

**SECTION 106 DEVELOPER CONTRIBUTIONS ON SMALL SCALE
RESIDENTIAL SITES AND AFFORDABLE HOUSING PROVISION**

1. Purpose of Decision

- 1.1 This report sets out the justification for Cabinet agreement to the cessation of seeking contributions (under Section 106 agreements) towards infrastructure from small scale residential developments (10 dwellings or less), following changes to national planning guidance and recent court cases. Agreement is also sought to implement national planning guidance changes to the way in which affordable housing requirements are sought on sites where a vacant building is to be demolished or re-used.

2. Background

- 2.1 At the end of November 2014, the Government made changes to the circumstances in which affordable housing and S106 contributions could be sought. These changes are set out in more detail later in this report and were made through a Ministerial Statement and amendments to the National Planning Practice Guidance (NPPG), following a consultation earlier in 2014. Correspondence from Government made it clear that these changes were to be introduced with immediate effect.
- 2.2 The changes were part of the Government's plans for boosting housing delivery by reducing the financial burden on small house builders and also were to act as further encouragement for authorities to implement the Community Infrastructure Levy. There were a number of local authorities who did not agree with this, both in terms of policy and procedure, and two authorities collectively commenced a legal challenge through judicial review, to the changes on procedural issues.
- 2.3 The challenge, by Reading Borough Council and West Berkshire District Council, to the High Court succeeded in July 2015, and the government immediately deleted the guidance. This action had been supported by Rushmoor, and during this period we had continue to collect S.106 contributions on small residential development schemes, principally for the provision of open space and for local highway improvements. The contributions towards mitigating the impact on the Special Protection Area (through Suitable Alternative Natural Greenspace and Strategic Access and Monitoring Measures) has been unaffected by the Government changes.

- 2.4 However, the Government challenged the High Court ruling, and in May 2016, the Court of Appeal overturned the decision, with judges quashing the grounds on which the High Court case was won. The Government then quickly moved to reinstate the passages in the NPPG, and informed all local planning authorities.

3. Policy Changes

Limits to using S106 for pooled obligations

- 3.1 The first change to national planning guidance relates to restricting pooled contributions from sites of 10 dwellings or less. The changes in the NPPG state¹:

There are specific circumstances where contributions for affordable housing and tariff style planning obligations (section 106 planning obligations) should not be sought from small scale and self-build development:

- *contributions should not be sought from developments of 10-units or less, and which have a maximum combined gross floorspace of no more than 1000sqm*
- *affordable housing and tariff-style contributions should not be sought from any development consisting only of the construction of a residential annex or extension to an existing home*

- 3.2 Until now, the Council has collected S106 contributions from small new housing developments towards open space improvements and towards highways and transport improvements. These contributions are usually towards named sites (or a number of possible sites) or towards generally defined schemes and are based on a 'tariff style' calculation, i.e. a set charge per dwelling for example. The implication of this part of the NPPG changes suggest that the Council should not be seeking any open space or transport 'tariff' style' contributions from sites of 10 or less dwellings (they are unlikely to exceed the 1000 sq.m. threshold).

- 3.3 In Rushmoor, we do not seek affordable housing on sites of less than 15 dwellings so this part of the guidance does not affect our affordable housing policy.

¹ Mitigation for European sites is excluded from these limits so SAMM and SANG payments would not be affected.

Vacant Building Credit for Affordable Housing

- 3.4 The second change is the introduction of a new vacant building credit which requires the floorspace of any vacant building which is to be reused or demolished to be deducted from the calculation of any affordable housing contributions sought from relevant development schemes. In such cases, a financial credit is to be offered equivalent to the existing gross floor space of any vacant buildings brought back into any lawful use or demolished for re-development.
- 3.5 This financial credit applies to all schemes, regardless of size, and regardless of how long the building has been vacant. So, for example, a warehouse site (1,000sqm) could be demolished to make way for 100 dwellings. Whilst this would trigger a policy requirement for 35 affordable units (35% of the provision) (subject to viability), the existing floor space set to be demolished would need to be taken into account when determining the affordable housing contribution. This would, in effect, discount the need for 35 units before viability has even been considered.

4 Implications for Infrastructure and Affordable Housing in Rushmoor

- 4.1 The Solicitor to the Council has confirmed that the contributions currently sought towards open space and highway improvements from small housing developments would fall within the definition of contributions covered by the changes to national guidance set out in paragraph 3.1. This change therefore has an impact on future potential income for infrastructure. For example, applications for developments of less than 10 dwellings considered by the Council in 2012 – 2014 sought total contributions of about £450,000, to address the impact of these developments in the locality of the site. Hampshire County Council has also acknowledged the new guidance, recognising that it will no longer receive contributions to highway improvements from such schemes.
- 4.2 In relation to the introduction of the vacant building credit, essentially this means that as most development in Rushmoor is on previously developed sites, often with buildings that could be made vacant in time for any planning application to be determined, that those developments where we will be seeking affordable housing are likely to be able to justify a reduced or even nil provision.

5 Conclusions

- 5.1 The Court of Appeal judgement has clarified the position and confirmed the legitimacy of Government advice in the NPPG that, on applications for residential development of 10-units or less, planning obligations should not be sought to contribute to pooled funding “pots” intended to fund the provision of general infrastructure in the wider area. Authorities may however still seek to fund measures with the purpose of facilitating development that would otherwise be unable to proceed because of regulatory or EU Directive requirements (this would include SANG and SAMM payments).
- 5.2 It is understood that those local authorities that challenged the original decision are highly unlikely to take the matter further. The Council is therefore left with little alternative but to follow the new Government guidance over S.106 contributions on small sites.
- 5.3 There have been a number of development proposals that fall within this category, which have been granted permission since November 2014, and that have not yet been implemented but still could be. In some cases, developers have already requested a variation to the S.106 legal agreement to recognise the change in government advice. At present, the scheme of delegation does not allow officers to vary agreements so each case would need to go back to committee for decision. Consequently, authority is sought from Cabinet to allow the Head of Planning to vary S.106 legal agreements in this regard.

6. Recommendations

- 6.1 It is recommended that:
 - a) unless there are special circumstances, infrastructure contributions through planning obligations should no longer be sought from developments of 10-units or less, and which have a maximum combined gross floorspace of no more than 1,000sq.m.; and, that in appropriate cases, the vacant building credit provisions be applied in order to comply with the National Planning Practice Guidance as amended on 19 May 2016, and

- b) the Head of Planning be authorised to instruct the Solicitor to the Council to enter into deeds of variation to vary S.106 Planning Obligations previously entered into in respect of infrastructure contributions from residential developments of 10 units or less.

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