

# Developer Infrastructure Agreements Policy

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<b>Reference number:</b>	POL 121
<b>Approval date:</b>	17 October 2022
<b>Policy owner:</b>	Manager City Strategy
<b>Next review:</b>	September 2025

## Section 1 – Introduction

### 1.1 Preamble

The Wagga Wagga Local Government Area (LGA) population is forecast to grow by around 11,800 people to 2034, as identified in the Council's current infrastructure contributions plan (Wagga Wagga Local Infrastructure Contributions Plan 2019 – 2034 (or LICP)).

Residential, commercial and industrial development driving this growth will generate additional demand for a range of local infrastructure, including roads, shared paths, open spaces and community facilities.

The majority of this infrastructure is funded by Sections 7.11 and 7.12<sup>1</sup> contributions that are levied against developers typically through Conditions of a Development Consent.

Developers either pay monetary contributions and Council provides the required infrastructure that is set out in the council's contributions plan, or they can voluntarily offer to enter into an Agreement – a 'Developer Infrastructure Agreement' - with the Council and provide infrastructure on behalf of Council and the community.

This Policy addresses how Council will treat offers from developers to meet their infrastructure contributions obligations through Developer Infrastructure Agreements to deliver infrastructure in addition to, or instead of, paying monetary contributions.

### 1.2 Purpose

The main purpose of this policy is to explain how Council will allow or enter into Developer Infrastructure Agreements to support new development and the increasing population.

Other purposes of this policy are to:

- provide a simple, consistent, and transparent framework for Developer Infrastructure Agreements
- facilitate timely provision of infrastructure aligned to Council's strategic planning objectives
- enable developers to provide infrastructure contributions both included in, and outside

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<sup>1</sup>S7.11 and s7.12 of the Environmental Planning and Assessment Act 1979 (EP&A Act)

those required by, a contributions plan

- support development by providing flexible and innovative solutions
- ensure developers are treated fairly and consistently in their dealings with Council
- ensure developer-provided infrastructure aligns with Council’s strategic plans and policies.

### 1.3 Types of Developer Infrastructure Agreements

Developer Infrastructure Agreements is an umbrella term used in this Policy covering the following types of agreements:

