

Report for Resolution

Report to Executive
4 February 2009.

Report of Assistant Director City Development

Subject Planning Obligations- A Framework for Prioritisation

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Purpose

The report proposes a process for dealing with the exceptional situations where the normal package of developer contributions sought through the planning process would make a scheme unviable

Recommendations

That Executive:-

- (1) endorses the approach outlined in this report and the prioritisation criteria set out in Appendix 1 for consultation with the County Council and other local authorities, developers and agents;
- (2) receives a report back on the outcome of the consultation in due course.

Financial Consequences

The financial consequences of this report are that in exceptional circumstances the Council may approve development proposals with a reduced level of developer contributions where schemes are proven to be unviable. In such circumstances the Council would include an overage clause to ensure that if circumstances changed, the Council was able to secure up to the normal full value of developer contributions.

Risk Assessment

Various options and associated risks have been considered. The options are:

- 1) To provide no guidance on the relative priorities of planning obligation requirements or how Local Plan policy and Supplementary Planning Guidance should be applied in cases where a scheme may be unviable.
This approach could:
 - Lead to a very unstrategic approach, with no rationale behind priorities.
 - mean the Council does not secure developer contributions for the most important aspects of development
 - result in a risk that the County Council (or other signatories to s.106 agreements) could raise formal objections to development proposals if their full requirements are not secured
- 2) Refusing planning permission for any scheme which cannot contribute to the full "list" of developer requirements. Issues with this approach are:

- It is unrealistic in the current economic climate where there may be an increase in the number of schemes which developers claim are unviable.
 - Important regeneration benefits through development may be lost
 - The risk that decisions would be overturned on appeal with inspectors imposing contributions which may not be in line with the Council's priorities.
 - The risk of costs awarded against the Council.
- 3) The preferred solution (set out in Appendix 1.) is for the Executive to agree a process and a framework including a set of criteria for prioritising developer contributions through planning obligations. The process would be followed in the event of a developer claiming that their scheme would not be viable. The developer would need to adopt an "open book" approach and cover the costs of an independent valuation expert (e.g. District Valuer) reviewing the scheme. The approach would:
- Ensure greater structure and clarity to decision making.
 - Ensure that developer contributions were secured for the most important element of the scheme.
 - Provide greater certainty for developers.
 - Demonstrate that the Council was acting reasonably and enabling development to go ahead rather than stifling development proposals.

The preferred solution provides a mechanism against which important choices can be addressed e.g. relative priority between affordable housing, open space etc. It will also have implications for the County Council and other partners e.g. if the outcome is that developments are approved without full contributions for education, libraries etc.

The risks can be minimised by consulting Norfolk County Council, other partners and developers on the process before it is finally approved so that they have an opportunity to comment, consider the implications and suggest any improvements. The financial risk is mitigated by inclusion of an overage clause in s.106 agreements, to deal with changes in economic circumstances.

Strategic Priority and Outcome/Service Priorities

The report helps to meet the strategic priority "Strong and prosperous city – working to improve quality of life for residents, visitors and those who work in the city now and in the future".

Executive Member: Councillor Morrey - Sustainable City Development

Ward: All

Contact Officers

Gwyn Jones

01603 212364

Background Documents

City of Norwich Replacement Local Plan Saved Policies November 2007

Supplementary Planning Documents:

- Affordable Housing SPD- draft for consultation December 2007

- Accessible and Special Needs Housing, June 2006
- Transport Contributions
- Open Space and Play Provision, June 2006
- Green Links and Riverside Walks, December 2006
- Heritage Interpretation, December 2006.

ODPM guidance on planning obligations, July 2005 (Circular 5/05)

CLG Planning Obligations: Practice Guide, July 2006.

