Chapter 2: Approach to Planning Obligations

Introduction

2.1 Planning obligations will typically be secured through a s106 Agreement, made under Section 106 of the Town and Country Planning Act 1990 (as amended). Where planning obligations are required, planning permission will not be granted until such time as the s106 Agreement has been prepared and completed by all relevant parties.

2.2 This section of the SPD sets out the process of negotiating, preparing, and completing a s106 Agreement in association with the handling of planning applications in an efficient and timely manner.

2.3 It details the actions required to be undertaken by the applicant and the Councils, as Local Planning Authority, at the pre-application and application stages of the planning application process. It also outlines the procedure for agreeing any planning obligations, and identifies the steps required to be taken before a planning application is formally submitted and during the consideration of a planning application. The main objectives are to ensure that, as far as possible:

- All appropriate information is provided by the applicant and is available from the date of submission of the application (this information should enable the Local Planning Authority and consultees to respond properly to applications); and
- Where approval is recommended, the planning obligation (be it a unilateral undertaking or s106 Agreement) is signed, or in the case of major applications, the detailed proposed heads of terms have been agreed, prior to the application being considered by the Planning Committee (Cambridge City Council Planning Committee, South Cambridgeshire District Council Planning Committee and the Joint Development Control Committee) or the Joint Director of Planning for delegated decisions; such that
- The time taken to complete and issue the agreement (assuming approval is granted) is kept to a minimum.

2.4 The main stages of the procedure are:

- Stage 1: Pre-application;
- Stage 2: Submission of the planning application (including accompanying proposed Heads of Terms, draft Legal Agreement or draft Unilateral Undertaking); and

- Stage 3: Appraisal, validation and agreement of a related planning obligation.

Pre-application stage

What types of obligations might be sought?

2.5 In accordance with the Town and Country Planning Act, the Councils will consider each application on its merits against relevant policy and other material considerations and will negotiate and secure planning obligations on a site-by-site and application-by-application basis.

2.6 While the Councils expect most impacts of development to be mitigated through good design and layout (in accordance with Policies 57 & 59 of the Cambridge City Local Plan and HQ/1 of the South Cambridgeshire Local Plan), some development specific impacts are likely to require physical works or other forms of improvement to mitigate them.

2.7 The possible obligations, set out in this document, are not exhaustive. The SPD focuses on the policy requirements set out in the Local Plans, and the types of obligations likely to arise from applying these. However, the nature of site-specific impacts means they may vary widely depending on the site, its local context, and the nature of the development proposed. It is therefore not possible to list every type of development that might be subject to a planning obligation or to ascribe a set of circumstances under which certain types of obligations will be sought as a norm. The Councils may therefore wish to negotiate other obligations, not included in this SPD, where they are relevant and necessary to a particular development.

2.8 Nevertheless, the purpose in setting out possible obligations is to assist applicants in preparing their planning applications, and to facilitate pre-application discussions around policy requirements, including affordable housing, development impacts, and appropriate mitigation. It is hoped that this ensures negotiations on planning obligations are conducted in a way that is seen to be fair, open and reasonable.

2.9 This SPD not only covers financial contributions but also benefits in kind negotiated as part of planning applications. In many cases provision in kind is preferable and suitable, especially where this secures the timely delivery of the required infrastructure and/or reduces overall construction and management costs.

2.10 Where development sites are proposed to be developed in phases, the Councils will consider the site in its totality and, as far as possible, seek to

match the provision of required infrastructure to the pace of the development through the use of appropriate triggers.

Pre-application discussions

2.11 In preparing a planning application, applicants should fully consider the impacts of the proposed development and any planning conditions or obligations that might be required to mitigate those impacts. To assist this process, applicants should have regard to the relevant policies of the development plan, neighbourhood plans (if relevant), and any other material considerations, including supplementary guidance as appropriate.

