

16 April 2021

Mr Rik Hart  
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Central Coast Council  
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By email: [ask@centralcoast.nsw.gov.au](mailto:ask@centralcoast.nsw.gov.au)

Dear Rik,

### **UDIA Submission on Draft Works in Kind Policies**

The Urban Development Institute of Australia, NSW (UDIA) is the leading industry body representing the interests of the urban development sector and has over 500 member companies in NSW. UDIA advocates for the creation of Liveable, Affordable and Connected Smart Cities. Our Central Coast Chapter is focused on the delivery of housing, employment, infrastructure, and sustainable development in the region.

UDIA welcomes the opportunity to comment on the draft policies for works-in-kind-agreements (WIKAs) including *Draft Policy CCC101: Works-In-Kind Policy (for Works under the Environmental Planning & Assessment Act, 1979; Draft CCC Procedures and Assessment Guidelines: Works-In-Kind under the Environmental Planning & Assessment Act, 1; Draft Policy CCC 102 Works-In-Kind Policy (for Works under the Water Management Act, 2000); and Draft CCC Guidelines - Works-In-Kind under the Water Management Act, 2000 (draft Policies).*

UDIA values the constructive relationship with Central Coast Council (Council) and our members on policies that impact the development sector. We are pleased that Council is undertaking this review to provide more clarity around the WIKAs process.

Our members have reported recent delays in processing WIKAs at Council which have constrained their ability to deliver development land in a timely way as well as exposed them to significant financial risk. Such circumstances create a disincentive to invest on the Central Coast.

We commend Council for reviewing its policies at this time, and we are hopeful that the inefficiencies and risk exposure for the industry, which then flows to housing affordability for the community, can both be mitigated as a result of this review. Our submission offers the following recommendations to improve the draft Policies:

- 1. In principle, all costs associated with the delivery of a S7.11 or DSP item, including legal, administrative, management and construction costs should be covered within the relevant Development Contribution Plan (CP) or Development Servicing Plan (DSP).**
- 2. Consistent with Council's ability to appoint an independent civil estimator, the applicant should also be afforded the opportunity to have the WIKAs preparation costs independently verified.**
- 3. The value of works should be independently verified when the Contribution Plan is created and at subsequent updates. This value should be applied to the subject works in a WIKAs, irrespective of actual costs. This would save significant time and cost in preparing WIKAs, provide certainty to applicants and ensure that Council has complied with NSW Audit requirements for independent verification.**

4. An end-to-end timeframe should be provided for the execution of a WIKA. UDIA recommends a reasonable timeframe would be 8 weeks from application to execution.
5. Within the overall 8 weeks, the Policies should specify reasonable timeframes for components of the negotiation, including:
  - a. If required, Legal Unit feedback: 28 days;
  - b. If required, appointment of independent civil estimator and their validation of proposed costs and standards: 28 days; and
  - c. Notwithstanding the normal meeting schedule of the Development Contributions Committee (DCC) being once a month, the Policy should include a stated commitment that the DCC will meet often enough and allow sufficient time on each agenda to enable efficient consideration of all active WIKA proposals within 28 days.
6. Market contractor rates should replace tendered contractor rates since the proposed costs and standards will be validated by an independent civil estimator.
7. Failing Recommendation 3 above, where the value of the S7.11 works are greater than the amount specified in the relevant CP, Council should be open to amend the values in the CP. The Policy should outline the circumstances in which this could occur.
8. Applicants should be allowed one revision to the WIK Application based on feedback from the DCC, instead of being required to re-lodge a new WIK Application if the DCC decline to support the first iteration.
9. In the case of delivering S7.11 works at a value higher than the applicant's S7.11 contribution obligation, Council should reimburse the difference to the applicant.
10. If an item cannot be delivered because there is not enough money in the relevant CP/DSP and the DCC do not execute a WIKA, the item should be removed as a condition of consent on the Development Application (DA).
11. The value of the security bond should be set at 5% of the value of the works - we disagree that a defects liability bond should be required; if required, it should be 2.5% of the value of the works (i.e., 2.5% to be refunded on completion of works, with 2.5% held for defects liability period); any defects liability period should not exceed 12 months. Security bonds should be released within 28 days of the completion of the period.
12. We oppose Clause 47 which provides no flexibility for a retrospective WIKA. Some flexibility should be afforded in the case where a WIK application is underway but delayed by Council, allowing for the consideration of costs for works that may of necessity commence prior to the finalisation of the agreement.
13. In any case, savings provisions should make clear that existing works and DAs underway at the time of finalisation of the Policy are not subject to Clause 47 and reimbursement will be allowed.
14. Where a net refund is owed the developer under a DSP, the Policy should specify that the refund will be provided within 28 days.
15. Where a net refund is owed the developer, but insufficient funds exist in the relevant DSP, Council should borrow the necessary funds to settle their obligation under the WIKA.

