DCCOM EXT

11/00046/FUL

FULL COUNCIL 15 DECEMBER 2009 **REPORT NO**

REPORT OF THE DIRECTOR OF COMMUNITY AND PLANNING SERVICES
RE: RENEGOTIATING FINANCIAL CONTRIBUTIONS REQUIRED FOR INFRASTRUCTURE IMPROVEMENTS

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1. PURPOSE OF REPORT

1.1 a) To advise members of this matter having been reported to Scrutiny Committee.
b) To discuss with members the changes in the property market and the construction industry, and the impact which this has already had, and may have in the future, on developer contributions payable.
b) To consider and agree a protocol for dealing with requests from developers to vary the payment terms for such contributions.

2. RECOMMENDATION

2.1 That the Council agrees the protocol set out in this report.

2.2 To review the protocol in April 2010.

3. BACKGROUND TO THE REPORT

3.1 This report was considered by Scrutiny Committee on 29 October 2009 and the committee resolved to accept the principles presented and agreed to the proposed protocol being presented before full Council for consideration.

3.2 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 under Section 106 of the Town and Country Planning Act 1990.

3.3 The starting point for the identification of such impacts which a developer may need to address is adopted planning policy in the Development Plan, and any other material considerations such as emerging development plan documents and national policy guidance in particular Circular 05/2005.

3.4 Historically, to offer a consistent service to applicants to avoid arguments of precedent the Borough Council has taken an approach not to negotiate on developer contributions after planning permission has been granted. Quite simply if a developer is not prepared to pay the required developer contributions planning permission would be refused. However, the wider negotiations related to the design and layout and acceptability of any proposal are an integral part of the development control process and such negotiations and decision are taken by officers to achieve the highest quality development in the best location.

3. 5 **Government Guidance**
Government Circular 05/2005 is relevant. This sets out the Secretary of State's policy on Planning Obligations, and would in practice be given significant weight by an Inspector on appeal.

3.6 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.

3.7 Paragraph 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."

3.8 Hinckley and Bosworth Local Plan:

3.9 Policy IMP1 of the Adopted Hinckley and Bosworth Local Plan requires contributions towards the provision of infrastructure and facilities to serve the development commensurate with the scale and nature of the development proposed.

3.10 Policies RES2, RES3 & RES4 seek to ensure adequate provision of affordable housing. The Hinckley and Bosworth Housing Needs Survey provides the data on the community's need for affordable housing.

3.11 Policy REC2 requires all new residential development (20 or more dwellings) to provide outdoor play space for formal recreation. Policy REC3 New Residential Development - Outdoor Play Space for Children requires the appropriate level of open space to be provided within development sites or, alternatively, a financial contribution to be negotiated towards the provision of new recreation facilities within the vicinity of the site or towards the improvement of existing facilities in the area.

3.12 Further guidance, including formulae for calculating contributions, is provided within the Borough Council's Supplementary Planning Guidance for Residential Development and the Supplementary Planning Documents concerning Play and Open Space, Affordable Housing and Section 106 Strategy on Developer Contributions.

3.13 The County Council's guidance on contributions is outlined their document 'Adopted Statement of requirements for developer contributions in Leicestershire'. Leicestershire Constabulary guidance is contained within Designing out Crime Liaison Protocol.

3.14 **The Changing Property Market**

3.15 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 and it is from this stance that the Borough's position has developed.

3.16 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.

3.17 More recently, the dramatic changes in the housing market and the construction industry have substantially changed the picture. The effect of the downturn after March 2008 has been seen, particularly in affordable housing completions, as progress on delivering the main housing developments in the Borough has slowed significantly. House price reductions have had and are still having a big impact on reducing development values and this in turn has resulted in less development sites commencing and a number of sites stalling. Furthermore the requirements for affordable homes continues to grow at a rate that exceeds the provision.

3.18 However, Leicestershire 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 build housing in order to seek to achieve the Borough's growth targets. This will not be possible if the development of otherwise suitable sites is not financially viable.

3.19 Although developers vary in their approach to risk, their need for external finance to cover development costs due to the demands of their funders and shareholders, if a development is not financially viable 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.

3.20 The amount and timing of payment of off-site infrastructure contributions required under planning policies can have a significant impact on the viability calculations in such circumstances. Officers are also aware that some local planning authorities have responded to current issues around contributions and the viability of developments by looking at options for trying to secure that developments proceed.

3.21 The concept of renegotiating developer contributions has already been accepted in principle by Homes and Communities Agency (HCA) Good Practice Note: Investment and Planning Obligations, Responding to the Downturn. This practice note expands on the current economic position, the problems facing the development industry and the ways in which local planning authorities should and can encourage development. Further recent professional press coverage in respect of the approaches taken by planning authorities has highlighted the need for a more flexible approach in an attempt to facilitate the delivery of development in these difficult economic times.

3.22 ATLAS, the Government's advisory team for large applications have been assisting officers in the research required in producing this paper and have identified that Bristol, Exeter, Norfolk, Ashford, Medway, Slough and Birmingham City Council have all recently publicised their short term revised approach to dealing with developer contributions.

3.23 In line with the good practice note and to ensure development within the Borough, in particular affordable housing completions are met, it is therefore proposed that the Council formally adopts a protocol to guide negotiations where financial viability is raised by developers, but only under strict criteria and subject to independent investigation.