Report

1. Section 106 of the Town and Country Planning Act 1990, facilitates the making of agreements between developers (and others owning land) and the Council as a local planning authority. These agreements or planning obligations enable local planning authorities to restrict or facilitate development, by ensuring that its impact is adequately addressed.
2. Agreements (or obligations) under Section 106 of the Act may require sums of money to be paid to the Council, e.g., the commuted sums for open space, or for other works of benefit to the area or the community.
3. S.106 agreements or planning obligations are an important means of securing positive contributions and benefits to meet the needs of the development which in turn help to deliver the Council's priorities.
4. Circular 5/05 provides the main guidance on the use of planning obligations in England under section 106 of the Town and Country Planning Act 1990. Specifically this sets out the key "tests" against which planning obligations may be applied. A planning obligation must be:
 - (i) relevant to planning;
 - (ii) necessary to make the proposed development acceptable in planning terms;
 - (iii) directly related to the proposed development;
 - (iv) fairly and reasonably related in scale and kind to the proposed development; and
 - (v) reasonable in all other respects.
5. Circular 5/05 also states in Paragraph B6. "The use of planning obligations must be governed by the fundamental principle that planning permission may not be bought or sold. It is therefore not legitimate for unacceptable development to be permitted because of benefits or inducements offered by a developer which are not necessary to make the development acceptable in planning terms" and in paragraph B7. "Similarly, planning obligations should never be used purely as a means of securing for the local community a share in the profits of development, i.e. as a means of securing a "betterment levy"."
6. The City Council has included a range of policies in the City of Norwich Replacement Local Plan (2004) which require developers to address the impact of development through on-site and off-site improvements e.g. transportation, affordable housing or commuted payments e.g. for play or education. These are dealt with in detail through Supplementary Planning Documents (SPD's). Planning obligation requirements may be provided directly as part of the development or secured via commuted payments to the Council. Some contributions are collected on behalf of the County Council e.g. education, libraries. The Council is currently working up a comprehensive "on-line" guide to developer contributions to make the process clearer and easier to understand and make all the relevant requirements more explicit.

7. There may be circumstances where the full list of planning obligations may result in a scheme being unviable. The recent consultation draft on the revised affordable housing SPD (proposing to increase the maximum percentage of affordable housing sought on large development sites from 30-40%) recognised that this may be an issue and proposed an “open book” approach with developers to deal with this scenario. The recent negotiations on the Anglia Square planning application have followed this approach with advice obtained from the District Valuer. The application was recommended for approval, notwithstanding the inability of the development to fund all the community benefits that would ordinarily be sought, because of its significant wider regeneration benefits. This approach was dealt with as a “one- off” and to date there is no formal mechanism or process for handling the situation. In the current economic climate it is likely that the Council will be faced with more situations where developers claim that they cannot afford to cover the full costs of all planning obligations.
8. Circular 5/05 supports this approach in paragraph B10. “ In some instances, perhaps arising from different regional or site-specific circumstances, it may not be feasible for the proposed development to meet all the requirements set out in local, regional and national planning policies and still be economically viable. In such cases, and where the development is needed to meet the aims of the development plan, it is for the local authority and other public sector agencies to decide what is to be the balance of contributions made by developers and by the public sector infrastructure providers in its area supported, for example, by local or central taxation. If, for example, a local authority wishes to encourage development, it may wish to provide the necessary infrastructure itself, in order to enable development to be acceptable in planning terms and therefore proceed, thereby contributing to the sustainability of the local area. In such cases, decisions on the level of contributions should be based on negotiation with developers over the level of contribution that can be demonstrated as reasonable to be made whilst still allowing development to take place.
9. Executive is asked to agree a process together with a set of criteria for prioritising developer contributions (in the event of a scheme not being viable). This is set out in detail in Appendix 1. It will be based on the following principles:
 - The developer would need to agree to an “open book” approach and cover the costs of an independent valuation expert (e.g. District Valuer) reviewing the scheme.
 - This situation should be treated as an “exception” and apply only rarely
 - It would include an “overage” clause to allow Council to “clawback” funding in the event of developer achieving larger profit than anticipated at the time of the appraisal
 - It provides a framework under which Planning Applications Committee can follow a structured, strategic and systematic approach to the consideration of planning obligations (where a scheme may be unviable) in order to achieve the best outcome for the City. (It will help to handle sensitive issues such as the priority given to achieving the full quota of affordable housing or

choices between open space, education and other contributions.)

10. Planning Applications Committee members will need to be briefed on the approach proposed in the framework.

Appendix 1.

A) Criteria for determining priorities for Planning Obligations (In event of a development proposal being proven to be unviable)

The following criteria provide a framework (for use by Planning Applications Committee when determining individual planning applications) for ranking requirements s.106 or planning obligations. The Framework is based on attributing a ranking of requirements based on the following categories, listed in priority order.

1. **Critical Requirements** – even if a scheme is unviable, planning permission cannot be granted if these elements are required but lacking.

