ENVIRONMENTAL AND PLANNING REVIEW COMMITTEE
20 APRIL 2009

THE USE OF PLANNING OBLIGATIONS AND THE COMMUNITY INFRASTRUCTURE LEVY

Report of the Director of Development and Regeneration

1.0 Purpose of Report

1.1 This report informs Committee of existing legislation relating to the use of Planning Obligations and provides further guidance relating to the potential future use of the Community Infrastructure Levy as introduced by the new Planning Act 2008.

2.0 Background

2.1 This report relates back to the resolution of Committee at the meeting on 14 July 2008 when it was agreed that a report be brought to a future meeting on this topic.

2.2 The government believes that almost all development will have an impact on local infrastructure, services and amenities and that is it is reasonable that those that benefit from development should share some of that gain with the local community to help fund necessary physical, environmental and social infrastructure to make development acceptable and sustainable.

2.3 Planning obligations (often referred to as Section 106 agreements) are legally binding agreements negotiated between the Local Planning Authority and the landowner, and are commonly used in the context of planning applications. Planning Obligations are seen as a key mechanism in the planning system for mitigating the specific impact of a development on the local area.

2.4 The Community Infrastructure Levy (CIL) originated in concept from the Barker Review into Land Use Planning (December 2006) which concluded that the provision of housing was being held back, for among other reasons, the inconsistent and insufficient provision of infrastructure relating to development (associated with the use of Planning Obligations). The Planning White Paper (May 2007), first introduced the suggestion of a 'planning gain supplement' that could impose a 'tariff' based levy on development with funds to be collected to be used for the provision of infrastructure. This has subsequently been taken forward as the Community Infrastructure Levy (CIL) which was introduced through the Planning Act 2008 which was enacted in November 2008. It is envisaged that both the CIL and the planning obligations regime could run in tandem, although to what extent remains to be determined by the Government.

3.0 Planning Obligations

3.1 Planning obligations have been in operation for a number of years and are given a statutory basis by virtue of Section 106 of the Town and Country Planning Act 1990 (the 1990 Act).

3.2 The purpose of a planning obligation is to provide a mechanism to enable the grant of planning permission by seeking to mitigate the impact of a development where that proposed development would otherwise be unacceptable in planning terms. The Section 106 powers therefore enable the Local Planning Authority (LPA) through a planning obligation to prescribe the nature of the development and control the future use of the land, specify works to be carried out or secure the payment of financial contributions towards local services or facilities to mitigate the development's impact. The Section 106 route can be used where the concerns surrounding the impact of the development cannot be suitably and lawfully addressed by the imposition of planning conditions.

3.3 The current system of planning obligations relies on agreements negotiated between the LPA and the developer in the context of granting planning permission. A planning obligation runs with the land and therefore also binds future owners of the site who will also be required to comply with any live planning obligation.

3.4 Planning obligations can be sought on developments of any size and can apply to a wide range of uses including the provision of new roads open space, education and community facilities. These may be delivered directly by the developer if they are on-site works or can be secured by the payment of a 'commuted sum' to the LPA.

3.5 As explained above, planning obligations are used to make development acceptable which would otherwise be unacceptable in planning terms. However, the use of planning obligations is governed by the fundamental principle that planning permission may not be bought or sold. It is therefore not legitimate for unacceptable development to be permitted merely because of benefits or inducements offered by a developer through a Section 106 Agreement which are not necessary to make development acceptable in planning terms. Equally, planning obligations cannot be used as a means of securing for the local community a share in the profits of development (in other words as a means of securing a 'betterment levy').

3.6 Government has set down clear guidance as to when planning obligations may be sought by a LPA. Circular 05/2005 states that a planning obligation must be : -

i) Relevant to planning;
ii) Necessary to make the proposed development acceptable in planning terms;

iii) Directly related to the proposed development;
iv) Fairly and reasonable related in scale and kind to the proposed development; and
v) Reasonable in all other aspects.

