



# WORKS-IN-KIND POLICY P4.0058.2

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# WORKS-IN-KIND POLICY

**DIVISION:** Sport, Community and Activation

**BRANCH:** Contributions Planning

**CATEGORY:** 2

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## PART 1 – INTRODUCTION

### 1. BACKGROUND

- 1.1 Under the provisions of the *Environmental Planning and Assessment Act 1979*, Council has the power to require development contributions toward the cost of providing services and facilities to meet the demand generated by the development. Council has a number of Contributions Plans that require contributions toward the provision of open space, recreation facilities, community facilities, roads, drainage and other community infrastructure.
- 1.2 In some instances, a developer may seek to construct public infrastructure in lieu of making a monetary contribution. This is known as ‘works-in-kind’.
- 1.3 Works-In-Kind Agreements provide opportunities for developers to deliver infrastructure for the community much earlier than Council would often be able to achieve, as they are already constructing works on site. By constructing works, developers can offset the development contributions they would otherwise be required to pay to Council.

### 2. OBJECTIVE

- 2.1 To provide a framework for Works-In-Kind Agreements that includes:
  - Procedures for making an application and entering into a Works-In-Kind Agreement, and
  - How Council will assess and determine whether it will enter into a Works-In-Kind Agreement.

### 3. SCOPE

- 3.1 This policy applies to all requests to carry out works-in-kind in full or part satisfaction of conditions of consent requiring development contributions to be made to Council.

### 4. DEFINITIONS

- 4.1 **Attributable Cost** means the estimated cost for each item in the works schedules of the relevant Contributions Plan, which may differ from the final actual cost of the item. It will be the value used in determining the amount of any offset of monetary contributions as a result of any works-in-kind proposal.

- 4.2 **Bank guarantee** means an irrevocable and unconditional undertaking without any expiry or end date in favour of Council to pay an amount or amounts of money to Council on demand issued by an Australian bank, non-bank financial institution or insurance company subject to prudential supervision by the Australian Prudential Regulatory Authority and which has a credit rating of "A" or above (as assessed by Standard and Poors) or "A2" or above (as assessed by Moody's Investors Service) or "A" or above (as assessed by FitchRatings).
- 4.3 **Consent** means a development consent issued for a development application.
- 4.4 **Contributions Plan** means a document that has been publicly exhibited and adopted by the Council pursuant to section 7.18 of the EP&A Act.
- 4.5 **Council** means Camden Council.
- 4.6 **Defects Liability Period** means the period agreed to in relation to the Works where council may give the developer a rectification notice stating the works to be rectified at the developers cost.
- 4.7 **Development contribution** means a contribution referred to in section 7.11 of the EP&A Act.
- 4.8 **Development Contributions Management Committee (DCMC)** means an internal Council committee comprised of management and specialist staff representing strategic planning, development assessment, finance and capital works sections. The committee meets on a regular basis to manage the development contributions system. Committee meetings are closed to the public and decisions are made by consensus. Committee meeting minutes, decisions and recommendations in relation to Works-In-Kind Agreements are communicated directly to the applicant who makes a written application to enter a Works-In-Kind Agreement.
- 4.9 **EP&A Act** means the *Environmental Planning and Assessment Act 1979*.
- 4.10 **EPA Regulation** means the *Environmental Planning and Assessment Regulation 2000*.
- 4.11 **Hand-Over Date** means a date no later that date specified in a Works-In-Kind-agreement in which the developer will hand over the works to Council.
- 4.12 **LGA** means the local government area.
- 4.13 **Land Contribution** means the area of land to be dedicated to Council in full or part satisfaction of conditions of consent requiring development contributions to be made to Council.
- 4.14 **Material Public Benefit (MPB)** means either works-in-kind or the provision of certain 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.
- 4.15 **Works-in-kind (WIK)** means the undertaking of a work or provision of a facility by an applicant which is already nominated in the Schedule of Works of a Contributions Plan.
- 4.16 **Works-In-Kind Agreement** means an agreement between Council and a developer concerning works-in-kind.

