

## CABINET

21st June 2016

### SECTION 106 AND AFFORDABLE HOUSING CONTRIBUTIONS ON SMALL SITES

Report of the Director of Places (Development and Economy)

Strategic Aim:	Creating A Sustained Environment Building Our Infrastructure	
Key Decision: No	Forward Plan Reference: FP/270516/07	
Exempt Information	No	
Cabinet Member(s) Responsible:	Mr T King, Leader and Places (Development and Economy) and Resources	
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Ward Councillors	N.A.	

#### DECISION RECOMMENDATIONS

That Cabinet be recommended to:

1. Amend the Council's current s106 policy to bring it in line with government changes as summarised at Appendix A to this report; and
2. Implement the revised approach to s106 policy with immediate effect, with provision being made to amend/nullify any affected s106 Agreements under negotiation for all small residential developments for which a Decision Notice has yet to be issued by the Council.

## **1 PURPOSE OF THE REPORT**

- 1.1 To summarise the government's revised national Planning Policy Guidance published May 19<sup>th</sup> 2016 in respect of the use of s106 Agreements on small scale development and identify and confirm changes now required to the Council's S106 policy in response to the above.

## **2 BACKGROUND AND MAIN CONSIDERATIONS**

- 2.1 Government first introduced a change to the national Planning Practice Guidance (PPG) on this matter through a Written Ministerial Statement (WMS) on the 28<sup>th</sup> November 2014. In response Cabinet quickly approved a recommendation to amend the Council's s106 policy to bring it in line with the changes at its 6<sup>th</sup> January 2015 meeting.
- 2.2 In July 2015, a High Court judgement was issued in favour of West Berkshire and Reading Borough Councils claims for judicial review of the Governments introduction, through WMS and the PPG of a threshold on the size of developments beneath which planning authorities should not seek affordable housing contributions through s106 agreements. The ruling resulted in the Government withdrawing the changes it had made to the Planning Practice Guidance (PPG).
- 2.3 In response to the Government's withdrawal of the changes it had made to the PPG the Council published a Planning Policy Briefing Note in August 2015. This explained that the Council would effectively re-instate its policy on small development sites of 10 units or fewer, in line with the Council's policy prior to November 2014.
- 2.4 In December 2015 Cabinet approved a new Supplementary Planning Document (SPD) to provide up to date guidance on the Council's use of planning obligations. It amended existing policy to pave the way for the Cabinet recommendation to Council to adopt a Community Infrastructure Levy (CIL). This was necessary because CIL would largely replace the use of Section 106 agreements for all community infrastructure investment other than for Affordable Housing. Both CIL and the new SPD were implemented on 1<sup>st</sup> March 2016.
- 2.5 On the 11<sup>th</sup> May this year the Court of Appeal handed down judgement in the Secretary of State's appeal against the High Court decision giving legal effect to the policy originally set out in the WMS of 28<sup>th</sup> November 2014. The outcome of the legal ruling and re-insertion on 19<sup>th</sup> May 2016 of the governments desired policy guidance on its affordable housing exemption for small sites and vacant building credit requires the Council to review its planning policy with immediate effect and, in due course, the Planning Obligations SPD adopted earlier this year.
- 2.6 It is possible that West Berkshire and Reading Borough Councils may choose to appeal the Court of Appeal ruling. Any such application for leave to appeal would have to be submitted within a 28 day period from the date of the Court of Appeal's decision. If leave is granted there can be no certainty when the appeal might be heard as this is not time limited and is a matter for the Courts to decide. There is also clearly no certainty that either an application for leave to appeal or, if granted, the appeal itself would be successful.

- 2.7 It is suggested that, in the meantime, work commence on the review of the Planning Obligations SPD to bring back to Cabinet for consultation purposes. The SPD review will also look to strengthen the Council's position in resisting residential 'site splitting' by landowners/developers seeking to avoid having to make s106 contributions towards the off-site provision of Affordable Housing. This issue will be further addressed in the local plan review work currently being undertaken to establish appropriate planning policies to deliver the required housing growth over the next 20 years.

### **3 CONSULTATION**

- 3.1 There are clearly no grounds for consultation on the Council's implementation of this change to government planning policy. The procedures however for revising the current Planning Obligations Supplementary Planning Document would require consultation on a draft SPD prior to its adoption.
- 3.2 In the meantime the statement attached at Appendix A can be used to inform stakeholders and other interested parties (particularly planning agents, landowners and other applicants) of the change in the Council's planning policy alongside updating the Council's web pages on the subject.

