

Wagga Wagga City Council

WORKS IN KIND POLICY

REFERENCE NUMBER	POL 003		
ORIGINAL APPROVAL DATE	27 June 2016		
RESPONSIBLE MANAGER	Manager Development Services		
RESPONSIBLE DIRECTORATE	Commercial Development		
<p>This document is to be reviewed: every four years or in the first twelve months of the new term of Council, whichever is the earliest. Next Review Date: September 2020</p>			
Revision number	Issue Date	Council Resolution	Council Meeting Date
1	23 July 2015	Res No: 16/148.10	27 June 2016
2	August 2017	Res No: 17/279	28 August 2017

PART 1: INTRODUCTION

This Policy has been developed to provide a standard procedure and criteria for the assessment of offers made by a developer for a works in kind or other material public benefit in lieu of the partial or full payment of –

- Section 94 developer contributions required under Council's Section 94 contributions plan; or
- Section 94A levies required under Council's Section 94A contributions plan.

1.1 Policy Objectives

To provide guidelines for the assessment of a works in kind or other material public benefit offered by a developer in lieu of the part or full payment of –

- Section 94 developer contributions under Council's Section 94 contribution plan; or
- Section 94A levies under Council's Section 94A contributions plan.

1.2 Scope of Policy

This Policy applies where the Council has granted development consent to development subject to a condition requiring the Developer to pay monetary Section 94 development contributions or Section 94A levies and the Developer seeks to carry out works pursuant to this Policy in lieu of paying the contributions or levies to Council.

1.3 Definitions

Contributions Plan - Is a public document prepared and approved by the Council pursuant to section 94EA of the *Environmental Planning and Assessment Act 1979*, which authorises the Council to impose conditions of development consent requiring the Developer to pay Section 94 Contributions or Section 94A Levies to the Council.

Council – reference to Council in this Policy is taken to be a reference to the Wagga Wagga City Council.

Credit - Is the amount, determined by the Council, by which the value of a WIK or MPB that it has agreed to accept exceeds the monetary amount of the Section 94 Contribution or Section 94A Levy that the WIK or MPB is intended to satisfy.

Developer – Is the person who made a development application to the Council in respect of which a development consent has been granted, or who is otherwise entitled to act on the development consent.

Material Public Benefit (MPB) - Is the provision of a material public benefit, other than a WIK and not involving the dedication of land, to the Council by a person entitled to act on a development consent.

Offsets - 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.

Section 94 - Refers to Section 94 of the *Environmental Planning and Assessment Act 1979*.

Section 94A - Refers to Section 94A of the *Environmental Planning and Assessment Act 1979*.

Section 94 Contribution – Refers to a monetary Section 94 contribution required to be paid to the Council under a condition of development consent imposed under Section 94;

Section 94A Levy - Refers to a Section 94A levy required to be paid to the Council under a condition of development consent imposed under Section 94A;

Work – Refers to a public work.

Works in Kind (WIK) - The provision to the Council of a work, excluding any related dedication of land, by a person entitled to act on a development consent.

Works Schedule – Refers to the works schedule in a Contributions Plan.

1.4 Legislative Context

This Policy has been created having regard to the legislative provisions contained within the Environmental Planning and Assessment Act 1979 (Sections 94 – 94 EC) and the Environmental Planning and Assessment Regulation 2000 (Sections 25 – 38).

The Policy also has regard to the Local Government tendering provisions outlined in Section 55 of the Local Government Act 1993.

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 adopting this policy, Council has resolved not to invite tenders under s55(1) of the Act for any works-in-kind agreement entered into with the Council because of the unavailability in every case of competitive tenderers, meaning that a satisfactory result cannot and would not be achieved by inviting tenders.

1.5 Related Documents

City of Wagga Wagga Section 94 Contributions Plan 2006 - 2019

City of Wagga Wagga Section 94A Levy Contributions Plan 2006

1.6 Responsibilities

The review and administration of this Policy is the responsibility of Council's Contributions Coordinator in consultation with the Planning and Regulatory Services Directorate and Contribution Review Committee

1.7 Review procedures

This Policy will be reviewed on a bi-annual basis.

PART 2: PROCEDURE

2.1 Written Application

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

- The WIK or MPB proposed to be provided to the Council;
- If a WIK, whether the works are contained within the Works Schedule of the Contributions Plan and, if so, whether the Developer proposes to carry out the whole or only part of those works;
- Whether the WIK or MPB is intended to be provided to the Council in partial or full satisfaction of a Section 94 Contribution or Section 94A Levy;
- If the WIK is not contained in the Works Schedule, the estimated value of the works;
- The differentiation of components of the WIK that are in accordance with the Contributions Plan and those that are not; and

- The time frame and milestones within which a WIK is proposed to be commenced and handed over to the Council, or an MPB provided to the Council.

If a WIK is in the Works Schedule, the value ascribed to the WIK will be the value in the Contributions Plan. If the WIK is not in the Works Schedule, or the proposal is for provision of an MPB the value will need to be determined and agreed. If the value is less than the value of the s94 Contribution or s94A Levy required to be paid, the Developer will be required to pay the balance of the s94 Contribution or s94A Levy in accordance with the relevant condition of consent.

2.2 Council Assessment

In considering an application for a WIK or other MPB, Council will have regard to the requirements of any current practice notes or circulars issued by NSW Planning and Environment and may consider matters such as, but not limited to, the following:

WIK

- The access, location and design of the proposed WIK in the context of the proposed development and adjoining current or future development that would be expected to benefit from the WIK;
- Whether the proposed WIK will be to a suitable standard for the council to eventually accept;
- Whether the Works Schedule, particularly the design and cost of the specified facility requires amendment;
- Whether the Developer seeks a Credit against any other contributions; and
- The financial implications for cash-flow and the continued implementation of the Works Schedule.

