



## Issue 18

**Does the Local Plan have clear and effective mechanisms for implementation, delivery and monitoring?**

- i) Is the intention within Policy IMP1 for 'all development' to make provision for infrastructure through planning obligations or CIL consistent with CIL Regulations and paragraph 204 of the NPPF? Is the policy sufficiently flexible to address changing economic conditions?***

1. It is not the intention for the 'all development' reference in Policy IMP1 to apply to S106 planning obligations for developments of 10 units or less (aside from affordable housing where the Council believe the requirement should be schemes promoting 10 dwellings or more), in line with the requirements of the PPG (Paragraph: 031 Reference ID: 23b-031-20161116). The intention of the policy was to establish that for all development that generates a need for infrastructure to mitigate its impact, they are required to make the appropriate provision.
2. However, it is accepted that the 'all development' reference in Policy IMP1 can be miss-interpreted and lacks clarity when proposals are of a size and type that are either exempt from contributions or in itself doesn't generate a need for such provision when compared against paragraph 204 or the CIL regulations. In light of this, the Council suggests that Policy IMP1 is changed to read:

*'All Development shall make provision to meet the additional requirements for infrastructure arising from the development, either through S106 Agreements and/or Community Infrastructure Levy Contributions where justified to do so in line with the requirements of the NPPF and CIL Regulations'.*

3. This provides greater clarity and does not dilute the intention of the overall policy approach.
4. With regards flexibility, the Council considers that policies IMP1 and IMP2 should be read together as the main provisions for flexibility, specifically in relation to addressing changing economic conditions, is provided for within Policy IMP2.

**ii)        *The first two paragraphs of Policy IMP2 and the first sentence of the third do not relate to ‘deferred contributions’. For clarity and effectiveness, should consideration be given to addressing these matters under Policy IMP1? What is the justification for requiring ‘clawback’ from developers in the event viability increases? How would this be assessed and implemented?***

5. The Council are content to include changes to Policy IMP1 and IMP2 as suggested, for clarity and effectiveness. In doing, this would also require a consequential amendment to the start of Policy IMP2 to read:  
  

*‘For larger schemes, where an initial reduced level of planning obligations has been agreed in accordance with Policy IMP1, and...’*
6. On reflection, it might be more preferable to combine policy IMP1 and IMP2 for ease of reference, especially as IMP2 effectively leads on from the application of IMP1. If the Inspector so wishes, the Council can provide a revised draft of a combined policy, alongside a revised supporting text.
7. With regards, the issue of ‘clawback’, the Council considers the approach to be justified and consistent with the NPPF and PPG in that it provides flexibility and can adapt to changing local circumstances.
8. As expressed through paragraphs 5.460 to 5.463 of the Local Plan, the Council recognises that a number of factors can impact on developer viability on a site-by-site level, even though the policies in the Local Plan have been assessed and

judged to not place an undue burden on development. As referenced in the Plan, such factors include changes to the economic cycles, specific abnormal costs, changes to Government policy and increased build costs.

9. In light of this, Policy IMP2 effectively allows for the relaxation of policy and/or infrastructure requirements where a development justifiably could demonstrate that it would not be viable to deliver the full package of contributions normally required up front. The Council would then consider deferring some of the contributions that become payable, in whole or part, if and when there was an increase in achieved sales values.
  
10. A deferred contributions policy approach has been implemented in the Borough for a number of years. In 2009, the Council produced a guidance note for Planning Committee entitled *'Principles for the Assessment of Planning Applications where the Financial Viability of the Development shows that it cannot afford to pay all of the necessary Infrastructure Contributions'*. These principles have been applied to a number of schemes in the Borough in the past (examples can be provided) and they remain a valid starting point for the implementation of Policy IMP2. A copy of this document is appended to this paper for information purposes.
  
11. In due course, it is the Council's intention to produce a developer contributions SPD that will provide greater clarity to a range of requirements sort and will also include reference about how Policy IMP2 will be implemented.
  
12. The Council accepts that undertaking a deferred contributions approach brings with it some complexities given the nature of the issue and the factors that can influence development viability. However the principles established within the guidance note of 2009, provides the broad framework on which any future negotiation is structured. Overall, it has been successful in both allowing strategically important development to take place that otherwise would not have

been built, and has also provided infrastructure provision to support that development, albeit at a later date.

13. The Council also accepts that Policy IMP2 does not include a development threshold where the policy approach would apply. However, it has always been recognised that applying the deferred contributions approach should be done in exceptional circumstances and where the scheme is strategic enough to warrant the approach. I.e. the benefits of progressing the development outweighs any initial (and potentially longer term) harm from non-policy compliance.

14. Clearly, this test will only normally apply to larger housing schemes, but the Council believes it would be inflexible to suggest a certain threshold as a development's importance, in terms of delivering the overall housing strategy for the borough, is not solely related to its scale. Other factors may be of relevance.

15. It is also worth noting that the principle of the 'claw-back' approach was also tested through the Chilmington Green Area Action Plan examination in relation to both affordable housing provision and the delivery of wider infrastructure.