## PART 2 - POLICY STATEMENT

The Council has sole discretion to decide whether it will accept works-in-kind in lieu of monetary contributions toward the provision of community infrastructure. Where the Council agrees to accept the provision of works-in-kind, they must be the subject of a formal Works-In-Kind Agreement. This agreement is a legally binding contract that is entered into by both developer and Council. The agreement must be entered into prior to commencing work.

This policy shall not limit or fetter Council's statutory discretion or duty in determining development applications under the EP&A Act.

### 5. WHAT IS THIS POLICY ABOUT?

- 5.1 Under the provisions of the EP&A Act, Council has the power to require development contributions toward the cost of providing services and facilities to meet the demand generated by the development. In order to require development contributions, Council must have a Contributions Plan in place which authorises contributions to be imposed as a condition of development consent. Council has a number of Contributions Plans that require contributions toward the provision of open space, recreation facilities, community facilities, roads, drainage and other community infrastructure.
- 5.2 A Contributions Plan contains a Schedule of Works, which identifies the infrastructure to be provided and includes an estimate of the cost. The cost of providing the infrastructure is then shared across an area or type of development. For Council to levy a contribution, it must impose a condition of consent on the development requiring the development contributions. These contributions may be satisfied by the payment of money, the dedication of land free of cost, or both.
- 5.3 In accordance with section 7.13 of the EP&A Act, Council may accept the provision of a Material Public Benefit (other than land or money) in full or part satisfaction of a condition of consent requiring development contributions. The most common form of a 'Material Public Benefit' is the construction of works that have been identified in the Schedule of Works in the Contributions Plan. This is known as 'works-in-kind'.
- 5.4 Council is ultimately responsible for these facilities and therefore needs to approve the proposed works before the developer commences any works and must ensure the works are carried out appropriately. This policy establishes what the developer needs to do if they want to carry out works-in-kind and their expectations throughout the process.
- 5.5 It is entirely at Council's discretion whether it will accept the provision of works-in-kind instead of a monetary contribution. Where Council does agree to accept works-in-kind, they must be the subject of a formal Works-In-Kind Agreement entered into by both the developer and the Council prior to commencement of works. The agreement is a legally binding contract. The purpose of this policy is to provide a framework for establishing when and how Council will enter into Works-In-Kind Agreements.
- 5.6 For the purposes of satisfying the tendering requirements under Section 55 of the *Local Government Act 1993*, in making this policy, Council resolved, at its meeting of the 24 November 2009 (ORD281/09), that it will not invite tenders in respect of Works-In-Kind Agreements or Voluntary Planning Agreements on the grounds that a satisfactory result will not be achieved due to the unavailability of competitive tenderers in accordance with the provisions of s 55(3)(i) of the EP&A Act.

## **6. WHAT OTHER COUNCIL DOCUMENTS DOES THIS RELATE TO?**

- 6.1 This policy should be read in conjunction with the relevant adopted Section 7.11 or 7.12 Development Contributions Plan, the Council Works-in-Kind Template, the Development Application Conditions of Consent and the Engineering Design Specification.

## **7. WHEN IS A WORKS-IN-KIND APPLICATION REQUIRED?**

- 7.1 If a developer would like to undertake works that are identified in a Contributions Plan in either full or part satisfaction of conditions of consent requiring development contributions to be made to Council then the developer will need agreement from Council that it will accept the provision of the works-in-kind. Also, if a developer would like Council to consider dedication of land identified in a Section 7.11 Contributions Plan as either full or part satisfaction of conditions of consent requiring development contributions to be made.
- 7.2 Council will only consider a request by a Developer to enter into a Works-In-Kind Agreement once the request has been made in writing.

NOTE: A Works-In-Kind Agreement to allow a developer to provide works-in-kind in full or part satisfaction of development contribution requirements is solely at Council's discretion. This Works-In-Kind Agreements policy is intended as a guide only. The applicant should not assume that compliance with the requirements in the policy will automatically give them approval.

## **8. WHAT IS THE PROCESS FOR OBTAINING APPROVAL TO PROVIDE WORKS-IN-KIND?**

### **8.1 *Step 1 – Initial Discussions with Council's Contributions Planner***

Prior to applying for Council's approval, an appointment should be made to discuss the Council's requirements in relation to the proposed works. This will include a discussion of the Attributable Cost of the land/works. Please contact Council's Contributions Planner to schedule a meeting.