### **4 ALTERNATIVE OPTIONS**

- 4.1 Consideration has been given to delaying making any changes to the Council's planning policy until it is clear that there will be no further challenge to the Supreme Court. An update can be given to this Cabinet meeting on whether or not leave to appeal has been sought but for the reasons outlined at paragraph 2.6 it is not clear how long the Council would have to delay in taking this approach. In the meantime planning applications determined in accordance with policy that was clearly contrary to the PPG could be the subject of challenge.

### **5 FINANCIAL IMPLICATIONS**

- 5.1 The impact of applying the new S106 policy guidance is immediate in respect of live planning applications affected by the policy change (i.e. applications yet to be determined where there are Affordable Housing requirements). As the Planning Obligations SPD only took effect on 1<sup>st</sup> March there are very few applicants with development proposals where S106 contributions for affordable housing apply in accordance with the Council's policy in the short period prior to the 19th May. These applicants have been informed of the possible change and what it may mean in respect of their planning application pending the Council's decision on the matter.
- 5.2 It is important to bear in mind that now CIL is being implemented at a charging level that is demonstrably viable to the development industry, it no longer requires a S106 legal agreement to be negotiated on each and every development proposal in order to secure 'tariff style' community infrastructure contributions. CIL is simply paid, 'up front' by the developer giving the Council a legitimate right to then invest the levy in its local infrastructure priorities.
- 5.3 The main impact on the Council will be in the loss of potential commuted sums towards off-site Affordable Housing on the small sites with between 2 and 5 dwellings in the designated rural areas and 2 and 10 dwellings in Oakham and

Uppingham. The Planning Obligations SPD had already determined a change in Council policy to not require a commuted sum for off-site Affordable Housing from single dwelling plots, residential annexe or extension to an existing home.

- 5.4 The Council currently hold a balance of approx. £151k in commuted sums for the provision of Affordable Housing. The change in policy will mean that the developers of housing sites below the new size thresholds will make no future contribution. Based on looking at recent development activity (i.e. site size breakdown of current residential commitments) and evidence produced for CIL on future site types expected to be brought forward, an estimate is that approx. 14% of future annual housing supply could be no longer making a contribution. If future housing supply is 160 dwellings a year and the average open market dwelling is 95m<sup>2</sup> in size and would have contributed £162/m<sup>2</sup> towards off-site Affordable Housing up to £344k per annum could in future years be 'lost'. There are many difficulties in estimating this potential income loss however.
- 5.5 It should also be noted that since 1<sup>st</sup> March 2016 we are applying CIL on these developments whereas with our former use of S106 agreements to securing funding for community infrastructure as well as AH contributions we would have received no future developer contributions on small sites. CIL will also apply in future to all of the dwellings on these sites if no AH is provided on site.

## **6 LEGAL AND GOVERNANCE CONSIDERATIONS**

- 6.1 A risk associated with the Council making effective the new PPG is that of a future successful legal challenge to the government's policy guidance. The benefits however outweigh this risk even allowing for the recent history of this policy initiative. When planning policy guidance changes the new guidance becomes a material consideration in any planning decision as discussed above.

## **7 EQUALITY IMPACT ASSESSMENT**

- 7.1 An EIA is not required to in respect of making planning policy compliant with government requirements. The EIA is considered in the making of the new national guidance.

## **8 CONCLUSION AND SUMMARY OF REASONS FOR THE RECOMMENDATIONS**

- 8.1 The new Planning Policy Guidance is now a material consideration in the determination of planning applications and should be implemented with immediate effect.

## **9 BACKGROUND PAPERS**

- 9.1 There are no additional background papers to the report.

## **10 APPENDICES**

- 10.1 Appendix A – Changes to Section 106 and Affordable Housing & Tariff Style contributions on Small sites

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## Changes to Section 106 and Affordable Housing & Tariff Style contributions on Small sites

### Introduction

The Government introduced a change to the national Planning Practice Guidance (PPG) on 19th May 2016.

(see <http://planningguidance.planningportal.gov.uk/revisions/23b/012/>)

In brief, it means that Local Authorities can no longer require affordable housing or s106 tariff-style contributions on small development sites of 10 units or less (and which have a maximum combined gross floor space of 1000m<sup>2</sup>) or 5 units or less in designated rural areas. Affordable housing or s106 tariff-style contributions can also no longer be sought on residential annexes and extensions.

