



DEVELOPMENT CONTRIBUTIONS LAND DEDICATION AND WORKS IN KIND POLICY

Adopted: 27 February 2019

TRIM: 063737.2017-009



1. PURPOSE

1.1 New urban development creates the need for additional public amenities and public services. Division 7.1 of Part 7 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) empowers Council to require new urban development to contribute towards the provision of these public services and amenities. Council's various Contributions Plans provide information on:

- a) the extent of anticipated development;
- b) public services and amenities needed to support new development; and
- c) the contributions that new development must make to fund the provision of these services and amenities.

1.2 The purpose of this policy is to establish a framework for the provision and acceptance of Works in Kind (**WIK**) in satisfaction of requirements to pay development contributions in accordance with the provisions of the EP&A Act and Council's various Contributions Plans.

2. DEFINITIONS

Contributions Plan means a Contributions Plan made in accordance with Division 7.11, Subdivision 3 of Part 7 of the EP&A Act.

Defects Liability Period will generally be:

- a) twelve (12) months from the date of issue of the certificate of practical completion for general construction works; and
- b) twenty-four (24) months for vegetation related works, to cover any defective works.

Developer is a person or entity who proposes to carry out development.

Development has the same meaning as in the EP&A Act, being:

- a) the use of land;
- b) the subdivision of land;
- c) the erection of a building;
- d) the carrying out of a work;
- e) the demolition of a building or work; and
- f) any other act, matter or thing referred to in s3.14 of the EP&A Act that is controlled by an environmental planning instrument,

but it does not include any development of a class or description prescribed by the regulations for the purposes of the EP&A Act.

Development Application has the same meaning as in the EP&A Act, being an application for consent under Part 4 to carry out Development but does not include an application for a complying development certificate.

Development Consent has the same meaning as in the EP&A Act, being consent under Part 4 to carry out Development and includes, unless expressly excluded, a complying development certificate.

Development Contributions means monetary contributions required to be paid in accordance with a condition imposed under s7.11 of the EP&A Act.

Land Dedication means dedicating portions of land to Council in conjunction with a plan of subdivision, other than for the purpose of a public road.

EP&A Act means the *Environmental Planning and Assessment Act 1979* (NSW).

Works in Kind (WIK) refers to the construction or provision of the whole or part of public amenities and/or public services, and the dedication of land identified in a works schedule in a Contributions Plan that applies to the site of the Development.

3. LEGISLATIVE REQUIREMENTS

3.1 Provisions of the following legislation and instruments will be relevant when considering WIK:

- a) *Environmental Planning and Assessment Act 1979* (NSW).
- b) *Environmental Planning and Assessment Regulation 2000* (NSW).
- c) *Local Government Act 1993* (NSW).
- d) The then current Liverpool Local Environmental Plan or State Environmental Planning Policy that applies to the site of the Development.
- e) Any Development Control Plan that applies to the site of the Development.
- f) Any Contributions Plan that applies to the site of the Development.

3.2 Section 7.11 of the EP&A Act provides that, where a consent authority is satisfied that proposed Development will require the provision of, or increase the demand for, public amenities and public services, the consent authority may grant Development Consent subject to a condition requiring a reasonable dedication of land or the payment of reasonable monetary contributions towards the extension or augmentation of those amenities or services.

3.3 At the time this policy was adopted by Council, section 7.11(5) of the EP&A Act specifically provided that a consent authority may accept the provision of a material public benefit in satisfaction of a condition requiring the dedication of land or payment of a monetary contribution towards the provision of public services and amenities.

3.4 Section 7.11(6) of the EP&A Act also provided that when proposing to impose a condition requiring payment of monetary contributions, a consent

authority must take into account any material public benefit that the Developer has elsewhere provided free of cost.

- 3.5** This policy is intended to fit within the legislative framework established under the EP&A Act for the consideration of material public benefits associated with Development. This policy addresses material public benefits that are offered:
- a) in satisfaction of existing conditions requiring payment of Development Contributions (under section 7.11(5) of the EP&A Act);
 - b) in conjunction with proposed Development (so that the offset can be considered under section 7.11(5) of the EP&A Act); or
 - c) in return for a 'credit' against future contributions that would otherwise be payable (under section 7.11(6) of the EP&A Act).

- 3.6** This policy is to be read in conjunction with the current version of the Contributions Plan that applies to the site of Development.

