



Urbanista

AFFORDABLE HOUSING
CONTRIBUTION SCHEME
RESILIENT SYDNEY PROJECT

STANDARD LEP CLAUSE



Purpose

The availability of a standard clause for use by councils in a local environmental plan (LEP) when introducing an Affordable Housing Contribution Scheme (AHCS) will assist in:

- Streamlining the process for councils to implement an AHCS and for the Department of Planning and Environment and Parliamentary Counsel in reviewing draft clauses;
- Providing transparency to the community and stakeholders;
- Notifying the market of intention to require affordable housing contribution;
- Delivering consistency for developers;
- Protecting against challenges to the validity of conditions applying affordable housing levies; and
- Enabling councils to join with neighbouring councils, for example in a District or Regional Affordable Housing Contribution Scheme.

Simplicity and clarity in drafting is critical, particularly in protecting against challenges to the validity of conditions. This was evidenced in a determination of the Land and Environment Court in 2022 in the case of *Blanc Black Projects Pty Limited v Willoughby City Council* where a condition requiring an affordable housing contribution was disallowed. A large part of the reasoning for disallowing the contribution stemmed from the way the requirements detailed in the relevant LEP clause were applied.

It is anticipated that the standard LEP clause be used to activate an AHCS developed using the standard template developed through this project.

Approach

In developing the standard clause for discussion, two potential applications were considered:

Context 1) Application to identified areas (zones, precincts or sites) ;

Context 2) Application to both identified areas (as in Context 1) and other sites as and when they are rezoned.

Two draft clauses have been prepared by Urbanista to cover these circumstances. The basic framework is the same for both clauses but Context 2 includes additional provisions to address future uplift (these differences are flagged by green shading).

The basic framework is drawn from a review of clauses used for existing schemes. Examples of existing LEP clauses are provided in a companion document entitled **AHCS Resources** which is the part of the suite of tools prepared by Urbanista for this project.

The draft clause for context 1 provided here could be used by councils now as a base for preparing a clause for their LEPs. It is consistent with the requirements of the Department of Planning and Environment's ['Guideline for Developing an Affordable Housing Contribution Scheme'](#) (the AHCS Guideline) for identification of areas for rezoning to be covered by an AHCS (p17).

It is acknowledged that there may be legal constraints in applying the approaches proposed for Context 2. Nevertheless, given the potential benefits for such a clause in capturing opportunities for affordable housing, it is considered important that the approach be put forward for consideration and, if appropriate, adopted or adjusted for future use.

For ease of updating and on the basis that it is desirable for the AHCS to detail all relevant provisions, it is proposed that where possible specific requirements be included in the AHCS rather than the LEP clause. Under this approach, the LEP provisions give legal weight to the AHCS in the LEP and all relevant provisions such as the areas to which it applies, the contribution rate, process for collecting and using contributions are in the AHCS.

A key benefit of this approach is that this enables provisions in the AHCS to be amended without the need to amend the LEP through a planning proposal, though the Department of Planning and Environment (DPE) will continue to have a role in approving amendments to an AHCS.

Councils may nevertheless elect instead to set out contribution rates in an LEP clause. Similarly, councils may choose to include a map of contribution areas in the LEP instead of in the AHCS itself. The DPE currently prefers this approach on the basis that it provides accuracy and transparency.

Key elements

General

- Provide a streamlined clause suitable for use by all councils introducing a AHCS with detailed provisions to be included in the accompanying scheme.
- Minimise provisions which create uncertainty or which may be interpreted as allowing unintended discretion in the application of contribution requirements.

Standard LEP Clause

- Applies to areas identified in the LEP Map and sets out the essential requirements to enable affordable housing contribution requirements to be collected in accordance with the relevant AHCS.
- Activates an AHCS approved through a planning proposal process¹.
- Provide for the dedication of land with Council's agreement at a rate specified in the AHCS to be equivalent of the required affordable housing contribution;
- Clarifies the floor space to which the contributions are required.

Affordable Housing Contribution Scheme

- Provides the local and regionally relevant provisions including:
 - The applicable contribution rates and approach for applying, collecting and updating contributions;
 - Minimum requirements for affordable housing dwellings; and
 - Excluded land or development types e.g. affordable housing, group homes, development under a certain size.
- The **Affordable Housing Contribution Map** in the AHCS identifies where the clause will apply²;
- May be supported by a **Distribution Plan** providing the machinery for applying contributions and tracking outcomes.

¹ This reflects the current requirement for a new scheme or updating of an existing scheme, i.e. a planning proposal required for a new scheme or to change the AHCS contribution rate or where contributions apply but not for other changes to a scheme. This could be further streamlined by replacing the requirement for a planning proposal with another agreed process in keeping with that used for other contribution plans.