3.24 **The Protocol**

The key matter in considering any negotiations of developer contributions is viability. For instance, a high quality design and well landscaped proposal will need the use of premium materials together with experienced designers and contractors to deliver a quality finish and environment. This all comes at a cost and is a financial constraint of the development therefore affects the viability of the proposal.

3.25 When there is a downturn in the market matters of viability will be brought to the forefront of any scheme. In order to achieve a profitable development applicants will seek to reduce the overall costs. Various reductions will be considered by them which will all have implications. Which may include:

Reductions	Implications
Section 106 contributions	Shortfall in overall budget in areas reduced
Use of cheaper materials/finishes	Poor quality development
Landscaping/Public Realm	Poor quality development

3.26 In considering the issues of viability, the economic costs of the development must be presented and carefully considered to ensure that the costs and profit margins of the development proposed are reasonable in the depressed economy.

3.27 As part of ongoing evidence base work associated with the emerging Local Development Framework Core Strategy, a consortium of the local authorities in the Leicestershire Housing Market Area commissioned Three Dragons Consultancy to undertake a study to examine the potential impact on development viability of affordable housing targets and level of threshold. As part of this process a viability toolkit has been created and is provided to the authority for use in assessing the financial viability of developments. The toolkit requires the developer to provide development costs data and with the input of developer contribution figures, provides a financial report on the developments costs. The toolkit enables the viability to be carefully considered in light of development costs is regularly updated with local build costs, sales values and Borough specific data.

3.28 In line with the HCA good practice note and the approach of other authorities, the Council will consider the viability of proposals and when presented in accordance with the following protocol.

i) The applicant/developer will be required to present "open book" accounting demonstrating the development's full costs. This will involve issuing developers with the Council's Viability Toolkit for completion with the required financial data. It is intended that this will be issued at an approximate cost of £300.
ii) Subject to the findings of the Viability Toolkit demonstrating a loss, the Council will agree to review the developer contributions in the case presented.
(iii) Any proposed variations arising from that review, will then be reported to, and if acceptable, approved by the Planning Committee.
(iv) A deed of variation of the applicable S.106 agreement be entered into or if applicable an applicable for the variation of a planning condition be submitted at the applicants/developers cost.

3.29 Having established the viability position of the scheme being presented the following options will be considered as a sequential approach for negotiations:-

<u>Option 1 - Deferred Payment by way of an Agreed Payment Plan</u>

This would still require the payment of the full amount of the previously agreed developer contributions, but on an agreed deferred basis

Option 2 - Phased Developer Contributions

This would require previously agreed developer contributions to be paid in accordance with an agreed phasing plan

In exceptional circumstances and only where significant planning gains are available, which are seen as a priority for immediate delivery by the Council, Officers may consider a further option - a reduction in developer contributions .

The following situation may be possible however this list is not exhaustive.

- To support regeneration initiatives.
- To support developments in accordance with conservation area initiatives and appraisals.
- To provide affordable housing where it is needed and supported by the Borough Council and transferred to a RSL.
- Where schemes are left half built and to the detriment of visual amenity and subject to formal administration.
- To secure the delivery of 5 year housing supply.
- All requests would be assessed on their own merits

3.30 To reflect possible changes in economic conditions, the use of the protocol will be reviewed in February 2010.

3.31 Economic viability will be only one of the material considerations taken into account in reaching a decision. It will also be important to consider why a development that is not viable, unless negotiated 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.

4 FINANCIAL IMPLICATIONS [IB]

4.1 As part of the revised protocol officers will seek independent verification of the development costs. The costs of independent verification will be paid for by the applicant. The costs for preparing and concluding an amended agreement will also be paid for by the applicant.

4.2 Council Officers will evaluate any independent verification as part of any renegotiations

4.3 There will be no additional costs for the Council. Any officer time allocated to dealing with amendment will be met from using existing resources.

4.4 Reductions in contributions will impact on the Council's ability to fund infrastructure improvements arising from the development.

5 **LEGAL IMPLICATIONS [MR]**

Section 106 of the TCPA 1990 permits the modification or discharge of a planning obligation at any time by agreement. This will require the consent of all the parties to the original agreement.

6. **CORPORATE PLAN IMPLICATIONS**

This document contributes to Strategic Aim 3 of the Corporate Plan: Safer and Healthier Borough.

7 **RISK IMPLICATIONS**

It is the Council's policy to proactively identify and manage significant risks which may prevent delivery of business objectives.

It is not possible to eliminate or manage all risks all of the time and risks will remain which have not been identified. However, it is the officer's opinion based on the information available, that the significant risks associated with this decision / project have been identified, assessed and that controls are in place to manage them effectively.

The following significant risks associated with this report / decisions were identified from this assessment:

Management of significant (Net Red) Risks		
Risk Description	Mitigating actions	Owner
No contribution (lower input to capital programme). If the Council decide to reject the proposals it is likely to stall development sites, impacting on investment and prosperity of the Borough.	Apply to draw upon Government Grants when available.	Tracy Darke
Reduced contribution (lower input to capital programme).Reduced contributions results in lower investment in the capital projects.	Reduce expectations on the level of investment. i.e. for play and open space, ensure land is provided but reduce the amount of equipment.	

8 **RURAL IMPLICATIONS**

- Financial implications of implementing throughout the Borough;
- Impact on Parish Councils

9 **CORPORATE IMPLICATIONS**

- Financial implications on the Capital Programme.

Background papers: Homes and Communities Agency Good Practice Note: Investment and Planning Obligations, Responding to the Downturn

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