

Audit Committee – 28th November 2013

6. Varying or Discharging Section 106 Planning Obligations

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Purpose of the Report

This report to the Audit Committee is to advise members of the process adopted by this Council in the consideration of requests by developers that obligations secured by Section 106 Town & County Planning Act 1990 agreement be discharged or varied subsequent to their completion.

Recommendation:

That members note the report on the process which formed part of the report to the District Executive in April 2011 and which is attached as Appendix 1 and make any suggestions and recommendations that they feel would further improve it.

Introduction

As part of the process of approving planning applications the applicant or developer may be required to enter into a section 106 agreement. These agreements contain certain obligations which attached to the land and require the owner to do certain things. These range from the provision of affordable housing, improvement to highways and on-site play space provision, through to the requirement to make payments for infrastructure provision e.g. education payments. In broad terms the section 106 agreements contain the provisions relating to payments and infrastructure without which the development would be unacceptable. In a strict legal sense, to be enforceable obligations must be necessary to make the development acceptable in planning terms; directly related to the development and fairly and reasonably related in scale and kind to the development.

Report

Although section 106 Town & Country Planning Act 1990 allows the Local Planning Authority to require and enforce these payment and infrastructure obligations, the 1990 Act also contains a provision that entitles the other party to apply to the LPA to vary or delete the section 106 obligations. Although the Act originally provided that the LPA did not need to consider any application if it was submitted within 5 years of the agreement being completed, case law effectively meant that any application submitted at any time needed to be at least properly considered by the LPA. It was also possible for both sides to reach an agreement to vary any obligations at any time. A recent change to legislation in 2013 means that owners can now apply under the statutory framework to have obligations varied or discharged which are contained in agreements entered into on or before 6th April 2010. More recently the 1990 Act has also been amended to include additional provisions which introduce a new application and appeal procedure specifically for the review of planning obligations on planning permissions which relate to the provision of affordable housing. Obligations which include a "requirement relating to the provision of housing that is or is to be made available for people whose needs are

not adequately served by the commercial housing market" are within scope of this new procedure.

The new application and appeal procedures do not, in any way, replace existing powers to renegotiate Section 106 agreements on a voluntary basis at any time. The application and appeal procedure will assess the viability of affordable housing requirements only. It will not present the LPA with the opportunity to reopen any other planning policy considerations or reconsider the planning merits of the permitted scheme to which the obligations relate. The Department for Communities and Local Government has provided guidance on how the Government expects these new provisions to be applied and specifically what factors to take into account in assessing viability in the cases to which these new provisions relate. It is important to appreciate that any affordable housing obligations on sites granted in accordance with a Rural Exceptions Site policy are exempt from this specific procedure.

The current process as adopted by this Council for considering any applications to vary or discharge obligations requires that the developer pays for an independent assessment of their viability case. This assessment is carried out by a specialist valuer from the District Valuer's Office who then issues the Council with a formal written report and set of recommendations. Agreeing to a reduction in the obligations should always be the last resort and officers are required to consider other options first as set out in the District Executive report. In the event that a reduction in contributions is the only option to ensure the development goes ahead, then as that reduction is based on market forces and costs at a definite period, it would be usual for a new agreement to be entered into with the developer requiring additional payments to the Council should market conditions improve in the intervening period up to the amount secured by the original obligations.

All applications which require a material change in contributions must be considered by the relevant Area Committee. Whilst some of the information that is considered may be commercially sensitive and not for public view on that basis, members can determine what information they require in order to make the decision being required/requested. It would be possible for the Committee to go into confidential session to consider the most sensitive information whilst at the same time striving to ensure as much of the information and process is open to the public as is reasonably possible. Members are faced with a fine balancing act between ensuring that enough money is recovered to put in the infrastructure generated by the new development whilst at the same time ensuring sites are viable enough to enable the development to proceed within a realistic timescale. If the Council refused an application or did not agree to the full amount of the variations requested then the applicant has the ability to appeal to the Secretary of State.

Financial Implications

There are none resulting from this report.

Legal Implications

These are no specific legal implications resulting from the subject matter of this report as the statutory requirements contained in Town & Country Planning Act 1990 and associated regulations are already being complied with.

Carbon Emissions & Adapting to Climate Change Implications (NI188)

There are no specific environmental implications arising from the subject matter of this report.

Equalities and Diversity Impact

There are no specific equality or diversity implications arising from the subject matter of this report.

Background Papers: *Agenda and minutes of District Executive Committee 7th April 2011*
