP 126122 ("Holmes"); 3 Lots 116, 162, 317, 318, 321, 322 in DP754111 ("Riverview"); 4 Lots 21, 186 and 251 in DP754111; 5 part Lots 23, 27, 30, 31 in DP754111; and 6 Lot 1 in DP126119.
Local Projects	<p>any projects proposed to be carried out within the Upper Lachlan Shire Council local government area with a preference for any projects located within the localities of Dalton, Gunning and Biala which are aimed at:</p> <ol style="list-style-type: none"> 1 enhancing any aspect of the local environment including, but not limited to, ameliorating any impacts from the Development; or 2 providing any public community service or public facility and public infrastructure.
Mediator	a person appointed as mediator under clause 10.5 of this deed.
Monetary Contribution	the monies paid to the Council in accordance with clause 5 of this deed.
Part 3A Approval	project approval no. MP10_0035 granted by the Planning and

Term	Meaning
	Assessment Commission, as delegate of the Minister for Planning and Infrastructure, under section 75J of the EPA Act which authorises the construction and operation of a gas turbine power station and associated infrastructure known as the Dalton Power Station.
PS 10-008	the planning system circular PS 10-008 issued on 10 May 2010 in the form at Attachment 1.
Quantity Surveyor	Independent quantity surveyor nominated by the Council and acceptable to the Company (acting reasonably)
Stage 1	Stage 1 of the Development comprising construction and operation of between two and four open cycle gas turbines with a capacity of up to 750 megawatts.
Stage 1 Capital Expenditure	the total capital expenditure for Stage 1, being an amount calculated in accordance with PS 10-008, as certified by a Quantity Surveyor.
Stage 1 Date	the date on which the Company gives notice to proceed for Stage 1 to its principal contractor for engineering, procurement and construction.
Stage 1 Monetary Contribution	an amount calculated in accordance with the following formula as adjusted in accordance with clause 5.1(b) of this deed: $\frac{0.833\% \times \text{Stage 1 Capital Expenditure}}{40}$
Stage 1 Monetary Contribution Year 0	an amount calculated in accordance with the following formula: $\frac{0.833\% \times \text{Stage 1 Capital Expenditure}}{40}$
Stage 2	Stage 2 of the Development comprising construction and operation of one or more additional gas turbines
Stage 2 Capital Expenditure	the total capital expenditure for Stage 2, being an amount calculated in accordance with PS 10-008, as certified by a Quantity Surveyor. For the avoidance of doubt, the Stage 2 Capital Expenditure does not include the Stage 1 Capital Expenditure.
Stage 2 Date	the date on which the Company gives notice to proceed for Stage 2

Term	Meaning
	to its principal contractor for engineering, procurement and construction.
Stage 2 Monetary Contribution	an amount payable annually over forty years calculated in accordance with the following formula as adjusted in accordance with clause 5.2(c) of this deed: $\frac{0.833\% \times \text{Stage 2 Capital Expenditure}}{40}$
Stage 2 Monetary Contribution Year 0	an amount calculated in accordance with the following formula: $\frac{0.833\% \times \text{Stage 2 Capital Expenditure}}{40}$

1.2 Interpretation

- (a) Clause headings are for convenience only and will be ignored in the interpretation of this deed.
- (b) References to a party include the successors and permitted assigns of that party.
- (c) Words importing the singular include the plural and words importing the plural include the singular.
- (d) Words importing a person includes any company, partnership, joint venture, association, corporation or other body corporate and any Government Agency as well as an individual.
- (e) Nothing contained in this deed will be deemed or construed as creating the relationship of partnership.
- (f) References to a month mean a calendar month and a reference to a year means a calendar year.
- (g) References to any document include any permitted amendment, supplement to or replacement or novation of the document.
- (h) References to any legislation or to any section or provision of any legislation includes any:
 - (1) statutory modification or re-enactment of or any statutory provision substituted for that legislation, section or provision; or
 - (2) ordinances, by-laws, regulations and other statutory provision substituted for that legislation, section or provision.
- (i) Other grammatical forms of defined words or expressions have corresponding meanings.
- (j) 'Including' and similar expressions are not words of limitation.
- (k) A reference to a clause, party, schedule, attachment or exhibit is a reference to a clause of, and a party, schedule, attachment or exhibit to, this agreement.
- (l) A promise on the part of 2 or more persons binds them jointly and severally.