## Works-in-Kind Guidelines – under the Environmental Planning and Assessment Act, 1979

### Applications to Undertake WIK

UDIA supports this section. We highlight our strong support for Clause 11 of the Guidelines for WIK under the EP&A Act which allows for WIK negotiations to begin during the DA assessment phase. This is a welcome and important provision that will bring more efficiency to the process.

### Evaluation and Negotiation of proposed WIK

UDIA recommends that all costs associated with a Contribution Plan (CP) or Development Servicing Plan (DSP), including legal, administrative including validation, management and construction costs, should be covered within the relevant CP or DSP. With these costs determined up front, there should be no need for additional costs to be borne by the applicant.

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***Recommendation 1:** In principle, all costs associated with the delivery of a S7.11 or DSP item, including legal, administrative, management and construction costs should be covered within the relevant Development Contribution Plan (CP) or Development Servicing Plan (DSP).*

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Clause 18 states that all WIK Applications will be evaluated against  
*whether the Development Contribution Plan/s Work Schedule or Contribution Plan Works Value is valid or requires amendment,*

and Clause 23 states that

*Council will obtain the services of a suitably experienced and qualified civil estimator (at the expense of the Applicant but independent of the applicant) to validate the costs and standards proposed within the WIK Application. This will occur only after the applicant has agreed in writing to pay the costs associated with the civil estimator.*

UDIA recommends that Council perform this critical action at the beginning of the process, i.e., when the Contribution Plans (CP) is created (and at any subsequent updates). The verified value of the works in the CP should then be applied to the subject works in a WIKA whether the actual costs are above or below the CP value. This would save significant time and cost in preparing WIKAs, provide certainty to applicants and ensure that Council has complied with NSW Audit requirements for independent verification. The administrative cost of this validation should be included in the overall cost basis of the CP.

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***Recommendation 3:** The value of works should be independently verified when the Contribution Plan (CP) is created and at subsequent updates. This value should be applied to the subject works in a WIKA, irrespective of actual costs. This would save significant time and cost in preparing WIKAs, provide certainty to applicants and ensure that Council has complied with NSW Audit requirements for independent verification.*

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The basic principle of Recommendation 1 (all costs should be incorporated within the relevant CP or DSP) should be adopted regardless of other procedures.

If our Recommendation 3 is not adopted, then for the process to work as outlined in the Guidelines, UDIA recommends the following modifications:

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***Recommendation 2:** Consistent with Council’s ability to appoint an independent civil estimator, the applicant should also be afforded the opportunity to have the WIKA preparation costs independently verified.*

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***Recommendation 6:** Market contractor rates should replace tendered contractor rates since the proposed costs and standards will be validated by an independent civil estimator.*

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***Recommendation 7:** Failing Recommendation 3 above, where the value of the S7.11 works are greater than the amount specified in the relevant CP, Council should be open to amend the values in the CP. The Policy should outline the circumstances in which this could occur.*

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#### Acceptance and Execution of WIK Agreements

The draft Policies both outline several steps a proposed WIKA will be subject to. UDIA is concerned with the lack of any timeframes in the draft Policies. There is no indication of how long it will take to perform steps, such as independent validation of proposed costs and standards; potential legal review; and consideration by the Development Contributions Committee (DCC).

Council will appreciate from our ongoing engagement that development is by its nature a risky proposition and any delays in the planning process increase that risk. A council can encourage investment in its local government area by providing a high level of certainty in its processes, thereby providing more confidence to the development sector.

UDIA recommends that Council add more certainty to its WIK policies for both S7.11 and DSP works by specifying timeframes for action in the overall WIK process, including specific timeframes for individual components. We believe the WIKA negotiation process should take no longer than 8 weeks from application to execution. Validation of costs and any legal review should be completed within 28 days. Likewise, the DCC should meet often enough to finalise advice on all WIKA proposals in the pipeline within 28 days of being referred to the Committee.

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***Recommendation 4:*** *The Policies should commit to finalising a WIKA within 8 weeks from application to execution.*

***Recommendation 5:*** *Within the overall 8 weeks, the Policies should specify reasonable timeframes for components of the negotiation, including:*

- a. If required, Legal Unit feedback: 28 days;*
- b. If required, appointment of independent civil estimator and their validation of proposed costs and standards: 28 days; and*
- c. Notwithstanding the normal meeting schedule of the DCC being once a month, the Policy should include a stated commitment that the DCC will meet often enough and allow sufficient time on each agenda to enable efficient consideration of all active WIKA proposals within 28 days.*

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Clauses 24-27 refer to the review of the proposed WIK Agreement by the DCC. Provision is made for the DCC to “require further amendments... before finalisation and approval”; however, if the DCC decline to support a WIKA, any “revised proposal must be re-lodged as a new WIK Application.”

UDIA appreciates the acknowledgement that amendments may be necessary as the WIKA is evaluated. Consistent with this logic, where the DCC declines to support an application, we recommend that applicants be allowed to submit one revised proposal directly to the DCC without formal re-lodgement. Making this allowance would increase efficiency in the system in the case where DCC advice can be reasonably incorporated, without burdening Council with multiple re-lodgements.