4. POLICY STATEMENT

- 4.1** Council will consider an application by a Developer to carry out works and/or dedicate land identified in a Contributions Plan.

- 4.2** This policy applies to works and/or land identified in a Contributions Plan that a Developer offers, or has offered, in exchange for a 'credit' or offset against Development Contributions (**WIK Credit**).

- 4.3** Prior to making any offer to undertake WIK, the Developer should consult Council about the proposal. The Developer should expect Council to seek details of the proposed WIK and any associated Development during the consultation process.

- 4.4** Any offer to undertake WIK with the intent of receiving a WIK Credit must be made in writing. The procedure for application and consideration of the proposed WIK arrangement will be carried out in accordance with this policy.

- 4.5** To be eligible for a WIK Credit, the WIK being offered must be:

- a) identified in a Contributions Plan;
- b) procured through an open and transparent process that will deliver value for money for Council; and
- c) in compliance with Council's specifications and relevant Australian Standards.

- 4.6** Variations to the items listed in the Contributions Plan will be considered at Council's sole discretion and items that are not listed in the Contributions Plans will not qualify for a WIK Credit and will not be considered under this policy.

- 4.7** The acceptance of an offer for WIK will be at the sole discretion of Council.

- 4.8 If the Developer wishes to provide works or dedicate land not identified in the relevant Contributions Plan, then an offer to enter into a voluntary planning agreement (**VPA**) should be submitted in accordance with Council's then current Planning Agreement Policy.

5. PROCEDURE FOR PROVISION OF WIK

5.1 Identification of proposed WIK in development application

Items that qualify for WIK can be identified by referring to the Contributions Plan that applies to the site of the relevant Development.

If a Developer wishes to make an offer to undertake WIK in conjunction with proposed Development, the scope of proposed WIK must be described in the relevant Development Application or construction certificate application.

5.2 Application to Council

A written application to undertake WIK must be submitted to Council by the Developer. The application must be supported with detailed documentation, including the following information:

- a) A detailed description of the WIK proposed to be undertaken supported by concept design drawings and a concept design report.
- b) Three (3) hard copies and one (1) electronic copy of the concept design.
- c) An explanation as to whether the proposed WIK is intended to be completed in full or to be partially completed.
- d) The estimated value of the WIK produced by a qualified practicing Quantity Surveyor, Civil Engineer or Surveyor with associate or higher membership of an accredited professional institution in Australia. The valuation should identify any variance between the cost estimate and the cost identified in the relevant Contributions Plan (noting the cost identified in the Contributions Plan is generally indexed in accordance with changes in the Consumer Price Index).
- e) A schedule identifying the components of the proposed WIK that are in accordance with the Contributions Plan that applies to the site of the relevant Development and those that are not.
- f) A program of works showing the timeframe for commencement and completion of the proposed WIK.
- g) Development approval (consent number and date of consent).

Where the value of the WIK is less than the value of the required Development Contribution, the Developer will be required to settle the balance of the contribution by way of a monetary contribution.

5.3 Assessment and determination of the offer to undertake WIK

Council will assess an offer to undertake WIK with due regard to the provisions in the Contributions Plan that applies to the site of the relevant Development and determine acceptability of the offer.

In assessing an offer to undertake WIK, Council will consider the current legislation, ministerial directions, and the requirements of any current guidelines, circulars and the practice notes issued by the Department of Planning.

Council will also consider the following matters:

- a) The monetary value of the proposed WIK and the amount of WIK Credit sought by the Developer.
- b) The design concept of the proposed WIK.
- c) The overall benefit of the proposed WIK to the current and future development in the area.
- d) The timing of completion of the WIK.
- e) The feasibility of constructing the proposed WIK within amounts budgeted in the Contributions Plan that applies to the site of the relevant Development.
- f) Financial implications for Council in accepting the WIK involving any effects on the implementation of Council's adopted works programs.
- g) Financial implications for Council in accepting the dedication of the WIK in relation to ongoing management and maintenance of the WIK. Particular regard will be given to works such as open space embellishment and drainage facilities. In this regard it is advisable to discuss the scope of embellishments with Council prior to submission of the application for WIK.

Council may consult other developer stakeholders who would be required to contribute to the works, prior to accepting the WIK proposal.

The Developer will be notified in writing of the outcome of the assessment of the WIK proposal.