2.12 Where obligations are likely to be required, applicants are encouraged to engage in pre-application discussions with the Local Planning Authority prior to the formal submission of a planning application (Pre-Application Advice Service). This is particularly important for schemes that trigger an affordable housing requirement in relation to the amount, type and mix of affordable housing to be provided, as agreement at the pre-application stage avoids delays and costs to the applicant at the subsequent submission stage. The pre-application process offers the opportunity for the applicant and Council officers to discuss, without prejudice, the types of obligations to be entered into, and whether these can or should be provided 'in-kind' either on or off site, or whether a financial contribution towards provision is appropriate.

2.13 For strategic scale and complex developments the Local Planning Authority encourages a collaborative Planning Performance Agreement (PPA) process. Through the PPA, infrastructure requirements and potential obligations are identified and discussed with the applicant team through an iterative process of assessment from a scheme's earliest stages through to submission of the planning application. This is especially advised for phased development proposals and applicants seeking to advance hybrid planning applications.

Submission stage

Submission of the planning application

2.14 Where it is identified that a planning obligation will be required, the applicant should submit with the planning application a draft unilateral undertaking or a draft s106 Agreement using only the Local Planning Authority's standard template which can be obtained from Legal Services (in the case of straightforward agreements containing financial contributions, the provision of affordable housing and open space). In the case of strategic development

proposals, a detailed proposal setting out draft 'Heads of Terms' (HoT's) should be submitted. Applicants are strongly encouraged to provide financial undertakings (on validation of an application) to cover the cost of the Councils' legal services in reviewing the draft s106 Agreement or HoT's, which should be commenced alongside and at an early stage in the consideration of an application.

2.15 In respect of each obligation, the applicant should ensure the draft s106 Agreement or proposed HoT's quantifies the nature and scale of the obligation, taking account of the requirements of the relevant Development Plan policies and this SPD, and specify how provision is to be made.

2.16 In accordance with national planning policy, there is a presumption that infrastructure to be provided through planning obligations should be provided 'in-kind' and 'on-site'. Where an obligation is to be provided other than 'in-kind' and on site, the draft s106 Agreement or proposed HoT's should explain the reason why this is and should specify whether provision is to be made on an alternative site or by means of a payment in-lieu. Where an obligation is to be provided off-site or by means of a payment in-lieu, the applicant should identify the level of contribution applicable to their proposed development.

2.17 If the applicant considers that, in respect of a particular obligation, no provision should be made, the applicant will need to provide sufficient information with their planning application to support their position.

Title information

2.18 Planning obligations are legally enforceable against the owner(s) (including their successors in title) of the land to which they relate. Only those persons having a legal interest in the land can enter into obligations even if a prospective purchaser/developer of the land has applied for the planning permission (although it is possible for prospective purchasers to be party to the obligations where they have exchanged contracts to purchase).

2.19 Because planning obligations run with the land, all owners, lessees and mortgagees must be signatories. The planning obligations are registered on the Local Land Charges Register, which forms part of the publicly available statutory planning register. Therefore, in addition to the draft s106 Agreement or Heads of Terms, applicants should submit with their planning application all necessary title and deed information as appropriate.

Matters to be taken into account in the drafting of a s106 Agreement

Financial contributions

2.20 The s106 Agreement will set out how the contribution is to be used and may include cascades to ensure that the investment in infrastructure is assured if any infrastructure provider withdraws consent for the identified project, or where more suitable alternative option for meeting the need from a development is identified post completion of the Agreement.

2.21 Financial contributions within s106 Agreements will be payable at specific stages in the development process, usually on commencement or on first occupation of the development. However, there may also be cases, typically for large-scale development, where contributions can be phased, in order to match the proportional impact of each phase of the development.

2.22 Trigger dates for the payment of financial contributions will be included in the s106 Agreement. Typically, the Councils will expect a repayment period to be no less than 10 years and substantially longer for strategic phased schemes. Repayment terms may also depend on the infrastructure to be secured which may require contributions to be pooled with other s106 contributions or alternative funding streams secured to deliver the infrastructure or improvements required.

Maintenance payments

2.23 Where contributions are secured through planning obligations towards the provision of facilities, it may be appropriate for the applicant to make provision for the physical upkeep of those facilities. Such payments may be required for the lifetime of the development, although generally a period of 15 years is standard.

2.24 For all maintenance payments, the Councils and the developer will need to negotiate the type of payments to be made.