- (m) A reference to an agreement other than this agreement includes a deed and any legally enforceable undertaking, agreement, arrangement or understanding, whether or not in writing.
- (n) A reference to liquidation or insolvency includes appointment of an administrator, compromise, arrangement, merger, amalgamation, reconstruction, winding-up, dissolution, deregistration, assignment for the benefit of creditors, scheme, composition or arrangement with creditors, insolvency, bankruptcy, or any similar procedure or, where applicable, changes in the constitution of any partnership or person, or death.
- (o) No provision of this agreement will be construed adversely to a party because that party was responsible for the preparation of this agreement or that provision.
- (p) A reference to a body, other than a party to this agreement (including an institute, association or authority), whether statutory or not:
- (1) which ceases to exist; or
 - (2) whose powers or functions are transferred to another body,
- is a reference to the body which replaces it or which substantially succeeds to its powers or functions.

2 Planning Agreement

The parties agree that this deed is a planning agreement governed by Subdivision 2 of Division 6 of Part 4 of the EPA Act.

3 Application of this deed

This deed satisfies condition B16 of the Part 3A Approval.

4 Operation of this deed

- (a) The parties agree that this deed will bind the parties from the date that AGL Energy Ltd and Upper Lachlan Shire Council have both executed, signed and dated the deed.
- (b) The parties agree that this deed will not operate until the later of:
- (1) the date on which the Company obtains a Construction Certificate for any part of the Development; and
 - (2) the Stage 1 Date.

5 Payment of the monetary contribution

5.1 Stage 1 Monetary Contribution

- (a) If the Company proceeds to Stage 1, the Company must pay to the Council the Stage 1 Monetary Contribution:

- (1) within 30 days of the Stage 1 Date; and
 - (2) each year up to and including the 39th anniversary of the Stage 1 Date, within 30 days of the anniversary of the Stage 1 Date.
- (b) The parties agree that the Stage 1 Monetary Contribution will be reviewed and adjusted each year on the anniversary of the Stage 1 Date in accordance with the following formula:
- $$MC = \frac{A \times B}{C}$$
- Where:
- MC = the Stage 1 Monetary Contribution payable for the following contribution year;
- A = the Stage 1 Monetary Contribution Year 0;
- B = the Index Number last published before the end of the contribution year just ended; and
- C = the Index Number last published before the Stage 1 Date.
- (c) The monetary contribution is a taxable supply for GST in accordance with Clause 12.

5.2 Stage 2 Monetary Contribution

- (a) If the Company proceeds to Stage 2, the Company must pay to the Council the Stage 2 Monetary Contribution:
- (1) within 30 days of the Stage 2 Date; and
 - (2) each year up to and including the 39th anniversary of the Stage 2 Date, within 30 days of the anniversary of the Stage 2 Date.
- (b) The Stage 2 Monetary Contribution is in addition to the Stage 1 Monetary Contribution.
- (c) The parties agree that the Stage 2 Monetary Contribution will be reviewed and adjusted each year on the anniversary of the Stage 2 Date in accordance with the following formula:
- $$MC = \frac{A \times B}{C}$$
- Where:
- MC = the Stage 2 Monetary Contribution payable for the following contribution year;
- A = the Stage 2 Monetary Contribution Year 0;
- B = the Index Number last published before the end of the contribution year just ended; and
- C = the Index Number last published before the Stage 2 Date.
- (d) The monetary contribution is a taxable supply for GST in accordance with Clause 12.

5.3 Application of Monetary Contributions

The Council must hold and apply all Monetary Contributions in accordance with clause 6.

6 Community Enhancement Fund

6.1 Community Enhancement Fund

- (a) The Council must invest all Monetary Contributions in an interest bearing externally restricted reserve fund held in the name of the Council for the purpose of the Community Enhancement Fund.
- (b) The Council must ensure that the Community Enhancement Fund is established and remains established during the term of this deed.
- (c) The Council must ensure that the Company has at least one representative on the Committee at any time, if the Company so chooses.

6.2 Call for funding applications

The Council agrees:

- (a) in February to March each year in which there are funds in the Community Enhancement Fund; or
- (b) any further period determined by the Committee,

to publicly advertise in the Council Voice newsletter and in the local newspapers the availability of funds in the Community Enhancement Fund and to call for applications to be made to the Committee, in the form required by the Committee, from the public, community groups and individuals for funding for Local Projects (**Funding Applications**).

6.3 Notification to Company

The Council must procure that the Committee:

- (a) if requested by the Company, consult the Company in relation to applications made for funding for Local Projects from the Community Enhancement Fund; and
- (b) notifies the Company of each Local Project which is to be funded from the Community Enhancement Fund after full Council adoption and resolution including the amounts of any funding.