- Works in Kind agreements
- Planning Agreements

Key features of Developer Infrastructure Agreements are shown below

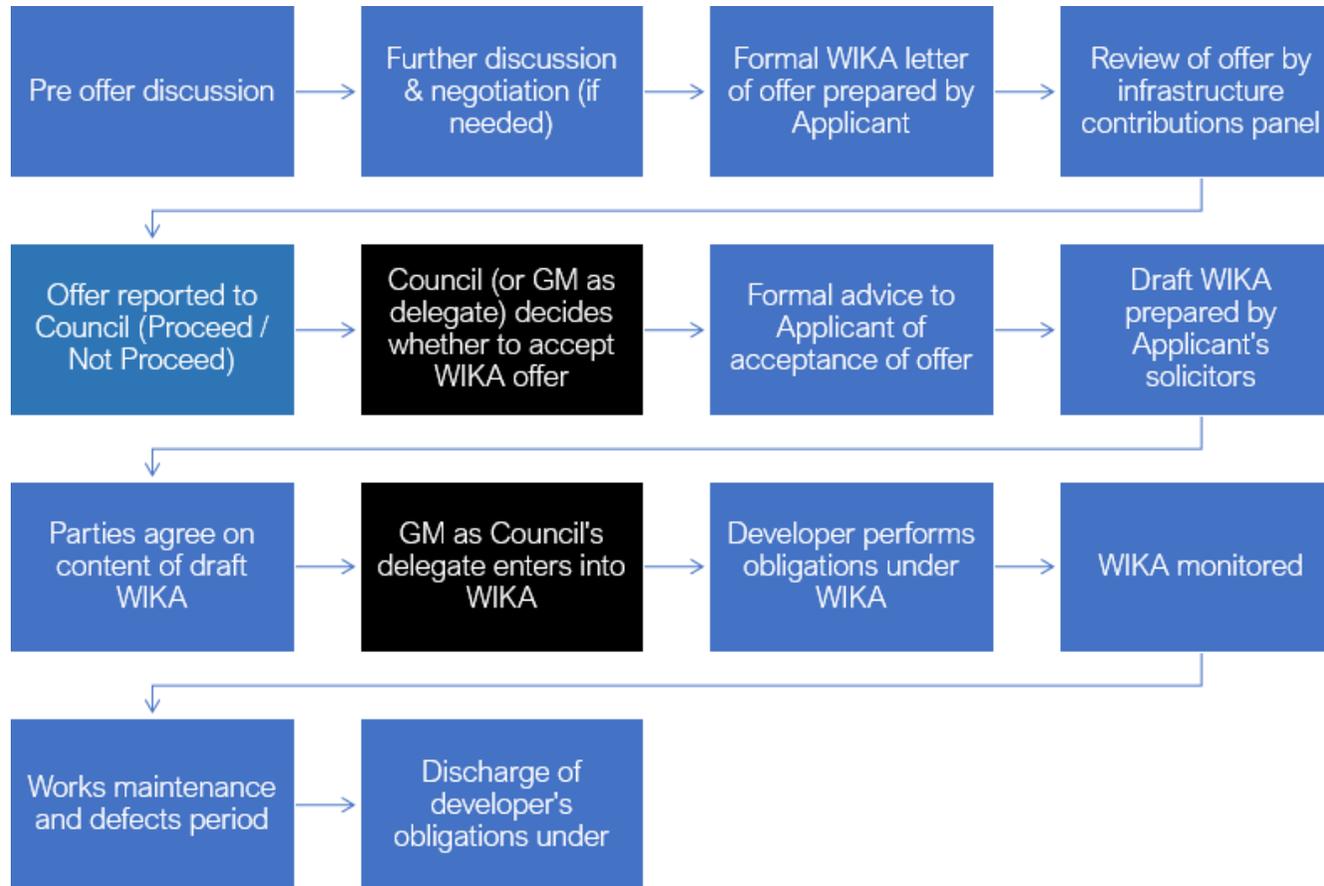
Works in kind Agreements		Planning Agreements
Authorised by	Section 7.11(5) of the EP&A Act, which allows a developer to settle part or all of a s7.11 obligation in a development consent by providing a material public benefit.	Section 7.4 of the EP&A Act, which allows a developer to voluntarily enter into an agreement with a planning authority to provide public benefits.
They are typically used when	<p>A developer:</p> <ul style="list-style-type: none"> <li>• intends to provide works that are included in a council contributions plan, and</li> <li>• the developer is seeking a part or full offset of the s7.11 obligation in the consent.</li> </ul>	<p>A developer intends to provide land, works, money, or a combination of these, as part of a:</p> <ul style="list-style-type: none"> <li>• planning proposal, or</li> <li>• development application, or</li> <li>• modification of a development consent, or</li> <li>• a complying development certificate.</li> </ul>
Offsets of section 7.11 contributions	S7.11 contribution amounts may be offset (or reduced) by the value of the contributions plan works agreed to be undertaken by the developer.	Planning agreements may include contributions plan items in addition to other public purposes. S7.11 offsets reflecting the value of contributions plan items may be allowed.