### What does this mean for Rutland?

In accordance with the PPG, the lower threshold of 5-units or less units will apply to the majority of Rutland Parishes which are designated as 'rural areas' under section 157(1) of the Housing Act 1985 (see list of Parishes designated as rural areas in Rutland in Table 1). The exceptions are the parishes of Oakham and Uppingham where the higher 10 unit threshold applies.

**Table 1: Designated Rural Areas in Rutland**<sup>1</sup>

In the District of Rutland, the parishes of Ashwell, Ayston, Barleythorpe, Barrow, Barrowden, Beaumont Chase, Belton, Bisbrooke, Braunston, Brooke, Burley, Caldecott, Clipsham, Cottesmore, Edith Weston, Egleton, Empingham, Essendine, Exton, Glaston, Great Casterton, Greetham, Gunthorpe, Hambelton, Horn, Ketton, Langham, Leighfield, Little Casterton, Lyddington, Lyndon, Manton, Market Overton, Martinthorpe, Morcott, Normanton, North Luffenham, Pickworth, Pilton, Preston, Ridlington, Ryhall, Seaton, South Luffenham, Stoke Dry, Stretton, Teigh, Thistleton, Thorpe by Water, Tickencote, Tinwell, Tixover, Wardley, Whissendine, Whitwell, Wing.

In the designated rural areas of Rutland, no s106 affordable housing or tariff style s106 contributions shall be sought from housing development of 5-units or less units. In addition, affordable housing and tariff style s106 contributions will be sought from developments of between 6 and 10-units in the form of cash payments which are commuted until after the completion of units within the development. The revised PPG also states that the restrictions on seeking planning obligations contributions do not apply to development on Rural Exceptions Sites which will continue to be determined in accordance with policy on such sites set out in the Council's Site Allocations & Policies Development Plan Document.

In Oakham and Uppingham, no s106 affordable housing or tariff based s106 contributions should be sought from housing development of 10-units or less units and which have a maximum combined gross floorspace of no more than 1000m<sup>2</sup>.

<sup>1</sup> Statutory instrument 2004/418 lists Rutland parishes (excluding Oakham and Uppingham) as being 'designated rural areas'.

Where vacant buildings are brought back into use or are demolished, the floorspace involved should now be deducted from the developer contribution required. New consents for self-build housing and residential extensions and annexes were already exempt subject to certain criteria under Rutland County Council policy following the decision made by Cabinet on 6 May 2014.

The PPG clarifies that the Council can still seek s106 obligations for site specific infrastructure - such as improving road access and the provision of adequate street lighting - where this is appropriate, to make a site acceptable in planning terms. This is entirely consistent with the Council's new planning obligations policy set out in the SPD adopted 1<sup>st</sup> March 2016.

In implementing these changes the Council will continue to use national planning policy guidance and adopted local planning policy to resist the artificial breaking up or division of sites by developers trying to avoid having to make a planning contribution.

### **When will these changes come into force?**

As these changes have now been introduced through the PPG, the changes will apply with immediate effect to any planning applications pending, where a decision notice has not been issued by the Council.

This also accords with the 'Presumption in favour of sustainable development' in the National Planning Policy Framework (NPPF) and Policy SP1 of the Site Allocations & Policies Development Plan Document which indicates that "where there is no policy or relevant policies are out of date at the time of making the decision the Council will grant permission unless material considerations indicate otherwise".

The Council intend to notify any applicants with pending planning applications where the exemptions now apply and a decision notice has not been issued about the change in policy. The Council will also update the information on its website to reflect the new situation.

The national changes do not directly affect any planning applications which already have planning consent; those s106 agreements have already been signed and remain valid. Applicants and developers who have paid contributions cannot receive refunds.

For clarity, the Council will bring forward an amended Planning Obligations SPD to update and consolidate these revised elements of section 106 policy. The SPD will continue to sit alongside the Community Infrastructure Levy which has been in force since 1<sup>st</sup> March 2016.

For further information on these changes, please contact the Council's Community Infrastructure and Planning Obligations Officer on Tel. no. 01572 758251 or email [planningpolicy@rutland.gov.uk](mailto:planningpolicy@rutland.gov.uk)