These discussions should occur as early as possible and, in the case of land subdivision, certainly well before time constraints are likely to impact on the ability for Council to issue a prompt subdivision certificate.

### **8.2 *Step 2 – Written Application***

The applicant must write to Council advising of its desire to undertake the land dedication/works that are identified in a Contributions Plan and request approval to enter into a Works-In-Kind Agreement. The applicant should do this as soon as they have received their development consent. The information provided should explain details of the works involved, their location and estimated costs in the form of detailed quotations (refer to section 9 – *What information is required in the written application?*).

NOTE: The applicant should lodge the written application as early as possible to allow sufficient time for Council to assess the application without impacting on the applicant's development schedule. Failure to meet these timeframes may result in delays to the development. Delays in development are not a relevant factor in considering any application.

### 8.3 *Step 3 – Council considers your application*

Upon receipt, Council will assess the information the applicant has provided against the provisions criteria outlined. This may include referral to the DCMC for consideration. In some circumstances, referral to the elected Councillors may be required. Council will then determine whether or not it is prepared to support the proposal and enter into a Works-In-Kind Agreement with the applicant.

### 8.4 *Step 4 – Determination*

Council (DCMC under delegation) will advise the applicant whether or not it will accept the provision of works-in-kind. Where Council does agree to accept the land/works, the developer and Council will enter into a Works-In-Kind Agreement using Council's template Works-In-Kind Agreement. The document establishes the scope of works, the rights and responsibilities of each party and the financial arrangements relating to the Attributable Value of the land/works and their offset against development contribution requirements.

If the applicant wishes to vary any of the clauses in Council's template Works-In-Kind Agreement, the applicant is to provide a detailed description or marked up version of Council's template Works-in-Kind Agreement with justification to Council's Contributions Planner. Council's Contributions Planner will refer all the applicant's proposed variations to Council's legal representatives for legal opinion and drafting. The applicant is liable for all of Council's legal costs with respect to considering variations to the template Works-In-Kind Agreement.

Council officers will consider the legal opinion and drafting received. All proposed variations to the legal drafting of the template Works-In-Kind Agreement must be approved by the DCMC. The legal opinion received by Council is confidential. However, the applicant will be advised of any legal drafting changes once the DCMC has made a decision to approve/reject variations after due consideration is given to the legal opinion provided by Council's legal representatives.

NOTE: The applicant should lodge all proposed variations to Council's Works-In-Kind Agreement template with the written application as early as possible to allow sufficient time for Council to obtain legal advice. Failure to meet these timeframes may result in delays to the development.

The Contributions Planner will forward a copy of the DCMC endorsed Works-In-Kind Agreement to the applicant for signing. The applicant is to return a hardcopy and electronic copy of the signed Works-In-Kind Agreement to the Contributions Planner. Council's Coordinator Contributions Planning has delegated authority to sign the Works-In-Kind Agreement on behalf of Camden Council.

Council expects Works-In-Kind agreements to be signed by the applicant within a reasonable period. A final approval to enter the Works-In-Kind agreement by DCMC remains valid for three months or otherwise negotiated between the applicant and Council. Should the agreement not be signed within three months, the applicant should seek re-approval by DCMC.

### 8.5 *Step 5 – Approvals for the works*

It is the responsibility of the applicant to obtain all necessary approvals for the works and relevant land dedications. The applicant must work cooperatively with relevant Council staff regarding design and specifications for the proposed works prior to submitting a development application and prior to submitting an application for a construction certificate.

Prior to commencing design of any Items of works which relate to a community and recreation facilities, including parks and playgrounds or other unique type of facility, the developer is to request that the Council provide the developer with its requirements for the design, materials and specifications for the provision of the Works. The developer may provide a proposal, including preliminary concept designs as a starting point for discussion with Council as to the proposed works.

The Council is to advise the developer in writing whether it approves of the initial design of Works within 40 working days of receiving the initial design from the Developer.