16. Although this scheme is unique because of its scale (5,750 homes) and timeframe for delivery - well beyond the timeframe of the Local Plan - the Area Action Plan is a Local Plan that was adopted and Examined post the publication of the NPPF. The Inspector who examined the AAP stated in his Report that:

*'The deferred contributions policy (the 2009 principles document reference above – our addition) has not been subject to public consultation or tested at appeal. Nevertheless, it appears to be the sort of flexible approach to current viability problems that the Government is encouraging Councils to adopt. Moreover, by relating a deferred contribution to the increase in sales price of a market dwelling above a specific minimum price, the worst-case position is known at the outset and there is reasonable certainty about the amount of claw-back required if market conditions improve'. (para 56)*

17. And he supplemented this position with the following:

*‘.....In the absence of compelling evidence that such an approach would threaten housing delivery, it is consistent with paragraph 50 of the Framework which seeks flexible affordable housing policies which take account of changing market conditions over time (para 57).*

18. It should be noted that the deferred contributions policy is one way in which the Local Plan provides for flexibility where it is justified to do so. However, other mechanisms also exist through the wording of specific Local Plan policies as well, most notably Policy HOU1 ‘Affordable Housing’ where a number of provisions are listed if viability evidence suggests that meeting the policy requirements is not possible from the outset.

19. It should also be noted that in circumstances where a scheme is not considered to bring with it overriding benefits from its delivery, then an application will be refused. Policy IMP2 should only be engaged in certain circumstances and should not be viewed as the de-facto position where viability is raised as an issue.

***iii) Is Policy IMP3 consistent with paragraph 154 of the NPPF, which states that only policies which provide a clear indication of how a decision maker should react to a development proposal should be included in the Plan?***

20. Enforcement is often seen as entirely reactive however Ashford, as part of its quality agenda, is seeking to locate enforcement as part of the end to end process. This policy sets out the way in which the council intends to address breaches of planning control. The purpose of this policy is to ensure that applicants are aware of the Ashford Borough Council Local Enforcement Plan for planning, and to link this Enforcement Plan to policy, as recommended by best practice<sup>1</sup>. This policy is similar to Policy D5 of the adopted Lambeth Local Plan, which was examined in public in 2015.

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<sup>1</sup> RTPI, PAS & NAPE, (2015) Towards a pro-active enforcement service: making the most of the tools in the box.

**iv) In assessing the viability of the Local Plan, has the effect of the requirements of Policy IMP4 been taken into account? Is the requirement for financial contributions justified and consistent with the CIL Regulations and paragraph 204 of the NPPF? Is the relationship between Policy IMP4 and COM1 clearly set out?**

21. Policy IMP4 refers to the governance of public community space and facilities, with three options:

- Community Stewardship
- Private management company
- Council adoption, with financial contributions for 10 years' maintenance

22. Of these three options, the first two (community stewardship and private management company) are cost neutral to development while only the third option has a cost implication that may affect viability. In assessing the viability of the Local Plan (SD09), it has been assumed that development will typically pursue one of the two cost neutral options and therefore no specific allowance has been made in the viability testing. Where the third option with a financial contribution is chosen, it is assumed that this will be on the basis of a commercial imperative for doing so.

23. Where the Council is asked to adopt the public space, there will be a cost implication to the Council and a justification for this impact to be mitigated. It is intended that the mitigation will be related to the cost of public space directly related to the development concerned, as derived through Policy COM1, (rather than any strategic provision) in line with the tests in NPPF paragraph 204.

### **Principles for the Assessment of Planning Applications where the Financial Viability of the Development shows that it cannot afford to pay all the necessary Infrastructure Contributions**

**Ward** Any where relevant

**Application Description** Any where relevant

#### **1. Introduction**

##### **The Rise of Infrastructure Contributions**

- 1.1. As Members are aware, a principal objective of the town and country planning system is to secure sustainable development in the public interest. To this end, it is necessary to consider a range of potential impacts which a particular development proposal may have, and it may be necessary for the developer to make provision for facilities or services to offset such impacts, by means of planning obligations (normally Agreements) under Section 106 of the Town and Country Planning Act 1990.
- 1.2. The starting-point for the identification of such impacts, which a developer may need to address, is of course the adopted planning policies in the Development Plan, and any other material considerations such as emerging development plan documents and national policy guidance including Circular 05/2005.
- 1.3. Under the Ashford Borough Local Plan 2000, the Council adopted Supplementary Planning Guidance on Developer Contributions/Planning Obligations (SPG3) in March 2001. This gave guidance on the Local Plan's requirements for affordable housing, public open space, sporting, recreational and social facilities, community facilities and education contributions.
- 1.4. Subsequently, Supplementary Planning Guidance on Providing for the Transport Needs arising from the South of Ashford Transport Study (SPG6) was adopted in July 2001 and revised in June 2004. This set out

the Council's approach to developer contributions to help meet the costs of transport infrastructure required to serve development to the south of Ashford. To date, over £2 million has been paid as contributions to SPG6, and a further £15 million approximately has been agreed to be paid under SPG6 in Section 106 Agreements.

- 1.5. The advent of the Kent and Medway Structure Plan 2006 meant that the range of potential developer contributions increased. Structure Plan Policy QL12 ("Provision for New Community Services and Infrastructure") requires provision to be made to accommodate additional requirements for a wider range of services within or near to new development, including social services, adult education, libraries, youth and community services, emergency services, health, and culture.
- 1.6. This Policy also requires the basis for funding the services required by new development to be identified and agreed. This is supported by Policy IM1, which requires appropriate and proportionate contributions to be agreed before planning permission is granted.
- 1.7. Kent County Council has published a Good Practice Guide to development contributions and community infrastructure, and both KCC and the Primary Care Trust (PCT) now routinely seek contributions under this Policy. Accordingly, it has been the practice of the Borough Council, since the adoption of the Kent and Medway Structure Plan in July 2006, to require appropriate contributions towards the KCC services identified, towards primary healthcare, and towards public art.
- 1.8. The Council's LDF Core Strategy, submitted in November 2006 and revised and adopted in July 2008, has taken matters still further. Policy CS18 sets out a comprehensive range of community infrastructure to which residential developers will be required to contribute, including consideration of management and maintenance arrangements through representative organisations where appropriate. In line with this Policy,



the Council now requires contributions to voluntary sector provision where appropriate.