Index linking

2.25 Financial contributions relating physical infrastructure, including maintenance sums, will be index linked to the Building Cost Information Service's General Building Cost index to maintain the value of the contribution to implement the necessary actions required by the agreement. Other indices where a

contribution relates to a service could include the Retail Price Index or Consumer Prices Index as appropriate.

2.26 Contributions will be indexed linked from the date that the s106 Agreement was entered into until the time of payment unless the s106 Agreement specifically advises otherwise. In some cases, it may be appropriate for contributions to be linked to an alternative time, such as the date of committee resolution or the consultation date identifying the contribution amount. Indexation provisions will require that no sum in the s106 Agreement shall be reduced as a result of indexation.

Land costs

2.27 In cases where land is required to accommodate the infrastructure required, the cost of land will be a legitimate consideration for inclusion in the cost of the infrastructure.

2.28 Regarding the types of infrastructure that should include land value within an obligation, the general rule of thumb is that for infrastructure typically or required to be delivered on-site to mitigate or meet the needs of the development, the land cost should be treated as a developer cost and be excluded. However, if provision is otherwise i.e. off-site or a contribution towards off-site provision, then the land value cost should be included.

2.29 In the circumstance where a new facility is required to meet unmet needs beyond that generated by a development itself, the developer should be entitled to offset the cost of the additional provision, including a pro rata land cost should the additional provision require an increased land area.

Transfer of land / facilities

2.30 Occasionally obligations will require land or facilities to be transferred to the relevant Council or another public body, usually in respect of public realm, highways, community or sports facilities and open space obligations. In such cases the s106 Agreement will contain a requirement to pay the Council's or public body's legal costs in respect of the land transfer and provisions relating to the condition of the land to be transferred.

Legal costs

2.31 The legal costs of a s106 Agreement are an impact of a development, one which the Councils would not have to bear if the development were not to take place.

2.32 For legal costs associated with the preparation of the s106 Agreement, any deeds of variation, or review of any unilateral undertaking, the applicant will be asked to cover the Council's legal costs. The Developer's legal adviser will be expected to provide the Council's Legal Services with an undertaking to pay the Council's reasonable legal fees within 48 hours of any such request and in any event before Legal Services commences any work related to the matter. In the limited cases where a Developer is not legally represented and as such cannot provide a solicitor's undertaking, the Developer will be expected to make a payment on account of costs prior to any work being undertaken by Legal Services.

2.33 The Council's Legal Service will be able to advise applicants on the legal fees. In the event that the actual fees incurred amount to less than the sum paid on account, the difference will be repaid. The Council's legal fees are payable whether or not the matter proceeds to completion i.e. in the event that the agreement/undertaking is drafted but not completed for whatever reason such as where planning permission is refused or where the developer decides not to proceed with the development proposal. Early provision of an undertaking to pay the Council's legal fees is strongly encouraged.

2.34 In all cases applicants are expected to provide timely comments on draft s106 Agreements, to ensure interested parties are sighted on the need for timely feedback on a travelling draft Agreement and expedite the signing of these once the draft Agreement is settled.

Monitoring and administration costs

2.35 Monitoring of obligations will be undertaken by the Councils to ensure all obligations entered into are complied with on the part of both the developer and the Council.

2.36 In addition to Council's legal costs, developers entering into s106 Agreements or Unilateral Undertakings will be required to pay a monitoring fee to cover the costs incurred by the relevant Council in the monitoring of the obligations or associated bespoke conditions and reporting on s106 agreements as required by government guidance. The charging of a monitoring fee is provided for

under Section 11 of the Local Government Act 1972, Section 1 of the Localism Act 2011, and is reflected in the Community Infrastructure Levy Regulations 2010 (as amended).

2.37 The fee will cover officer resource and time in maintaining a dedicated database, logging agreements, checking triggers, determining indexed amounts, issuing of demand notices, arranging receipt of contributions, alerting and checking that they are used by service areas, making sure that records are kept of discharge of clauses, responding to solicitor enquiries and publishing annual Infrastructure Funding Statements etc.