It is important for the developer to understand that Council entering into a Works-In-Kind Agreement does not imply that development consent for the subject work has, or will, be given. The normal development assessment process under Section 4.15 of the EP&A Act will apply.

In the event that the applicant has obtained development consent for the subject work prior to entering a Works-In-Kind Agreement with Council and working with Council to develop the approved scope and concept design the applicant may be required to amend the development application so that the proposed works are in accordance with Council's designs, specifications, standards and intentions for infrastructure. Any modifications to development consents for subject works and land dedications will attract fees and costs that are to be entirely borne by the applicant. Council takes no responsibility for costs incurred by the applicant.

NOTE: All works shall be in accordance with Council's design, specification standards or as otherwise agreed.

#### 8.6 *Step 6 – Construction Phase*

Upon completion of the first five steps and compliance with the Works-In-Kind Agreement, construction of the work may commence. No additions or alterations, including variations to costs, should be made to the works without Council's consent in writing. This consent may need to include a Section 4.55 Development Consent Modification Approval.

The works will be inspected by Council as stated in the Works-In-Kind Agreement and/or development approval consent, including an inspection when construction is complete, to ensure the facility has been built to an acceptable standard. Any defects must be rectified during the Defects Liability Period in accordance with the provisions of the Works-In-Kind Agreement. Council's Assets team is to be consulted as to the general maintenance periods and Defects Liability Periods required for different asset classes. The agreed periods will be listed in the Works-In-Kind Agreement.

#### 8.7 *Step 7 – Handover Phase*

The applicant must submit an AutoCAD drawing file or equivalent file form as required by Council. This AutoCAD drawing file must be provided in electronic format including all notation. PDF documents are not satisfactory.

The applicant is also required to complete and submit Council's Asset Data Sheet or Fair Value Valuation for each asset to be handed over to Council. The Asset Data Sheet is available on Council's website.



The developer is to give the Council not less than 20 calendar days' written notice of the date on which it proposes to hand over any works to the Council, being a date not later than the Hand-Over Date and the Items of work the subject of the notice.

NOTE: Where there is deviation from Council's standards, specifications, plans, data or otherwise at handover, this could result in delays to the development.

## **9. WHAT INFORMATION IS REQUIRED IN THE WRITTEN APPLICATION?**

9.1 The applicant must provide the following information as a minimum:

- Detailed description of the works proposed to be undertaken and/or land to be dedicated to Council in lieu of section 7.11 conditions of consent. It would be desirable for the description to be supported by concept/detailed design drawings.
- Legal description of the land to be dedicated and/or land on which any works are proposed to be carried out under the agreement.
- If the applicant seeks to claim the value of works on land that is not owned by the applicant, all the landowners must be identified as parties to the Works-In-Kind Agreement. It is the responsibility of the applicant to obtain written confirmation from all the landowners that they raise no objection to the applicant claiming the Attributable Value of works on their property, forfeiture of the landowner's rights to enter an agreement for the subject works at a later date, and an understanding that Council has discretion to accept the land dedication as a contribution at a later date.
- The estimated Attributable Cost of the land and works. A sufficient level of detail will be required to enable Council to verify the value of works.

(Note: Council will only provide an offset against development contributions at a maximum to the extent of the Attributable Cost of the works i.e. the amount provided for in the Contributions Plan.)

- A schedule identifying the relationship between those land dedications and works and the relevant Contributions Plan.
- An explanation as to whether the proposed works are intended to be completed in full or to be partially completed, relative to the specifications contained in the Contributions Plan and any existing development consent approval/s for works.
- Detailed description of the expected timeframe and staging for design, construction and handover of works.
- A summary table of the development contributions payable on conditions of consent and the extent the proposed Works-In-Kind Agreement will offset these conditions of consent.
- For applicants who have accrued a surplus credit in previous Works-In-Kind agreements, identify the current and remaining surplus credit position if the Works-In-Kind Agreement is entered into.