- 1.9. In addition, higher levels of affordable housing are now required, under Policy CS12, than under the former Local Plan policies. Contributions to transport infrastructure are also required, under Policy CS15. In due course, a strategic tariff is to be introduced under Policy CS8 for the Ashford Growth Area, and a contribution to public realm improvements will also be required from commercial developments in the Town Centre.

### **The Changing Property Market**

- 1.10. Members will appreciate from the above that the gradual increase in the range of demands on developers to fund community and other public infrastructure coincided with the increasingly buoyant property and development market in recent years.
- 1.11. Against that market background, the contributions payable by developers under planning policies have generally been accepted in principle, included in Section 106 Agreements and paid by the developers. This was particularly the case with greenfield developments, such as Cheeseman's Green and Park Farm South and East. A few brownfield developments, such as Victoria Road and (to a small extent) The Barracks (Repton Park), where the costs of redevelopment were proportionally higher than for greenfield developments, found it difficult to afford the full range of infrastructure contributions and sought to negotiate special arrangements with the Council such as reduced and/or phased payment clauses.
- 1.12. More recently, the dramatic changes in the housing market and the construction industry have substantially changed the picture. As Members of the LDF Task Group were advised in December, the effect of the downturn after March 2008 has been seen in the last four months, particularly in affordable housing completions, as progress on delivering the main housing developments in the town has slowed significantly. House price reductions have had and are still having a big impact on

reducing development values and this in turn makes it less likely that landowners will bring land forward for development. The possible use of deferred contributions, as outlined below, will not guarantee that developments will be commenced.

- 1.13. However, Ashford is a designated 'Growth Area' under the Government's Sustainable Communities Plan 2003 and Regional Planning Guidance, and as such is expected to encourage developers to keep building housing in order to seek to achieve the town's growth targets. This will not be possible if the development of otherwise suitable sites is not financially viable, as measured by the profit, or rate of return on investment, that the development would provide to a developer.
- 1.14. Although developers vary in their approach to risk, their need for external finance to cover development costs, and the demands of their funders and shareholders, the key point is that, if a development is not sufficiently financially viable to satisfy the developers' criteria, then they will not commence the development. In such cases, they will either await better market or financial circumstances or seek permission for a more profitable scheme instead.
- 1.15. The amount and the timing of payment of the off-site infrastructure contributions required under planning policies can have a significant impact on the viability calculations in such circumstances.
- 1.16. Some local planning authorities have now appreciated that a way to encourage developers to bring forward key developments in current circumstances is to be prepared to consider methods by which, out of the total amount of the infrastructure contributions due (the "**Total Contribution**"), only a proportion will be payable as the development proceeds (the "**Initial Contribution**"), and the balance of the Total Contribution (the "**Deferred Contribution**") will only become payable (in whole or part) if and when there is an increase in the achieved sale values

of the housing units compared to the values assumed in the viability appraisal.

- 1.17. This concept has already been accepted in principle by the Committee in its Resolutions to Grant Permission for redevelopment of Charter House and Newtown Works on 19 November 2008 (see para. 3.3 below). It is now proposed that the Committee formally adopts Principles to guide negotiations on these and other planning applications where financial viability is raised by developers, but only under strict criteria and subject to independent investigation.
- 1.18. Viability will be only one of the material considerations taken into account in reaching a decision on planning applications. It will also be important to consider why a development that is not viable unless deferred contributions are accepted should nevertheless be assisted to come forward. This may well apply to key brownfield developments where values may be lower and costs higher, but which would deliver a significant piece of infrastructure or play a key regeneration role. Conversely, there may well be developments which are not critical to the delivery of the strategic agenda, for example on smaller sites, when it may not be appropriate to agree a deferred contributions approach. This could result in permission being recommended for refusal because the full infrastructure requirements are not met.
- 1.19. A great deal of time has been spent in recent months researching how the concept of deferred contributions is likely to work in principle and how it can be achieved, by the testing of the developers' claims and then including appropriate wording in Section 106 Agreements. Professional viability and valuation advice has been sought and obtained and Officers are now able to bring forward to the Planning Committee a suggested set of Principles under which Officers would seek in appropriate cases to negotiate with developers. These Principles seek to achieve a fair and balanced formula in order to encourage and enable appropriate developments to commence despite the current market conditions.

1.20. In such cases, there will be implications for the way contributions are currently paid by developers to the Council, the County Council and other parties such as the PCT. It will be necessary for all contributions, other than those identified for specific infrastructure such as highway improvements, to be paid to this Council under “pooling” arrangements as described below.

## **2. Proposed Principles for Deferring some Contributions**

### **Procedure:**

2.1. Deferring of contributions will only be considered in exceptional cases.

2.2. If the Strategic Sites and Design Manager or Development Control Manager agrees that an application might fall into the ‘exceptional’ category, the developer will be required to submit a Development Appraisal in accordance with Guidelines to be published by the Council. Attached at **Annex 1** for Members’ assistance is a draft of these Guidelines, which has been prepared in discussions with the Council’s consultant, and is shortly intended to be made widely known, subject to any changes which may be needed as a result of this meeting or Officers’ further consideration of the issues raised by appraisals.

2.3. If, as a result of the testing of the developer’s appraisal the Council agrees that the development would not be financially viable if the Total Contribution was required to be paid in full in accordance with the planning policies, then Officers will discuss with the developer whether, by the use of Initial Contributions and Deferred Contributions, the development could be made viable and whether this would be likely to lead to the development being brought forward in practice. Testing of the appraisal would normally be by a consultant who is a development valuer being appointed and instructed by the Council. The consultant’s costs would however be paid for by the developer.

