

BACKGROUND

This policy is known as the Bank Guarantees for Subdivisions and Development Policy.

The Bank Guarantees for Subdivisions and Development Policy replaces the previous Bank Guarantees or Equivalent – Receipt, Retention and Release Management Policy.

The Policy applies to incomplete works that have been conditioned to be constructed as part of a Development Consent and/or Construction Certificate where those works are required to be dedicated to Council and later become Council's asset, when completed.

This policy has been developed in order to enable Council to consider a request from an applicant/developer to accept a bank guarantee for certain incomplete public works (eg road works, kerb and guttering drainage works etc), in order to enable the issue of the Subdivision Certificate or Interim Occupation Certificate, prior to the completion of such works.

The provisions of sub-section 80A(6) of the Environmental Planning and Assessment Act 1979 (EP&A Act) enable a consent authority (Council) to enter into an agreement with an applicant/developer that the applicant/developer must provide security for the payment of the cost of any one or more of the following:

- a Making good any damage caused to any property of the consent authority as a consequence of the doing of anything to which the development consent relates;
- b Completing any public work (such as road work, kerbing and guttering, footway construction, stormwater drainage and environmental controls required in connection with the consent;
- c Remedying any defects in any such public work that arise within six (6) months after the work is completed.

Section 109J(2) of the EP&A Act also enables a consent authority (Council) to issue a subdivision certificate for a subdivision that involves subdivision work where agreement has been reached between the applicant for the certificate and Council, concerning, relevantly, the security to be given by the applicant to Council with respect to the work to be completed, and when it will be completed.

The security is to be provided before the carrying out any work in accordance with the development consent or at such other time as may be agreed to by Council (sub-section 80A(9) of the EP&A Act). In relation to "such other time as may be agreed to by Council", an applicant for a subdivision certificate can make a request to enter into such an agreement at any time (sec 109J(2)(c)).

The security will generally take the form of an unconditional bank guarantee, to the satisfaction of Council. In very limited circumstances, and entirely within its own discretion, Council may consider insurance bonds, issued by companies other than banks.

However, there is no legal basis for Council to require a security (in any form, including a bank guarantee) for works proposed entirely on private land where such works will not be dedicated to Council in the future.

Council has as a matter of practice in its grant of development/building consents and in association with entering contracts, required applicants to lodge a security deposit in the form of a cash bond or a bank guarantee (or equivalent) with Council in order to provide Council with security of performance by those applicants.

All action that is required to be undertaken to bring about lodgement of a bank guarantee or equivalent with Council is the responsibility of the Council Division (including Environment and Health, Development Assessment and Compliance, Subdivision Engineers, Landscaping Officers and/or Contract Supervisors) whose officers have requested the guarantee to be lodged with Council. Those officers are responsible for forwarding the guarantee to Central Records for retention as a legal document on behalf of Council and for administering the release by Council of guarantees when no longer required to be retained by Council.

OBJECTIVE

The main objective of this policy is to provide policy guidelines for when Council will consider the bonding of certain works required to be constructed in association with a development or subdivision.

POLICY STATEMENT

This policy aims to enable Council to consider a request from an applicant/developer to accept a bank guarantee for certain incomplete public works (eg road works, kerb and guttering drainage works etc), in order to enable the issue of the Subdivision Certificate or Interim Occupation Certificate, prior to the completion of such works.

POLICY REVIEW AND VARIATION

- 1 Council is to have opportunity to review and adopt, at least once during its Term, each Council policy.
- 2 A resolution of Council is required to adopt any variations to this policy, with the exception of minor administrative changes, such as updates to legislative references, which may be endorsed by the Executive Management Committee (EMC). Endorsement of administrative changes made to this policy by EMC does not alter the requirement for it to be reviewed and adopted by each Term of Council.

STATEMENT OF PROCEDURES

1 Policy Procedures for Accepting a Bank Guarantee and Implementation

Any incomplete works that a developer would like to make the subject of security (bond works) will be subject to a formal request being submitted to Council.