6.4 Allocation of funds

- (a) The Council must pay funds from the Community Enhancement Fund to each Local Project recommended from time to time by the Committee for funding from the Community Enhancement Fund in accordance with the determinations made by the full Council of Upper Lachlan Shire Council.
- (b) This deed expressly authorises Council to progressively or otherwise pool funds to fund prioritised projects as recommended by the Committee.

6.5 Public recognition

- (a) If requested by the Company, the Council must publicly acknowledge:
 - (1) the payment of the Monetary Contribution by the Company; and
 - (2) the Company's role in funding any Approved Local Projects via the Community Enhancement Fund.
- (b) The form of public acknowledgment required by clause 6.5(a) is to be agreed by the Council and the Company (acting reasonably) but may include:

- (1) the inclusion of the Company's logo in any advertisement for Funding Applications or an announcement made in relation to the Approved Local Projects and funding determinations; and
- (2) where appropriate for particular Approved Local Projects, a permanent sign recognising that the Approved Local Project was funded by the Company via the Community Enhancement Fund.

6.6 Auditing

- (a) During each year in which there are funds in the Community Enhancement Fund, the Council must appoint an Auditor to reconcile:
 - (1) the Monetary Contributions paid by the Company under clause 5; and
 - (2) any payments made by the Council in accordance with clause 6.4, and identify any corrective payments required.
- (b) The Company and the Council must make any corrective payments identified by the Auditor as being necessary to reconcile the Community Enhancement Fund.
- (c) The costs of the Auditor will be paid out of the Community Enhancement Fund.
- (d) The Auditor must provide to the Company a report on its work undertaken in accordance with clause 6.6(a) within three months of completing that work.

6.7 Administration

The costs of administering the Community Enhancement Fund by Council shall be paid out of the Community Enhancement Fund. The administration costs shall be \$5000 per annum, indexed to CPI over the life of the project.

7 Registration

The parties agree that this deed will be registered on the Land pursuant to section 93H of the EPA Act. All costs associated with the registration of the deed will be payable by AGL Energy Limited.

8 Disposal by the Company of its interest in the Development

Prior to the Company disposing of its interest in the Development to any third party, the Company must procure entry by that third party into a deed with the Council on substantially the same terms and conditions as this deed.

9 No fetter

Nothing in this deed shall be construed as requiring the Council to do anything that would cause it to be in breach of any of its obligations at law, and without limitation, nothing shall be construed as limiting or fettering in any way the exercise of any statutory discretion or duty.

10 Dispute resolution

10.1 Notice of dispute

If a party claims that a dispute has arisen under this deed (**Claimant**), it must give written notice to the other party (**Respondent**) stating the matters in dispute and designating as its representative a person to negotiate the dispute (**Claim Notice**).

10.2 Response to Claim Notice

Within 20 business days of receiving the Claim Notice, the Respondent must notify the Claimant of its representative to negotiate the dispute.

10.3 Negotiation

The nominated representatives must:

- (a) meet to discuss the matter in good faith within 10 business days after service by the Respondent of notice of its representative; and
- (b) use reasonable endeavours to settle or resolve the dispute within 15 business days after they have met.

10.4 Further notice if not settled

If the dispute is not resolved within 15 business days after the nominated representatives have met, either party may give to the other a written notice calling for determination of the dispute (**Dispute Notice**).

10.5 Mediation

The parties agree that a dispute shall be mediated if it is the subject of a Dispute Notice, in which case:

- (a) the parties must agree the terms of reference of the mediation within 5 business days of the receipt of the Dispute Notice (the terms shall include a requirement that the mediation rules of the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply);
- (b) the appointment of a Mediator will be agreed between the parties, or failing agreement within 5 business days of receipt of the Dispute Notice, either party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply to appoint a mediator;
- (c) the Mediator appointed pursuant to this clause 10.5 must:
 - (1) have reasonable qualifications and practical experience in the area of the dispute; and
 - (2) have no interest or duty which conflicts or may conflict with his function as mediator, he being required to fully disclose any such interest or duty before his appointment;
- (d) the Mediator shall be required to undertake to keep confidential all matters coming to his knowledge by reason of his appointment and performance of his duties;
- (e) the parties must within 5 business days of receipt of the Dispute Notice notify each other of their representatives who will be involved in the mediation;

- (f) the parties agree to be bound by any mediation settlement and may only initiate judicial proceedings in respect of a dispute which is the subject of a mediation settlement for the purpose of enforcing that mediation settlement;
- (g) in relation to Costs and expenses:
 - (1) each party will bear their own professional and expert costs incurred in connection with the mediation;
 - (2) the Costs of the Mediator will be shared equally by the parties unless the Mediator determines a party has engaged in vexatious or unconscionable behaviour in which case the Mediator may require the full costs of the mediation to be borne by that party.

