5.3 Cost sharing

5.3.1 Introduction and issues

Duty to mitigate

The RMA places a duty on a developer to avoid, remedy or mitigate any adverse effects on the environment arising from their development (s17). The “environment” includes all physical resources (s 2(1) RMA), such as the state highway network. Further, decision makers under the RMA act in accordance with the sustainable management purpose of the Act. This purpose requires the development of natural and physical resources to be managed in a way that avoids, remedies or mitigates any adverse effects on the environment.

Section 5.2 above provides guidance on Transit’s approach to assessing development proposals and identifying the mitigation measures required for proposals that may have adverse effects on the state highway network.

A developer may be able to mitigate the effects of a development on the state highway network on land they own (for example, mitigating against reverse sensitivity effects through building design or mitigating against unsafe access by providing land for a slip lane). However, mitigation works may be required on a state highway or local road. Therefore, a developer may make a monetary contribution to Transit or the local road authority towards the costs of providing the mitigation, or in appropriate circumstances may undertake works to upgrade the road network themselves.

Cost sharing

Where mitigation takes the form of a new road or an improvement to an existing state highway, it is often the case that there will be wider network benefits arising from the mitigation measure over and above the minimum improvement in service or safety that would be needed solely to address the adverse effects of the development proposal. Equally there may be cases where the road improvement measure would have been undertaken by Transit in due course in any case, and the development brings forward in time the need for implementation.

In these circumstances, it may be appropriate for the mitigation costs to be shared between the developer, Transit and other parties.

In this PPM the term “cost sharing” refers to any situation where a developer makes a contribution towards the costs of a road network improvement triggered by the need to mitigate adverse effects of their development by the provision of money, land and/or works. Mitigating direct effects of property access, such as the need for improved sight distances or sealed entranceways, is not subject to cost sharing because the developer is required to pay the full cost.
Types of contribution: Contributions from developers towards the costs of projects to provide or improve transport infrastructure come in several forms:

1. developer contributions under the Local Government Act 2002;
2. financial contributions under the RMA;
3. side agreements to secure contributions of land, works or money;
4. in-kind contributions (for example of land); or
5. construction of the mitigation measures by the developer (for example a section of new road or a slip lane) followed by vesting of the asset as a state highway or local road.

Availability of matching funds: Where a particular package of mitigation needs to be partially funded by Transit, Transit may not have the funds readily available to provide its share. The more notice and certainty Transit has in relation to a proposed development, the higher the likelihood that it can be considered and included in the SHF.

Phasing of development and infrastructure provision: Ideally, the required transport infrastructure will be in place before the transport effects of a new development occur. However, developers may find funding mitigation difficult until at least part of the development has been completed. To deal with this issue, larger developments may need to be phased, such that development below a certain threshold can be undertaken with limited mitigation and development beyond that threshold level can only be carried out once the required transport infrastructure is in place.

Cumulative effects: Where a succession of small to medium-scale developments have a significant adverse effect on the state highway network, it can be difficult to identify the point in the time when a state highway network improvement becomes required, or the proportion of the cost of the improvement that should be attributed to each development. The complexities of these situations can sometimes be dealt with by a side agreement involving Transit, the developer and the local authority.
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<th>5.3.2</th>
<th><strong>Cost sharing policy</strong></th>
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<td><em>Transit will give effect to the Integrated Planning Policy by implementing this supporting policy:</em></td>
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<td>Significant adverse effects of new development on the safety and/or function of the state highway network should be avoided in the first instance, and if unable to be avoided should be remedied or mitigated. Transit will:</td>
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<td>1. Seek sharing of the costs of state highway network improvements through contributions of land, works or money from developers, local authorities and other relevant parties (if appropriate) to mitigate the adverse effects of development on the state highway network where:</td>
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<td>• the development will have a more than minor adverse effect on the safety and/or function of a state highway;</td>
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<td>• practical and economically justifiable solutions exist to mitigate the adverse effects; and</td>
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<td>• there is reasonable certainty through the cost sharing arrangement that the state highway works will be undertaken within a reasonable time period.</td>
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<td>2. Negotiate with developers, local authorities and other relevant parties to agree the equitable sharing of costs, generally based on the extent the development is a trigger for the works, whether the development significantly advances a project identified in Transit’s State Highway Forecast or generates a new or amended project, and the real cost to meet Transit’s requirements to mitigate the effects on the state highway network.</td>
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<td>3. Seek recognition of the importance of sharing the costs of state highway network improvements directly related to developments in regional policy statements, district plans, long term council community plans and other planning documents such as growth strategies and regional land transport strategies through the inclusion of objectives, policies and, where appropriate, rules.</td>
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### Method 1 - Provision in planning documents to enable cost sharing

**Introduction**

Local authorities have a number of statutory and non-statutory mechanisms available to collect contributions from developers. Transit will advocate for appropriate mechanisms to be included in regional and district council planning documents so that these mechanisms are coordinated and available for use.
Under the RMA, local authorities can collect financial contributions, through the imposition of appropriate conditions on resource consents. For a local authority to impose a consent condition requiring the payment of a financial contribution the relevant regional or district plan or proposed regional or district plan must specify the purposes for which such contributions will be required and how the amount of any financial contributions is to be determined. Unless the relevant plan provides for the imposition of conditions requiring the payment of financial contributions, a local authority cannot impose such conditions.

