KEMPSEY SHIRE COUNCIL

Kempsey Shire Council Works in Kind Policy & Procedure **Procedure 1.1.20**

Policy Goal	1.1	Development Control Policy
Policy Sub Group	1.1.20	Works in Kind Policy & Procedure
Version	1	
Date Adopted	<Insert Adoption Date>	

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PLANNED REVIEW DATE	<Planned Review Date>	

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1. Objectives

1.1 The objective of this policy is to establish a framework for Works in Kind (WIK) Agreements in satisfaction of requirements to pay development contributions in accordance with the provisions of the Environmental Planning & Assessment (EP&A) Act and Council's Contributions Plans that includes:

a) Information regarding making an application and entering into a WIK agreement;

b) Detail about how Council will assess and determine whether it will enter into a WIK Agreement; and

c) Ensuring that a fair, transparent, efficient and accountable framework governs the use of WIK Agreements to facilitate the provision of public facilities, services and strategic planning context, including Council's Development Contributions Plans.

1.2 This policy is intended to fit within the legislative framework established under the EP&A Act for the consideration of material public benefits

associated with development. This policy addresses material public benefits that are offered:

a) in satisfaction of existing conditions requiring payment of Development Contributions (under Section 7.11(5) of the EP&A Act);

b) in conjunction with proposed development (so that the offset can be considered under Section 7.11(5) of the EP&A Act); or

c) in return for a 'credit' against future contributions that would otherwise be payable (under Section 7.11(6) of the EP&A Act).

2. Scope

2.1 The purpose of this policy is to establish a framework for WIK Agreements in satisfaction of requirements to pay development contributions in accordance with the provisions of the EP&A Act and Council's Contributions Plans that includes:

a) Information regarding making an application and entering into a WIK agreement;

b) Detail about how Council will assess and determine whether it will enter into a WIK Agreement; and

c) Ensuring that a fair, transparent, efficient and accountable framework governs the use of WIK Agreements to facilitate the provision of public facilities, services and strategic planning context, including Council's Contributions Plans.

2.2 This policy is intended to fit within the legislative framework established under the EP&A Act for the consideration of material public benefits associated with development. This policy addresses material public benefits that are offered:

a) in satisfaction of existing conditions requiring payment of Development Contributions (under Section 7.11(5) of the EP&A Act);

b) in conjunction with proposed development (so that the offset can be considered (under Section 7.11(5) of the EP&A Act); or

c) in return for a 'credit' against future contributions that would otherwise be payable (under Section 7.11(6) of the EP&A Act).

3. Background

3.1 New development creates the need for additional public amenities and public services. Section 7.11 of the EP&A Act provides that where a consent authority is satisfied that a proposed development will require the provision of, or increase the demand for, public amenities and public services, it may grant development consent subject to a condition requiring a reasonable dedication of land or the payment of reasonable monetary contributions towards the extension or augmentation of those amenities or services.

3.2 Section 7.11 (5) of the EP&A Act specifically provides that a consent authority may accept the provision of a material public benefit in satisfaction of a condition requiring the dedication of land or payment of a monetary contribution towards the provision of public services and amenities.

3.3 A developer may seek to construct or provide public infrastructure or amenities in whole or part in lieu of making monetary contributions - this is known as WIK. WIK Agreements can provide opportunities for developers to deliver infrastructure for the community earlier than Council would be able to achieve, as they are already constructing works on site.

3.4 Council has sole discretion to decide whether it will accept WIK. However, it is intended that Council and all persons dealing with Council in relation to WIK will follow this Policy to the fullest extent possible.

4. Policy

4.1 General

4.1.1 Council will consider an application by a developer to carry out works and identified in a Contribution Plan.

4.1.2 This policy applies to works and identified in a Contributions Plan that a developer offers, or has offered, in exchange for a 'credit' or offset against Development Contributions (WIK Credit).

4.1.3 Prior to making any offer to undertake WIK, the developer should consult Council about the proposal. The developer should expect Council to seek details of the proposed WIK and any associated development as part of this process.

4.1.4 Items that may qualify for WIK can be identified by referring to the Contributions Plan that applies to the site of the relevant development.

4.1.5 Land parcels that may qualify for land dedication can be identified by referring to the Contributions Plan that applies to the site of the relevant development. However, land dedication cannot be undertaken via a WIK agreement and must instead occur via a condition of development consent or via a planning agreement.

4.1.6 Any offer to undertake WIK with the intent of receiving a WIK Credit must be made in writing via a WIK Proposal. The procedure for application and consideration of the proposed WIK agreement will be carried out in accordance with this Policy and related documents. In the event that the WIK Proposal is accepted, the applicant must enter into a WIK Deed with Council.

4.1.7 To be eligible for a WIK credit, the WIK being offered must be:

a) identified in a Contribution Plan;

b) procured through an open and transparent process that will deliver value for money for Council; and

c) in compliance with Council's specifications and relevant Australian Standards.

4.1.8 Variations to the items listed in the Contributions Plan will be considered at Council's sole discretion and items that are not listed in the Contributions Plans will not qualify for a WIK Credit and will not be considered under this Policy.

4.1.9 The acceptance of an offer for WIK will be at the sole discretion of Council or its delegate. The terms of the WIK Agreement will be generally consistent with the provisions of this Policy, unless Council is satisfied that the circumstances justify a departure from the Policy. Council is not obliged to approve WIK proposals. In the event a proposal is declined, the applicable contributions payment condition must be met.

