

WYRE FOREST DISTRICT COUNCIL

CABINET
16th SEPTEMBER 2020

Section 106 Planning Viability Priorities

| OPEN | |
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| CABINET MEMBER: | Councillor Fran Oborski- Cabinet Member for Economic Regeneration, Planning and Capital Investments |
| RESPONSIBLE OFFICER | Corporate Director: Economic Prosperity & Place. |
| CONTACT OFFICER | Kate Bailey, Head of Strategic Growth |
| APPENDICES: | None |

1. PURPOSE OF REPORT

- 1.1 The purpose of this report is to agree the prioritisation of allocating funding achieved through planning obligations across the various elements (such as education, highways and affordable housing) on sites where there is a shortfall in meeting the costs of all obligations following a viability assessment.

2. RECOMMENDATION

The Cabinet is asked to DECIDE that:

- 2.1 **The priority list set out in paragraph 4.10 of this report is used to determine the allocation of s106 obligations where the viability of sites is deemed to be such that not all policy requirements can be met.**

3. BACKGROUND

- 3.1 Planning obligations, under s106 of the Town and Country Planning Act 1990, are a mechanism which mitigate the impact of a development proposal to assist in making it acceptable in planning terms, that might not otherwise be acceptable. They are focused on site specific mitigation of the impact of development. S106 obligations are often referred to as 'developer contributions' along with highway contributions and the Community Infrastructure Levy (where these have been introduced). Planning obligations run with the land, are legally binding and enforceable.
- 3.2 The common uses of planning obligations are to ensure that necessary infrastructure is provided on and off site to enable the development to take place and to secure affordable housing; and to specify the type and timing of this housing. Other uses might include securing financial contributions for education provision or other matters which are reasonably required in order to make the development acceptable. However, these are not the only uses for a s106 obligation. A s106 obligation can:
- a) restrict the development or use of the land in any specified way

b) require specified operations or activities to be carried out in, on, under or over the land

c) require the land to be used in any specified way; or

d) require a sum or sums to be paid to the authority on a specified date or dates or periodically.

3.3 The legal tests for when a s106 obligation can be used are set out in regulation 122 and 123 of the Community Infrastructure Levy Regulations 2010 as amended and the National Planning Policy Framework (NPPF). The tests are that an obligation 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.

3.4 The amount of s106 contribution differs in each planning application as each site has different characteristics which dictate the need for s106 to be applied. Generally, the amount of s106 contribution which each site can make is a product of the financial viability of bringing a site forward for development; an unviable site is unlikely to be developed. Therefore, the amount of s106 contribution recommended by the planning officer when reporting to Planning Committee follows negotiation about where the line of viable and unviable lies and how much the development can afford to contribute before it becomes unviable.

3.5 The national Planning Practice Guidance (PPG) states the role for viability assessment is primarily at the plan making stage. Viability assessment should not compromise sustainable development but should be used to ensure that policies are realistic, and that the total cumulative cost of all relevant policies will not undermine deliverability of the plan. Policy requirements, particularly for affordable housing, should be set at a level that takes account of affordable housing and infrastructure needs and allows for the planned types of sites and development to be deliverable, without the need for further viability assessment at the decision making stage.

3.6 The viability sections of the Planning Practice Guidance (PPG) (Chapter 10) were completely rewritten in 2018. The changes provide clarity and confirm best practice, rather than prescribe a new approach or methodology. Having said this the emphasis of viability testing changed significantly. The, now superseded, requirements for viability testing were set out in paragraphs 173 and 174 of the 2012 NPPF which said:

173 ... To ensure viability, the costs of any requirements likely to be applied to development, such as requirements for affordable housing, standards, infrastructure contributions or other requirements should, when taking account of the normal cost of development and mitigation, provide competitive returns to a willing land owner and willing developer to enable the development to be deliverable.

174 ... the cumulative impact of these standards and policies should not put implementation of the plan at serious risk, and should facilitate development throughout the economic cycle...

