

## WORKS IN KIND / MATERIAL PUBLIC BENEFIT POLICY

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### Background

Selected Council section 94 Development Contributions Plans (s94 Plans) provide for developers to offer the carrying out of “Works In Kind” (WIK) or “Material Public Benefits” (MPB), in lieu of the payment of development contributions. Acceptance of such offers is at Council’s discretion.

This policy complements those s94 Plans by detailing the criteria which will be used to assess WIK or MPB proposals and the process for progressing those proposals through Council.

### Commencement

This Policy was adopted by Council on 25 March 2013 and takes effect from that date.

### Objective of this policy

The objective of this policy is to ensure that Council’s assessment of Works In Kind (WIK) or material public benefits proposals as alternatives to development contributions achieve:

- Delivery of facilities or land (or appropriate alternatives) described in the relevant s94 Plans at the required standards; and
- Satisfaction of the relevant State legislation and guidelines.

### State Legislation and Guidelines

Development contributions and their implementation are provided for under Section 94 of the Environmental Planning and Assessment Act and Regulation and the Local Government Act.

At the time of writing, relevant legislation and guidelines for the Contribution Planning Process - as it applies to WIKs and Material Public Benefits - are contained in

- the “Development Contribution Practice Notes – July 2005” issued by DIPNR; and
- Section 55 of the Local Government Act (with respect to public tendering).

In the event that the legislation or guidelines are amended, the operation of this policy is varied to ensure consistency with the revised requirements.

## 1. Introduction

### 1.1 WIK and MPB applications affected by this policy

This policy applies to all proposals for works in kind (WIK) or material public benefit (MPB) offers in lieu of paying the necessary development contributions to Council, where this alternative payment arrangement is provided for in the affected s94 Plans.

WIKs and MPBs cannot be accepted in relation to s94A/ indirect (i.e. flat rate) contributions.

### 1.2 Definitions

**Contributions Plan** means a public document prepared by a Council under the provisions of section 94EA of the *Environmental Planning and Assessment Act*.

**Credits** means where the cost burden on an applicant is less because of a previous dedication of land, monetary payment or through provision of an MPB (excluding where this has been provided as a consequence of the granting of a condition of consent or through a planning agreement), or where allowance is made for existing development on site.

**Developer** means a person who has sought a change to an environmental planning instrument (which includes the making, amendment or repeal of an instrument), or who has made or proposes to make a development application, or who has entered into an agreement with or is otherwise associated with such a person.

**Material Public Benefit (MPB)** means either works in kind or the provision of public amenities or services that are not scheduled within a contributions plan in lieu of the part or full payment of either a monetary contribution or the dedication of land that is required as a condition of development consent.

**Offsets** means where a developer covers part or all of the development contributions in a manner other than the payment of a contribution or the dedication of land, such as through the provision of an MPB.

**Works in Kind (WIK)** means the construction or provision of the whole or part a public facility that is specifically included within a contributions plan, in lieu of payment or part payment of either a monetary contribution or the dedication of land that is required as a condition of development consent.

## 2. Procedure

This section outlines the 10 steps in the process which must occur for Council to assess and progress WIK or MPB proposals.

- Step 1** - The developer meets with Council staff to discuss the proposed WIK or MPB
- Step 2** – The developer makes an initial written application to Council for a WIK or MPB, submitting details described in 2.2 below
- Step 3** - Council staff assess the merit of the application in accordance with this policy’s requirements (described in 2.3 below) and advise the developer if the offer is acceptable “in principle”. Note, Any application for a Work in Kind or other Material Public Benefit or any proposal which requires a contribution from Council will require a formal resolution of the Council before proceeding further.
- Step 4** - A report is presented to Council on the proposed WIK or MPB and Council resolves whether to proceed with the proposal in principle.
- Step 5** - The developer submits detailed information (described in 2.4 below) regarding the WIK or MPB proposed.
- Step 6** - Council assesses the submission and engages (at the developer’s expense) an independent Quantity Surveyor to cost the proposed WIK or MPB
- Step 7** - A WIK or MPB agreement is entered into with Council, subject to Council endorsement
- Step 8** - A Construction Certificate is issued,
- Step 9** - Construction of the WIK or MPB is undertaken, to Council’s standards
- Step 10** - The WIK or MPB facility is dedicated to Council following achievement of Council’s standards.

### 2.1 When is a WIK or MPB application required ?

Written application is required for ALL WIK or MPB proposals.