4.1.10 If a developer wishes to provide works or dedicate land not identified in the relevant Contributions Plan, then an offer to enter into a planning agreement should be submitted in accordance with Council's Planning Agreement Policy.

4.2 Assessment and Determination of the Offer to Undertake WIK

4.2.1 The WIK Proposal

4.2.1.1 The WIK Agreement must be entered into before any works under consideration commence; Council will not consider a proposal for works that have already begun.

4.2.1.2 To enable Council to assess and consider the provision of WIK, the applicant must submit a WIK proposal to Council that addresses the following:

a) Works to be undertaken: WIK Contracts will only be negotiated on those works detailed in the relevant contribution plan.

b) Timing of works: No WIK Contracts will be negotiated retrospectively, i.e., after works commence.

c) Community Benefit: it should be demonstrated that approval of the application will be a significant benefit to the community in the spirit of providing what is intended under the Contribution Plan.

d) Prejudicial Impact: the Application must not prejudice the timing or the manner of the provision of the infrastructure for which the contribution was required. Prejudicial impact will have regard of all items in the Plan's Work Schedule, not only the item(s) in the Application, and will consider any impacts, both negative and positive, upon service levels.

e) Financial Impact: the cost of works proposed under the Application should not exceed the indexed cost of the works included in the relevant contribution plan.

f) Repayment or utilisation of surplus value: if the value of the proposed WIK significantly exceeds the value of the contributions required to be paid for the proposed development, the Application should outline the proposed

strategy for utilisation of the surplus value which may include a credit that can be used to pay contributions obligations under future development consents subject to the same contributions plan, or seeking the repayment of surplus value from the Council to the developer at an agreed time. The consideration of Council's ability to repay surplus credits to a developer will be informed by principle (d) above with careful consideration of the financial position and cash flow of the contributions plan and the continued implementation of the works schedule contained in the contributions plan by the Council.

4.2.1.3 Discussions around the proposal 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.

4.2.1.4 The Applicant must pay a WIK proposal fee at the time of submission, the amount of which is detailed in the Schedule of Fees and Charges. The Applicant will be responsible for all costs of (and incidental to) the design and specification, approval, construction and delivery to the Council of works contained in an approved WIK Proposal.

4.2.2 The WIK Deed

4.2.2.1 In the event that the WIK Proposal is accepted, the applicant must enter into a WIK Deed with Council.

4.2.2.2 The Applicant is responsible for the preparation of, and costs associated with the WIK Deed.

4.2.2.3 In preparing the WIK Deed, the Applicant must:

a) obtain Council's approval to the design and specification of the works;

b) obtain Council's agreement on the value of works and whether the works are in full or part satisfaction of the s7.11 contributions obligation;

c) have control of, and take full responsibility for the works site (whether it is owned by the Applicant, Council or a third party);

d) ensure Council is authorised to access the site (if it is not the owner) to inspect works. This may require approval of a third-party owner;

e) provide details of any third parties that will be carrying out the works, including proof of appropriate work, health and safety management systems;

f) provide a timetable of the works;

g) provide Security to Council for the works, by way of cash deposit, bond or bank guarantee. The amount of the Security required is:

- 125% of the Contributions Plan Works Value on the public land component
- 25% of the Contributions Plan Works Value on the private land component.

h) in the event that the applicant is a government authority, provide a Deed of Undertaking to Council's satisfaction that replicates the Security obligations and amounts listed above;

i) provide evidence of currency of relevant insurances. This includes, but is not limited to: contracts works, public liability and workers compensation insurances;

j) agree to a defects liability period and rectification works;

k) assign step-rights to Council;

l) agree to a restriction on dealings until satisfactory completion of works;

m) indemnify Council from and against all claims connected with the works;

n) assign principal contractor warranties to Council at completion of the works.

4.2.2.4 Council expects WIK agreements to be signed by the applicant within a reasonable period. A final approval to enter the WIK agreement by Council remains valid for three months or otherwise negotiated between the applicant and Council, after which the application expires.

4.2.2.5 Once commenced, non-compliance with the Deed will result in non-compliance with the consent. For these reasons, construction of any item in an application should not commence until the WIK is executed by both parties.

4.3 Settlement of a Works in Kind Credit

4.3.1 Credit against existing contributions requirements

Where a developer seeks to offset a WIK Credit against an existing requirement to pay Development Contributions, the WIK must be provided prior to the WIK Credit being granted.

The WIK 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 WIK Agreement. A WIK 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 WIK Credit to be utilised.

4.3.2 WIK constructed in conjunction with development

If Council accepts an offer from a developer to provide WIK in conjunction with proposed development, Council will apply the WIK Credit in the following manner:

a) A condition will be imposed on the relevant Development Consent requiring the payment of contributions calculated under the Contributions Plan that applies to the site of the relevant development, including any reductions in the amount of contributions resulting from the dedication of land identified in the contributions plan to the Council free of charge.

b) When the Development Consent is granted, Council will confirm in the WIK Agreement, that it will accept the provision of the WIK 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 WIK. The condition requiring the payment of the Development Contributions does not need to be modified to allow for the application of the WIK Credit.

4.4 Discretion to Grant Consent

4.4.1 The provision of WIK 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.

4.4.2 Council's statutory discretion or duty in determining Development Applications will not be limited or fettered by the provision of any WIK Agreement or any offer to undertake WIK.

4.4.3 The provision of WIK or entering into any WIK Agreement with a developer will not impose any obligation on Council to grant Development Consent.