## Section 2 – Developer Infrastructure Agreement Procedures

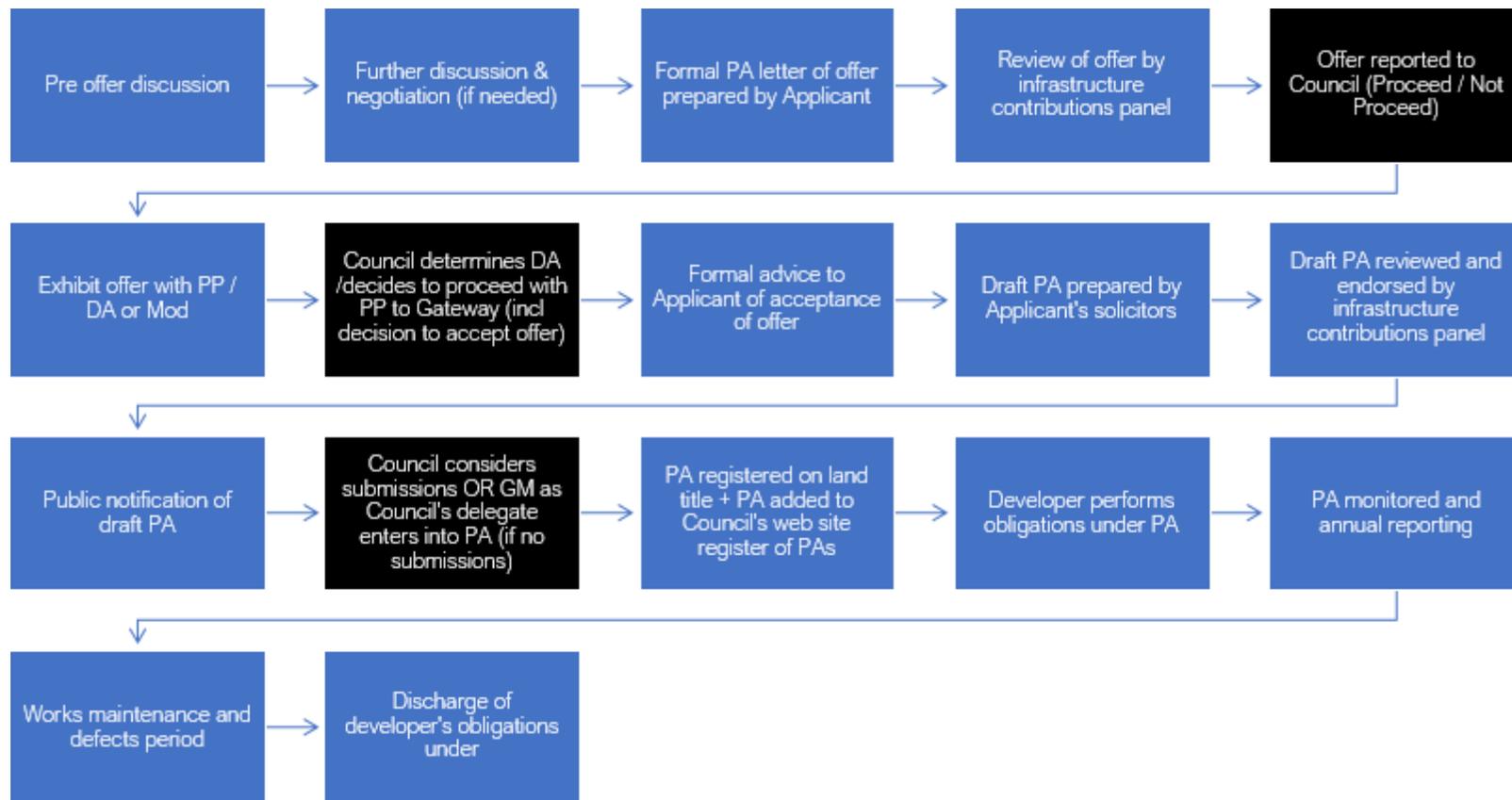
The following diagrams outline the process and procedure that the Council will follow in negotiating, preparing and implementing each type of Developer Infrastructure Agreement.

Sections 3 and 4 address the requirements of Agreements, including more detailed notes on the procedures.

### 2.1 Works in Kind Agreement



## 2.2 Planning Agreement



## Section 3 – Requirements for all Agreements

### 3.1 Probity issues

To maximise transparency and public confidence in Developer Infrastructure Agreements,

(a) Council will:

FOR ALL AGREEMENTS -

- make this Policy available to developers
- ensure that Agreements are voluntary for both Council and developers
- not allow interests of developers, individuals or interest groups to outweigh public interest
- ensure it avoids potential, perceived or actual conflicts of interest between its role as the consent authority and its interest as a developer (if it has an interest in a development)
- ensure Council staff and Councillors are aware of their roles and responsibilities
- ensure Councillors are not involved in negotiations
- ensure all meetings are documented
- work with developers to establish timeframes to progress agreements efficiently
- seek to minimise its financial risk in all agreements
- provide a clear and transparent pathway for proponents to make an offer
- update this Policy from time to time to ensure the Policy is consistent with relevant legislation, practice notes and guidelines.

FOR PLANNING AGREEMENTS -

- not permit unacceptable development because of public benefits offered
- not seek public benefits wholly unrelated to the development
- ensure planning decisions are not bought or sold through agreements
- ensure consideration, negotiation and assessment of developer agreements is separate from the assessment of a development application, complying development certificate or planning proposal
- ensure agreements are underpinned by appropriate strategic land use and infrastructure planning
- not improperly rely on its statutory position in order to extract unreasonable public benefits under a planning agreement.

(b) Council will expect developers to:

- conduct themselves in a professional manner
- request works specifications from Council before preparing a letter of offer
- provide transparent and sound information for the agreement
- not seek to involve Councillors in the negotiation process

### 3.2 Letter of Offer

Before submitting a proposal to Council to enter into a Developer Infrastructure Agreement, developers are encouraged to meet with Council staff to discuss the proposal.