10.6 Litigation

If the dispute is not finally resolved in accordance with clause 10.5, either party is at liberty to litigate the dispute.

10.7 Exchange of information

The parties acknowledge that the purpose of any exchange of information or documents or the making of any offer of settlement pursuant to this clause is to attempt to settle the dispute between the parties. No party may use any information or documents obtained through the dispute resolution process established by this clause 10 for any purpose other than an attempt to settle a dispute between the parties.

10.8 Continue to perform obligations

Each party must continue to perform its obligations under this deed, notwithstanding the existence of a dispute.

11 GST

11.1 Interpretation

- (a) Except where the context suggests otherwise, terms used in this clause 11 have the meanings given to those terms by the *A New Tax System (Goods and Services Tax) Act 1999* (as amended from time to time).
- (b) In this clause 11:
 - (1) "monetary consideration" means any consideration expressed as an amount of money; and
 - (2) "non taxable supply" means a supply that is not a taxable supply.
- (c) Any part of a supply that is treated as a separate supply for GST purposes (including attributing GST payable to tax periods) will be treated as a separate supply for the purposes of this clause.
- (d) A reference to something done (including a supply made) by a party includes a reference to something done by any entity through which that party acts.

11.2 Reimbursements

Any payment or reimbursement required to be made under this deed that is calculated by reference to a cost, expense, or other amount paid or incurred will be limited to the total

cost, expense or amount less the amount of any input tax credit to which an entity is entitled for the acquisition to which the cost, expense or amount relates.

11.3 Additional amount of GST payable

If GST becomes payable on any supply made by a party ("Supplier") under this deed:

- (a) any amount payable or consideration to be provided under any provision of this deed (other than this clause), for that supply is exclusive of GST;
- (b) any party ("Recipient") that is required to provide consideration to the Supplier for that supply must pay an additional amount to the Supplier equal to the amount of the GST payable on that supply ("GST Amount") at the same time as any other consideration is to be first provided for that supply; and
- (c) the Supplier must provide a tax invoice to the Recipient for that supply, no later than the time at which the GST Amount for that supply is to be paid in accordance with this clause.

11.4 Variation

- (a) If the GST Amount properly payable in relation to a supply (as determined in accordance with clause 11.3), varies from the additional amount paid by the Recipient under clause 11.3, then the Supplier will provide a corresponding refund or credit to, or will be entitled to receive the amount of that variation from, the Recipient.
- (b) The Supplier must issue an adjustment note to the Recipient in respect of any adjustment event occurring in relation to a supply made under or in connection with this deed as soon as reasonably practicable after the Supplier becomes aware of the adjustment event.

12 General

12.1 Costs

The parties agree to meet their own Costs in connection with:

- (a) the negotiation, preparation and execution of this deed;
- (b) performing its obligations under this deed; and
- (c) the advertising and exhibiting of this planning agreement in accordance with the EPA Act.

12.2 Notices

- (a) A party notifying or giving notice under this deed must do so in writing addressed to that party in accordance with the details nominated in Schedule 1 (or any alternative details nominated to the sending party by notice).
- (b) A notice given in accordance with clause 12.2(a) will be deemed to have been given and received:
 - (1) if delivered, on receipt;
 - (2) if posted via registered post, three business days after posting;
 - (3) if sent by facsimile on confirmation of the correct transmission of the facsimile; and

- (4) any notice received after 5.00 pm or on a day not a business day shall be deemed to have been received at 9.00 am on the next business day.

12.3 Waiver

- (a) The fact that a party fails to do, or delays in doing, something the party is entitled to do under this deed, does not amount to a waiver of any obligation of, or a breach of obligation by, another party.
- (b) A waiver by a party is only effective if it is in writing.
- (c) A written waiver by a party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

12.4 Governing law

This deed is governed by New South Wales law and each party irrevocably submits to the exclusive jurisdiction of courts exercising jurisdiction in New South Wales and courts of appeal from them in respect of any proceedings arising out of or in connection with this deed.