Note- if these items can be funded by other means they would become Category 4.

- Requirements which provide a “once and for all opportunity”
- Where the requirement is a vital component or integral part of the scheme
- Where implementation can only happen as part of development
- Where the ability to provide the requirement is lost once the site is developed
E.g. on/off-site highway improvements; bridges; riverside walk; restoration of historic buildings.

2. **Essential policy requirements**– Development should not normally be granted planning permission unless there are exceptional benefits in terms of regeneration.

- Site specific requirements identified in Local Plan policy or a SPD
- Requirements (listed under Category 3 below) in an area of the City where there is an identified existing deficit or evidence of under provision.

3. **Local Plan Policy requirement** - Development should not normally be granted planning permission unless regeneration benefits are overriding

- Requirements that should normally be achieved as part of the scheme, These will include:

1. General transportation contributions/enhancements
2. Affordable housing
3. Play/open space
4. Way finding/signs
5. Education
6. Libraries
7. Heritage interpretation
8. Shop mobility

4. **Other related requirements** – these would usually be scheme specific benefits, which are beneficial, but are not a policy requirement and could

potentially be capable of being financed by other means (as in Circular 5/05)

Note- Where a scheme is proven unviable if all the s106 requirements are provided, categorisation of requirements into priorities 2-4 will depend on an appraisal of site and area specific circumstances. It will require consideration of:

- *the scale of the requirement and the level to which needs may be capable of being met in part by other developments;*
- *the actual works that will be delivered, costs involved and other sources of funding to ensure that obligations achieve worthwhile community benefits;*
- *commuted sums in lieu of on-site provision.*
e.g. in an area of predominantly public housing the option of a commuted sum for affordable housing requirements may be acceptable; open space requirements could be reduced/waived in areas of high quality provision.

B) S.106 –Process for Negotiations.

1. Case officer draws up comprehensive list of s.106/related requirements (which impose a cost on development) at “informal” or pre planning application stage. This list should include those requirements secured on behalf of other agencies e.g. education contributions for Norfolk County Council
2. Case officer refines list as a result of discussions with development team to coordinate corporate input
3. In the event that:
 - the developer claims the scheme will not be viable if the full list of planning obligations is to be provided **and**
 - where it is considered that the development may be needed to meet the aims of the development plan, the City Council instructs an independent valuation expert e.g. District Valuer to undertake an “open book” appraisal of the scheme to verify the viability of the full scheme including all s.106 requirements. This should be based on residual valuation methodology and for housing schemes should be based on the Homes and Communities Agency model. Costs of this work to be met by the developer.
4. The appraisal process will include:
 - An assessment of all costs and values based on **current** prices (at the time of the appraisal) and may not therefore reflect the actual price that the developer has paid for the site)
 - advice from the valuation expert on a reasonable level of profit which is acceptable from the development in the light of development risks, which may require private housing to be dealt with separately from affordable housing e.g. 18-20% (on capital value) and affordable housing (6% of cost.)
 - clarification about the level of developer contributions which can be met from the development and allow the scheme to be economically viable

5. Following receipt of appraisal report and understanding of the viability of the scheme, case officer prioritises list of s.106 requirements according to the criteria in the framework to determine whether or not it is appropriate to recommend approval for the scheme without the full requirements being met.
6. Corporate officer discussion to reach agreement about priorities in particular to:
 - determine the proportion of the needs arising from the development that can be delivered through potential commuted sums and
 - Ensure that any commuted sums will also be capable of delivering worthwhile community benefits (through identifying works that will be delivered, costs involved and other sources of funding).
7. Negotiate with developer to secure requirements in priority order according to overall level of contribution that can be provided on the basis of economic assessment of whole scheme
8. Report to Planning Applications Committee to include:
 - explanation of the exceptional circumstances and how the proposal will meet the needs of the development plan, in order to justify a recommendation of approval with reduced s.106 requirements
 - The timeframe that the viability assessment remains valid e.g. to allow for a reappraisal of the scheme if it does not commence for 1 year.
 - An “overage” clause to allow Council to “clawback” funding in the event of developer achieving larger profit than anticipated at the time of the appraisal. The overage clause would have a cap on it being the balance of contribution the site is liable for after deduction of any contribution already made.
9. The detailed information in the appraisal will remain confidential.