2.4. If terms can be agreed at Officer level then these, with the Council’s consultant’s comments on the proposals and the appraisal, will be

reported to the Planning Committee with the normal planning report for that application. The Committee may, as now, be asked to delegate authority to Officers to negotiate the finer details of such arrangements, and/or to make minor changes to approved arrangements, in order to assist the finalisation of negotiations without the need to report to Members again.

2.5. If, following:

- detailed consideration of the developer's explanation for claiming that there are reasons why a development would not be viable;
- detailed consideration of a development appraisal;
- negotiations with the developer; and
- a report from the Council's consultant, incorporating his comments on the appraisal, to enable the Council to fully evaluate the appraisal,

the Committee approves the use of Deferred Contributions in all the circumstances of the case, then the following Principles will form the basis of such arrangements.

#### **Arrangement of Contributions:**

2.6. The '**Total Contribution**' will be the total of those financial contributions which are payable under all relevant and current planning policies at the date of the Committee. This total will form a "cap" on the amount the development will have to pay. This "cap" will then be index linked to ensure that it does not lose its value as costs increase in the future.

2.7. The '**Initial Contribution**' will be such part of the Total Contribution as is considered the maximum amount that the developer can reasonably be expected to pay, on the basis of the agreed viability appraisal. The Initial Contribution will be spread across **all** dwellings in the development, and the Section 106 Agreement will provide for an Initial Per Dwelling Contribution to be paid before occupation of each dwelling.

- 2.8. It may be that some infrastructure contributions, e.g. specific highway works payments linked to a development, need to be treated as special cases and given priority over other contributions. If these special cases are required to be paid notwithstanding the viability situation (sometimes these are known as ‘regardless’ contributions), then these will be allowed for in the calculation of the Initial Per Dwelling Contribution. An example would be the contribution to SPG6 which the Committee has required for the Newtown Works development.
- 2.9. There may also be scheme-specific obligations that will require payment of contributions, and/or matters that will have to be provided on-site by the developer. All of these would need to be allowed for separately in the calculations and Section 106 Agreement, because they will not form part of the Initial Contribution.
- 2.10. The difference between the Total Contribution and the Initial Contribution becomes the ‘**Deferred Contribution**’, which will be subject to the index linked “cap” as described above. Any affordable housing units on the site that would be transferred to one of the Council’s registered social landlord partners under an offer arrangement already made at the time of the viability assessment will not normally show any increase in sale value and thus will be excluded from the payment of the Deferred Contribution unless the registered social landlord changes for any reason.
- 2.11. The Deferred Contribution will therefore normally be spread over **all the open market units** to give a ‘**Deferred Per Open Market Dwelling Contribution**’. This is a notional figure representing the amount of Deferred Contribution which would be recovered from each Open Market Dwelling, but only subject to the sale value having increased sufficiently since the date of the viability appraisal to be able to pay it. It is not a “cap” in the sense of being a maximum that any given open market dwelling will pay, since it may be necessary for dwellings sold when the market improves to pay more than this amount (if the sale price achieved justifies it under the formula below) to help to offset the fact that dwellings sold in

poorer market conditions may have paid little or nothing by way of Deferred Contribution. Instead, the total amount payable from the development will be “capped” as set out above.

- 2.12. The sale price of an Open Market Dwelling taken from the Development Viability Appraisal will be the '**Base Sale Price**'.
- 2.13. For each quarter (or other agreed period) when open market units are sold, the developer will provide full details of the sales to the Council, including the **Actual Sale Price**. The amount of additional sales value achieved is the difference between the Actual Sale Price and the Base Sale Price.
- 2.14. In some cases, it may be appropriate for both the Base Sale Price and the Actual Sale Price to be converted into a per square metre or per square foot figure based on gross internal floor area, in effect a “blended” rate that takes into account different sizes of dwellings. The additional sales value achieved would then be measured by comparing the actual average level of sales value per square metre/foot with the average level taken from the original viability appraisal.

#### **Payment of Contributions:**

- 2.15. Before Occupation of the first dwelling on the site, and the first dwelling on each subsequent phase or tranche of the development, the developer would have to pay the Initial Per Dwelling Contribution for the number of Dwellings in the phase or tranche to be commenced, i.e. these are paid in advance and this simplifies administration and monitoring of compliance. In practice, the actual payment date might need to be earlier than Occupation in some cases.
- 2.16. Following a calculation of the additional sales value achieved from each quarter's or period's sales, if any, the developer would have to pay an amount of Deferred Contribution for the number of dwellings sold in the previous period, i.e. in arrears. The same arrangement will apply for each

subsequent period during the development. Safeguards may need to be included in Agreements, in appropriate cases, to ensure that the deferral of contributions does not act as a disincentive to the developer to complete the development.

- 2.17. The amount payable as Deferred Contribution for each period will depend on the '**Agreed Percentage**' whereby any uplift in sales value would be apportioned between the Council and the Developer. The "share" to be paid to the Council could vary depending on the circumstances, with the developer keeping the balance. The intention behind the developer keeping a proportion of any uplift in value is to cover any increased build costs or other contingent risk, and also to avoid de-incentivising any promotional or other activity designed to increase interest from purchasers and seek sales at the highest realistic price.
- 2.18. The Agreed Percentage payable to the Council could be adjusted by way of a sliding scale as the development progresses, and/or as the market improves. This is a matter that will need to be part of the negotiations and will depend entirely on the specific circumstances of each proposed development. It may be appropriate in particular cases, where this would be justified, for the Agreed Percentage to be modest or nil up to a certain trigger point in terms of sale values achieved, and thereafter increasing in a series of stages for higher sales values. This could, for example, reflect the anticipated situation at present, where it is difficult to know when and by how much the market may begin to pick up.
- 2.19. In view of the Deferred Contributions necessarily being payable in arrears, after sales of Open Market Dwellings have been completed, the Council would require, in the Section 106 Agreement, that the developer undertakes to provide to the Council security for the payment of the Deferred Contributions if the Council reasonably considered it necessary at any time during the course of the development.