2.38 For monitoring and administrative costs, the Councils will include within a s106 Agreement an amount to cover these costs. For developments in South Cambridgeshire a proportion of this contribution will be transferred to the Parish Council to cover additional costs associated with administering s106 contributions (including but not limited to additional Clerk expenses and financial audits which would not have been incurred were it not for the development). The current fee schedule is provided below:

- A base fee of £1,000 with additional fees set out below based on the content of the deed:

    a. An additional fee of £1,500 where the deed contains financial contributions
    b. An additional fee of £1,500 where the deed contains covenants relating to public open space
    c. An additional fee of £500 where the deed contains covenants relating to affordable housing
    d. An additional fee of £500 is required for each covenant which the Council is required to approve that does not relate to public open space or affordable housing (i.e. approval of a "Custom Build Strategy")
- A minimum fee of £250 per each deed of variation or supplemental agreement depending on the terms of any variation or supplemental agreement

2.39 The monitoring fee associated with strategic and complex developments will continue to be negotiated on a case-by-case basis and may derive high values, for example, when developing a highly contaminated site requiring specialist independent verification of data related to mitigation. All monitoring fees will be subject to indexation and will be increased annually on 1 April. The base fee of £1,000 is payable within 30 days of completion of the s106 Agreement with the balance due upon commencement of development.

Late payments and enforcement

2.40 In the event of any delay in making any payment required under a s106 Agreement, interest shall be charged on the amount payable at the rate of five per cent per annum above the annual Bank of England base lending rate, from the date that the relevant payment falls due to the date of actual payment. Indexation will continue to run until payment is made. In the rare event of scheduled payments being agreed the sum charged will include interest at the rate normally charged by the Councils in addition to any indexing due.

2.41 The Local Planning Authority will work with developers to find solutions in cases where they demonstrate real difficulty in making payments at the trigger set out in the s106 Agreement. This could be through agreeing payment of obligations at a later stage of the development process, or through provision by the developer of works rather than finance. However, where it is imperative that the relevant measure is in place prior to a development being occupied, the obligations to fund it will always become payable on commencement of the development and no variation will be possible.

2.42 Planning obligations are enforceable against the signatories to the s106 Agreement and anyone who subsequently acquires an interest in the land. The Councils will enforce obligations through the relevant legal channels once other reasonable approaches to address non-compliance with obligations have been taken. In such cases, the Councils will seek to retrieve its legal costs in taking action from the party that is in breach of its obligations as well as any additional indexation or interest on the sum that is due.

Appraisal, validation and agreement of a related planning obligation

2.43 In assessing the merits of the planning application and associated material considerations, regard will be had to requirements of the SPD as they relate to the proposed development, any comments received as part of the planning application process, and to the detail provided in the draft unilateral undertaking, draft s106 Agreement, or proposed Heads of Terms. All of these matters will form part of the assessment of the application proposals by the planning case officer and the planning obligations to be sought.

2.44 It is the responsibility of planning officers to consider whether it is appropriate, in policy and legal (Regulation 122 of the CIL Regulations) terms, to seek or accept planning obligations in respect of an individual application. The case officer will provide a summary of their assessment, in the form of a CIL compliance table, within their delegated report or report to Planning

Committee. Where appropriate, the planning case officer will obtain, from Legal Services, legal advice as to the scope of permissible planning obligations and the content and form of the proposed agreement/undertaking.

Statutory consultation

2.45 Planning applications, Design and Access Statements, Environmental Statements, alongside other submitted documents, will be the subject of public and statutory consultation in accordance with the Greater Cambridge Statement of Community Involvement.

2.46 Consultation will be undertaken by the Local Planning Authority as soon as possible after applications have been validated and registered. As necessary, other relevant departments of the Councils will also be consulted on the detail of the planning application including the proposed planning obligations offered or to be sought in the draft unilateral undertaking, draft s106 Agreement or draft Head of Terms.

2.47 Where applicable, comments received from consultees will be discussed with the applicant where changes to likely obligations may be sought prior to the planning application being formally determined.