5.4 Acceptance by Council of the offer to undertake WIK

Should Council decide to accept an offer to undertake WIK, details of the agreed WIK, including the rights and responsibilities of the Developer, will be set out in an enforceable agreement (**a WIK Agreement**).

The relevant WIK Agreement will be prepared by Council at the cost of the Developer.

The WIK Agreement will include terms relating to the following:

- a) Timing for completion, design requirements and relevant standards for the WIK.
- b) Security bonds/or bank guarantees for the WIK and defects in respect of the WIK, including defects liability periods (see below).
- c) Insurance requirements.
- d) Indemnities provided by the Developer to Council.
- e) Inspections required before the WIK is deemed to be completed.
- f) Work Health and Safety requirements.

The terms of the WIK Agreement will be generally consistent with the provisions of this policy, unless Council is satisfied that the circumstances justify a departure from the Policy.

5.5 Securities

Council will require every WIK Agreement entered into by it to contain appropriate security provisions which allow for the enforcement of the WIK Agreement by suitable means in the event of a breach of the WIK Agreement by the Developer.

Such provisions may include the following:

- (a) Requiring the WIK to be completed prior to the time by which the relevant Development Contributions would have been required to be paid.
- (b) Requiring the Developer to lodge separate irrevocable and unconditional bank guarantees or bonds (**Securities**) as security for the performance of the obligations of the Developer under the WIK Agreement.

If Securities are included in the WIK Agreement, the Securities will be for:

- (a) the agreed value of the WIK (**Primary Security**); and
- (b) an additional amount equivalent to **100% of the agreed value of the WIK (Defects Security)**,

and must be provided to Council prior to execution of the WIK Agreement.

Upon completion of the WIK, Council will release and return the:

- (a) Primary Security to the Developer, but only if:
 - (i) Council has not made or does not intend to make a demand against that security in respect of any of the WIK;
 - (ii) the WIK to which that security relates have been completed in accordance with the terms of the WIK Agreement; and
 - (iii) the Developer is not in breach of the WIK Agreement at the time the Security is to be returned.
- (b) Defects Security to the Developer, but only if:
 - (i) the Defects Liability Period relating to the WIK has expired;
 - (ii) Council has not made or does not intend to make a demand against the Defects Security in respect of any of the WIK; and
 - (iii) the Developer is not in breach of the WIK Agreement at the time the Defects Security is to be returned.

Council will be entitled to call on the Securities in accordance with the terms of the WIK Agreement (including but not limited to where the Developer fails to complete the WIK in accordance with the WIK Agreement).

5.6 Insurances

The Developer will be required to produce evidence of current policies of insurance relevant to the construction of the WIK. The values of the policies

will be determined having regard to the nature and extent of the WIK and the risks inherent in carrying out the WIK.

The policies of insurance required include:

- a) public liability with \$10,000,000 minimum cover (this may be higher depending on the nature of the proposed work);
- b) professional indemnity;
- c) workers compensation;
- d) insurance of the works; and
- e) motor vehicle insurance.

Any insurance to be effected by the Developer is to include Council as an 'insured' for the purpose of the Policy.

5.7 Approvals

The Developer must obtain, and comply with, all necessary approvals to carry out the WIK, including development approvals, approvals under environmental and water legislation, and public road legislation and approvals from entities such as the Roads and Maritime Services, Endeavour Energy, Telecommunications provider and the like.

Where the WIK is not subject to the Development Consent obtained by the Developer, the Developer, at its cost, must lodge an application for Development Consent for the WIK and obtain that Development Consent as well as the necessary construction certificate prior to commencement of the WIK.

It is the responsibility of the Developer to ensure that it has all necessary consents required to undertake the WIK. Council entering into a WIK Agreement should in no way be taken as Council agreeing that any consent necessary for the conduct of the WIK will be granted.

5.8 Construction

Subject to the Developer obtaining the necessary consents for the WIK, construction of the WIK can commence on completion of Steps 5.1 to 5.7 of this policy, and any other preliminary requirements under the WIK Agreement.

Council will carry out inspections of the WIK as outlined in the WIK Agreement.

On completion of the WIK, a final inspection will be carried out and Council will assess the acceptability of the WIK. The Developer will be notified of the outcome of the inspection in writing.

If incomplete or defective works are identified, the Developer will be required to rectify those defects to Council's satisfaction in accordance with the specifications, the design documents and the WIK Agreement.