3.7 Given the above, it would be reasonable to seek, or take account of, a planning obligation, if what is sought or offered is necessary from a planning point of view, for example in order to bring a development in line with relevant local, regional or national planning policies. Obligations must also be directly related to the proposed development and that the development ought not to be otherwise permitted without the obligation. For example, there should be a functional or geographical link between the development and the item being provided as part of the developer's contribution under the obligation.

3.8 Within these categories of acceptable obligations, what is sought must also be proportionate and fairly and reasonably related in scale and kind to the proposed development and reasonable in all other respects. For example, developers may reasonably be expected to pay for or contribute to the cost of all, or that part of, infrastructure which would not have been necessary but for their development. The effect of the infrastructure investment may be to confer some wider benefit on the community but payments should be directly related in scale to the impact which the proposed development will make. Planning obligations should not be used solely to resolve existing deficiencies in infrastructure provision.

3.9 Therefore in practical terms, planning obligations can be used for : -

- Compensating for the loss or damage to be caused by a proposed development.. Compensation may be required by substituting or replacing the loss of, or damage to that particular resource. For example, compensating for the loss of a landscape feature of bio-diversity value, open space or a right of way.
- Mitigating the impact of the development where a proposed development would, if implemented create a need, or add pressure to an existing facility or local infrastructure. For example, new residential development could give rise to increase pressures on the local educational infrastructure. Contributions could be sought towards new classrooms.

4.0 The use of Planning Obligations in Sunderland

4.1 The adopted Unitary Development Plan (1998) sets out two specific policies relating to Planning Obligations.

- Policy R3 provides the principle guiding policy, for the use of planning obligations to cover those matters which while necessary

in practical or planning terms for a proposed development to proceed, cannot be dealt with via planning condition.

- Policy CF15 considers the use of planning obligations to provide childcare facilities in large scale developments that would attract significant numbers of users.

4.2 At present obligations are generally dealt with on a case by case basis. To date planning obligations have been negotiated or provisionally discussed with developers in respect of the following issues:

- Open space maintenance
- Children's play provision
- Formal sport provision
- Highway improvements
- Educational provision
- Community infrastructure (for example).

4.3 The negotiations in each case are undertaken by planning officers, in partnership with other Council Directorates including, Community and Cultural Services, Development and Regeneration (Transport and Engineering), Children's Services and also Sport England. Legal Services advise on and draw up the subsequent agreements based on the heads of terms agreed with the developer. The council department responsible for the relevant "infrastructure" towards which the financial contribution is proposed/required generally uses its own formulae for working out what level of financial contribution, if any, is required when a planning application for housing of more than 10 units is referred to them.

4.4 In accordance with the Circular, the need for a financial contribution usually depends on the amount of spare capacity in the current system/ local infrastructure rather than an automatic requirement. For instance in terms of education provision if there is no pressure on schools at either primary or secondary level which would be likely to take pupils from the proposed new housing development, it is normal practice not to request a contribution. However, if a contribution is required, it is calculated by a formula based on the number of pupils likely to be generated by the new development and the consequent impact on class sizes and the like.

4.5 With regard to children's play facilities, the decision as to how play space should best be provided for the community is based on an established strategic framework. Sunderland was one of only 30 authorities to be awarded Pathfinder status recently, and the City's approach to developer contributions was particularly recognised.

4.6 Elected Members may be aware that play was the subject of one the first scrutiny reviews by Culture and Leisure Review Committee in 2003/2004. 'Planning for Play' identified the need to ensure that new developments contributed to, or developed high quality, meaningful

play spaces which provided for the full age range of children and young people up to 19yrs.

4.7 Small, poorly located play spaces located in small to medium housing estates (singular wooden pigs or isolated toddlers areas) with poor play value, have and continue to cause challenges to residents and provide poor play opportunities for children and young people.

4.8 Traditionally, where small to medium housing developments have gone ahead with developers building on-site provision, there have been almost immediate requests from the new residents to have the play area removed, such as at The Crofters (Newbottle), The Pastures (Washington) and Roker Park (Sunderland). The usual basis for such requests is the perceived or real anti-social behaviour, where older young people seek somewhere to meet and socialise which is too small and poorly designed. The relatively hidden and under provided play areas are not suitable for modern standards and aspirations.