An offer to enter into a Developer Infrastructure Agreement must be in writing and signed by or on behalf of all parties to the proposed Agreement. The letter should include the following:

- the land affected
- all parties to the agreement (if one party has the authority to act on behalf of other parties)
- the planning proposal, development application, complying development certificate or modification the agreement relates to
- written consent of all the owners of land affected
- details of the monetary, works, land or other contributions to be provided by the developer
- estimated cost of each item (prepared by a quantity surveyor or suitably qualified person)
- proposed relevant development triggers for the delivery of works
- if the offer is made in lieu of paying Section 7.11 or 7.12 contributions
- the developer's capability to deliver the infrastructure
- identify any risks associated with the offer and which party will bear these risks

### 3.3 Negotiation and assessment

The negotiation and assessment process for different types of Developer Infrastructure Agreements is shown in the flow charts in Section 2.

When a proposed Developer Infrastructure Agreement is received by Council it will be referred to the Infrastructure Contributions Panel. The Panel will review the draft offer and provide a recommendation to the Director Regional Activation who will also review the proposed draft offer. Feedback will then be provided to the developer.

As Works in Kind Agreements include works identified and endorsed by Council as part of the approval of the LICP, negotiation is often simpler than for a Planning Agreement. The indexed cost identified in the LICP will be the agreed value of the works and the developer and Council must agree on the timing of delivery and specifications of assets required.

As the scope of a Planning Agreement usually includes infrastructure that is not included in a Council contributions plan the negotiation process can be more complex. Proposed projects, including costs, timing and specifications will be assessed by Council and feedback will be provided to the developer. Agreement must be reached between the developer the Director Regional Activation before a Planning Agreement will be reported to Council.

Where the material public benefit or works in kind under a Developer Infrastructure Agreement is the provision of land for public purpose, Council will seek to value the benefit on the basis of the estimated amount of compensation to which the developer would be entitled under the *Land Acquisition (Just Terms Compensation) Act 1991*.

Council staff may recommend declining an offer of a planning agreement. A report will be sent to Council advising the Councillors support the recommendation.

### 3.4 Payment of costs

- Payment of Council's cost in preparing and executing Developer Infrastructure Agreements are to be met by the developer. Payment will be due 30 days from invoice issued by Council.
- All developer agreements will include a monitoring and enforcement charge of 1% of the infrastructure costs. This will be invoiced by Council at the commencement of a developer agreement and will be due 30 days from invoice.
- Developers are required to prepare a deed for Developer Infrastructure Agreements based on the template to be provided by Council.

### 3.5 Security and insurance

Council will require agreements to make provision for security by the developer of the developer's obligations under the agreement. The form of security will be two unconditional bank guarantees from an Australian bank in favour of Council to the full value of the infrastructure works included in the agreement. One guarantee is to be for 90% of the value of the works covered by the bank guarantee and the other for 10% of the value. Security must be provided before a Construction Certificate or Subdivision Construction Certificate is issued.

Upon completion of the agreed works, inspection by Council and receipt of required handover documentation, 90% of the infrastructure value covered by the bank guarantee will be released. In determining the amount to be released the following items will be considered:

- funds expended
- standard of the works
- schedule of payments.

The remaining amount will be kept as a security bond and returned once the 12 month maintenance period has lapsed and following certification by Council that all obligations and works have been undertaken and completed to the standard as detailed in the agreement. If the works covered by the developer agreement are not completed to the satisfaction of Council, Council will call upon the second bank guarantee.

All agreements are required to be registered on the land title prior to the agreement being executed. Council will not execute a Planning Agreement until evidence is provided of the registration on title. The developer (at their own cost) is required to submit documents necessary to enable Council to effect registration of the Planning Agreement. The removal of the registration will occur when a Subdivision Construction Certificate or Construction Certificate is released and the works are completed. The developer is required to submit all documents necessary to remove the affectation from the title. Any costs incurred at this time are to be met by the developer.

All Developer Infrastructure Agreements require the developer to take out and keep current the following insurances in relation to infrastructure provided in the agreement:

- contract works insurance
- public liability insurance
- workers compensation insurances required by law
- any other insurances provided by law.

