



Policy No. 3.10

Name of Policy:	Works-In-Kind / Material Public Benefit Policy
Date of Adoption by Council:	15 July 2015
Last Review Date:	Not as yet reviewed
Review Timeframe:	Every 2 years or Legislative Change
Next Scheduled Review Date:	15 July 2017
Related Legislation:	Environmental Planning and Assessment Act 1979 Environmental Planning and Assessment Regulation 2000
Associated Policies Documents:	Section 94A Contributions Plan 2015 Planning Agreement Policy
Responsible Director:	Manager Planning and Environment

1. INTRODUCTION

1.1 POLICY STATEMENT

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 development contributions or section 94A levies required under Council's section 94 or section 94A contributions plans.

1.2 APPLICATION

This Policy applies to all applications submitted to Council for development approval where the applicant wishes to carry out works pursuant to this Policy in lieu of paying the necessary development contributions to Council.

This Policy also applies to any offer made to Council by a developer following the granting of development consent, to provide Works in Kind or Material Public Benefit to partially or fully satisfy a s94 or s94A condition under such development consent.

1.3 DEFINITIONS

Contributions Plan Is a public document prepared by a Council pursuant to section 94EA of the *Environmental Planning and Assessment Act*.

Credits 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 done 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 A developer is 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) A MPB can consist of either a 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.

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* which is the principal legislation that allows councils to levy contributions.

Works-in-Kind (WIK) The undertaking of a work or provision of a facility that is specifically included 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.

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 works proposed to be undertaken and whether the works are contained within the works schedule of the Contributions Plan;

- 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;
- The proposed timing for design, construction and hand-over of the works.

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.

2.2 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 the Department of Planning and Infrastructure and may consider matters such as, but not limited to, the following:

Works-in-Kind

- The access, location and design of the proposed facility in the context of the proposed development and adjoining current or future development that would be expected to benefit from the works;
- 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 works 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 works specified in the Contributions Plan and whether there is any requirement or expectation for a credit against any other contributions;
- The financial implications for cash flow and the continued implementation of the works schedule of the Contributions Plan.

Material Public Benefit

- 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 exceeds 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; and

- Whether or not Council may need to make up the shortfall in anticipated contributions.

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 Material Public Benefit, a Works in Kind that is not a condition of development consent or any proposal which requires a contribution from Council will require a formal resolution of the Council before proceeding further.

2.3 SUBMISSION OF DETAILED INFORMATION

- If Council has agreed in principal to the application, it will be necessary for the applicant to provide the following detailed information;
- A copy of all written documentation including plans and specifications for the proposed works;
- The value of the work 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 may review the valuation of works or land to be dedicated, and may seek the services of an independent person to verify their value. In such cases, all costs and expenses borne by the Council in determining the value of the works or land will be paid for by the applicant/developer.

Attention is drawn to Section 55 of the Local Government Act 1993 which requires Councils to adhere to the public tendering process for the provision of facilities with a value in excess of \$150,000.00.

Under the provisions of Clause 55(3), Council may 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.

2.4 PREPARATION OF AGREEMENT

If a WIK or other MPB agreement has been reached, a draft Agreement in the form of a legal contract shall be prepared by Council's legal representatives covering;

- The works proposed;
- The costs of such works;
- Any implementation steps;
- The applicants rights and responsibilities; and

- Council's rights and responsibilities.

The draft Agreement will be referred internally to the relevant Asset Manager, any other internal stakeholder, and then to the applicant for comment and agreement.

Once all parties have agreed to the content, the draft Agreement will then be presented to Council if necessary (see clause 2.2 of this Policy).

All costs associated with the preparation of the WIK/MPB Agreement are to be met by the applicant/developer.

2.5 BANK GUARANTEE

Once the WIK or other MPB negotiations have been finalised, 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 any Certificate is issued under Part 4 of the Environmental Planning & Assessment Act 1979.

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 retained as a security bond which shall be returned to the developer/applicant once the 12 month defects liability 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 COMPLETION OF AGREEMENT

If formal resolution of Council is required, the Common Seal of the Council must be affixed to the document upon execution.

Two copies of the final Agreement will be prepared by Council staff for execution by the applicant/developer before being executed by Council. Once both copies of the Agreement have been fully executed, one copy will be provided to the applicant/developer and one will be retained by the Council.

The Agreement will not take effect until it has been executed by all parties.

2.7 CONSTRUCTION

Once the Construction Certificate has been issued (if required under the Act), construction can begin on the agreed works. It should be noted that 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 identified in the Agreement, 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/works once handed-over, the works will be inspected by Council's representative as they progress to ensure that they are being completed to the specified standard/s. The proposed timing of these inspections will be identified in the Agreement.

Once commenced, non-compliance with the contract will result in non-compliance with the development consent.

2.8 HAND-OVER

Upon completion of the works or land identified in the Agreement, Council will inspect the works and identify any defects. Upon rectification of any defects, Council will accept hand-over of the works, in accordance with the Agreement.

The developer is required to meet all costs associated with the hand-over of the works.

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, it should be noted that if the works proposed relate to works covered by a specific category within the Council's section 94 Plan then 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 done in one of four ways:

- 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

- 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
- 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; or
- Where Council also has a contribution to make under the section 94 Plan Council will make such a payment on hand-over of the works to the Council.

Council does not accept any financial risk associated with the construction of the works and only those costs agreed to in the Works-in-Kind or Material Public Benefit Agreement entered into by the developer, will be offset against development contributions. 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 as 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 contributions identified in the development consent minus the offset amount.
- It should be noted that where an offer to Council for the dedication of land is made following the granting of development consent, the application will need to be accompanied by a request for an appropriate modification under s96 of the *Environmental Planning and*

Assessment Act to the terms of the development consent requiring the amendment of the condition relating to the s94 contribution.

Variations between estimated costs contained in the works schedule of the Contributions Plan and actual construction costs are to be entirely the applicant's/developer's responsibility.

3.3 FINANCIAL REQUIREMENTS

If Council enters into an Agreement where it is responsible for contributing contributions received for works from other development (as identified in the Contributions Plan), Council will only reimburse the applicant/developer as contributions are received and will not accept any financial risk incurred by any applicant/developer as result of funding the up-front cost of a facility/works.

Council will however, reimburse their portion of the cost of the works as identified in the Contributions Plan on completion of the works.