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***Recommendation 8:*** *Applicants should be allowed one revision to the WIK Application based on feedback from the DCC, instead of being required to re-lodge a new WIK Application if the DCC decline to support the first iteration.*

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We re-emphasise our Recommendation 1, that all costs (including legal costs) and fees be incorporated into the Contribution Plan / Development Servicing Plan from the start.

#### Credits and Offsets

Clause 35 states:

*Council will only consider offsetting the Development Contributions payable by a condition of a Development consent, for the works shown in that Development Contributions Plan Works Schedule which is the subject the WIK Agreement.*

UDIA queries Council’s position if the value of the S7.11 works delivered by the applicant is greater than their obligation under the relevant CP. Similar to provisions under Development Servicing Plans (DSP) for water and sewer, UDIA recommends that Council reimburse the difference to the applicant.

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***Recommendation 9:*** *In the case of delivering S7.11 works at a value higher than the applicant's S7.11 contribution obligation, Council should reimburse the difference to the applicant.*

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### Conditions of Consent

Clause 37 states:

*Works within a Development Contributions Plan with a direct nexus to the development will be conditioned within a Development Consent.*

Similarly, the Guidelines for both S7.11 and DSP matters each include a Clause 6 which states:

*Council is under no obligation to accept offers to enter into WIK Agreements.*

UDIA is concerned that taken together, these Clauses could seriously delay the delivery of housing or employment land. It is not uncommon for a CP or DSP to delay delivering infrastructure items for many years, sometimes even when sufficient funds exist in the plan. Especially where Council is unable to deliver items in a timely manner, Council should always undertake a good faith effort to negotiate a reasonable WIKA. If Council does not execute a WIKA, the item should be removed as a condition of consent, in order for the delivery of housing and jobs to proceed, without being held hostage to the vagaries of collecting contributions.

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***Recommendation 10:*** *If an item cannot be delivered because there is not enough money in the relevant plan and the DCC do not execute a WIKA, the item should be removed as a condition of consent on the Development Application (DA).*

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### Payment and Release of Securities

UDIA does not disagree that reasonable securities be provided to protect Council's interests. For efficiency and certainty for all parties, we strongly recommend that the amounts and release timeframes be specified in the Guidelines.

Civil works delivered by the applicant are designed by experts and approved by the local authority and should perform as designed. Any security, if required, should be minimal.

We note that Section 11.2 of the draft WIK agreement states that 'the Applicant must comply with a Rectification Notice at its own cost'. Given this, we question why Council would need to retain a defects security?

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***Recommendation 11:*** *The value of the security bond should be set at the standard 5% of the value of the works - We disagree that a defects liability bond should be required; if required, it should be 2.5% of the value of the works (i.e., 2.5% to be refunded on completion of works, with 2.5% held for defects liability period); any defects liability period should not exceed 12 months. Security bonds should be released within 28 days of the completion of the period.*

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## Works Commenced without an Executed WIK Agreement

Clause 47 states:

*Where works which would be the subject to a WIK Agreement have commenced or have been completed without a WIK Agreement being executed, Council will not enter into a retrospective WIK Agreement and will not reimburse the costs associated with the works undertaken.*

We oppose Clause 47 which provides no flexibility for a retrospective WIKA. Some flexibility should be afforded in the case where a WIK application is underway but delayed by Council, allowing for the consideration of costs for works that may of necessity commence prior to the finalisation of the agreement.

In any case, savings provisions should make clear that existing works and DAs underway prior to the finalisation of the Policy are not subject to Clause 47 and reimbursement will be allowed.

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*Recommendations 12 & 13: Clause 47 should be deleted. If retained, savings provisions should be clear that Clause 47 does not apply to works and DAs underway at the time of its formal adoption.*

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## **Works-in-Kind Guidelines – Water Management Act Matters**

UDIA points out that many of our recommendations above also apply to DSP WIKAs under the *Water Management Act*, as noted.

In addition, as regards the case of a net refund payable to an applicant under a DSP, we recommend that the Policy commit to providing the refund in a timely manner utilising reasonable means to fulfill its obligation to the applicant.

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*Recommendation 14: Where a net refund is owed the developer under a DSP, the Policy should specify that the refund will be provided within 28 days.*

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*Recommendation 15: Where a net refund is owed the developer, but insufficient funds exist in the relevant DSP, Council should borrow the necessary funds to settle their obligation under the WIKA.*

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## Conclusion

UDIA appreciates this opportunity to offer our recommendations aimed at improving the Works in Kind Agreement processes for the Central Coast.

Should you have any questions or wish to arrange a meeting to discuss further, please contact Elizabeth York, Regional Manager at [eyork@udiansw.com.au](mailto:eyork@udiansw.com.au) or 0434 914 901.

Yours sincerely,



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cc: Scott Cox  
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