Viability considerations

2.48 Planning obligations are a necessary cost of development and it will be expected that the likely cost of obligations, including requirements for affordable housing provision, will be factored into the development cost from an early stage. Furthermore, both Local Plans have been informed by evidence of infrastructure and affordable housing need and supported by a proportionate assessment of viability that took into account all relevant policies, and local and national standards including the cost implications of planning obligations. Therefore, if a developer is seeking to raise viability concerns regarding the obligations due, the onus will be on the developer to provide robust information regarding the viability of an individual scheme.

2.49 Where an applicant reasonably believes their development proposal cannot fully provide the applicable obligations required by the Local Plan due to exceptional site circumstances, the Council will consider whether the particular circumstances justify a tailored approach to the delivery of a scheme. In order to determine such applications, the applicant is required to submit an open book financial viability assessment to the Local Planning Authority for consideration by its Property and Valuation Service, Housing

Strategy Team or an independent assessor, noting that a fee will be charged to fully cover the Council's costs of reviewing the financial viability assessment.

2.50 The development appraisal should follow a recognised UK professional standard, such as the latest edition of the RICS Red Book Valuation, and will be required to justify the applicant's position. The requirements for open book appraisals are provided below. It is important that the information provided for use in a financial viability assessment is accurate and assumptions will need to be clearly shown in any assessment used, so the Local Planning Authority can understand how the assumptions are made.

Requirements for open book appraisals

- Identify and justify (with comparable evidence where appropriate) all development value and cost variables specify any 'exceptional' cost items with supporting evidence in writing from a reputable cost consultant;
- Adhere to the standard conventions in terms of appraisal calculations not least regarding developer's profit;
- Specify all assumptions made concerning the provision of affordable housing and planning obligations;
- Provide Red Book, or other appropriate valuations (bank draft) to support Existing Use Values, where they are affected;
- Identify in cash flow terms the effect of deferred contributions;
- Demonstrate that the development proposal in financial terms is the only feasible option when compared to other possibilities including any role played by public sectors providers of 'gap' funding; and
- Satisfy where necessary any Independent Assessor's evaluation.

2.51 A detailed list of requirements and expected sources is set out at Appendix B.

2.52 In cases where a dispute relates to the viability of a proposal, and in any case where the Local Planning Authority considers it appropriate, an independent financial assessor may be required. The assessor will be appointed by the Local Planning Authority and the reasonable costs of the assessment will be met by the applicant. The independent financial assessor's report will be provided to the Local Planning Authority and the applicant.

2.53 Where the Local Planning Authority is satisfied that the proposed development cannot, for financial viability reasons, fully provide the obligations due, priority will be given to those obligations necessary to manage the most significant impacts of the proposed development and to the priorities provided in policy or

as determined by the Local Planning Authority, taking account of the specifics of the site.

2.54 Issues regarding viability must be resolved, to the satisfaction of the Local Planning Authority, before any meaningful negotiations between the applicant and Local Planning Authority can commence.

2.55 To take account of changes in economic conditions, and in respect of development schemes where a much lower level of obligation than required by Local Plan policies or this SPD was agreed at the date of the planning permission, the Councils may require the inclusion of a viability review mechanism within the s106 Agreement to assess whether a higher level of obligation can be achieved at a later point. The review mechanism will reflect current best practice with the threshold, methodology, and the timing of any scheme re-appraisal to be determined on a case-by-case basis having regard to the level of shortfall in the obligation(s) due, the complexity of the development, the underlying causes of viability, and whether the development is phased.

2.56 Review mechanism provisions will include appropriate dispute resolution clauses allowing parties to refer the matter to RICS or the Law Society to appoint an arbitrator or independent expert for valuation in the case of disagreement. Any additional provisions will be capped at policy required levels and in all instances the review mechanism cannot be used to reduce further the policy requirements of the development.

Negotiation and agreeing the obligations

2.57 Once a planning application is submitted, Council officers will review the planning obligations proposed by the applicant alongside comments received from consultation and will confirm whether the obligations are acceptable or not.

2.58 In those circumstances where the Local Planning Authority is not satisfied with the proposed obligations or the form of the draft s106 Agreement or proposed Heads of Terms, it will advise the applicant of this, will set out what the Local Planning Authority considers would be acceptable obligations to be sought, and will provide an indicative timeframe for continued negotiations.