3.7 The PPG confirms it is appropriate for Local Plan makers to use site typologies to determine viability at the plan making stage. Average costs and values can then be used to make assumptions about how the viability of each type of site would be affected by all relevant policies. Plan makers can also undertake site specific viability assessment for sites that are critical to delivering the strategic priorities of the plan, in the case of the Council's Plan submitted for Examination earlier this year, this was

case with the Eastern Kidderminster Expansion site. A viability assessment already existed for Lea Castle, the other major growth site in the Submitted Plan, and accompanied the planning application.

- 3.8 The purpose of viability testing is now to ensure that '*maximum benefits in the public interest*' has been secured. If the maximum viable benefit is secured, but not all impacts are mitigated, it becomes a matter of planning judgment whether to allow a development proposal to proceed or not.
- 3.9 The Council's current policy is set out in the Planning Obligations Supplementary Planning Document (SPD) (2015) and covers developer contributions around physical, social and green infrastructure. Affordable Housing contributions are covered in the Council's Affordable Housing SPD (2014).
- 3.10 As part of the Local Plan Review the Council has developed an Infrastructure Delivery Plan (IDP). The purpose of the Wyre Forest Infrastructure Delivery Plan (WFIDP) is to set out the infrastructure requirements as part of the evidence base to support the proposals contained in the Wyre Forest Local Plan Review (WFLPR), which covers the period 2016 to 2036. Importantly the IDP seeks to;
- Review the existing capacity of physical, social and green infrastructure provision across the District.
 - Identify the infrastructure needs required to serve the proposed level of growth within the District.
 - Identify the delivery mechanisms required in order to implement the required infrastructure.
 - Where possible, identify the responsible delivery body and provide a broad indication of costs.
 - Identify what funding sources might be available to facilitate implementation.
- 3.11 There are a number of other obligations on developers that have been included in the Viability Assessment work which was developed as part of the evidence base for the Submitted Local Plan as they are imposed on developers through the Local Plan policies, but that aren't shown as separate planning obligations for the purpose of s106. These obligations include;
- 3.11.1 All new developments over 100 square metres gross, or one or more dwellings, should incorporate the energy from renewable or low carbon sources equivalent to at least 10% of predicted energy requirements,
- 3.11.2 The provision of self-build units or serviced plots on sites of 50 dwellings or more
- 3.11.3 20% of properties on all major housing developments to meet the higher access standards (Part M Building Regulations (Access to and use of buildings), (Category 2 M4(2), accessible and adaptable dwelling); and a further 1% of the overall number of housing units to meet Category 3 M4(3), wheelchair user dwellings standards.
- 3.12 When there are insufficient s106 contributions available through a development site to satisfy all of the matters which require a contribution (because the site would otherwise be unviable), and the planning judgment reached is that the development should nonetheless be permitted to proceed in the public interest, the Council has to prioritise where it will allocate the monies which are available. Logically such prioritisation would reflect the Council's Corporate priorities which are;
- a safe, clean and green living environment
 - supporting a successful local economy

- good quality and affordable homes for all

On that basis affordable housing and open spaces are likely to be top priorities, or where the development can directly contribute to economic growth. Accordingly, priorities around education and community facilities might be lesser priorities as they don't directly contribute to the Corporate Plan Priorities or other funding streams maybe available to deliver them. Clearly key infrastructure (generally such as highways or drainage) which is necessary to enable the development to take place at all also has to be a priority as they do contribute to the living environment and can negatively affect the local economy if not undertaken.