- a A request to Council to bond works shall comprise the following:
 - i A written statement detailing the works to be bonded and a program for the completion of all such works.
 - ii A minimum of two (2) itemised quotations prepared by a civil contractor or quantity surveyor for the completion of outstanding works. In this regard, Council reserves its rights to request or seek additional quotations at its discretion, in order to verify the true costs of construction of the incomplete works.
 - iii Two (2) copies of relevant engineering plans detailing the outstanding works to be bonded.
- b Council may, at its discretion, favourably consider a request to bond incomplete works, where the following criteria have been met:
 - i The works have been substantially completed and do not adversely affect the efficiency and/or operation of the development or a vital element of the development.
 - ii The incomplete works do not present a safety issue that cannot be satisfactorily managed.
 - iii The completion of the incomplete works can be carried out without significant impact on the operation of the development site and/or will not inhibit the commencement of building development on the development site.
 - iv The nature and value of the incomplete works can be accurately estimated and validated.
 - v The developer can retain sufficient control of the site to satisfactorily carry out the incomplete works.
- c If Council agrees that the request to bond works meets the abovementioned criteria, the following requirements shall be met or complied with:
 - i A timeframe and schedule for the carrying out of the bonded works (by the developer) acceptable to Council.
 - ii Suitable security is to be provided to Council to cover the future cost of the work including administrative costs to Council, and increases in construction costs due to the timing of works and contingency costs. For large scale projects, Council may consider the use of a bond ledger with the developer.
 - iii The bank guarantee shall be generally 130% of the costs of construction of the incomplete works plus any additional increase due to the proposed timing of the works, as agreed by Council. This is essential to ensure that Council is not financially disadvantaged should it be necessary for Council to arrange for the works to be carried out.
 - iv The cost of construction of the incomplete works to be bonded shall be undertaken by a quantity surveyor or a suitably qualified and experienced civil engineer/contractor using a recognised construction cost guide (eg Cordell's eCosting Guide).
 - v The security shall not have an expiry date. Bank guarantees are invalid and unenforceable after their termination dates even if the obligation has not been performed or the work is yet to be completed. Therefore, Council will not accept bank guarantees with a termination date.
 - vi The bank guarantee shall only be from a reputable financial institution in which Council agrees in writing to have an acceptable level of risk. To minimise credit risk, Council will only accept bank guarantees from banks or other financial institutions with a minimum long term credit rating of BBB with Standard and Poor's, a minimum long term credit rating of Baa2 with Moody Investor Services or a minimum long term credit rating of BBB with Fitch Ratings. Bank guarantees from banks or other financial institutions with a lower rating will not be accepted.
 - vii In the event that a financial institution relating to an existing bank guarantee is downgraded below BBB, Council may ask that a new bank guarantee be provided from another more highly rated financial institution.
 - viii The bank guarantee shall be unconditional and irrevocable and shall enable the Council to have immediate access to the monies secured by the bank guarantee at any time where the Council is satisfied the owner is in breach of any requirements concerning the completion of the outstanding works.
 - ix The bank guarantee shall not require the approval of the developer (or an agent of the developer) for the release of the monies (secured by the bank agreement) to Council.

- x Any bank guarantee shall contain the Development Consent reference number and the property description (Lot and Deposited Plan number) details.
- xi Unless Council has agreed to a 'Bond Ledger', where outstanding works are tracked against a single bank guarantee for staged subdivision works, separate bank guarantees are required for separate obligations. Over the course of a project, the level of work may increase. In such circumstances, the original amount of the bank guarantee may no longer be sufficient to fulfil the intended obligation. If the value is insufficient, Council will notify the developer and request an additional bank guarantee for the shortfall.
- xii The lodgement of security or the making of a payment to Council for the completion of works must be the subject of an agreement in writing between the applicant and Council. This shall include statements as to the required completion date and an agreement of Council's absolute right to draw on the security to carry out the works and if required to recover any additional costs incurred in the carrying out of the works.
- xiii Permission for unencumbered access for Council and/or its appointed contractors to enter the site and carry out the uncompleted works (if required).
- xiv The payment of appropriate application fees in accordance with Council's adopted Fees and Charges.
- xv Where any charge, fee, supply of products or services under this policy is subject to a goods and services tax (GST), an amount equal to the GST paid or payable in respect to the charge, fee, supply of products or services, shall be included in the amount of consideration paid or payable under this policy.
- xvi An agreement from the developer to pay all Council fees for all inspections and administration relating to the bonded works and release of the bank guarantee when the works are completed.

2 Council Reserves the Right to Refuse to Accept a Bank Guarantee

- Council reserves its rights to refuse to accept a bank guarantee, based on its own risk assessment.
- Council will also not enter into a bank guarantee for the completion of essential services such as water and sewerage infrastructure or other essential services.

3 Receipt and Retention of Guarantees

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- A bank guarantee must be accompanied by a completed M20 form and payment of the required fee as prescribed by the Fees & Charges. The Customer Service Officer shall forward the form and the original guarantee to Council's Information Management Unit for registration, scanning and retention as a legal document on behalf of Council.
- Each guarantee is to remain in the custody of Council's Information Management Unit in a legal file until such time it is requested by the officer of Council who is responsible for authorising the release of the guarantee.

4 Exchange of Guarantees

- It is possible for bank guarantees (or document) to be exchanged so long as the replacement document is in accordance with Council's Procurements. The replacement bank guarantee must be accompanied by a completed M20 form and payment of the required fee as prescribed by the Fees & Charges. Such exchanges must be sent to Council's Information Management Unit for registration, scanning, any amendments to the title of the legal file and retention.

5 Release of Guarantees

- A completed M20 form and payment of the required fee as prescribed by the Fees & Charges must be provided to allow the release of a guarantee. All documentation associated with the release of a guarantee must be registered and scanned to the relevant legal file.
- The original guarantee together with the 06-01 Pathway letter, amended as attached is to be returned to the financial institution which originally issued it.
- A copy of Council's letter to the institution is to be forwarded to the person on whose behalf the bank guarantee was lodged with Council to inform that person of the release of the guarantee.
- Following withdrawal of a guarantee from Council's Information Management Unit the hard copy legal file will be destroyed and the title of the electronic file amended to reflect the status of the guarantee.

Letter to financial institution which provided the security deposit

Date

Dear Sir/Madam

RELEASE OF SECURITY DEPOSIT FOR (Property)
..... (Contract date)

Attached please find security deposit certificate lodged with Council which is no longer required to be retained by Council.

Yours faithfully

Releasing Officer of Council

cc *(person who lodged security deposit)*

SUMMARY SHEET	
Responsible Division	Development Assessment and Certification
Date adopted by Council	24 September 2018
Date of previous adoptions	14 September 2015, Prior - Management Policy adopted by EMC 8 December 1997 and 23 June 2003
Date of next review	24 September 2018
Responsible Manager	Special Projects Manager
Authorised by	Manager Development Assessment and Certification