## 10. WHAT ARE YOUR (THE APPLICANT'S) RESPONSIBILITIES?

10.1 If Council agrees to accept the proposal to provide works-in-kind, the applicant must:

- Work cooperatively with Council to develop a design that achieves a positive outcome for the community having regard to aesthetics, sustainability, life cycle costs and value for money prior to lodgement of a DA for the works.
- Comply with all statutory requirements and regulations that relate to the works.
- Fulfill any requirements set out in the Works-In-Kind Agreement.
- Indemnify Council against all claims etc related to the works undertaken.
- Retain a suitable public risk insurance policy with a minimum liability of \$20,000,000 (or other minimum required by Council) and present Council with a copy of this policy and other insurances set out in the Works-In-Kind Agreement.
- Not make any variations to the agreed works without written approval from Council.

NOTE: Council is not liable for any variations between the Attributable Value of the works/land in the Contributions Plan and estimated (actual) construction costs.

- Notify Council when all inspections are required as per the Works-In-Kind Agreement and/or Development Consent.
- Provide Council with a Land Tax Clearance issued by the Office of State Revenue dated less than one month prior to the land transfer to Council.
- To pay all costs incurred with Council appointing a qualified quantity surveyor to provide a "fair value" valuation for the asset/s to be dedicated to Council. The valuation must be carried out by a registered valuer and in accordance with AASB 116 and the NSW Department of Local Government Code of Accounting Practice and Financial Reporting. Valuations are not required for roads, bridges or drainage. The valuation of buildings should be componentised and land valued on the basis of its intended use. i.e. operational or community land.
- When the works-in-kind are complete they will need to be handed over to Council. The Works-In-Kind Agreement will specify the Hand-Over Date and provisions relating to rectification of defects. Generally, items of work will need to be maintained in accordance with Council's Engineering Specifications.
- Upon the handover or dedication of land, property and buildings to Council, the applicant must provide an AutoCAD drawing file or equivalent to Council and notice of intended Hand-Over Date.
- Provide security for rectification of defects for the duration of the Defects Liability Period in accordance with Council's Engineering Specifications.

These responsibilities will be further explained in the Works-In-Kind Agreement.

NOTE: Council maintains the right to instruct the developer to modify the form, quality or quantity of the works.

## **11. HOW WILL THE VALUE OF WORKS BE OFFSET AGAINST REQUIREMENTS TO MAKE DEVELOPMENT CONTRIBUTIONS?**

- 11.1 The purpose of providing works-in-kind is to satisfy the conditions of development consent that require contributions to be made (i.e. to construct works instead of making a cash payment to Council).
- 11.2 Council will only offset the value of works-in-kind against the development contribution required for that particular type of work. For example, construction of a community centre can only be offset against contributions required for the purposes of community facilities. The construction of the community centre would not satisfy contributions that were required for the purposes of open space, roads or drainage etc.
- 11.3 Council preference is to only accept land and works-in-kind to the value of the development contributions required by conditions of consent. It is at Council's discretion whether it will accept the provision of works-in-kind where the combined value of the land and works exceeds the value of development contribution required by conditions of consent. For example, where the Attributable Cost of constructing a community centre is \$1,500,000, but the contribution required for the purposes of community facilities is only \$900,000.
- 11.4 Works-in-kind credit will be applied as an agreed reduction of contributions payable under the relevant development consent in accordance with s 7.11(5) of the EPA Act. The condition requiring the payment of the contributions does not need to be modified. Works-in-kind credit cannot be applied once development contributions have been paid.
- 11.5 In the exceptional circumstances where Council agrees to accept works with a value greater than the contributions required, Council will hold the surplus value of the works as a credit in favour of the developer and will apply this credit against future development contribution requirements for that particular type of work.  
  
For example, the surplus value of constructing a community centre with an Attributable Cost of \$1,500,000, where the contribution required is only \$900,000, would be \$600,000 ( $\$1,500,000 - \$900,000 = \$600,000$ ). In this instance, the surplus value of \$600,000 will be held as a credit and will only be used to offset future requirements to make development contributions for the purposes of community facilities and indexed. Council will not offset requirements to make contributions for the purposes of recreation facilities, open space land acquisition, plan administration and the like against this surplus value, as the surplus value relates only to the provision of community facilities.
- 11.6 A developer providing works-in-kind that are in excess of its contribution requirements should not expect monetary payment from Council until all contributions toward the provision of the works have been collected from other developers. This is usually at the end of the life of the relevant Contributions Plan i.e. when the relevant Contributions Plan is repealed.
- 11.7 Where the value of works undertaken is equal to the contribution required as a condition of consent, Council will consider those works to be the equivalent of the payment of the contribution in full.