**Pooling of Initial and Deferred Contributions:**

- 2.20. All Initial Contributions and Deferred Contributions will need to be paid to the Council, and the Council will receive them on behalf of all parties to whom contributions might otherwise be payable (e.g. KCC, PCT). The reason for this is that such payments will not, as payments usually are at present, be in respect of specific items of infrastructure but as lump sums in respect of Initial Contributions and Deferred Contributions. If the sums received are simply apportioned proportionately to each piece of infrastructure required to support the development, there will be insufficient funds to deliver individual items of infrastructure until towards the end of the development. It will therefore be necessary to pool the contributions. This would allow infrastructure to be brought forward in a prioritised sequence as funds are available. It will be important to maintain a clear audit trail to show that sums of money paid to the Council are spent on infrastructure needs arising from the development.
- 2.21. The Borough Council will have the right in its absolute discretion, subject to any protocol that may be agreed between the Council and other public sector service providers, to determine how to allocate the payments received. Such decisions would normally be delegated to the Strategic Sites and Design Manager and Development Control Manager and would normally be made in consultation with partners and would seek to be in accordance with any previously agreed protocols. Officers may of course choose to report large or contested decisions to the Committee if they felt that course of action appropriate.
- 2.22. Following an allocation decision being made, the Council would then pass or pay part of the Initial Contributions and/or Deferred Contributions to the relevant service departments within the Council, the County Council or any other parties for each development. These payments would be identified as being towards or in settlement of specific elements contained within the infrastructure needs for that development as set out in the resolution of the Planning Committee to grant planning permission. The payments would

be subject to appropriate safeguards and would be monitored as would the delivery of the funded infrastructure. This will be reported to the Executive in the annual Section 106 monitoring report,

- 2.23. The Section 106 Agreement will include detailed provisions for these arrangements. In the event that KCC are unable to support these arrangements in any particular case, it may not be necessary to include KCC as a signatory to the Section 106 Agreement as KCC will not be involved in the receipt of Initial or Deferred Contributions from the developer. However, KCC states that it supports the local planning authority and appreciates that these are difficult issues to balance, and that Ashford Borough Council is aware of the need for KCC services in Ashford and the impact that a failure to provide adequate community infrastructure will have on both the new and existing communities in Ashford.
- 2.24. Partners other than KCC have not been signatories to Section 106 agreements in the past and the arrangements now proposed do not require a change to this approach as Ashford Borough Council will continue to work to secure a full range of contributions to create a sustainable, well-planned development regardless of who is responsible for the infrastructure in question.
- 2.25. Members will note that this pooling arrangement, whilst similar in concept, would not constitute a full-blown “tariff” arrangement, under which infrastructure contributions from a number of different developments are “pooled” into a joint fund, which is then used to deliver infrastructure of various kinds across a wide area. Each development which is subject to a deferred contributions arrangement would normally have its own separate ‘pool’ of receipts, pending decisions as to allocations of that ‘pool’ to those items of infrastructure within the Total Contribution.

### **3. Consultations**

3.1. A draft of this report was sent informally to the following organisations for comment:-

- Kent County Council
- Eastern and Coastal Kent Primary Care Trust
- Ashford's Future.

3.2. Kent County Council's immediate comments were as follows:-

"KCC supports the local planning authority and appreciates that these are difficult issues to balance. ABC is aware of the need for KCC services in Ashford and the impact that a failure to provide adequate community infrastructure will have on both the new and existing communities in Ashford."

3.3. In addition, a draft of this report was sent informally to developers of three sites whose planning applications are currently before the Council but are acknowledged to be affected by financial viability issues, and to whom this report would therefore be particularly relevant. These developments are as follows:-

- **Fairview Enfield Ltd. – Land at Hunter Avenue, Ashford**

Application ref. **07/02294/AS** for 350 dwellings; and duplicate application ref. **07/02298/AS** for 350 dwellings, currently on appeal to the Planning Inspectorate.

Please see the following two reports on this Agenda in connection with this development.

- **Kier Property Developments Ltd. - The Old Railway Works, Newtown Road, Ashford**

Application ref. **05/01798/AS** for mixed use development of up to 928 flats and 6,866 sq m of mixed commercial, community and retail floorspace.

The meeting of this Committee on 19 November 2008 resolved to grant this application, subject to conditions and subject to:

B) The applicants satisfying Development Control Manager and/or the Strategic Sites and Design Manager that they have taken or will take reasonable endeavours to secure grant funding and that such funding is reasonably available.

C) The prior completion of an agreement in terms acceptable to the Development Control Manager and/or the Strategic Sites and Design Manager in conjunction with the Head of Legal and Democratic Services under s106 of the Town and Country Planning Act 1990 (as amended) providing for the heads of terms and payment schedules set out in Tables 2, 3, 4 and 5 in the report.

D) The principles for the claw back mechanism being reported to and approved by the Committee at a future meeting.

E) The Development Control Manager and/or the Strategic Sites and Design Manager being authorised to agree in conjunction with the Head of Legal and Democratic Services

a) the final details of the mechanism for claw-back in the above agreement, such mechanism to accord with the principles for claw-back previously agreed by the Planning Committee, and

b) to agree minor variations to and additional Heads of Terms and conditions as may be necessary as a result of further negotiations with the applicants.