Local authorities decide whether to impose consent conditions requiring the payment of financial contributions on a case-by-case basis and any such conditions must meet the usual requirements for ‘reasonableness’ that apply to all resource consent conditions. Developers can appeal the consent decision, including any financial contribution conditions imposed.

It is important that Transit seeks the explicit ability for local authorities to impose conditions requiring the payment of financial contributions to avoid, remedy or mitigate adverse effects on state highways. Given that some local authorities are removing or limiting the financial contributions sections in their plans, it is important that Transit seeks that those plan provisions be retained and (where necessary) explicitly expanded to enable state highways to benefit from financial contributions levied under the RMA where appropriate.

Suggested objectives, policies and rules for inclusion in planning documents are contained in Appendix 4B.

LTCCPs under the LGA are an important mechanism to secure funding for multi-modal transport networks. The inclusion of appropriate funding policies, including those requiring contributions from developers, is important and is actively sought by Transit. This is particularly where:

- an integrated package of local and state highway network transport solutions is required;
- the local road network or alternative mode is integral to the effective functioning of the state highway network; and/or
- there is an opportunity for Transit and a local authority to share the costs of network improvements, such as intersection improvements.

Other planning mechanisms undertaken by local authorities can help secure and coordinate transport funding. While some of these are non-statutory or do not lead to direct requirements for developer contributions, they can help set expectations and provide justification for the quantum of cost sharing arrangements. These mechanisms include:

- structure plans;
- transport plans (including passenger transport plans);
- regional growth and development strategies; and
- RLTSs.
5.3.3.2 Method 2 – Identifying, quantifying and securing cost sharing arrangements

Identification - general approach

Contributions from developers will often be required to directly remedy or mitigate any significant adverse effects of development on the land transport system.

In identifying which developments require cost sharing arrangements, Transit will particularly focus on those with significant adverse effects that must be mitigated in order to ensure Transit provides a safe and sustainable state highway network.

Cost sharing scenarios

Cost sharing arrangements generally fall into two types:

1. If a development gives rise to the need for works on the state highway network that are not listed or provided for in the SHF, then a contribution may be required. The amount of the contribution will be relative to the extent that the development triggers the need for works on the state highway network.

2. If a development gives rise to the need for works that are listed or provided for in the SHF or are a project that Transit intends to undertake more than 10 years into the future and as a result of the development the works will be required ahead of the time that Transit has forecast, then Transit may seek for a contribution towards the costs of bringing the works forward.

Exceptions

Cost sharing arrangements do not apply to the formation of an accessway from a site directly to a state highway, as this is an essential prerequisite for any development fronting a state highway and the developer must meet all associated costs.

There may also be no element of cost sharing in situations where the works are needed only because of the proposed development and there are no associated benefits to the state highway network. In these situations Transit is likely to require the developer to meet all mitigation costs.

Quantifying - matters to consider

When cost sharing is being assessed, there are a number of matters to consider in coming to an appropriate quantification of amounts. These include:

1. whether the development is the sole or substantial cause for the works that are required;

2. whether the necessary mitigation works would only benefit the development, or also benefit the safe and sustainable function of the state highway and/ or other public roads, and whether it is possible to quantify the respective benefits;

3. the effects of the development on congestion and delay on the state highway network (at intersections and on midblocks) in the vicinity of the development and on the wider state highway network

4. the proportion of the traffic or traffic growth on the state highway and local road intersection (where relevant) that will be generated by the development;

5. whether the development significantly advances the need for an
existing state highway project or generates new or amended projects;
6. the real costs in terms of processes, land acquisition and physical works to meet Transit’s requirements to mitigate the adverse effects on the state highway assessed for the time at which the work will be constructed; and
7. any wider implications for the transport network.

**Quantifying - dealing with inflation and interest**

The amount of a developer’s contribution will need to be sufficient to meet the developer’s share of the estimated costs of the works (including process and land acquisition costs) at the time when the works are forecast to be built:

1. if the contribution will be provided by the deposit of money into Transit’s public trust facility: the contribution will generally be the developer’s share of the estimated costs of the works at present, based on the assumption that the facility interest rate is equivalent to the Producer Price (Inputs) Index (PPI Inputs) rate. When that assumption is not valid an alternative approach will be needed, along the lines of that set out below for bonds and bank guarantees; or

2. if the contribution will be secured by a bond or a bank guarantee: the contribution will generally be the developer’s share of the current estimated cost of the works inflated by the average annual movement in the PPI Inputs over the last three years, for the number of years until the forecast completion date of the works. This can be done either by grossing up the bond amount at the beginning or by incremental increases in the bond.