² Consideration has been given to whether the map should be an LEP map or in the AHCS. If a streamlined process is to be achieved whereby the clause enables a duly prepared and approved AHCS, the preferred approach is to include all relevant provisions including contribution rates and where they apply in the AHCS and Scheme Map.

Standard LEP Clause: Identified areas (Context 1)

Utilising the approach outlined above, the following base clause has been developed for activating an AHCS which applies to identified zones, precincts or sites.

STANDARD CLAUSE: APPLICATION TO IDENTIFIED AREAS
<p>Preliminary, X.X Definitions</p> <p>In this clause a reference to:</p> <p>(1) the Affordable Housing Contribution Scheme means the Affordable Housing Contribution Scheme adopted by Council.</p> <p>(2) an affordable housing contribution scheme area means land shown as an affordable housing contribution area on the Affordable Housing Contribution Map included in the Affordable Housing Contribution Scheme.</p> <p>(3) an affordable housing levy contribution, in relation to the development on a site, means the percentage of the gross floor area³ required as affordable housing in pursuance of this clause determined in accordance with the Affordable Housing Contribution Scheme.</p> <p>(4) Excluded development means development that is excluded development⁴ under the Approved Affordable Housing Contributions Scheme.</p>
<p>X.X Affordable housing</p> <p>(1) This clause applies to development (other than excluded development) on land identified as being within an affordable housing contribution area.</p>
<p>(2) Development consent must not be granted in respect to land within an affordable housing contribution area unless the consent authority is satisfied that the proportion of the gross floor area of the development used for affordable housing is not less than the amount calculated in accordance with the Affordable Housing Contribution Scheme.</p>
<p>(3) When granting development consent to development to which this clause applies, in lieu of the provision of affordable housing under sub-clause (2), the consent authority may impose a condition in accordance with the Affordable Housing Contribution Scheme requiring a monetary contribution or the dedication of land or both.</p>

³ See **Attachment 1** for explanation of the rationale for use of GFA rather than Total Built Area as is currently used in some instances. Where an existing scheme is in place that uses an alternative approach, the reference to gross floor area may need to be varied.

⁴ **Note:** Excluded development could embrace identified types of development such as affordable housing or boarding houses or development that will result in the creation of less than X square metres of total floor area.

For example. The AHCS could exclude development that involves –

- (i) the erection of a new building the gross floor area of which is less than 200 square metres;
- (ii) alterations to an existing building that will result in the creation of less than 200 square metres of gross floor area that is intended to be used for the purpose of residential accommodation;
- (iii) alterations to an existing building that will result in the creation of less than 60 square metres of gross floor area that is intended to be used for a purpose other than residential accommodation;
- (iv) the demolition of existing floor area and the subsequent creation, whether for the same or a different purpose, of less than 200 square metres of gross floor area;
- (v) a change of use of less than 60 square metres of existing floor area of a building.

STANDARD CLAUSE: APPLICATION TO IDENTIFIED AREAS

(4) A condition imposed under this clause must provide for the **affordable housing levy contribution** to be satisfied—

(a) by dedication in favour of the Council of land comprising—

(i) **1 or more dwellings** in accordance with the **Affordable Housing Contribution Scheme**, with any remainder paid as a monetary contribution to the Council, or

(ii) other land approved by the Council in accordance with the **Affordable Housing Contribution Scheme**, with any remainder paid as a monetary contribution to the Council, or

(b) [if the Council agrees]⁵, by monetary contribution paid to the Council.

(5) The rate at which a monetary contribution or a contribution of land is to be taken to be equivalent to floor area for the purposes of the **affordable housing levy contribution** is to be calculated in accordance with the **Affordable Housing Contribution Scheme**.

(6) To avoid doubt—

(a) it does not matter whether the floor area, to which a condition under this clause relates, was in existence before, or is created after, the commencement of this clause, or whether or not the floor area concerned replaces a previously existing area, and

(b) the demolition of a building, or a change in the use of the land, does not give rise to a claim for a refund of any contribution.

Table 1: Example of contribution rate provisions for identified areas under Context 1

Minimum proportion of gross floor area of the building used for affordable housing to satisfy Clause x(2)—

A. Context 1 – Identified Areas :

(i) on land within —

Area:	DA lodged	Affordable Housing Contribution Rate	
		before xx/month/yr	after xx/month/yr
A		U%	X%
B		V%	Y%
C		W%	Z%

⁵ Council may choose to add the words 'if the Council agrees' if primarily seeking in-kind contributions.

Standard LEP Clause: Identified and future contribution areas (Context 2)

The draft clause for Context 2 is designed to capture both specifically identified areas (as in Context 1) and additional land as and when it is rezoned or upzoned. It does this by identifying 'Future Affordable Housing Contribution Areas' in addition to provisions for requiring contributions in identified areas. These are precincts, sites or zones where affordable housing contributions will be required in the event land is rezoned or upzoned for residential or business purposes through a Council or proponent led planning proposal.