If the WIK can be accepted by Council, Council will issue a Certificate of Practical Completion to the Developer. The WIK will not be complete unless and until Council issues the Certificate of Practical Completion.

5.10 Accountability requirements

Council is responsible for the collection and disbursement of the funds collected under the EP&A Act. In order to ensure probity and transparency, supporting documentation must be kept by the Developer for a minimum period of twelve (12) months after the handover of the WIK to Council.

The Developer should be aware that any WIK Agreement may be reported and accounted for by Council in accordance with annual requirements for reporting of contributions.

5.11 Dedication of WIK

Prior to the issue of a Certificate of Practical Completion for any WIK, the Developer must:

- a) dedicate the works and associated land to Council; and
- b) supply two hard copies and one electronic copy of the works as executed drawings for the WIK.

6. PROCEDURE FOR DEDICATION OF LAND

6.1 Identification of proposed dedication of land

Land parcels that qualify for land dedication can be identified by referring to the Contributions Plan that applies to the site of the relevant Development. If a Developer seeks to have WIK Credit applied for the dedication of land in conjunction with proposed Development, the scope of land dedication must be described in the relevant Development Application or construction certificate application.

Where it is proposed to dedicate land to Council that is not identified in a Contributions Plan that applies to the site, Council will consider whether it should accept the land, however no WIK Credit will be given for the land dedication against any contributions payable for the Development.

6.2 Application to Council

A written application for land dedication must be submitted to Council by the Developer. The application must be supported with detailed documentation, including the following information:

- a) A detailed description of the land proposed to be dedicated.
- b) A plan prepared by a registered surveyor to a standard satisfactory for submission to NSW Land Registry Services.
- c) Identification of any works to be carried out on the land to be dedicated to Council.
- d) A schedule identifying the components of works that are in accordance with the Contributions Plan that applies to the site of the relevant Development.
- e) A land contamination report, prepared by a suitably qualified person.
- f) A valuation from a registered land valuer providing evidence of the value of land that is being sought as a land dedication.

6.3 Assessment and determination of the application to dedicate land

Council will assess the proposal with due regard to the provisions in the Contributions Plan that applies to the site of the relevant Development and determine acceptability of the proposal. In assessing an application to reduce Developer Contributions for land dedication, Council will consider the current legislation, ministerial directions and any guidelines, circulars and practice notes issued by the Department of Planning

Council will also consider the following matters:

- a) The monetary value of the proposed land dedication and the amount of WIK Credit sought by the Developer.
- b) The design concept of any proposed works in conjunction the proposed land dedication.
- c) The overall benefit of the proposed land dedication to the current and future development in the area.
- d) The timing of completion of the proposed land dedication as a WIK.
- e) If works are proposed on the land to be dedicated as a WIK, the feasibility of constructing those works within amounts budgeted in the Contributions Plan that applies to the site.
- f) Financial implications for Council in accepting the land dedication, including any effects on the implementation of Council's adopted works programs and requirements for ongoing management and maintenance of the land dedication.

Council may consult other Developer stakeholders who would be required to contribute to the works, prior to accepting the land dedication as a WIK proposal.

The final decision on the acquisition of land will be made by Council.

The Developer will be notified in writing of the outcome of the assessment.

6.4 Acceptance by Council of the offer to dedicate land

A decision to accept the dedication of land will be by Council resolution. Should Council determine to accept an offer for dedication of land, details

of the agreed dedication, including the rights and responsibilities of the Developer, will be set out in an enforceable WIK Agreement.

Any such WIK Agreement will be prepared by Council at the cost of the Developer.

The terms of the WIK Agreement will be generally consistent with the provisions of this Policy, unless Council is satisfied that the circumstances justify a departure from the Policy.

7. SETTLEMENT OF A WIK CREDIT

7.1 Credit against existing contributions requirements

Where a Developer seeks to offset a WIK Credit against an existing requirement to pay Development Contributions, the WIK must be provided or dedicated to Council prior to the WIK Credit being granted.

The WIK Credit will be applied as an agreed reduction of contributions payable under the relevant Development Consent in accordance with section 7.11(5) of the EP&A Act and as specified in the relevant WIK Agreement.

A WIK Credit cannot be applied once Development Contributions have been paid. The condition requiring the payment of the Development Contributions does not need to be modified to allow a WIK Credit to be utilised.