**Negotiating - principles**

The following principles will generally apply when negotiating a cost sharing arrangement:

1. arrangements will generally be negotiated between all relevant parties, which may include Transit, developers, local authorities and other stakeholders.
2. Transit will take a proactive role in organising and facilitating negotiations and will encourage Land Transport NZ to participate in negotiations where relevant.
3. the RMA will often exert some influence, particularly if physical works are contemplated, but agreements may be reached outside the RMA.
4. if mitigation is not possible or is unable to be agreed upon and the adverse transport effects are potentially significant, Transit may seek that the consent application or plan change be declined by the local authority.

**Negotiating – involvement of stakeholders**

Negotiating cost sharing arrangements with developers and local authorities typically occurs in the spirit of cooperation to achieve better outcomes. Due to the voluntary nature of the process and often limited timeframes, Transit proactively seeks negotiated outcomes that involve all relevant stakeholders. This may include the developer, the local authority, other transport providers and other developers and landowners who may directly benefit. If significant contributions of money are sought, Transit will encourage Land Transport NZ to participate in the negotiations.
Negotiating - criteria

Some general criteria for negotiations that Transit will seek to apply are:

1. to negotiate in good faith with all parties, including advising that, at a minimum, Transit’s General Management Team will need to approve any agreement;
2. to require developers to mitigate only the effects of a development to the situation prior to the development occurring or, if Transit considers it appropriate to undertake works itself that would improve the state highway network to a greater degree (e.g. to avoid the construction of interim solutions that would need to be replaced by long term solutions in a relatively short period of time), to seek an equitable contribution from the developer to those works;
3. it may often be preferable from Transit’s perspective to have developers undertake works, especially if the developer is undertaking 100% of the necessary works (although in those circumstances Transit will still retain control over design and construction standards and operations on the existing state highway);
4. to be cautious over cumulative effects or when there is difficulty in identifying the adverse effects of a development, as contributions in these circumstances are often for smaller amounts that can have inefficiently high transaction costs and risks;
5. to ensure all risks (especially those relating to cost and property issues) are identified and managed in the resulting agreement;
6. when setting a time period during which the contribution can be called on, to assess the likely construction date of the proposed works and generally allow a margin of 2 to 3 years;
7. to negotiate if a practical and economically justified solution is available within a reasonable timeframe but not to seek a cost sharing arrangement where this is not the case; and
8. negotiations and agreements about money should be inclusive of GST for both the costs of any works (i.e. estimate plus GST) and the amount of any monetary contributions.

Failure to agree

If mitigation is not possible or not able to be agreed despite Transit’s best endeavours to reach agreement and the adverse effects on the state highway are potentially significant, Transit may seek that any RMA authorisation required for the development be declined on the grounds that the adverse effects cannot be appropriately avoided, remedied or mitigated.
Security - principles

The following principles apply to securing a cost sharing agreement:

1. all agreements are to be secured in writing;
2. all agreements will be different; while there are some critical clauses, there is no standard agreement. Example agreements are contained in Appendix 5E;
3. as a minimum, approval is required from Transit’s General Management Team for all cost sharing agreements;
4. an appropriate form of financial assurance is essential to secure future performance. Bonds provided by a registered bank, similar bank guarantees and/or monies held on trust at Transit’s facility with the Public Trust Office are Transit’s accepted methods of securing agreements, in some cases backed up by encumbrances and caveats to secure the registration of those encumbrances; and
5. guarantees or undertakings from parent companies, company directors or shareholders are not acceptable methods of securing agreements and solicitors trust accounts are not acceptable for the holding of monies.

Agreement content

A cost sharing agreement should set out:

1. the amount of any monetary contribution, the extent of any contribution of physical works and/or the amount of land that is to be vested in the Crown/local authority. Generally Transit will avoid agreements under which a developer or other party agrees to contribute a certain percentage of the costs of the works as these increase the potential for uncertainty and disputes;
2. the event that will trigger Transit issuing an invoice for the contribution (being the developer’s share of the actual cost up to the amount being held on deposit), the implementation of physical works and/or the provision of land;
3. an acknowledgement by the parties that the commitments under the agreement do not impose any obligation on Transit to pursue the required state highway upgrade(s) in any different manner or in accordance with any timetable different from those which it would have pursued if those commitments had not been entered into and/or the developer contribution had not been made;
4. how adjustments are to be made to ensure the true cost in a forward year is included. CPI indexation or the Producer Price (Input) Index will often be inappropriate and it will usually be better to estimate the likely cost of construction as at the likely construction date.
5. Where money is involved, it should be stated that any interest follows the capital (e.g. to Transit or back to the developer);
6. how risks are to be allocated, especially those involving costs and property matters;
7. requirements for an appropriate form of financial assurance, e.g. a bond, to secure the agreement in the event of default by the developer;
8. what happens if the development does not proceed as planned (including delays) or if the developer disposes of their interest in the development;
9. what happens if Transit changes its view on what works are needed and in particular whether the contribution is still payable if Transit alters its position about the nature of the necessary works (e.g. adding traffic signals rather than a roundabout); and
10. conditions to terminate any agreement and release monies held on trust.
Example agreements are set out in Appendix 5E. These are indicative only and each matter will need its own specific agreement.

**Agreements for works**

When Transit allows works to be carried out in a state highway corridor by a developer it will obtain:

- a written agreement with the developer specifying the works to be done, the standards to be achieved and the timeframe by which those works are to be completed;
- an appropriate form of financial assurance, e.g. a bond, to secure the agreement in the event of default by the developer;
- a means of legally binding any successor to the developer to comply with the agreement (if appropriate), e.g. encumbrances and caveats to secure the registration of encumbrances; and
- provision for meeting Transit’s costs in supervising the works and for Transit control over the design and construction of the works.

In some situations it may be appropriate for the parties to agree to also seek the imposition of a resource consent or designation condition or plan change provision requiring the physical works to be undertaken. Generally this is not necessary but if it is pursued care must be taken to ensure the wording of the agreement and the condition are identical in all material respects.

**Securing contributions for works**

Bonds to secure a contribution of physical works should be provided as an unconditional agreement to pay Transit upon demand and issued by a registered bank or other financial institution acceptable to Transit. Transit has developed a form of document that is acceptable to the major banks and protects Transit’s interests. This is set out in Appendix 5E.

The bond should be provided at the time of the agreement. However, if that is not the case, Transit should register an encumbrance on the title to the relevant land title(s) obliging the landowner (or future owners) to provide the bond. Caveats can be used to protect Transit’s position until the encumbrance is in place.

The amount of a bond required to secure a works contribution will vary depending on the circumstances and needs to be determined on a case-by-case basis. As general guidance:

- if the works are likely to be completed within 2 years the amount of any bond should be the estimated cost of the works plus 20% for contingencies and the uncertainties of the estimation process;
- if the works are likely to be completed within 2 to 5 years the amount of the bond should be the estimated cost of the works plus 20% for contingencies and the uncertainties of estimating plus approximately 10% a year to allow for inflation; and
- if the works are likely to be more than 5 years out a more complex agreement is likely to be required which could, for example, include a mechanism for ‘topping up’ the amount of the bond.
**Provision of a bond as a resource consent condition**

A resource consent condition imposed by a local authority can also require the provision of a bond. Such bonds can be registered against the title to the land that is the subject of the consent and bind subsequent owners. Any such consent condition can also provide that the liability of the developer is not limited to the amount of the bond. However, the disadvantage of such bonds is that they can often be varied or released by agreement between the consent holder and the local authority without Transit knowing or being consulted.

**Encumbrances**

In some cases, where there are on-going obligations under the agreement (e.g. a maintenance period or an obligation to pay a monetary contribution into Transit’s Public Trust Office facility at some future time) the registration of an encumbrance on the relevant title(s) is appropriate to secure compliance with those obligations by current and future owners of the land. Encumbrances are also a useful way of ensuring that future owners have notice of the commitment. Appendix 5E sub-section 3 contains an example encumbrance for the circumstances where a Transit objection to a development has been withdraw before payment of a contribution. This will need modification to meet the needs of other agreements or circumstances.

**Where money is to be paid to**

Transit requires all monies to be paid to the interest bearing deposit facility that Transit has established with the Public Trust Office (the facility details are in the example agreements in Appendix 5E).

**Terms for holding money**

The essential terms on which money is to be held under a cost sharing arrangement must include:

- that the monies will be held until some precondition(s) has (or have) been met that is/are not totally within Transit’s control;
- that the money must be paid to Transit once Transit certifies that the preconditions have been met;
- that the money is not to be released to the developer without Transit’s written consent;
- that there is no right to withhold the money if there is any dispute between Transit and the developer on any matter; and
- that any rights of set off have to be negated.

**Developer contributions register**

All agreements, payments and bonds must be entered onto Transit’s developer contributions register.

**Completion of arrangements**

Of great importance is following through and where necessary enforcing cost sharing agreements. This will include completing and executing documentation, executing and registering encumbrances and caveats where required and fulfilling all other obligations under the agreement.