- 11.8 Where the value of the works undertaken is less than the contribution required as a condition of consent, the developer will be required to pay the difference.
- 11.9 Council will not offset against the value of required development contributions, the value of any work which is required under Section 4.17 of the Act, being works required as a result of the considerations of Section 4.15 of the Act.

**NOTES:**

Council does not accept any financial risk associated with the construction of the works and will only cover those Attributable Costs agreed to in the Works-In-Kind Agreement entered into by the developer. Any costs beyond this will be borne by the developer.

Council does not accept any liability for costs associated with altering the design or construction of works or land dedications if the applicant has received development consent for the land/works prior to execution of a Works-In-Kind Agreement.

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.

**12. WHAT SECURITY ARRANGEMENTS WILL BE REQUIRED FOR THE WORKS-IN-KIND?**

- 12.1 As Council is agreeing to offset the value of works-in-kind against the requirements to pay development contributions, satisfactory security arrangements need to be in place. This falls into two main categories: works that will be completed prior to a subdivision certificate being issued and works that will be completed after a subdivision certificate is issued.
- 12.2 Generally, all works-in-kind are to be completed prior to a subdivision certificate being issued for the development consent which is the subject of the development contributions. However, in some circumstances this may not be possible.
- 12.3 Council may accept a bank guarantee if the applicant, or any other person entitled to act upon the relevant consent, makes a written request and can satisfy the Council that non-compliance with the Works-In-Kind Agreement is justified. Acceptance of any request is entirely at the discretion of the Council. The DCMC will consider each proposal on a case-by-case basis.
- 12.4 The Contributions Planner shall prepare a report to the DCMC outlining the request against the following criteria.

Bank guarantees may be permitted in any one or more of the following circumstances:

- Making of the contribution at the time stipulated in the development consent or the relevant Contributions Plan is unreasonable or unnecessary in the circumstances of the case.

- Deferral of the contribution by means of a bank guarantee will not prejudice the timing or the manner of the provision of public facilities included in the Contributions Plan works program.
- The execution of a Works-In-Kind Agreement in lieu of a 7.11 monetary contribution is required is imminent.
- A Works In Kind agreement is 'imminent' if
  - Council is satisfied the draft agreement is expected to be executed within a three-month timeframe
  - The draft Works-In-Kind Agreement has progressed through Steps 1 to 3 of the Works-in-Kind process outlined in section 6 of this Policy, and
  - There are no outstanding legal matters to be resolved, that is, no matters pending a legal opinion or legal drafting of variations to Works-In-Kind Agreement template.
- In the case of a voluntary planning agreement, Council will only accept a bank guarantee if, at an Ordinary meeting of Council, Council has resolved to publicly exhibit a draft voluntary planning agreement.
- There are extenuating circumstances justifying the deferred or periodic payment of the contribution.

12.5 The DCMC will consider the request and make a recommendation as to whether the request is in the public interest.

12.6 If the Council does decide to accept deferred or periodic payment, the payment may be deferred for a period not exceeding 12 months from the date that such payment is due under the relevant conditions.

- The Bank Guarantee must be for the amount of the total contribution, or the amount of the outstanding contribution.
- If the applicant has not entered an agreement with Council within the abovementioned timeframes, the bank guarantee be for the amount of the total contribution, or the amount of the outstanding contribution, plus an amount equal to 10 percent of the outstanding amount plus any charges associated with establishing or operating the bank security.
- A non-refundable administration charge must be paid to Council at the date of lodgement of the Bank Guarantee to cover any bank charges and to contribute to the coverage of Council administration costs. Refer to Council's adopted Fees and Charges for current administrative charges. Administrative charges are also payable for substituting bank guarantees with Council.
- The developer may, at any time after lodging the Bank Guarantee, make part payments of either 25% or 50% of the Bank Guarantee amount. An adjustment to the interest payable will be made after the payment of the contribution in full.