12.5 Prior agreements superseded

This deed:

- (a) wholly replaces and excludes all prior agreements, correspondence, negotiations, representations, explanations and statements between the parties covering or in connection with the matters covered by this deed; and
- (b) is the entire agreement between the parties in respect of the matters covered by this deed.

12.6 Modification of deed

No modification or alteration of any provision of this deed will be valid unless it is in writing and signed by all parties to this deed.

12.7 Representations and warranties

The parties represent and warrant that they have power to enter into this deed and comply with their obligations under the deed and that entry into this deed will not result in the breach of any law.

12.8 Severability

If any provision of this deed is invalid under the law of any jurisdiction the provision is enforceable in that jurisdiction to the extent that it is not invalid, whether it is in severable terms or not.

12.9 Confidentiality, media releases and enquiries

- (a) The parties agree that the terms of this deed are not confidential and this deed may be treated as a public document and exhibited or reported without restriction by any party.

- (b) If requested by a party, the other party must not issue, publish or authorise any media release or advertisement concerning this deed, without obtaining the other party's prior written approval (which approval may not be unreasonably withheld).

12.10 Counterparts

This deed may be executed in any number of counterparts that together will constitute one instrument. A party may execute this deed by signing any counterpart.

12.11 No fiduciary relationship

Nothing in this deed will be construed or interpreted as constituting the relationship between the parties as that of a partnership, joint venture or any form of fiduciary relationship.

12.12 Further acts

Each party must promptly execute all documents and do all things reasonably required to effect, perfect or complete this deed and all transactions incidental to it.

12.13 Enforcement

This deed may be enforced by any party in any court of competent jurisdiction subject to compliance with clause 10 of this deed.

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Notice details

The Upper Lachlan Shire Council

Address 44 Spring Street, Crookwell NSW 2583
Attention General Manager
Phone (02) 4830 1000
Fax (02) 4832 2066
Email jbell@upperlachlan.nsw.gov.au

AGL Energy Ltd

Address Level 21, 101 Miller Street, North Sydney NSW 2060
Attention Mark Stephens
Phone (02) 9921 2280
Fax (02) 9921 2474
Email mstephens@agl.com.au

Executed as an agreement

Signed for
The Upper Lachlan Shire Council

sign here ▶  _____

print name JOHN BELL _____

in the presence of

sign here ▶  _____
Witness

print name TINA DODSON _____

Signed for
AGL Energy Ltd
by their authorised representative

sign here ▶  _____

print name Anthony Fowler _____

in the presence of

sign here ▶  _____
Witness

print name JALE BLAMPIED _____

Planning Circular



Planning

PLANNING circular

PLANNING SYSTEM

Regional and State planning

Circular	PS 10/000
Issued	10 May 2010
Related	

New definition of capital investment value

This circular is to advise councils, developers and the community of a new definition of 'capital investment value' under the *Environmental Planning and Assessment Regulation 2000* and certain State Environmental Planning Policies.

Introduction

A new definition of capital investment value (CIV) has been included in the *Environmental Planning and Assessment Regulation 2000* (the Regulation) to provide greater certainty as to what items should be included and excluded when calculating the CIV for a project.

From 7 May 2010, this definition is to be used when considering whether Schedule 1 of the State Environmental Planning Policy (Major Development) 2005 (MD SEPP) identifies a proposal as a project to which Part 3A of the *Environmental Planning and Assessment Act 1979* (EP&A Act) applies or if it is an application to be determined by a Joint Regional Planning Panel (Regional Panel). The definition is also to be used to determine the fees payable for an application under Part 3A of the EP&A Act. It is also relevant to certain other types of development and actions covered by SEPPs that reference the term

However it does not apply for the purpose of calculating an application fee for a Part 4 development application, which continues to use 'cost of works' (see Clause 246 of the Regulation).

On 7 May 2010, the *State Environmental Planning Policy Amendment (Capital Investment Value) 2010* (the CIV SEPP) amended several State Environmental Planning Policies (SEPPs) to ensure the definition of CIV is consistent throughout the NSW planning system.