2.59 The Local Planning Authority is unlikely to present applications for approval unless the applicant agrees in principle to the draft s106 Agreement or to the detailed proposed Heads of Terms to be reflected in a planning obligation,

both of which will normally include triggers for the discharging of each respective obligation.

2.60 For planning applications, where the Local Planning Authority considers the draft s106 Agreement or proposed Heads of Terms to be acceptable, the Local Planning Authority will agree with the applicant that this be reported, along with the planning application and any other material considerations, to the Planning Committee for determination.

2.61 Should the undertaking, s106 Agreement or Heads of Terms not be completed or agreed in principle within agreed timescales, Council officers will consider refusing the application based on a failure to secure appropriate mitigation.

Post decision process

2.62 Where planning obligations are to be secured by means of a signed unilateral undertaking that has been agreed with the Council's legal team prior to the planning application being determined, if the application is approved (subject to the completion of the planning obligation) without further modification, the decision notice will be issued and, after payments of relevant costs where applicable, the undertaking will be placed on the local land charges register.

2.63 Where the draft s106 Agreement has been agreed in principle, prior to the application being determined, if the application is approved either by way of delegated powers or Committee decision, the s106 Agreement will then be formally completed and sealed prior to the decision notice being issued and the s106 Agreement being placed on the local land charges register.

2.64 The Local Planning Authority will work with applicants to finalise s106 agreements in a timely manner and will impose a long-stop deadline of 12 weeks, unless the parties both agree to a short extension.

Varying planning obligations

2.65 The principles for modifying planning obligations are set out in Section 106A of the Town and Country Planning Act 1990 (as amended). Applicants are encouraged to seek pre-application advice prior to making a formal s106A application to vary previously agreed planning obligations. Where the request forms part of a fresh planning application (either as a s73 or standalone application), the application and supporting documents should be submitted via the Planning Portal. Requests to vary previously agreed planning obligations outside the application process should be made in writing to the

Joint Director of Planning and the applicable fee paid following guidance on Greater Cambridge Shared Planning Service website.

2.66 Where a s106A application is made to vary a planning obligation in an existing agreement or undertaking, the costs associated with varying the obligation, including negotiation, preparation and drafting of such variation, legal fees, and costs associated with independent assessment of viability (where relevant) must be met by the applicant.

2.67 Variations to an existing s106 Agreement may only be done by way of a Deed (except in relation to the modification or discharge of affordable housing requirements). In determining such applications, the Local Planning Authority will have regard to whether the obligation "no longer serve a useful purpose" or whether it "continues to serve a useful purpose…equally well" as modified. These principles will be the underlying considerations.

2.68 A person against whom an affordable housing requirement is enforceable may apply to the Council for its variation or modification pursuant to s106A.

2.69 Prior to submitting a s106A application to vary a planning obligation, applicants are encouraged to talk with the Local Planning Authority about the options available. Often the solution lies with varying the planning application itself, such as altering the mix of uses or the housing mix, to better address market needs and to improve the viability of the granted scheme. Other options included varying the payment schedule or the timing for delivery of obligations, to assist in improving cash flow.

2.70 Where the council is satisfied that an otherwise desirable development cannot be fully policy compliant and remain viable, a reduced package of planning obligations may be recommended.

2.71 Where viability has been raised by the applicant as a reason for the variation or discharge of an obligation, and the Local Planning Authority considers that a viability assessment (see 'Viability Considerations' above) is required to enable the Council to assess the viability of the development. The applicant will be required to provide any necessary cost and income figures to the Local Planning Authority and pay the Council's reasonable costs in appointing consultants to undertake the assessment.

Reporting

2.72 The Councils recognises that it is important that developers entering into planning obligations know where, when and how their money will be spent.

The Councils maintain Records of financial and non-financial planning obligations including details of the developments site, relevant dates for the receipt of funds, the purpose of the obligation and the level of funding.

2.73 The value of contributions received and spent is reported and published annually in an Infrastructure Funding Statement that can be found via the respective Council websites for Cambridge City and South Cambridgeshire.