

Seminar and workshop – s106 obligations

The Planning and Environment Team will be offering a free seminar and workshop on the use of s106 agreements now the Community Infrastructure Levy Regulations (CIL) are fully in place. We will consider the effect on County and District Councils and the three situations local planning authorities may be in – your authority may already have a CIL schedule in place, it may be considering one or it may have decided that a CIL schedule is not for it. Whichever situation you are in, the regulations apply and change how you can use s106 agreements to provide infrastructure, whether your authority is a District or County Council. We will address the anticipated problems and look at possible solutions to the pooling conundrum, the pros and cons of going for generic or specific projects and much else. We will update you once we have secured a date and venue – but all will be welcome including your members if you think they would benefit.

Affordable housing clawback provisions for single phase developments

We are now aware of 4 Planning Inspector decisions that question the provision of affordable housing clawback in Section 106 Agreements for single phase developments. To give you a flavour of the comments made the following are extracts from the appeal decisions;

APP/V2635/A/14/2217840

Paragraph 36 – looks at the Council’s proposal that the s.106 should be subject to a clause to allow the review of the affordable housing contribution on completion of the scheme or, say, after half of the flats have been sold. The Inspector states: *‘However, this would be contrary to the advice in the RICS Professional Guidance GN 94/2012 Financial Viability in planning (GN). GN paragraph 3.6.4.1 explains that such re-appraisals are generally suited to phased schemes over the longer term, rather than a single phase scheme to be implemented immediately, which requires certainty. The PPG also advises that viability assessment in decision-taking should be based on current costs and values. Whilst the PPG includes a proviso concerning phased delivery in the medium and longer term, it says that planning applications should be considered in today’s circumstances.*

Moreover, in his appeal decision ref APP/N0410/A/13/2207771, regarding another relatively small single phase housing scheme, my colleague explained that developers operate in a high risk environment and that an overage clause would create post-completion uncertainty, which would be likely to act as a serious disincentive to the implementation of the proposal. I agree. So, whilst the Council explained that, with the contribution capped at £360,000, a

post completion review could result in a zero contribution, in the light of national policy and guidance such a review would not be necessary or reasonable.'

Appeal decision APP/N0410/1/13/2207771

'Paragraph 8.12 of the Council's Affordable Housing Supplementary Planning Document (SPD) indicates that an overage should normally be included in obligations where a reduced contribution is appropriate. The implication of this is that any profit margin achieved above 20% of gross development value would be partially 'clawed back' by the Council at a rate of 40% of any additional revenue achieved. This is a clause that would now be insisted upon following the publication of the SPD in July 2013. 13. The PPG confirms that viability assessment in decision-taking should be based on current costs and values. Where a scheme requires phased delivery over the medium and longer term then changes in the value of development and in the costs of delivery may be considered. However, the proposal for 39 flats with an estimated build time of 18-24 months does not fit that description. The Council noted that others had entered into obligations on this basis but this does not form one of the tests at paragraph 204 of the Framework. 14. There is furthermore nothing in national planning policy or guidance that supports this approach for a scheme of this size. Developers operate in a high risk environment and an overage would introduce post implementation uncertainty. It is also likely to hamper the competitive return referred to in the Framework and the PPG. In this case, the developer has been attempting to bring development forward for over 10 years. The Government is seeking to boost significantly the supply of housing and such a clause would be likely to act as a serious disincentive to the implementation of the proposal. 15. Whilst contrary to the SPD the omission of an overage clause does not make the development unacceptable in planning terms. The Council indicated that the template used had recently been updated to widen some definitions and that it would have preferred any contribution to be made on commencement rather than 6 months afterwards but none of these matters are critical.'

