



Hawkesbury City Council
Policy

Works in Kind
Procedure

Hawkesbury City Council

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1. PROCEDURE FOR PROVISION OF WORKS IN KIND

1.1 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.

1.2 Application to Council

A written application to undertake Works in Kind 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 Works in Kind proposed to be undertaken supported by concept design drawings and a concept design report.
- b) One (1) hard copy and one (1) electronic copy of the concept design.
- c) An explanation as to whether the proposed Works in Kind is intended to be completed in full or to be partially completed.
- d) The estimated value of the Works in Kind produced by a qualified and practicing Quantity Surveyor, Civil Engineer or Surveyor with associate or higher membership of an accredited professional institution in Australia and with demonstrated relevant experience. 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 Works in Kind 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, completion, and handover of the proposed Works in Kind.
- g) Development approval (consent number and date of consent).

Where the value of the Works in Kind 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.

1.3 Assessment and determination of the offer to undertake Works in Kind

Council will assess an offer to undertake Works in Kind with due regard to the provisions in the Contributions Plan that applies to the site of the relevant development and determine the acceptability or otherwise of the offer. Council's developer Contributions Committee will lead the assessment of any Works in Kind offer.

In assessing an offer to undertake Works in Kind, 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, Industry and Environment.



Council will also consider the following matters:

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

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

The developer will be notified in writing of the outcome of the assessment of the Works in Kind proposal.

1.4 Acceptance by Council of the offer to undertake Works in Kind

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

The relevant Works in Kind Agreement will be prepared by Council with all costs (including legal costs) borne by the developer. The Works in Kind Agreement will include (but not necessarily limited to) terms relating to the following:

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



Council expects Works in Kind agreements to be signed by the applicant within a reasonable time. Should the agreement not be signed within three months, the applicant should seek re-approval.

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

1.5 Securities

Council will require every Works in Kind Agreement entered into by it to contain appropriate security provisions which allow for the enforcement of the WORKS IN KIND Agreement by suitable means in the event of a breach of the Works in Kind Agreement by the developer.

Such provisions may include the following:

- a) Requiring the Works in Kind 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 Works in Kind Agreement. Performance security and administration fees apply in accordance with Council's adopted schedule of fees and charges.

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

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

and must be provided to Council prior to execution of the Works in Kind Agreement.

Upon completion of the Works in Kind, 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 Works in Kind;
 - ii. the Works in Kind to which that security relates have been completed in accordance with the terms of the Works in Kind Agreement; and
 - iii. the developer is not in breach of the Works in Kind 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 WORKS IN KIND 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 WORKS IN KIND; and
 - iii. the developer is not in breach of the WORKS IN KIND 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 Works in Kind Agreement (including but not limited to where the developer fails to complete the Works in Kind in accordance with the Works in Kind Agreement).

1.6 Insurances

The developer will be required to produce evidence of current policies of insurance relevant to the construction of the Works in Kind. The values of the policies will be determined having regard to the nature and extent of the Works in Kind and the risks inherent in carrying out the Works in Kind.

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 with \$ 10,000,000 minimum cover;
- 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' party for the purpose of the Policy.

1.7 Approvals

The developer must obtain, and comply with, all necessary approvals to carry out the Works in Kind, including Development Consents, approvals under environmental, sewer, water and public road legislation, and approvals from utility providers and entities such as the Roads and Maritime Services, Endeavour Energy, Telecommunications companies and the like.

Where the Works in Kind 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 Works in Kind and obtain that Development Consent as well as the necessary construction certificate prior to commencement of the Works in Kind.

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

1.8 Construction

Subject to the Developer obtaining the necessary consents for the Works in Kind, construction of the Works in Kind can commence on completion of Steps 4.1 to 4.7 of this policy, and any other preliminary requirements under the Works in Kind Agreement.

The developer is responsible for preparation of any necessary dilapidation reports. Copies must be submitted to Council prior to work commencing.

The developer is responsible for administration of all construction and works contracts.