MPB

- The overall benefit of the proposal;
- The monetary value to Council of the MPB;
- What needs of the population would be satisfied by the provision of the MPB and whether there is any benefit from the MPB over and above the benefit if the s94 Contribution or s94A Levy were paid;
- Whether the Works Schedule requires amendment;
- The financial implications for cash-flow and the continued implementation of the Works Schedule; and
- Whether Council may need to make up the short fall in anticipated contributions.

The acceptance of an offer for a WIK or other MPB is at the sole discretion of Council.

Unless a proposed WIK or MPB is authorised by a development consent, the decision to accept will be made by resolution of the governing body of the Council unless the governing body resolves otherwise generally or in a particular case.

WIK to a value of less than \$250,000 and authorised by development consent will not be reported to Council for determination but will be assessed by Council's Contribution Committee; all other applications will be reported to Council for determination.

All MPB applications will be reported to Council for determination irrespective of cost.

2.3 Submission of Detailed Information

If Council has agreed in principle to an application for a WIK or MPB, it will be necessary for the Developer to provide the following detailed information;

- A copy of all written documentation including plans and specifications for the proposed works (if any);
- An estimate of the costs of construction of the works if the works are not contained in the Works Schedule, independently certified by a Quantity Surveyor who is registered with the Australian Institute of Quantity Surveyors or a person who can demonstrate equivalent qualifications.
- 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 generally cannot accept land as an MPB in satisfaction of s94 Contributions or s94A Levies.

Any costs Council incurs in independently valuing works will be paid for by the Developer.

2.4 Completion of Agreement

If a WIK or MPB proposal is accepted by the Council, a legal agreement ('**WIK Agreement**') shall be prepared by Council's legal representatives covering;

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

The WIK Agreement will ordinarily be based on Council's standard template WIK agreement.

The WIK Agreement will be referred internally to the relevant Asset Manager and to the Developer for agreement.

The WIK Agreement will then be presented to Council. Formal resolution is required for the WIK to be approved unless the governing body of the Council resolves otherwise generally or in a particular case.

All costs associated with the preparation of this contract are to be met by the Developer. The Developer will be required to make a deposit of 50% of Council's estimated legal costs to draft the WIK Agreement before Council will proceed to do so

2.5 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 works. This guarantee will be for the agreed value of the WIK or other MPB and will need to 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 which shall be returned once the 12 month maintenance period has lapsed and following certification by Councils Asset Manager that all obligations and works have been undertaken and completed to the standard as detailed in the contract.

2.6 Carrying out of WIK or MPB

Development consent will be required for a WIK or MPB (if it comprises development).

A construction certification will also be required for a WIK.

Once the construction certificate has been issued construction may begin on the agreed works.

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 agreement.

2.7 Handover

Upon completion of the works identified in the WIK Agreement, Council will inspect the WIK and identify any faults. Upon rectification of such faults Council will accept handover of the WIK.

PART 3: ADMINISTRATION

3.1 Offsets to Section 94 Contributions

The purpose of a WIK or MPB is to partially or fully satisfy a Section 94 Contribution or Section 94A Levy. In this regard, it should be noted that if the works proposed relate to a facility covered by a specific category within the Council's Section 94 Plan then the costs of the works proposed can only satisfy the contribution required for that category. It cannot be used to satisfy the total section 94 contribution.

For accounting purposes, any Offsets will be done in one of three ways:

- Where the agreed value of works undertaken is equal to the s94 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 for that category in full;
- Where the agreed value of the works undertaken is less than the s94 Contribution required for the relevant category as a condition of consent the developer will need to pay the difference;
- Where the agreed value of the works 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.

3.2 Treatment of Offsets

Offer made to Council as part of a development application

If a Developer proposes, when making a development application, to provide a WIK or MPB in lieu of s94 Contributions or s94A Levies, then the agreement entered into will be a planning agreement, and this Policy does not apply.

Offer made to Council following the granting of development consent

Where a WIK or other MPB is proposed to partially or fully satisfy a Section 94 Contribution, the consent condition requiring the contribution will remain in place as s94(5)(b) of the *Environmental Planning and Assessment Act 1979* provides the legal means of Council accepting such an offer without the need for the development consent to be modified.

Where a WIK or other MPB is proposed to partially or fully satisfy a Section 94A Levy, the consent condition requiring the levy will need to be modified in order for the Council to agree to and implement the proposal.

Once Council and the Developer have agreed on the value of the WIK or MPB, any difference between the amount of the Section 94 Contribution or the Section 94A Levy and the WIK or MPB, must be paid to the Council unless the relevant development consent is modified to the contrary.

It should be noted that where an offer to Council for the dedication of land is made following the granting of development consent, Council can only proceed with the WIK Agreement if the applicable Contributions Plan permits acceptance of land, or the dedication is made pursuant to a planning agreement. The terms of the development consent may also need to be modified under s96 of the *Environmental Planning and Assessment Act 1979*

3.3 Financial Requirements

If a WIK or other MPB is undertaken before all Section 94 Contributions or Section 94A Levies are received for the relevant public facility, Council will nevertheless only reimburse costs to the Developer as and when Section 94 Contributions or Section 94A Levies are received from other developers for the facility. Council will, however, reimburse its portion of the cost of the facility as identified in the Contributions Plan on completion of the facility.