Council will require a Developer Infrastructure Agreement to contain an acknowledgement by the developer that Council may, in its absolute discretion, make a notation under Section 10.7 (5) of the Act in respect to the agreement on any certificate issued under Section 10.7(2) of the Act relating to the land the subject of the agreement or any other land.

### **3.6 Offsetting Value of Works against Section 7.11 Contributions**

Council will not consider recording any surplus value of works over and above the Section 7.11 contribution due for a development application towards any future development.

### **3.7 Work Specification**

Specifications of all works are required to be determined in consultation with Council. Works plans are to have written approval from Council at the development application stage (as initial designs) and at the construction or subdivision certificate stage (as final designs).

### **3.8 Entering into a Developer Infrastructure Agreement**

A Developer Infrastructure Agreement is entered into when it is signed by both parties.

All Developer Infrastructure Agreements will contain provisions of the commencement or works, notifications of inspections and allowing Council staff to access the land for inspections. Agreements will establish Council's required approval and handover requirements.

Deferrals of developer agreement contributions could be accepted by Council under the following circumstances:

- Written request has been submitted to Council
- Council has provided their approval in writing
- A bank guarantee 110% of the value of the contribution item has been provided to Council (this will be in addition to the bond in clause 3.5)
- The revised timing has been agreed to by Council.

A deferral approved under the above terms could allow the release of the relevant Construction Certificate or Subdivision Certificate.

### **3.9 Handover of infrastructure**

Council will inspect works constructed under Developer Infrastructure Agreements before a bank guarantee is released and assets are handed over.

Council will not accept the hand-over of assets unless the developer provides Council a report showing the work has been carried out and completed in accordance with the Developer Infrastructure Agreement and any applicable development consent.

Council will require Developer Infrastructure Agreements to provide for a defects and liability period during which any defects must be rectified at the developer's expense. This period will be 12 months unless otherwise stated in the Developer Infrastructure Agreement. The developer will be responsible for maintenance and rectification works during this period.

Works included in an agreement may require assessment and approval under the Act.

Handover of assets will not occur before the developer provides the required documentation as listed above, a full set of works-as-executed plans and a final inspection as approval from Council's relevant asset manager.

### **3.10 Dispute resolution**

Council will require Developer Infrastructure Agreements to provide for a dispute resolution mechanism between the parties to the agreement.

### 3.11 Monitoring

Council will continuously monitor developer's obligations under Developer Infrastructure Agreements.

Council will require each agreement to contain a mechanism under which the agreement is periodically reviewed with the involvement of all parties. This will include a review of the developer's performance of the delivery of the agreement.

### 3.12 Modifying agreements

Developer Infrastructure Agreements linked to large scale development may change if there is significant variation to the development. The need to make amendments to an agreement will be assessed on a case by case basis.

Agreements can be modified by arrangement between the parties. Either party can initiate modification. This will occur via a deed of variation to the agreement in a form acceptable to Council. The party proposing the modification will bear the modification costs. Modification of an agreement may be required to be re-exhibited to the public, this will be assessed on a case by case basis.

A developer may choose to sell the land associated with a developer agreement. Prior to any sale the developer party to the Developer Infrastructure Agreement must transfer the developer's obligation under the agreement to the incoming party or Council and discharge the agreement in respect of the affected land or development. All such proposals will be considered on a case by case basis. All costs are to be met by the developer. Council's costs will be invoiced by Council and will be due 30 days from invoice.

## Section 4 – Additional Requirements for Planning Agreements

The following additional requirements for Developer Infrastructure Agreements that are Planning Agreements reflect Council's consideration of the matters to be addressed in the Planning Agreements Practice Note – February 2021, prepared the NSW Department Planning, Industry and Environment.

### 4.1 Principles

Council will apply the following principles in its use of Planning Agreements:

- Council will always consider a development proposal on its merits, not on the basis of a planning agreement.
- Planning Agreements will, as far as practicable, implement strategic land use and infrastructure planning carried out by State and local government and address expected growth and the associated infrastructure demand.
- Strategic planning should ensure that development is supported by the infrastructure needed to meet the needs of the growing population.
- A consent authority cannot refuse to grant development consent on the grounds that a planning agreement has not been entered into in relation to the proposed development or that the developer has not offered to enter into such an agreement.
- Planning agreements should not be used as a means of general revenue raising or to overcome revenue shortfalls.
- Planning agreements must not include public benefits wholly unrelated to the particular development.
- Value capture should not be the primary purpose of a planning agreement.