7.2 Land Dedication and/or WIK constructed in conjunction with development

If Council accepts an offer from a Developer to provide WIK in conjunction with proposed Development, Council will apply the WIK Credit in the following manner:

- a) A condition will be imposed on the relevant Development Consent requiring the full amount of contributions calculated under the Contributions Plan that applies to the site of the relevant Development.
- b) When the Development Consent is granted, Council will confirm in the WIK Agreement, that it will accept the land dedication (subject to Council resolution) and/or provision of the WIK in satisfaction of the Development Contributions (or part of those Development Contributions) payable under that condition in accordance with section 7.11(5) of the EP&A Act.

The Developer will then be required to only pay the reduced amount of Development Contributions as agreed in the WIK. The condition requiring the payment of the Development Contributions does not need to be modified to allow for the application of the WIK Credit.

7.3 Credit against future Development Contributions requirements

If the land dedication and/or WIK are not offered in conjunction with proposed Development, Council will only consider the WIK when determining

future Development Applications in accordance with any WIK Agreement once the WIK has already been provided or dedicated to Council.

In accordance with s7.11(6) of the EP&A Act, Council may impose a condition of Development Consent requiring less Development Contributions than would otherwise be payable under the Contributions Plan that applies to the relevant Development, if it considers that a credit is available for past WIK provided by the Developer.

8. DISCRETION TO GRANT A CONSENT

- 8.1** The provision of WIK in accordance with this Policy will not be considered by Council when determining a relevant Development Application, except to the extent authorised by s7.11(5) and s7.11(6) of the EP&A Act.
- 8.2** Council's statutory discretion or duty in determining Development Applications will not be limited or fettered by the provision of any WIK Agreement or any offer to undertake WIK.
- 8.3** The provision of WIK or entering into any WIK Agreement with a Developer will not impose any obligation on Council to grant Development Consent.

9. OTHER REQUIREMENTS

- 9.1** Nothing in this Policy negates the application or requirements of any other relevant legislation. Council's policies are designed to ensure compliance with the Local Government Act 1993 (NSW). Council officers have varying levels of delegated authority to approve works and expenditure. For the purposes of this Policy, Council's Chief Executive Officer can approve expenditure which has not been included in the Budget.
- 9.2** Section 55 of the Local Government Act 1993 (NSW) requires Council to invite public tenders for works and services in excess of \$150,000. WIK requiring a funding contribution from Council of more than these limits must be tendered in accordance with Council's tendering policy. In particular the tendering requirements under s55 of the Local Government Act 1993 (NSW) will continue to apply to these works.
- 9.3** WIKs which are either fully funded by the Developer, funded by Development Contributions held by the Developer or require less than \$150,000 funding from Council do not have to be tendered in accordance with the *Local Government Act 1993* (NSW). However, competitive prices must be obtained to Council's satisfaction.

10. NOTES

- 10.1** Council does not accept any financial risk associated with the provision of WIK and will only cover those attributable costs agreed to in the WIK Agreement entered into by the Developer. Any costs beyond this will be borne by the Developer.

- 10.2** Council does not accept any liability for costs associated with altering the design or construction of works or land dedications if the Developer has received Development Consent for the land/works prior to execution of a WIK Agreement.
- 10.3** Developers should not expect reimbursement of surplus value in full. The possibility and level of reimbursement is limited to the funds collected from contributions received from other developers for those works pursuant to the relevant Contributions Plan (at the time of plan repeal) and the possibility funds shall be distributed equitably to multiple Developers as reimbursement of their respective surplus values. Council also retains the right to repay Council's outstanding financial liabilities for local infrastructure projects forward funded by Council's Capital Works Program and invest funds collected from other developers to other local infrastructure projects.

AUTHORISED BY
Council Resolution

EFFECTIVE FROM
27 February 2019

DIRECTORATE RESPONSIBLE
Planning and Growth (Development Engineering)

REVIEW DATE
Two years after the date of the adoption of this policy

VERSIONS

| Version | Amended by | Changes made | Date | TRIM Number |
|----------------|--------------------|--|------------------|--------------------|
| 1 | Adopted by Council | Not applicable | 20 August 2012 | 212110.2012 |
| 2 | Adopted by Council | Mainly to clause 7 and new clause 8 | 27 July 2016 | 180376.2016 |
| 3 | Adopted by Council | Includes reference to land acquisition | 29 March 2017 | 063737.2017 |
| 4 | Adopted by Council | Holistic review | 27 February 2019 | 063737.2017-009 |