As discussed further below, for practical implementation, a more streamlined approach to setting contribution rates would be required.

The objectives of this approach are to

- Minimise lost opportunities when sites are rezoned without a contribution framework in place;
- Put the market on notice of council's intention to require a contribution to provide transparency and so that this can be factored into land values;
- Remove the uncertainty about future contribution rates to be applied;
- Avoid the need for direct negotiation between development proponents and council in relation to feasibility and contribution rates;
- Reduce administrative burden for DPE and Councils.

Setting contributions for Future Contribution Areas

Contribution rates for Future Affordable Housing Contribution Areas would be set out in the Affordable Housing Contribution Scheme. This approach will make clear that upon rezoning, a contribution will be payable and place the market on notice of the level of contribution payable.

Since a council will not know in advance what level of uplift or zoning change may be proposed, the schedule of rates would set out the applicable rates for different types of zoning change and for different levels of potential uplift (refer to example in Table 2).

To achieve the best outcomes in terms of the objectives set out above, it is suggested that land to which future contributions will be required be widely cast to include all sites which may potentially be subject to a council or proponent led planning proposal for a rezoning (e.g. all land not currently subject to affordable housing contribution requirement excluding environmental zones). This approach will be most effective in minimising lost opportunities and will also avoid market speculation that any specifically identified sites are earmarked for future rezoning.

For the future contribution areas identified, the Affordable Housing Contribution Scheme would set out the framework for determining the applicable contribution with reference to the current and future zoning and development controls, as illustrated in the example in Table 2.

The implementation of the clause for Context 2 will require Council's approach to setting contribution rates to be identified in advance of any contemplation of rezoning. Under the current approach required for assessing feasibility and determining contribution rates, this is likely to represent a substantial piece of work, particularly in large and varying LGAs.

Work scoped by Urbanista as part of the AHCS Project proposes the development of a streamlined approach to assessing feasibility and setting rates. This would greatly aid the identification of the contribution framework to apply for 'Future Affordable Housing Contribution Areas' and avoid the need for undesirable site-by-site determinations.

As the future contribution rates would be set with reference to the level of uplift and the relevant zoning change, they can be published in advance, placing the market on notice of the requirements to expect. This will assist in limiting speculation about contribution rates and enabling the market to price requirements into the price paid for land. The applicable contribution rate would be confirmed when the future zoning/control is changed based on the methodology set out in the AHCS and illustrated at Table 2.

STANDARD CLAUSE: APPLICATION TO IDENTIFIED & FUTURE CONTRIBUTION AREAS (Context 2)

Note: Text shaded in green indicates varied/additional provisions in the draft standard clause for Context 2 from that provided for Context 1.

Preliminary, X.X Definitions

In this clause a reference to:

- (1) the **Affordable Housing Contribution Scheme** means the Affordable Housing Contribution Scheme adopted by Council as amended or replaced from time to time.
- (2) an **affordable housing contribution scheme area** means land shown as an affordable housing contribution area on the **Affordable Housing Contribution Map** included in the **Affordable Housing Contribution Scheme**.
- (3) an **affordable housing levy contribution**, in relation to the development on a site, means the percentage of the gross floor area⁶ required as affordable housing in pursuance of this clause determined in accordance with the **Affordable Housing Contribution Scheme**.
- (4) **Excluded development** means development that is excluded development⁷ under the **Approved Affordable Housing Contributions Scheme**.
- (5) a **future affordable housing contribution scheme area** means land shown as a **future affordable housing contribution area** on the Future Affordable Housing Contribution Map included in the **Affordable Housing Contribution Scheme**.

⁶ See **Attachment 1** for explanation of the rationale for use of GFA rather than Total Built Area as is currently used in some instances. Where an existing scheme is in place that uses an alternative approach, the reference to gross floor area may need to be varied.

⁷ **Note:** Excluded development could embrace, for example, identified types of development such as affordable housing or boarding houses or development that will result in the creation of less than X square metres of total floor area.

For example. The AHCS could exclude development that involves –

- (i) the erection of a new building the gross floor area of which is less than 200 square metres;
- (ii) alterations to an existing building that will result in the creation of less than 200 square metres of gross floor area that is intended to be used for the purpose of residential accommodation;
- (iii) alterations to an existing building that will result in the creation of less than 60 square metres of gross floor area that is intended to be used for a purpose other than residential accommodation;
- (iv) the demolition of existing floor area and the subsequent creation, whether for the same or a different purpose, of less than 200 square metres of gross floor area;
- (v) a change of use of less than 60 square metres of existing floor area of a building.