## 4.2 Acceptability Test

Planning Agreements will be assessed against the acceptability test below:

- Is the Planning Agreement directed towards legitimate planning purposes, which can be identified in the statutory planning controls and other planning strategies and polices applying to the development?
- Does the Planning Agreement support the Council's strategic land use and infrastructure planning to address growth and infrastructure demands?
- Does the Planning Agreement provide for the delivery of infrastructure or public benefits not wholly unrelated to the development?
- Does the Planning Agreement produce outcomes that meet the general values and expectations of the public and protects the overall public interest?
- Does the Planning Agreement provide a reasonable means of achieving the desired outcomes and securing the benefits?
- Does the Planning Agreement protect the community against adverse planning decisions?

## 4.3 Alignment of Agreements with Council's strategic land use planning and infrastructure funding and delivery activities

The Wagga Wagga Local Strategic Planning Statement - Wagga Wagga 2040 sets the long-term strategic framework for planning and development in the City of Wagga Wagga local government area over the next 20-years. It addresses issues of strategic significance to the Council, guiding development or introduction of new planning policies, strategies or actions related to land use and development. The Local Strategic Planning Statement can be found at <https://wagga.nsw.gov.au/the-council/planning-and-reporting/community-planning/current-community-plans/lsp>.

## 4.4 Circumstances in which Council would consider entering into a Planning Agreement

- Where the developer wishes to offset their s7.11 of s7.12 contributions obligations by delivering contributions plan infrastructure located on their land.
- Compensate for the loss of or damage to a public amenity, service, resource or asset by development through replacement, substitution, repair or regeneration.
- In major development sites or precincts that are owned by a single landowner or a consortium of landowners.
- Where the developer has a direct incentive, such as bringing forward potential development, to be involved in the delivery of local infrastructure.
- Where the developer wants to provide local infrastructure in addition to, or at a higher standard than, what has been specified under the contributions plan.
- Where the Council and the developer negotiate a different and better or more innovative outcome than can be achieved through paying a monetary contribution or entering into a Works in Kind Agreement.
- Where a proposed development has not been anticipated by council and thus works and facilities to cater for this development have not been identified.
- Where the Council will secure off-site benefits for the community so that development delivers a net community benefit.

### 4.5 Examples of public benefits sought by Council

The following are examples of public benefits the Council will consider in any Planning Agreement offer. The list is not exhaustive.

Type	Examples
Infrastructure	<ul style="list-style-type: none"> <li>• Roads – design and construction</li> <li>• Accessibility improvements – accessible parking, kerbs, ramps, modifications to community buildings or areas</li> <li>• Open space – parks, public places, embellishment</li> <li>• Drainage and stormwater assets – drainage, amplification, integrated water treatment facilities, detention basins, overland flow paths and stormwater channel improvements and sediment control measures</li> <li>• Pedestrian and cycleway connections</li> <li>• Information technology in public spaces (e.g. free WIFI)</li> <li>• Bridges (pedestrian and vehicular)</li> <li>• Works to enhance existing public transport facilities</li> </ul>
Public Community Facilities	<ul style="list-style-type: none"> <li>• Community buildings</li> <li>• Public toilets</li> <li>• Public carparking areas</li> <li>• Bus shelters or interchanges</li> <li>• Sport, recreation and activity assets</li> <li>• Affordable housing</li> <li>• Business, research and creative industries incubator spaces</li> </ul>
Public open space and public domain improvements	<ul style="list-style-type: none"> <li>• Embellishment of open space, including new playgrounds, lighting, sports facilities, furniture and landscaping, shelters and BBQ facilities</li> <li>• Tree and undergrowth plantings in streets and open spaces</li> <li>• Street furniture</li> <li>• Public art in the public domain</li> <li>• Environmental management improvements</li> <li>• Signage (suburb identification, way finding, parking, interpretation and information signs for pedestrians, cyclists and vehicular users)</li> </ul>
Other contributions	<ul style="list-style-type: none"> <li>• Cash</li> <li>• Land dedication</li> <li>• Aboriginal site protection</li> <li>• Other benefits identified in Council’s strategies and plans                             <ul style="list-style-type: none"> <li>• Other public benefits that provide positive planning outcomes for the community and meet the objectives of the Act</li> </ul> </li> </ul>

#### **4.6 Letter of Offer**

In addition to the matters listed in Section 3 of this Policy an offer to enter into a Planning Agreement must address all matters referred to in Section 7.4 of the Act and the NSW Department Planning, Industry and Environment, Planning Agreements Practice Note – February 2021 are addressed.