- If the amount of the total contribution, or the amount of the outstanding contribution, plus an amount equal to twelve months interest has not been paid within 12 months from the date that the payment of the development contribution was due or the Works-In-Kind Agreement has not been executed, the Council will call on the Bank Guarantee without reference to the developer, landowner or other person who lodged the guarantee, and without regard to any dispute, controversy, issue or other matter relating to the development consent or the carrying out of development to which the Bank Guarantee relates.
- The bank's obligations are discharged when payment to the Council is made in accordance with the Bank Guarantee or when council notifies the bank in writing that the Bank Guarantee is to be released. Where a bank guarantee has been deposited with the Council, the guarantee shall not be cancelled until such time as the original consent contribution plus indexation in accordance with this Plan from the date of the consent has been paid.

#### 12.7 Security requirements for works to be completed **prior** to a subdivision certificate being issued

For works that are being constructed and handed over to Council prior to a subdivision certificate being issued, Council acknowledges that the subdivision certificate itself is a form of security. As a result, Council will only require security to be provided in the following instances:

- Works constructed on privately owned land – NIL
- Works constructed on publicly owned land where there will be no disruption to existing services and facilities – an amount sufficient for Council to make the works safe if they are left incomplete. This will be negotiated on a case-by-case basis and could be as minimal as the cost to erect a fence around the works.
- Works constructed on publicly owned land where there will be disruption to existing services and facilities – an amount will be negotiated on a case-by-case basis. In some instances (such as road works on an existing public road) Council may require an amount equal to the cost of completing the works.

Any exclusion from the need to lodge Bank Guarantees for the purposes of development contributions does not extend to Bank Guarantees for performance or damage to existing infrastructure.

#### 12.8 Security arrangements for works to be completed **after** a subdivision certificate has been issued

For works that are to be completed and handed over to Council after a subdivision certificate has been issued, Council will require a security equal to 115% of the cost of the remaining works.

### **13. OWNERSHIP OF WORKS PROVIDED BY WORKS IN KIND AGREEMENTS**

- 13.1 Works become the property of the Council when they are handed over to Council. The Works-In-Kind Agreement will specify a Hand-Over Date. No credit will be provided for the works until they have been handed over to the Council or in the case of works to be completed after a subdivision certificate has been issued, appropriate bank guarantee arrangements are in place.
- 13.2 When the work undertaken by the applicant is for the design of an item of infrastructure, the design work will become the intellectual property of the Council. All plans and related documentation must be provided to the Council for credit to be acknowledged for the work.
- 13.3 If the applicant is to dedicate land to Council in a Works-In-Kind Agreement, the landowner is to provide a land tax clearance certificate to Council.

### **14. PAYMENT OF LEGAL COSTS**

- 14.1 Council has invested its resources in preparing a Works-In-Kind Agreement template, which is a standard agreement to be used for Works-In-Kind Agreements. Council is allowing applicants to use this agreement free of cost.
- 14.2 Variations to the Works-In-Kind Agreement template will only be considered in unique circumstances. Where a variation is required, the applicant must bear all of the legal costs of drafting the amendment to the template agreement, including Council's legal costs.

### **15. TREATMENT OF SURPLUS VALUE**

- 15.1 In certain circumstances applicants may, through previous development applications, have contributed more to the Council than was required. This would only likely have occurred when the applicant provided land or other material public benefit through a works-in-kind or land dedication agreement and this extra provision is referred to as 'surplus value'.
- 15.2 If a person seeking to settle a contribution obligation with the Council would like Council to consider accrued surplus value relating to an earlier consent and agreement, they must submit a written request together with details of the earlier agreement. The earlier agreement should explicitly acknowledge that previous payments exceeded contributions that were required at that time. In such circumstances, Council may offset the surplus value from an earlier agreement against a current application or more recent consent.
- 15.3 Council will only consider applying the surplus value to future developments after land and works in previous Works-In-Kind Agreements have already been completed and dedicated to the Council.
- 15.4 Whether Council has already granted consent or not, the subject development application will, if granted, include the relevant condition(s) requiring full payment of development contributions and land dedications. The offset against surplus value will be resolved externally to the consent in an agreement.
- 15.5 The surplus value of land is not subject to indexation. However, the surplus value of works in previous agreements is subject to indexation consistent with the indexation approach set out in the relevant Contributions Plan.