STANDARD CLAUSE: APPLICATION TO IDENTIFIED & FUTURE CONTRIBUTION AREAS (Context 2)
(6) residential or business purposes includes development comprising residential accommodation and/or commercial premises as defined in the standard instrument and any purposes ancillary thereto.
<p>X.X Affordable housing</p> <p>(1) This clause applies to development (other than excluded development)</p> <p>(a) on land identified as being within an affordable housing contribution area;</p> <p>(b) on land identified as being within a future affordable housing contribution area that is allowed because of the initial zoning of a site or the rezoning of a site for residential or business purposes.</p>
(2) Development consent must not be granted in respect to land within an affordable housing contribution area unless the consent authority is satisfied that the proportion of the gross floor area of the development used for affordable housing is not less than the amount shown on the Affordable Housing Contribution Scheme Map or specified in the Affordable Housing Contribution Scheme .
(3) Development consent must not be granted in respect to land within a future affordable housing contribution area unless the consent authority is satisfied that the proportion of the gross floor area of the development used for affordable housing is not less than the amount shown on the Future Affordable Housing Contribution Scheme Map or specified in the Affordable Housing Contribution Scheme .
(4) When granting development consent to development to which this clause applies, in lieu of the provision of affordable housing under sub-clause (2) or sub-clause (3), the consent authority may impose a condition in accordance with the Affordable Housing Contribution Scheme requiring a monetary contribution or the dedication of land or both.
<p>5) A condition imposed under this clause must provide for the affordable housing levy contribution to be satisfied—</p> <p>(a) by dedication in favour of the Council of land comprising—</p> <p>(i) 1 or more dwellings in accordance with the Affordable Housing Contribution Scheme, with any remainder paid as a monetary contribution to the Council, or</p> <p>(ii) other land approved by the Council in accordance with the Affordable Housing Contribution Scheme, with any remainder paid as a monetary contribution to the Council, or</p> <p>(b) [if the Council agrees]⁸, by monetary contribution paid to the Council.</p>
(6) The rate at which a monetary contribution or a contribution of land is to be taken to be equivalent to floor area for the purposes of the affordable housing levy contribution is to be calculated in accordance with the Affordable Housing Contribution Scheme .
<p>(7) To avoid doubt—</p> <p>(a) it does not matter whether the floor area, to which a condition under this clause relates, was in existence before, or is created after, the commencement of this clause, or whether or not the floor area concerned replaces a previously existing area, and</p> <p>(b) the demolition of a building, or a change in the use of the land, does not give rise to a claim for a refund of any contribution.</p>

⁸ Council may choose to add the words ‘if the Council agrees’ if primarily seeking in-kind contributions.

Table 2: Example of Contribution Rate provisions for Context 2

Minimum proportion of gross floor area of the building used for affordable housing to satisfy Clause x(2)–

B. Context 2 - Future affordable housing contribution requirements - Example

(i) on land rezoned (e.g R4) with increased density

Proposed FSR	Affordable Housing Contribution Rate
< X:X	X%
≥ X:X < X:X	Y%
≥ X:X	Z%

(ii) on land rezoned from 'x' (e.g. RU1) to 'y' (e.g R4)

Proposed FSR	Affordable Housing Contribution Rate
< X:X	X%
≥ X:X < X:X	Y%
≥ X:X < X:X	Z%

(iii) on land rezoned from 'z' (e.g. E1) to 'aa' (e.g. MU1)

Proposed FSR	Affordable Housing Contribution Rate
< X:X	X%
≥ X:X < X:X	Y%
≥ X:X < X:X	Z%

Use of Gross Floor Area versus Total Built Area

It is proposed that the clause be applied to *gross floor area* of development to which the clause applies.

Some existing AHCS apply to gross floor area while others include all built area to the outer face of the building and balconies. It is understood that the objective in capturing the total built area is to ensure that no floorspace escapes the requirement to contribute. This is a legitimate objective but it is considered that it is simpler to allow for this in calculating the applicable rate to be applied to relevant gross floor area.

The example below illustrates this:

Proposal 20 unit development of units of 50m²

Applicable contribution rate: 10% of floorspace equivalent to 2 units

Option 1 GFA

GFA per unit 65m²

Total GFA for development 1300m²

Option 2 Total Built Area

Balconies and Built area external face 10m² per unit

Total built area per unit 75m²

Total for built area for development 1500m²

Assessment of applicable rate and total contribution

In either case the contribution of 10% would be equivalent to 2 units.

If units were valued at the market value of dwellings of a similar size and quality to those proposed at, for example \$500,000 each, the total contribution value would be \$1m.

Converting this to \$/m² rate:

Option 1: $\$1,000,000 \div 1300\text{m}^2 = \$769/\text{m}^2$

Option 2: $\$1,000,000 \div 1500\text{m}^2 = \$666/\text{m}^2$

So while the rate will be applicable to a larger square metre area in Option 2, the applicable rate will be lower and the resulting size of the contribution will be the same. The final total contribution will be the same under both options.