#### **4.7 Relationship with development applications and planning proposals**

Council encourages developers considering proposing a Planning Agreement to do so in the pre-lodgement phase of a planning proposal or development application.

When determining a development application, Council is required to take into consideration any relevant Planning Agreement (including any draft Agreement) and any public submissions made relating to the Planning Agreement.

The EP&A Act requires Council to state the objectives and outcomes of a planning proposal and describe and justify how they will be achieved. The role of a Planning Agreement in facilitating these objectives or outcomes should be clearly set out in the planning proposal documentation (*NSW Department Planning, Industry and Environment, Planning Agreements Practice Note – February 2021, pg6*)

If a planning agreement relates to an undetermined planning proposal or development application, Council will require the developer to give an irrevocable offer and sign the agreement before granting development consent or before the planning proposal is returned to the Department of Planning Industry and Environment after the gateway exhibition.

If there is an approved development application, Council will require a Planning Agreement to be entered into as a condition of granting consent to the development to which the agreement relates. Therefore, a modification of consent is required (at the developer's expense).

#### **4.8 Valuing public benefits**

The estimated value of public benefits proposed in a Planning Agreement are to be costed by a quantity surveyor or a suitably qualified person. These costs will be assessed by Council.

#### **4.9 Public exhibition**

In accordance with Section 7.5 of the Act, a draft planning agreement will be publicly exhibited and available for inspection for 28 days, with submissions accepted for 42 days.

Where possible, Council will seek to publicly notify a proposed planning agreement and the development application or planning proposal to which it relates together.

As required by Section 7.5 of the Act, a copy of each planning agreement will be sent to the Minister within 14 days after it is entered into, amended or revoked.

If a planning agreement is changed materially (as decided by Council) it will be publicly exhibited.

Works in kind agreements relate only to works in contributions plans that have been adopted by Council following public exhibition. Works in kind agreements will therefore not be publicly exhibited.

#### 4.10 Entering into a Planning Agreement

A Planning Agreement can be entered into at any time after the planning agreement is publicly notified in accordance with the Act and Regulation.

#### 4.11 Registering Planning Agreements

Council will keep a register of all Planning Agreements. The register will include the date the agreement was executed and a short description (and any amendments made). It will be published on Council’s website.

#### 4.12 Notifying the Minister

Section 7.5 of the Act states that if the Minister is not a party to a planning agreement, the planning authority must provide the Minister a copy of the agreement within 14 days after the agreement is entered into.

### Section 5 - Legislative Context

- Environmental Planning and Assessment Act 1979
- Environmental Planning and Assessment Regulation 2000
- NSW Department Planning, Industry and Environment, Planning Agreements Practice Note – February 2021

### Section 6 - Related Documents

- Wagga Wagga City Council Local Infrastructure Contributions Plan 2019 - 2034

### Section 7 - Definitions

Term	Definition
Contributions Plan	A plan developed by a council that authorises a consent authority to impose a condition on a development application or a complying development certificate requiring a contribution to be made under s7.11 or s7.12 toward local infrastructure – e.g., roads, active travel assets, recreation and community facilities.
Council	Wagga Wagga City Council
Developer	A person who has: <ul style="list-style-type: none"> <li>• sought a change to an environmental planning instrument, or</li> <li>• made or proposes to make development application or a complying development certificate, or</li> <li>• requested to modify a development consent, or</li> <li>• entered into an agreement with or is otherwise associated, with, a person to whom the above applies</li> </ul>

Term	Definition
Development Application	Has the same meaning as in the Act
EP&A Act	Environmental Planning and Assessment Act 1979
Public Benefit	A benefit enjoyed by the public as a consequence of a development contribution
Planning Proposal	Has the same meaning as the Act
Planning Agreement	Has the same meaning as the Act. Section 7.4.
Practice Note	Planning Agreements Practice Note – February 2021, published by the NSW Department Planning, Industry and Environment
Works in Kind	Works included in the works program of a council's contributions plan that offered by a developer to be provided in part or full satisfaction of a monetary infrastructure contribution requirement in a development consent or a complying development certificate.
Works in Kind Agreement	An agreement between Council and a developer proposing to undertake a works in kind

## Section 8 - Revision History

Revision number	Council resolution	Council meeting date
1	Res No: 22/168	30 May 2022
2	Res No: 22/354	17 October 2022