Council will carry out inspections of the Works in Kind as outlined in the Works in Kind Agreement and is subject to a supervision fee in accordance with Council's adopted Fees and Charges Schedule.



On completion of the Works in Kind, a final inspection will be carried out and Council will assess the acceptability of the Works in Kind. 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 Works in Kind Agreement.

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

1.9 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 Works in Kind to Council.

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

1.10 Dedication of Works in Kind

Prior to the issue of a Certificate of Practical Completion for any Works in Kind, the Developer must:

- a) dedicate the works and associated land to Council; and
- b) supply two (2) hard copies and one (1) electronic copy of the works as executed drawings for the WORKS IN KIND.
- c) valuation data in the format required for inclusion in Council's Asset Registers.

2. PROCEDURE FOR DEDICATION OF LAND

2.1 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 Works in Kind 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 Works in Kind Credit will be given for the land dedication against any contributions payable for the development.



2.2 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 and experienced person.
- f) A valuation from a registered land valuer providing evidence of the value of land that is being sought as a land dedication.

2.3 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, Infrastructure and Environment.

Council will also consider the following matters:

- a) The monetary value of the proposed land dedication and the amount of Works in Kind 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 WORKS IN KIND.
- e) If works are proposed on the land to be dedicated as a WORKS IN KIND, 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 Works in Kind proposal.

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



2.4 Acceptance by Council of the offer to dedicate land

A decision to accept the dedication of land will generally be by Council resolution, except where it relates to minor or low value land dedication. 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 Works in Kind Agreement.

Any such Works in Kind Agreement will be prepared by Council at the cost of the developer.

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

2.5 Credit against existing contributions requirements

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

The Works in Kind 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 Works in Kind Agreement.

A Works in Kind 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 Works in Kind Credit to be utilised.

2.6 Land Dedication and/or Works in Kind constructed in conjunction with development

If Council accepts an offer from a developer to provide Works in Kind in conjunction with proposed development, Council will apply the Works in Kind 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 Works in Kind Agreement, that it will accept the land dedication (subject to Council resolution) and/or provision of the Works in Kind 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 Works in Kind. The condition requiring the payment of the Development Contributions does not need to be modified to allow for the application of the Works in Kind Credit.



2.7 Credit against future Development Contribution requirements

If the land dedication and/or Works in Kind are not offered in conjunction with proposed development, Council will only consider the Works in Kind when determining future development applications in accordance with any Works in Kind Agreement once the Works in Kind has already been provided or dedicated to Council.

In accordance with Section 7.11(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 Works in Kind provided by the developer.

3. DISCRETION TO GRANT CONSENT

- a) The provision of Works in Kind in accordance with this Policy will not be considered by Council when determining a relevant Development Application, except to the extent authorised by Sections 7.11(5) and 7.11(6) of the EP&A Act.
- b) Council's statutory discretion or duty in determining Development Applications will not be limited or fettered by the provision of any Works in Kind Agreement or any offer to undertake Works in Kind.
- c) The provision of Works in Kind or entering into any Works in Kind Agreement with a developer will not impose any obligation on Council to grant Development Consent.

4. OTHER REQUIREMENTS

- a) 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.
- b) Section 55 of the Local Government Act 1993 (NSW) requires Council to invite public tenders for works and services in excess of \$250,000. Works in Kind requiring a funding contribution from Council of more than these limits must be tendered in accordance with Council's Tendering Operational Management Standard. In particular the tendering requirements under Section 55 of the Local Government Act 1993 (NSW) will continue to apply to these works.
- c) Works in Kind which are either fully funded by the developer, funded by Development Contributions held by the developer or require less than \$250,000 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 and in accordance with the Council's relevant operational procurement policies and standards.



5. NOTES

- a) Council does not accept any financial risk associated with the provision of Works in Kind 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.
- b) 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 Works In Kind Agreement.
- c) 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 Contribution 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.
- d) 9.4 This policy should be reviewed two years after the date of the adoption of this policy.