Appeal decision APP/V2635/W/15/3004252

Paragraph 10 onwards states:

'A suggestion made by Councillors when assessing the appeal and by those speaking on behalf of local residents at the Hearing was that some form of 'clawback' clause or deferred contingency payment should be agreed with the Appellant. This would mean that if finances at a later date in the development process were more favourable than now expected a contribution could be forthcoming. 11. However, Government guidance on viability assessments entitled Section 106 affordable housing requirements: Review and appeal emphasises the need for viability evidence to be based on current costs and market values. In contrast though a 'clawback' clause or similar would be introducing a further assessment of viability based on costs and sales returns at some time in the future. In my opinion this would inevitably introduce uncertainty into the project's funding arrangements that, in turn, could have implications on the overall viability. While stronger arguments for such a clause may exist in relation to multi-phased schemes that is not the case here as the development

is almost certainly to be completed in a single phase. Therefore, a 'clawback' clause or similar would be contrary to Government guidance and would not be suitable.'

Appeal APP/N0410/A/14/2228247

Paragraph 8 onwards states;

'The disagreement between the parties relates to the Council's request for an overage clause to be included within the UU. This clause would require a viability review to take place and subsequent additional contribution to be paid to the Council should the viability review demonstrate an increase in the viability of the development. The appellant has argued that this request is not reasonable or necessary in accordance with the tests identified within Regulation 122 of the Community Infrastructure Levy Regulations 2010. 9. The Council accepts that the overage clause requirement is not part of the development plan. The requirement for such a clause is referred to in paragraph 6.15 of the South Bucks District Council Affordable Housing Supplementary Planning Document (SPD) 2013. This paragraph states, amongst other things, that the Council will normally require an overage clause as part of the UU and that this approach reflects the objectives of the Core Strategy which are to maximise the amount of new affordable housing. 10. The Planning Practice Guidance (PPG) was published in March 2014 and post-dates the SPD. Paragraph 17 of this document is clear that viability assessment in decision taking should be based on current costs and values and planning applications should be considered in today's circumstances. The only exception to this is where a scheme requires a phased delivery over the medium and longer term and in this case, changes in the value of development and changes in costs of delivery may be considered. The appellant confirmed at the Hearing that the proposal would be undertaken as a single phase development. The construction programme identified by the appellant cannot be regarded as medium to long term. In this way, I am of the view that the PPG supports the appellant's case. 11. The appellant has referred to a recent appeal decision within South Bucks District Council (appeal reference APP/N0410/A/13/2207771) which supports the approach taken by the appellant in connection with this appeal. The Council do not agree with this approach. I agree that whilst the approach maybe contrary to the guidance contained within the SPD, the omission of the overage clause does not make the development unacceptable in planning terms. 12. The Council argued that the overage clause is not prohibited by the Framework and the SPD supports the overall objectives of the Council which include maximising affordable housing contributions from market housing development proposals. Furthermore, the Council put forward various arguments at the Hearing in relation to post development uncertainty. I have considered all of these issues in detail. However, they are not central to the conclusion I have come to above, namely that the request for the overage clause is at odds with the guidance contained within the PPG and would not accord with the provisions of Regulation 122 of the Community Infrastructure Levy Regulations 2010 and the tests for planning obligations set out in the Framework. 13. Taking the above matters into account, I am unable to conclude that the overage clause sought would be necessary, related to the development and fairly related in scale and kind. As such, it would not accord with the provisions of

Regulation 122 of the Community Infrastructure Levy Regulations 2010 and the tests for planning obligations set out in the Framework.'

Overall, based on the above cases, that refer to the Planning Practice Guidance, CIL test, NPPF paragraph 204, the guidance 'Section 106 affordable housing requirements: review and appeal' and the RICS guidance, we appear to be in a position that on appeal (dealing with a single phase development) an Inspector, in light of the above, is not going to accept an affordable housing clawback is necessary. We are not, at least at present, recommending to our clients not to adopt these measures in agreement with applicants.

Once it becomes more generally known that developers may not be required to enter into an obligation providing for clawback for affordable housing in single phase developments it is likely that applications will suddenly all be for single phase developments. We would welcome the views of our clients on how we may approach this issue. We have various ideas and can provide you with advice on this issue.

If you have any queries relating to this update or wish to seek planning law advice, please contact:

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