- **Dukelease Properties Limited - Charter House, Park Street, Ashford**

Application ref. **08/00396/AS** for 334 flats and 9,380 sq m of flexible commercial, community and retail floorspace.

The meeting of this Committee on 19 November 2008 also resolved to grant this application, subject to conditions and subject to:

B) The principles for the claw back mechanism being reported to and approved by the Committee at a future meeting; and

C) The prior completion of an agreement in terms acceptable to the Development Control Manager and/or the Strategic Sites and Design Manager in conjunction with the Head of Legal and Democratic Services under s106 of the Town and Country Planning Act 1990 (as amended) providing for the heads of terms in respect of the matters listed below; and

D) The Development Control Manager and/or the Strategic Sites and Design Manager being authorised to agree in conjunction with the Head of Legal and Democratic Services

a) the final details of the mechanism for claw-back in the above agreement, such mechanism to accord with the principles for claw-back previously agreed by the Planning Committee, and

b) to make or approve minor changes to and additional Heads of Terms and/or planning conditions as may be required as a result of further negotiations with the applicants, including the timing of the payment of contributions and the carrying out of obligations.

- 3.4. Any further comments received from any of these parties will be reported to the Meeting.

[Note: references in the above Resolutions to “claw back” are references to the obtaining of Deferred Contributions from the proceeds of sales, as described in this report.]

#### **4. Planning Policy**

- 4.1. In addition to the Policy documents referred to in the Introduction, ODPM Circular 05/2005 is relevant. This sets out the Secretary of State’s policy on Planning Obligations, and would in practice be given particular weight by an Inspector on appeal.
- 4.2. The Circular advises, inter alia, that there should be a consistent approach to the use of standard charges and formulae applied to developments in respect of infrastructure costs.

4.3. Para. B10 of Annex B to the Circular states as follows:-

“In some cases, perhaps arising from different ... site-specific circumstances, it may not be feasible for the proposed development to meet all the requirements set out in local, regional and national planning policies and still be economically viable. In such cases, and where the development is needed to meet the aims of the development plan, it is for the local authority and other public sector agencies to decide what is to be the balance of contributions made by developers and by the public sector infrastructure providers in its area supported, for example, by local or central taxation. If, for example, a local authority wishes to encourage development, it may wish to provide the necessary infrastructure itself, in order to enable development to be acceptable in planning terms and therefore proceed, thereby contributing to the sustainability of the local area. In such cases, decisions on the level of contributions should be based on negotiations with developers over the level of contribution that can be demonstrated as reasonable to be made whilst still allowing development to take place.”

**5. Assessment of Implications**

**5.1 Financial**

5.1.1. Members will appreciate that agreeing to a deferred contributions arrangement for any particular development necessarily implies accepting the uncertainty that any of the Deferred Contribution will ever be received. As this will depend partly on subsequent decisions by developers as to whether and when to implement any permission granted on that basis, and partly on future property and financial market conditions, it is difficult in any given case even to estimate the probability of receiving all or any part of the Deferred Contribution.

5.1.2. Therefore, in granting permission on such basis, the public sector is (as the extract from the Circular above shows) accepting that there is a balance of infrastructure contributions which the development may never

pay. This 'deficit' in infrastructure provision will have to be accepted or made up from any other available sources of revenue or capital. The amount at stake in connection with any given development will be made clear in the relevant report to Committee as it will be the amount of the Deferred Contribution. The Council, Ashford's Future and Kent County Council will continue to monitor the overall infrastructure gap in the Growth Area and report this to the Ashford's Future Partnership Board. Also, the Council and partners in Ashford's Future will continue to lobby the Government to provide extra funds to enable this gap to be funded to keep pace with the development, which was one of the Council's key initial conditions in signing up to the growth agenda.

## **5.2 Pragmatic**

- 5.2.1. What is the position if the Council is not able to agree the principle of and/or a format for the payment of Deferred Contributions?
- 5.2.2. Members are aware that planning applications which are stalled or refused for such reasons may be subject to appeal, as was the case with the former Powergen site last year. In that case, the Secretary of State attached considerable weight in particular to the needs to bring forward development on that key site, and to enable a significant number of housing units to be delivered in Ashford, and considered that those considerations, together with a perceived high quality of design and sustainability, outweighed the indisputable conflict with planning policies in the development plan which required substantial contributions to be achieved.
- 5.2.3. In other parts of Kent and further afield, some appeal decisions have been made where Inspectors have decided that the development of unviable sites is the overriding consideration as opposed to the payment of full infrastructure contributions. However, not all decisions have been along these lines, and appeal outcomes can be unpredictable.

5.2.4. In the difficulties of the current financial situation, these considerations are made more acute. There is also the Council's need and wish to encourage developers to commence work on sites to bring forward housing in appropriate cases despite the market conditions, particularly as Ashford is a growth area. In considering this, other alternative incentives such as any available grant or pump-priming funding will also be considered.

5.2.5. Members will therefore need to decide in individual cases which of the following they consider to be more important:

- a. The regeneration of a strategically important site which, after full and careful investigation as set out above, is accepted as being unviable due to exceptional costs, unforeseen site conditions and/or the current market conditions at the time of determination, and in that case whether this justifies limited payment of contributions upfront and the hope for the balance being paid if and when the value of the completed dwellings on the development increases; or
- b. To seek to require the payment of full contributions, with the risk of either losing some or all of the contributions altogether on appeal, or facing the prospect of developers and/or landowners leaving a strategically important site undeveloped. This could itself lead to difficulties on appeals if it results in housing trajectory shortfalls and more difficult conversations with government if Ashford is perceived as not delivering its growth role.