Changes relating to the Regulation

The amended definition is included in clause 3 of the Regulation, as follows:

Capital investment value of a development or project includes all costs necessary to establish and operate the project, including the design and construction of buildings, structures, associated infrastructure and fixed or mobile plant and equipment, other than the following costs:

(a) amounts payable, or the cost of land dedicated or any other benefit provided, under a condition imposed under Division 5 or 6A of Part 4 of the *Environmental Planning and Assessment Act* or a planning agreement under that Division

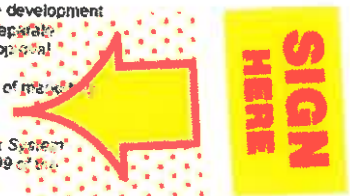
(b) costs relating to any part of the development or project that is the subject of a separate development consent or project approval

(c) land costs (including any costs of market and selling land)

(d) GST (as defined by A New Tax System (Goods and Services Tax) Act 1999 of the Commonwealth)

The main change to the definition is a **clear direction** that the following items should be excluded when calculating the CIV for a development:

- Development contributions - it is not appropriate to include development contribution charges in calculating the capital investment value. These charges are considered an external cost that should not contribute to the value of the development or be included for the purpose of calculating the project fees or other developer charges.



- Costs relating to any part of the development or project that is, or will be, the subject of a separate development consent or project approval – the capital investment value of the development must only include those works that are subject to the current application, not prior or subsequent applications

CIV made consistent in all SEPPs

The CIV SEPP amends

- MD SEPP
- Statement Environmental Planning Policy (Sydney Regional Growth Centres) 2006
- State Environmental Planning Policy (Infrastructure) 2007, and
- State Environmental Planning Policy (Western Sydney Parklands) 2009

These instruments are amended to ensure CIV has the same meaning as in the Regulation (as above).

Recent court case on CIV

The recent Land and Environment Court judgment *Calardu Penrith Pty Ltd v Penrith City Council* (2010) NSWLEC 50 Pty Ltd was partly concerned with the calculation of CIV. Although the judgement did not consider the amended definition of CIV it provides relevant principles when calculating CIV, as follows.

- The included costs must relate to works contemplated in the application
- The CIV of a proposed development is to be calculated at the time of lodgement of the application for the purposes of determining whether an application should go to a Regional Panel
- CIV is expressly concerned with "costs" that are of a capital nature
- These costs do not need to be incurred by the proponent/ applicant
- There must be sufficient evidence to support the amounts, and considerable weight should be given to amounts that have been contractually agreed upon
- Finance costs should not be included.

Determination of CIV

- The calculation of CIV under clause 13B of the MD SEPP is one of fact; it is not subject to the 'opinion' of either the Council or the Regional Panel. Any disagreement about the CIV should be resolved objectively by a quantity surveyor.
- The Minister has the sole responsibility for forming the opinion if a development is a project to which Part 3A applies. Once such an opinion is formed, the project remains a Part 3A project regardless of any subsequent variations to CIV (or other relevant factor)

Staged development

When calculating the CIV for a staged development, the CIV of the separate applications comprising the overall staged development must be considered in determining the CIV for that development. However

an application can only be 'staged' at the request of the applicant.

Calculating CIV

The following information is provided as a guide to assist in establishing the types of costs that should be included and excluded when calculating CIV. The following information is not exhaustive and should be considered as a general guide based on the amended definition and the relevant matters raised in the recent court case

Design and construction

The calculation of CIV should include the amount required to design and construct all buildings and other facilities that are part of/ included in the application, including any temporary buildings that will be used during the construction phase.

Structures and infrastructure

CIV should include all costs incurred from the construction of associated structures and infrastructure that are the subject of the current application. These costs include any supplementary or site preparatory works such as remediation, demolition, excavation and filling, that are required for the construction of buildings, provided these works are needed to make the site suitable for construction and for the operation of the project

Site services

CIV should include the costs of providing electrical services, water, gas, sewerage and stormwater drainage, including any temporary diversions and/ or arrangements during construction, and should form part of the application

The costs of fire protection and communications services that are reasonably required to construct and operate the project should also be included.

Site works such as landscaping, car parking, roads and footpaths should also be included.

Plant and equipment

CIV should include standard building plant, such as lifts and air-conditioning, and all specialist and specific equipment related to the operation of the project provided these are specifically included as part of the application.

Fit-out costs of a building may be included in the calculation of CIV where the costs are subject to the application. In such cases, the application would need to include specific tenancy use, and would be defined by specific reference to descriptor in the application. Where such tenancy is not referred to or will be subject to further applications, the fit out costs should not be included.

Labour fees

All labour and personnel costs including the payment of long service levies and other associated construction and labour costs should be included in the calculation of the CIV

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Other fees

Costs such as finance application fees, mortgage stamp duty, fees paid to register strata titles or to amalgamate land prior to development, and interest payable on the loans associated with the development should be excluded in the calculation of CIV.

Further information

A copy of the amended Regulation and relevant SEPPs are available on the NSW legislation website:

<http://www.legislation.nsw.gov.au>

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

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