4. KEY ISSUES

- 4.1 As part of the Local Plan making process various viability assessments were undertaken as part of the evidence base. The original study in 2017 undertaken by HDH Planning and Development Ltd was based on undertaking financial appraisals of sites, the output of which is the Residual Value. The Residual Value is the maximum that a developer could be expected to contribute from a site and still make an adequate return and retain the viability of the site for development purposes. For a site to be viable the Residual Value must exceed the Existing Use Value (EUV) by a sufficient margin for to induce the landowner to sell (so called EUV+)
- 4.2 In the study a range of typologies (i.e. types of developments) were modelled to reflect the expected future development (based on current use, size and geographic distribution, etc). In addition, 12 potential strategic sites were modelled, based on estimates of their strategic infrastructure and mitigation requirements provided by Worcestershire County Council (WCC). It is acknowledged that modelling is never totally representative, however the aim of the work was to broadly test development viability of sites likely to come forward over the plan period and to inform the selection of sites. The Council should only be proposing to allocate sites in the Local Plan which are viable and have a reasonable expectation of being capable of delivery. As the plan advanced, more detailed s106 expected costs came to light through feedback from statutory and non-statutory consultees (worst case scenarios were used) and some market changes occurred.
- 4.3 Overall the vast majority of sites represented by the typologies were shown as deliverable and the Council can be confident that they will be forthcoming. The exceptions were some of the brownfield sites, including Lea Castle, but with a degree of policy flexibility most sites were deliverable. The work sensitivity tested a number of different scenarios around affordable housing percentages, the tenure split within affordable housing and social versus affordable rent and these, coupled with the Housing Needs Study 2018, helped to settle the policy position of 25% affordable housing with a 65:35 split between rented and intermediate types of home ownership which was part of the Submitted Plan.
- 4.4 The Pre-Submission Viability Note was published in June 2019 to assist with the finalisation of the Local Plan. It considered further changes to the NPPF (Feb 2019), PPG (May 2019), CIL regulations and the new RICS guidance (May 2019). It also updated information concerning the strategic sites and the Council's policy changes. At the time this work was undertaken, there was some more detailed estimates of the strategic infrastructure costs for both strategic sites that had been included in the updated Infrastructure Delivery Plan (based on the worst case scenario) and these were included in the Pre-Submission Viability Note.

- 4.5 The strategic infrastructure and mitigation costs did cause viability to worsen and so the Viability Note proposed policy changes to potentially improve viability. This included increasing the numbers on sites, pursuing other sources of infrastructure funding and reconsidering strategic infrastructure, affordable housing and density requirements. All these options were considered by the Local Plan Review Panel and officers will continue to look for alternative sources of funding for infrastructure or to reduce requirements where this still leaves the development acceptable.
- 4.6 Overall the viability assessment takes a cautious approach and uses averages and the best cost estimates available at the time but still identifies that the Local Plan sites are deliverable. However, as the Taylor Wimpey (east of Kidderminster) and Homes England (Lea Castle) viability assessments show, both have involved policy compromises in the form of a reduced contribution of affordable housing.
- 4.7 This reduction in supply of affordable housing delivered through s106 sites has an impact on both the residents of Wyre Forest, who have a reduced range of housing options if they are in receipt of a lower income, and on the finances of the council who are funding unprecedented numbers of households in emergency accommodation due to the lack of an affordable housing supply to move people into.
- 4.8 Where viability assessments show that the developer will be unable to meet all policy requirements on a site, it is proposed that a prioritisation of infrastructure requirements is agreed by the Council so that the provision of affordable housing isn't always reduced first from the developers obligations. This will be site specific as each site will bring forward its own individual and specific requirements, but the prioritisation model should broadly follow the corporate priorities outlined in 3.12 above.
- 4.9 Where sufficient funding is not available to cover all planning s106 obligations it will be necessary to prioritise the list of "asks" and may require the Council to decide that some obligations aren't met at all. It may be possible to still fund these obligations through other funding streams or alternatively it may be these particular obligations aren't as essential as others to make the development acceptable. The Council could prioritise the elements in relation to the agreed corporate plan whilst also taking into consideration the essential infrastructure needed specific to any site, such as highways or drainage.
- 4.10 The amount of s106 contribution allocated to each prioritised element will differ from site to site and will be subject to the detailed negotiations undertaken by the planning officer on behalf of the Council. Where it is the case that not all policy requirements can be met it is proposed that the Officers will prioritise in the following order:
- On and/or off site infrastructure necessary to make the development acceptable
 - Affordable housing
 - Open space and recreation
 - Education
 - Other stakeholder contribution requests such as infrastructure costs associated with health provision or the police
- 4.11 The recently (August 2020) published White Paper "Planning for the Future" which is currently out for consultation proposes a number of changes to the current system of planning obligations including setting the a nationally set, value-based flat rate