## **6. Recommendation**

That the Planning Committee:

- A. approve the Principles for the payment of deferred contributions as set out in this report.
- B. approve the principle of 'pooling' of receipts of Initial Contributions and Deferred Contributions for each development, as set out in this report, and



if appropriate and necessary the entering into of Section 106 Agreements with developers without the need to include the County Council or other partners.

- C. delegate to the Strategic Sites and Design Manager and Development Control Manager, in consultation with the Head of Legal and Democratic Services, the negotiation of and agreement to the detailed terms under which the Total Contribution, Initial Contribution and Deferred Contributions are to be paid for each development where these Principles are applied, to be reflected in the wording of the Section 106 Agreement for any such development.
- D. delegate to the Strategic Sites and Design Manager and Development Control Manager decisions as to the allocation of any amounts received by way of Initial Contributions and Deferred Contributions in respect of each development to which these Principles are applied.
- E. agree that these Principles be kept under review in the light of changes in the economic climate.
- F. agree that the overall impact of the use of deferred contributions is monitored and included in the annual report to the Executive in relation to Section 106 Agreements, together with their impact on the infrastructure deficit.
- G. support the approach to development appraisal financial guidelines set out in Annex1 to this report.

[**Note:** by virtue of Members' resolutions on 19 November 2008 referred to above, if this Recommendation is passed then the Newtown Works and Charter House developments will automatically be developments to which these Principles are to be applied.]

**Background Papers:**

None

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## **ASHFORD BOROUGH COUNCIL**

### **Development Appraisal Financial Guidelines – D R A F T**

#### **1. Introduction**

- 1.1. In response to the increasing emphasis in planning guidance on the financial viability of planning policies (such as Para.29 of PPS3 regarding affordable housing thresholds), and the increasing relevance of particular site specific development circumstances, especially in the current economic climate, Ashford Borough Council will expect applicants for planning permission who are suggesting that exceptional financial circumstances exist and are a material consideration, to provide a robust development appraisal calculation and appropriate supporting evidence to justify the financial variables cited.
- 1.2. To facilitate consideration of such cases and in order to standardise submissions as far as possible, the Council have issued these guidelines together with a standard summary appraisal template which all applicants should adopt. The Council accepts that additional exceptional financial circumstances may well arise in individual cases, evidence of which can be appended to the template and detailed in the supporting statement. For simplicity, the template is based on a summary Residual Valuation but where necessary, especially on larger phased schemes, the Council may require in addition more detailed Discounted Cashflow Analysis.

#### **2. Development Appraisal Principles**

- 2.1. Development Appraisal models are in essence simple, and can be summarised via the following equation;

$$\begin{array}{r} \text{Completed Development Value} \\ \text{Minus} \\ \text{Total Construction Costs} \\ \text{Minus} \\ \text{Developers Profit} \\ = \\ \text{Residual Land Value} \end{array}$$

- 2.2. **Residual Land Value** – what the landowner receives – will normally be the critical variable. If a proposal generates sufficient positive land value, it may be capable of implementation; if not, unless, there are alternative funding sources to bridge the ‘gap’, the proposal will not go ahead.
- 2.3. The Council notes one major proviso to this simple approach, namely that the Residual Land Value – i.e. the value of the land in question arising from the development proposal – must exceed (significantly)
- Existing Use Value (EUV) – i.e. the value of the land in its current use and also
  - Alternative Use Value (AUV) – i.e. the value of the land if used for another purpose for which planning permission exists.
- 2.4. Clearly, if the Residual Land Value is lower than either EUV or AUV, then it is unlikely that the landowner will pursue the development proposal.
- 2.5. More particular problems with Development Appraisals all stem from the requirement to identify the key variables – values, costs etc. - with some degree of accuracy in advance of implementation. Even on the basis of the standard convention, namely that current values and costs are adopted (not values and costs on completion), the Council accept that this can be difficult.
- 2.6. Problems with key variables can be summarised as follows:
- Values attached to Completed Development Value are largely dependent on comparable evidence, which requires sufficient new-build development in the locality of a similar size and type, to provide a realistic value base. If it is necessary to use more general transactional evidence, an adjustment to reflect the premium on new build will be expected.
  - Development costs are subject to extensive national and local monitoring and can be reasonably accurately assessed in ‘normal’ circumstances. Where development proposals arise on brownfield sites, the Council accepts that ‘exceptional’ costs such as decontamination may arise which will require detailed assessment in individual cases (however, see paras. 3.14 and 3.19 below as to how such costs should be treated when purchasing sites).

- Costs are further being driven by changes in terms of sustainability requirements currently emerging.
- Development value and costs will also be significantly affected by assumptions about the nature and type of affordable housing provision and other Planning Obligations and on major projects, assumptions about development phasing and infrastructure triggers.
- While Developer's Profit has to be assumed in any appraisal, its level is closely correlated with risk. The greater the risk, the greater the profit level, in part as a contingency against the unexpected.
- Ultimately, the landowner holds the key and will make a decision on implementing the project or not on the basis of return and the potential for market change and thus alternative developments.