15.6 The settlement of contributions against those paid under previous consents should be viewed as a variation of that earlier agreement. The applicant is effectively submitting a request for variation of the agreement. If Council agrees, it will issue a 'Letter of Variation of the Past Agreement', which both parties must sign.

15.7 The written application to Council must contain the following information:

- Particulars of executed Works-In-Kind Agreements: Date of execution and Surplus Value
- Letter(s) of Variation of the Past Agreement issued by Council (if any), and
- Recent section 7.11 advice obtained from Council's Contribution Accountant on the indexed monetary contributions payable.

15.8 The DCMC may at its discretion permit the offset. Each request will be considered on a case by case basis using the following minimum criteria:

- Evidence of the applicant's compliance with executed Works-In-Kind Agreements, that is, the handover of land to Council, completion of works and acceptance by Council
- The applicant seeking to offset surplus value in accordance with the relevant infrastructure category and Contributions Plan that the monetary contribution is due, and
- The financial implications for cash flow and the continued implementation of the works schedule being included in the relevant Contributions Plan(s).

15.9 Landowners/developers who provided land contributions or works-in-kind in excess of their contribution requirements should not expect monetary payment (reimbursement) from Council until all contributions toward the provision of the land and/or works have been collected from other developers. This is generally the end of the life of the relevant Contributions Plan, that is, when the Contributions Plan is repealed.

15.10 Landowners/developers should not expect reimbursement of surplus value in full or at a predetermined date. The possibility and level of reimbursement is limited to the funds collected from other developers received for those works pursuant to the relevant Contributions Plan. The timing and level of reimbursement may be affected by financial liabilities associated with forward funded local infrastructure projects directly undertaken by Council, the possibility that Council may reimburse multiple developers' surplus values (to the extent of contributions collected from other developers) and that Council may apply development contributions received towards a public purpose other than the public purpose specified in the Works-In-Kind Agreement if the Council considers that the public interest would be better served by applying the development contributions towards that other public purpose rather than the purpose so specified.

15.11 An applicant may make a written application to Council to transfer part or all of surplus value to a third party. The following criteria will be used to determine whether this arrangement is acceptable:

- The current surplus value held in favour of the applicant relevant to each Contributions Plan and infrastructure category (e.g. community facility, open space)



- The level of section 7.11 offsets sought from the third party in relation to development consents granted
- Implications on Council's financial position
- Impact on Council's ability to deliver infrastructure.

15.12 Should Council approve the transfer of surplus value, this will be subject to conditions including but not limited to the following:

- The applicant agrees to pay all legal costs.
- All parties (Council, applicant and third party) must enter a legally binding agreement - a 'Letter of Variation of the Past Agreement'.
- The third party acknowledges that they have read and understood this policy.
- Neither the applicant nor third party can transfer surplus value to another party without Council's prior approval.
- The arrangement to transfer surplus value shall expire (i.e. cease to have effect) if the third party has failed to use the agreed surplus value to satisfy development conditions of consent within 28 days or as otherwise notified in writing by the applicant and third party and agreed by Council.
- The applicant is to make a subsequent written application to Council after 28 days have lapsed.

□ \* \* \*

**RELEVANT LEGISLATIVE INSTRUMENTS:** *Environmental Planning and Assessment Act 1979*

**RELATED POLICIES, PLANS AND PROCEDURES:**

**RESPONSIBLE DIRECTOR:** Sport, Community and Activation

**APPROVAL:** Council

**HISTORY:**

<b>Version</b>	<b>Approved by</b>	<b>Changes made</b>	<b>Date</b>	<b>EDMS Number</b>
1	Council	New	13/09/2012	15/217085
2	Council	Minor amendments	10/08/2021	21/397388