4.9 Fewer, but better equipped and landscaped play spaces in the right location for children and young people are essential. The initial capital outlay of such sites may be greater, but their use, enjoyment, informal oversight and sustainability are significantly greater.

4.10 The Culture and Leisure Review Committee 'Planning for Play' document was followed by the Play and Urban Games Strategy (2004-2014) which sought to apply the principles of Planning for Play and was endorsed by Cabinet. In 2007, the Strategy was further reviewed to develop 'Moving Forward' based on revised government guidance. This was further endorsed by Cabinet and the Children's Trust.

4.11 The Strategy identifies that regular enjoyment, space and opportunity to play is an essential part of the lives of children and young people. Through play, children develop physically, intellectually, emotionally, spiritually and socially. Children and young people 'playing' signify a healthy community.

4.12 The Strategy considered current provision and sites, ongoing feedback from children and young people themselves, land availability citywide and forthcoming renewal opportunities, which help to re-shape our neighbourhoods and improve the settings. The approach is to ensure that fewer, but larger strategic sites of higher quality are provided 1km from the children's doorsteps.

4.13 In order to ensure funding opportunities of all types were directed towards priorities, the Strategy identifies specific sites which are the prioritised destination for external funds and developer contributions, within an approximate 1km radius of the development(s) wherever possible. Exceptions are where there is a new large housing development which clearly warrants onsite provision, as the number of young people would place too greater burden on the other provision

nearby, if it exists. This is particularly the case where new developments take place in very urban areas where no current provision exists, or indeed in rural settings where infrastructure has not been established.

4.14 The Strategy has enabled clear priorities for investment, which in turn helps to focus funds to achieve results and ensure that a greater percentage of children and young people have access to larger and high quality play spaces 1km from their door. It also prevents small and low play value sites being built with fragmented funds or 'adhoc' developer build sites, which could drain resources in terms of long term maintenance and community safety issues. A large percentage of developer contributions in isolation fall significantly short of that required to develop a large playsite to meet modern aspirations.

4.15 The specific priorities within the current Strategy are viewed as the next stage of improvement and recognise that beyond the current action plan further work is required. Elected members will be aware of recent area committee presentations asking for site/land nominations for next priorities beyond Pathfinder.

4.16 In 2007, when the Strategy was reviewed, just 15% children and young people had access to high quality play spaces 1km from their door.

4.17 The successful strategic allocation of developer contributions and other external funds resulted in access increasing to 25% by mid 2008 and by March 2009, an impressive 45% access achieved. The second year of the Play Pathfinder programme will deliver over 65% access to high quality play spaces citywide. One of the most significant factors for which Sunderland has also been commended is it's continuous involvement of children, young people and families in the design and development of new play spaces.

4.18 When considering a planning proposal for residential development be it at pre-application or application stage, the Directorate of Community and Cultural Services is consulted for advice on the most appropriate form of provision, i.e. on site or off site. The principles and clearly identified priorities in the strategy guide the preferred options. As previously mentioned such a decision will take into account the size of the residential development and the level of provision in the general area. As a general rule the smaller the residential development the less likely it is that on-site provision will be made. It is accepted that the contribution may go towards provision outside the ward in which the housing development is located, Consultation with children and young people identifies that ward boundaries per se are not a restriction to children and young people's play. Busy roads and rail lines are more likely to determine how a young person accesses play space . It is considered important that the contributions help to achieve the council's approved Play and Urban Games Strategy.

4.19 Where a view has been taken for off-site play, for all developments proposing 10 or more dwellings the current (2008 – 09) requirement is for a contribution of £680 for each dwelling proposed with 2 or more bedrooms. The formula was developed some years ago and is increased annually to take account of inflation. The revised figure for 2009 -10 is not available at the time of writing. It should be noted that contributions are often made in phased payments during a development, which can take some years. On this basis, play developments cannot be started until the payments have been received from the developer, which further complicates the overall timing and phasing of improvements to communities.