### 3. Development Appraisal Details

- 3.1. In the light of these basic principles, this section considers each key financial variable and identifies the issues likely to arise and thus the questions which may need to be addressed in the applicant's financial appraisal and the supporting evidence. While appraisals and supporting evidence should be based on metric measures, the Council note that elements of the development industry continue to use imperial measures. Where necessary, both metric and imperial units may be included.
- 3.2. **Gross Development Value.** GDV, that is the capital value of the development proposal on completion but at today's values, will comprise some or all of the following;
- The value of residential sales;
  - The capitalised value of commercial elements and any other non-residential elements;
  - The value of the affordable housing units
  - The capitalised value of ground rents;
  - The capital value of parking spaces.
- 3.3. **Residential Sales.** Freehold and/or long leasehold (in flatted schemes) sales will require comparable evidence based on actual values achieved (via the Land Registry or an alternative dataset such as Hometrack).

Local agents' advice may be helpful but will not be adequate in itself.  
Sales values should not be projected to the point of completion.

- 3.4. The appraisal must include a breakdown of house and flat types and their average floorspace based on gross internal area, tenure, bedrooms, and average unit value per m<sup>2</sup>.
- 3.5. **Commercial Values.** While in some cases, freehold evidence of, for example, free standing business units may be available, most commercial space will be valued on the basis of rents being achieved, capitalised by an appropriate yield. Both rental and yield evidence will therefore be required to substantiate value, with particular attention paid to local variations reflecting precise location, quality of build and potential tenant covenants. Where pre-lets are achieved, appropriate supporting evidence should be included. The Council is well aware of the sensitive nature of these variables and will review the submitted evidence carefully.
- 3.6. **Affordable Housing.** In terms of the provision of affordable housing, applicants will be required to provide supporting evidence from the Council's preferred partner Registered Social Landlords (Housing Associations), with particular regard to the values which partner RSLs are prepared to pay for social rented units, affordable rented units, shared ownership units and any other relevant intermediate tenure forms of occupation approved from time to time by the Homes and Communities Agency. The Council will require a statement of the assumptions made regarding target rents and likely levels of Social Housing Grant where appropriate. Applicants should provide an unconditional or conditional offer in writing from at least one partner RSL.
- 3.7. The appraisal must include a breakdown of affordable house and flat types and their average floorspace based on gross internal area, tenure, bedrooms, and average unit value per m<sup>2</sup>.
- 3.8. **Ground Rents.** In flatted schemes, applicants should include capitalised ground rents as a separate income item in Gross Development Value.
- 3.9. **Car Parking etc.** Similarly, capitalised income from car parking spaces and any other elements, such as satellite TV facilities and entry-phone systems, should also be identified where appropriate.
- 3.10. **Density.** The appraisal and supporting evidence should include the overall gross site area (in hectares), the net developable area, the

dwelling and non-residential density per net hectare and the floorspace per net hectare.

- 3.11. **Basic Build Costs.** The appraisal should specify standard build costs for market housing, for affordable housing, for non-residential uses and any ancillary facilities including car parking, landscaping and infrastructure works as separate items. While base build costs can be a composite figure per m<sup>2</sup> for each item, including external works, drainage, utilities, fees, preliminaries and contingencies, the supporting evidence must also provide a breakdown of these factors by cost and/or percentage on cost where appropriate. Average standard build cost as well overall total build cost must be included.
- 3.12. A professionally prepared cost plan may be required including a written justification for any costs which are markedly different from standard industry indices such as BCIS.
- 3.13. **Code for Sustainable Homes (CSH) and BREEAM.** The appraisal and supporting evidence must specify the level of CSH or BREEAM certification which is to be attained in both market and affordable housing units, and any commercial or mixed-use elements, the measures being included to achieve those standards and the costs associated.
- 3.14. **Abnormal Costs.** Any abnormal build costs over and above basic build costs must be itemised in the appraisal and fully explained in the supporting evidence. Thus for example, decontamination and remediation works must be specified and costed by appropriate contractors.
- 3.15. The Council will consider carefully any costed items presented as 'abnormal', not least those items e.g. decontamination and remediation works which should have been identified prior to acquisition and reflected in the land price and/or option to purchase agreement.
- 3.16. **Planning Obligations.** The development appraisal calculation must include a detailed breakdown of planning obligations in line with published policy documents and reflecting pre-application negotiations with the Council, County Council and any external provider. The nature, extent and timing of contributions should be specified.
- 3.17. **Finance Costs.** Finance costs, the borrowing rate and period of borrowing must be specified in the development appraisal calculation.

- 3.18. **Profit Margin.** The appraisal must specify total projected profit, profit margin on gross development value and return on cost.
- 3.19. **Land Acquisition Cost.** Where the site in question has been acquired by the applicant in advance of planning permission, the basis of the acquisition cost must be fully explained in the supporting evidence. If the land cost is based on **Existing Use Value**, then the Council will require evidence of an appropriate existing use valuation in the form of an RICS 'Red Book' or bank valuation. Similarly, if acquisition cost is based on Alternative Use Value, i.e. an extant planning permission, and it can be demonstrated that the consent is capable of implementation, then an appropriate development appraisal calculation for that alternative scheme will be required in the supporting evidence.
- 3.20. Where development sites are subject to Option to Purchase agreements with fixed returns to the landowner(s) when planning consent is achieved, the Council will expect such Options to be re-negotiated if proposals cannot meet policy requirements.
- 3.21. Applicants should be aware that while the Council will exceptionally consider cases where bona fide land purchases have been undermined by subsequent unexpected site specific circumstances, the Council will not entertain arguments that site acquisition costs were such that policy compliant development proposals cannot be delivered. Planning policy requirements must be fully reflected in land acquisition valuations.

#### 4. **Conclusion**

- 4.1. In considering development proposals which otherwise comply with planning policy and the Growth Strategy for Ashford, the Borough Council are aware of the need to take account of development viability where this is a material consideration. Nevertheless, the Council will expect development proposals to be policy compliant in respect of contributions to infrastructure requirements unless a robust and fully justified financial argument can be presented.