### 2.2 Written Applications requirements

Any application for the provision of a WIK or other MPB must be made in writing and contain the following information:

- The works proposed to be undertaken;
- Whether such works are intended to be full or partial completion of the project;
- The estimated value of the works – identifying variations, if any, between the cost identified in the Plan and the estimated cost of works;
- The differentiation of components of the works that are in accordance with the plan and those that are not; and
- The time frame within which the works are proposed to commence and be completed.

***Note : Where the value of the WIK or other MPB is less than the value of the required contribution, the applicant will be required to settle the balance of the contribution by way of a monetary contribution and/or land dedication.***

## 2.3 Council Assessment Requirements

In considering an application for a WIK or other MPB, Council will have regard to the requirements of the current Practice Notes issued by the NSW Government in the Revised Development Contributions Manual (DIPNR 2005) and may consider matters such as, but not limited to, the following:

### Works in Kind offer – Matters for consideration by Council

- The access, siting, design and delivery timeframe of the proposed facility in the context of :
  - the proposed development ;
  - adjoining current or future development that would be expected to benefit from the facility; and
  - the relevant Contributions plan intentions and specifications for the facility;
- Whether the proposed WIK will be to a suitable standard for the Council to eventually accept, including analysis of maintenance implications;
- Whether the works schedule, particularly the design and cost of the specified facility in the contributions plan, remains valid or requires amendment;
- Whether the applicant proposes to carry out the work to a higher standard than the baseline facility specified in the contributions plan and whether there is any requirement or expectation for a credit against any other contributions;
- Whether the cost of the work proposed or the value of the benefit is less than the required contributions. **Note. Where the value of the WIK or other MPB is less than the value of the required contribution, the applicant will be required to settle the balance of the contribution by way of a monetary contribution and/or land dedication.**
- The financial implications for cash-flow and the continued implementation of the works schedule contained in the relevant contributions plan.
- Whether accepting the WIK would set an adverse precedent.

### Material Public Benefit offer (Other than WIK) - Matters for consideration by Council

- The overall benefit of the proposal;
- The monetary value of the MPB;
- What needs of the population would be satisfied and whether these equal or exceed those provided by conventional means;
- Whether the works schedule in the contributions plan remains valid or requires amendment;
- The financial implications for cash-flow and the continued implementation of the works schedule;
- Whether Council may need to make up the short fall in anticipated contributions.
- Whether accepting the offer would set an adverse precedent

***The acceptance of an offer for a Works in Kind or other Material Public Benefit is at the sole discretion of Council.***

Any application for a Work in Kind or other Material Public Benefit or any proposal which requires a contribution from Council will require a formal resolution of the Council before proceeding further.

## **2.4 Submission of Detailed Information**

If Council has agreed in principle to the application, it will be necessary for the applicant to provide the following detailed information;

- Three (3) Copies of all written documentation including plans and specifications for the proposed works;
- The value of the work and land.
- A construction program including commencement and completion dates and relevant milestones; and
- Written consent to carry out the work from the owners of all land affected by the proposal.

Council will review the valuation of works or land to be dedicated through the services of an independent person to verify their value. Works will be independently certified by a Quantity Surveyor who is registered with the Australian Institute of Quantity Surveyors or a person who can demonstrate equivalent qualifications. Land costs will be certified by an independent land valuer/land economist. The costs for these valuations and expenses will be borne by the applicant.

***Section 55 of the Local Government Act 1993 requires Councils to adhere to the public tendering process for the provision of facilities with a value in excess of \$150,000.***

Under the provisions of Clause 55(3), Council can resolve that, because of extenuating circumstances, a satisfactory contract result would not be achieved by inviting tenders. In this regard, each application for a WIK or other MPB will be assessed on its merits.

## **2.5 Completion of Agreement**

If a WIK or other MPB agreement has been reached, a legal contract shall be prepared by Council's legal representatives covering;

- The works proposed
- The costs of such works
- The applicants rights and responsibilities
- Council's rights and responsibilities.

***All costs associated with the preparation of this contract are to be met by the applicant.***

## **2.6 Bank Guarantee**

If a WIK or other MPB agreement has been reached, the developer will be required to lodge a Bank guarantee to cover the agreed value of the WIK or other MPB works. This guarantee must be lodged before a construction certificate is issued.

Upon completion of the agreed works *up to 90%* of the project value will be released. In determining the amount to be released the following items will be considered:

- The funds expended;
- The progress of the works; and
- The schedule of payments.