charge (the 'National Infrastructure Levy') that replaces both the Community Infrastructure Levy and the current system of planning s106 obligations. The government aim is that the new Levy will raise more revenue than under the current system of developer contributions and "deliver at least as much – if not more – on-site affordable housing as at present".

- 4.12 The White Paper proposes to give local authorities greater powers to determine how developer contributions are used, including by expanding the scope of the Levy to cover affordable housing provision to allow local planning authorities to drive up the provision of affordable homes. The Government plans to extend the scope of CIL and remove the exemptions from it to capture changes of use through permitted development rights, so that additional homes delivered through this route bring with them support for new infrastructure.
- 4.13 The White Paper acknowledges that a reformed Infrastructure Levy will also need to have considered the impact of this change on areas with lower land values. The Council's response to the White Paper is subject of a separate report to this Cabinet meeting.

5. FINANCIAL IMPLICATIONS

- 5.1 The aims of the s106 planning obligations are necessary to make the development acceptable in planning terms. Where a site isn't policy compliant due to viability it has generally been the case that affordable housing provision is compromised first and this has a direct consequence on the ability of the council to meet the housing needs of those who can't afford to purchase on the open market. This, in turn, impacts on the Council's budget as each year more households approach the Council as homeless as they are unable to afford housing to meet their own needs. In 2019/20 the council spent over 70k (net) on emergency accommodation as it wasn't able to rehouse households into appropriate accommodation when they became homeless.
- 5.2 There are other funding streams available to infrastructure providers, such as the County Council or the Local Enterprise Partnership, that can be bid for to reduce the burden on planning obligations. This includes bidding for government programmes for highways (the Local Growth Fund or Housing Infrastructure Fund for example) or education provisions, however the Council recognises that the opportunities for bidding might be limited.

6. LEGAL AND POLICY IMPLICATIONS

- 6.1 Planning obligations are enshrined in the s106 of the Town and Country Planning Act 1990.
- 6.2 The Council currently has a Planning Obligations SPD which outlines when planning obligations apply and the levels they are set at.

7. EQUALITY IMPACT NEEDS ASSESSMENT

- 7.1 An EIA screening has been undertaken and no adverse impacts were identified for groups with protected characteristics.

8. RISK MANAGEMENT

- 8.1 The purpose of planning s106 obligations is to help make development acceptable. If the viability of the site means funding for the developer contributions is limited then the site may get delivered but without vital elements, which may be unacceptable to the Council and local community. The alternative is that the site doesn't get delivered. Through having a hierarchy of prioritised planning obligations agreed, the Council is making it clear what must normally get delivered on the site, whilst still enabling the development to take place.

9. CONCLUSION

- 9.1 The majority of sites in the emerging Local Plan are deemed to be viable. However, it may turn out that there are unforeseen challenges to policy compliance posed by the two large strategic sites and large scale brownfield sites. Where viability has been tested, and full policy compliance cannot be achieved, the Council can then determine a set of priorities that are met by the actual funding available. This will enable development to still take place and a developer contribution made to all the infrastructure requirements.

10. CONSULTEES

- 10.1 WFDC Development Manager
10.2 WFDC Principal Solicitor
10.3 CLT

11. BACKGROUND PAPERS

- 11.1 Viability Topic Paper
11.2 Infrastructure Delivery Plan