4.20 Where an onsite development is the required provision, increased emphasis is being placed on ensuring the agreed quality and location of the play space is submitted prior to planning approval, enabling full engagement of the planning committee before approvals are sought. This approach removes any chance of the developers building poor quality play space or failing to deliver the planning condition.

4.21 In the last three years, there have been very few on-site play areas provided or proposed as part of new housing developments. However, the one notable exception being the development on land to the north of Murton Lane, at Easington Lane identified as part of an approved planning framework. It should be noted that the section 106 agreement (all the required contributions having been agreed) in respect of the development remains to be signed, due in no small part to the current economic situation.

4.22 It should be noted that it is proposed to prepare a Supplementary Planning Document (SPD) relating specifically to planning obligations. The status of the SPD would be to expand on existing higher-level policies, such as those in the Unitary Development Plan and Alteration No. 2 (September 2007) and would be consistent with national and regional policies. SPDs do not form part of the statutory development plan, but they are a material consideration in determining planning applications.

4.23 The benefits of such an SPD would be to provide clarity to developers, development control officers, stakeholders and local residents as to the Council's expectations concerning developer contributions in appropriate circumstances. This would benefit the Council, in its role as local planning authority in meeting its targets for determining planning applications.

4.24 Areas where it could be appropriate to seek obligations would be affordable housing, public realm, education, employment and skills, open space and recreation, landscape, biodiversity, highways and transport, social and community infrastructure (such as libraries, waste management and recycling). However, this is not an exhaustive, and there may be circumstances where other provisions could be sought.

The SPD would provide guidance around : -

- opportunities for on or off site provision;
- commuted sum payments including those required for maintenance
- minimum thresholds for which the planning obligations would be sought
- formulae for calculating developer contributions.

4.25 To take forward the SPD requires a firm evidential backing as to how each formulae has been derived and why obligations are sought in the first place. For example, one of the remaining evidential requirements relates to quality and quantity of greenspace throughout the city in terms of the deficiencies and surplus types of greenspace that exist. This would provide key data to inform what types of green space may be secured through new development and where this can be best located. This study is programmed to be completed this Summer.

5.0 The Community Infrastructure Levy

5.1 The government has made it clear that local communities should benefit more from the uplift in land value arising from planning permission to finance the infrastructure needed to support housing growth in particular. As part of its response to the Barker Review, the government accepted the recommendation for, and consulted on proposals for a 'Planning Gain Supplement'. In effect, contributions from developers would be collected nationally and redistributed back to local authorities to provide key infrastructure.

5.2 In August 2008, the government subsequently refined the proposals for the Planning Gain Supplement which is now described as the Community Infrastructure Levy (CIL). The Planning Act 2008 provides a statutory framework for the implementation of the CIL. However the precise mechanics behind the CIL, including the scope of its application, and how such financial contributions will differ from planning obligations have yet to be decided upon and will be the subject of secondary legislation in order to implement the CIL at a future date. The implementing regulations were originally programmed for Spring 2009, however, it is understood that these will not come into effect until late 2009 at the earliest. The government has confirmed that due to the present economic downturn more time is needed to consider the wider effects of the proposed implementing regulations and subsequent impacts on the economy. A more detailed report will be presented to this Committee once the draft regulations are published. For information, this report outlines the proposals relating to CIL as they are presently set out.

5.3 The CIL will be a new charge which local planning authorities will be empowered to, but not required, to levy on most types of new development, based on a simple formulae which relates the amount of the charge to the size and character of the development giving rise to

it. Proceeds of the CIL will be spent on local and sub-regional infrastructure only to support the development of the area. The CIL aims to ensure that the quality of life in a neighbourhood is maintained by the provision of services as a community grows. Infrastructure is defined by the 2008 Act to include transport, schools and health centres, flood defences, play areas, parks and other green spaces. However contributions relating to affordable housing, direct replacements of facilities or amenities caused by development on a very local level and other matters necessary to make the development site acceptable in planning terms would continue to be secured through the present system of planning obligations.