The remaining amount will be kept as a security bond. The bond shall be returned once; the 12 month maintenance period has lapsed; and following certification by Council's Asset Manager and any relevant Council technical specialists, that all obligations and works have been undertaken and completed to the standard as detailed in the contract.

## **2.7 Construction**

Once the construction certificate has been issued, construction can begin on the agreed works. Once Council has agreed to the specific works identified in the contract, no additions or alterations, including variations to costs, should be made to these works without written consent.

***Unless approved by Council, no credits will be recognised for works carried out by the developer which are in excess of the approved contribution.***

As Council will be ultimately responsible for the facility and its future maintenance, the works will be inspected by Council's representative as they progress to ensure that they are being completed to the specified standard. The proposed timing of these inspections will be identified in the contract.

## **2.8 Dedication**

Upon completion of the works identified in the contract, Council will inspect the facility and identify any faults. Upon rectification of such faults Council will accept dedication of the facility.

***The developer is required to meet all costs associated with the dedication of the facility.***

## 3 Administration

### 3.1 Offsets to Section 94 Contributions

The purpose of a WIK or other MPB is to offset the cash contribution or land dedication required under *Section 94 of the Environmental Planning and Assessment Act*. In this regard, if the works proposed relate to a facility covered by a specific category within the Council's Section 94 Plan, the costs of the works proposed can only be offset against the contribution required for that category. It cannot be used to offset the total section 94 contribution.

For accounting purposes, any offsets will be calculated in one of three ways:

1. *Where the value of works undertaken is equal to the contribution required for the relevant category as a condition of consent* - Council will consider those works to be the equivalent of the payment of the contribution in full; or
2. *Where the value of the works undertaken is less than the contribution required for the relevant category as a condition of consent* - the developer will need to pay the difference; or
3. *Where the value of the works undertaken exceeds the value of the cash contribution required for the relevant category as a condition of consent* - Council will offset the total amount against the contribution to be paid, with the remainder generally to be reimbursed as contributions are received from other developers. Where Council also has a contribution to make under the Section 94 Plan, Council will make such a payment on dedication of the facility to Council. In this instance, when the proposed works are completed, Council will amend the affected s94 Plan(s) to reflect the actual cost of provision.

**Council does not accept any financial risk associated with the construction of the facility. Council will only cover those costs agreed to in the Works-in-Kind or Material Public Benefit agreement entered into by the developer. Any costs beyond this will be borne by the developer.**

### 3.2 Treatment of offsets

#### Offer made to Council as part of a development application

Where the provision of a WIK or other MPB is negotiated as part of a development application, the agreed works will be set out in the development consent as a condition and the development contribution will be adjusted (or deleted if necessary) to reflect the agreed offset.

#### Offer made to Council following the granting of development consent

Where an application is received by Council for a WIK or other MPB to partially or fully satisfy a condition requiring a s94 contribution, the consent condition requiring the contribution will remain in place. This is because s94(5)(b) of the *Environmental Planning and Assessment Act* provides the legal means of a council accepting such an offer without the need for the development consent to be modified.

Once the council and applicant have agreed on the value of work proposed (the offset), the payment to the Council will be the difference between the s94 contribution identified in the development consent, minus the offset amount.

Any offer to Council for the dedication of land made following the granting of development consent is to be accompanied by a request for a modification of consent under s96 of the *Environmental Planning and Assessment Act* . The s96 application is to seek the amendment of the condition relating to the s94 contribution.

### **3.3 Financial requirements**

Council is accountable for the income and expenditure received under Section 94 of the *Environmental Planning & Assessment Act*. To ensure this process is transparent the following procedures will be followed;

- The developer will provide regular documentation including copies of statement of accounts, receipts and bank statements as evidence of works completed to date. The type of documentation required and the timing for its submission will be set out in the contract for the works.
- The financial information provided must distinguish between those costs related to Section 94 works and those that relate to other works.

If a WIK or other MPB is undertaken before all contributions are received for that facility, Council will not accept the financial risk for that facility. In this regard Council will only reimburse costs as contributions are received from developers. Council will however reimburse their portion of the cost of the facility as identified in the Section 94 Plan on completion of the facility.

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**Acknowledgement** : We acknowledge the generous cooperation of Maitland City Council in permitting use of its “Works In Kind / Material Public Benefit Policy” , as the model for this policy.