5.4 The purpose of the CIL is to assist in funding the infrastructure needs of development in the area as identified in the development plan. While CIL could make a significant contribution to new infrastructure provision, it cannot be used to remedy existing deficiencies. Core public funding will continue to bear the main burden and local authorities will need to utilise CIL alongside other funding streams.

5.5 It is proposed that local authorities may decide what infrastructure is appropriate to its locality, with additional freedoms to work with other local authorities to pool CIL contributions for delivering cross boundary and sub-regional infrastructure .

Setting the CIL

5.6 If the Council were to seek to implement the CIL, it would first need to set out the justification and the infrastructure requirements that will be needed to deliver the proposals in its emerging Local Development Framework including the likely costs of that infrastructure coming forward. Taking other funding sources into account, the Council would identify gaps in funding to arrive at a proposed amount to be raised from CIL. This would be subject to an assessment of local development viability.

5.7 The Council would be required to prepare a draft charging schedule which is suggested may be a form of new type of document within the Local Development Framework. The draft charging schedule would set out the types of development which will attract CIL and the rate at which each type will be charged. It would be subject to the same level of testing as a development plan document including a public inquiry with an independent planning inspector and with a binding report. However, there would be no obligation to adopt the inspector's recommendations, and the Council could resubmit revised proposals for fresh examination in the event it was unhappy with the recommendations. Nevertheless, the Council would not then be entitled to impose the CIL until the charging schedule had been finally adopted.

5.8 Regardless of whether the Council chooses to implement the CIL and produce a charging schedule, there is still a requirement to set out detailed proposals for how schemes set out within the emerging Local Development Framework will be implemented. The 'Infrastructure Delivery Plan' will inform future infrastructure requirements, the Council is presently in the process of gathering information on infrastructure provision (that will include information relating to capacity shortfalls and surpluses).

5.9 The government recognises the need to consider a number of flexibilities to ensure that charging schedules can be tailored to meet local circumstances. These include the: -

- Ability for LPAs to set differential rates geographically and different rates for different types of development (in order not to prevent development in regeneration areas)
- Provision for exceptional circumstances where the developer cannot afford to pay the rate set out in the charging schedule.

5.10 Where enacted, it is proposed that the CIL would be levied on most types of development including residential and commercial schemes. Developments below a minimum threshold would not be liable to pay CIL, for example householder extensions.

Calculation and Payment of the CIL

5.11 The amount of CIL due will be calculated with reference to the charging schedule when a planning permission is granted and expressed as a cost per unit of development. However payment (including any indexing against inflation) would not be due until commencement of the development.

Relationship to the Planning Obligations

5.12 Local authorities that choose not to establish the CIL can continue to use planning obligations. It is not intended that planning obligations are to be replaced. There would still be a role for planning obligations to secure non-financial, technical and site specific mitigation, to impose restrictions on future land use and secure affordable housing. The government is however considering whether restrictions on the use of planning obligations should be made once the CIL is introduced. It is possible that the future use of Section 106 planning obligations may be scaled down in subsequent legislation or government guidance to take account of the impact of the CIL.

6.0 Conclusion

6.1 Through the current use of planning obligations, the planning system has a means to mitigate the impact of new developments. However, at a national level, obligations have often been raised on a discretionary basis by Local Planning Authorities in response to the type of

development proposed. The government considers the introduction of the optional CIL would be supplementary to the present planning obligations regime.

6.2 Without sight of the secondary legislation which will implement the charge and specify the real mechanics of the Community Infrastructure Levy, it cannot at this time be ascertained whether the Council should embark on adopting this approach. However, much of the baseline work around the possible future use of the CIL will be prepared as an essential part of the evidence base for the emerging Local Development Framework. This will be irrespective of whether the Council eventually decides to adopt the CIL in future.

6.3 That said, in addition to the above, it is essential that a consistent approach is adopted by the Council to take forward Planning Obligations. This will take the form of a supplementary planning document.

7.0 Recommendation

7.1 This Review Committee is asked to note this report for information and to agree to receive a separate report in relation to Government's future proposals for CIL at a later date.

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