GOOD PRACTICE GUIDANCE NOTE

S106 AGREEMENTS + COVID-19

June 2020

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Planning Officers Society

POS is the single credible voice for public sector planners, pursuing good quality and effective planning practice. The Society's aim is to ensure that planning makes a major contribution to achieving sustainable development in ways that are fair and equitable and achieve the social, economic and environmental aspirations of the community.

We operate in three main ways:

- As a support network for planners in the public sector
- As promoters of best practice in planning
- As a think tank and lobbying organisation for excellence in planning practice

Where we can, we will work across the sector to craft proposals that have widespread support from the people who operate the planning system at the coalface: landowners, developers, agents, legal, local authorities and politicians. We will be both radical and practical as we look for solutions to tangible problems that will make a real difference to crucial areas. Our objective is to improve the planning system to enable it to deliver its key aim of sustainable development. It is within this context that we have published this advice note so our members can improve what they do.

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1 Introduction

1.1 According to the Chancellor of the Exchequer we are already in recession and it is likely to get worse before it gets better. The Treasury are however predicting a relatively rapid recovery (Bank of England Monetary Policy Committee Report May 2020) albeit with a high degree of uncertainty given the unique circumstances. This is not an unreasonable expectation given that the causes of this recession are non-economic, unlike other recent recessions. The recovery should not be impaired by structural economic issues, but will be reliant on businesses being able to recover from the effects of the lockdown period. How the development market will react is as yet an unknown quantity, but there is an expectation that demand will be reduced for some time and with it, sales and starts on site.

1.2 There are already suggestions that S106BC should be reintroduced to allow requests for an subsequent appeals against S106 requirements for Affordable Housing. It is certainly very likely that Local Planning Authorities will receive requests to re-negotiate S106 agreements, to reduce the burden on development and help promote a revival in the market, particularly the housing market.

1.3 Local authorities should be taking a positive approach to measures to revitalise the economy and respond constructively to initiatives to deliver housing, however the need to deliver necessary infrastructure and affordable housing should also be properly considered and balanced.

1.4 This note is intended to give some help to LPAs in responding to requests to re-negotiate agreements and in processing new applications.

2 Deferring payments

2.1 Local Authorities should take a sympathetic approach to requests to defer payments where development has not commenced or stalled or where sales of completed units are not proceeding. Where deferral is agreed there should be clear triggers indicating when and to what extent they will be re-activated.

3 New agreements or re-negotiating existing agreements

NPPF and NPPG

3.1 The NPPF and NPPG remain the starting points in any discussions. Paragraph 47 of the NPPF requires ‘that applications for planning permission be determined in accordance with the development plan, unless material considerations indicate otherwise’. Paragraph 57 states:

3.2 ‘Where up to date policies have set out the contributions expected from development, planning applications that comply with them should be assumed to be viable. It is up to the applicant to demonstrate whether particular circumstances justify the need for a viability assessment at the application stage. The weight to be given to a viability assessment is a matter for the decision maker, having regard to the circumstances of the case, including whether the plan and the viability evidence underpinning it is up to date, and any change in site circumstances since the plan was brought in to force. All viability assessments should reflect the approach in national planning guidance, including standardised inputs, and should be made publicly available’

3.3 All applications or requests to re-negotiate S106 agreements which do not accord with the development plan should therefore be accompanied by a reasoned justification why there is non-compliance which will almost certainly need a viability assessment. It is highly likely that the market impact of Covid-19 will be cited as the change in circumstances justifying reconsideration. Local Planning Authorities should request viability assessments which are up to date, site specific and in accordance with the NPPG.

4 Viability Assessments

4.1 NPPG requires viability studies to set out the change in circumstances and specifically includes '…where a recession or similar economic changes have occurred'… it further states that any assessment should reflect the government's recommended approach to defining key inputs which are listed as gross development value, costs, land value, landowner premium and developer return.

4.2 In the early stages of an economic downturn, reliable evidence of sales values is going to be difficult to find. The starting point will therefore be the pre-Covid position, with an allowance for market change. This will need to be based on what evidence is available at local, regional or national level, modified where necessary by expert advice. This will remain to an extent speculative in the early stages and should be treated as such.

4.3 As with GDV, evidence of changes in build costs will not be readily available in the short term. It will be for developers to provide what evidence they may have, eg in the form of tenders, if they feel build costs are changing significantly – up or down. Costs of policy compliant public benefits should be included in full as the starting point in any appraisal.

4.4 NPPG is very clear that 'under no circumstances will the price paid for land be a relevant justification for failing to accord with relevant policies in the plan'. Changes in circumstances therefore do not extend to the price paid for the site.

4.5 The two areas that the LPA will want to examine closely in determining its decision are the premium to be paid to the landowner and returns to developers. NPPG states that the premium to be paid to the landowner should provide a 'reasonable incentive for a land owner to bring forward land for development while allowing a sufficient contribution to fully comply with policy requirements'. During a downturn it follows that money available to incentivise sale would fall and that landowners might therefore delay bringing sites forward pending economic recovery. This situation can arise on sites without permission, but also where sites have permission with an option agreement in place.

4.6 Returns to developers reflect the risk and comparative returns from other investments. In the short term with interest rates at an all-time low, and poor prospects in the investment market, comparative returns will be generally unattractive. The NPPG assumes that a suitable return should be 15-20% of GDV for the purpose of plan making, with a lower figure where affordable housing sales are guaranteed. In current circumstances, where all parts of the economy with few exceptions are seeing a major impact on profits, it is not appropriate for developers to continue to expect their returns to be maintained at pre-covid levels, particularly where this would be at the expense of reductions in public benefit. Development proceeding at much lower profit levels will still produce a positive return for all parties involved. LPAs should therefore ensure that viability assessments show a realistic approach to current market conditions where the public benefits are not sacrificed to maintain unrealistic profit levels.

5 Review Mechanisms

5.1 Whether through re-negotiation or new permissions, LPAs accept that viability cannot be achieved with full policy compliance at the outset, review mechanisms can be included in S106 agreements. The review mechanism should be clear about how policy compliance can be achieved over time. NPPG states ‘Review mechanisms are not a tool to protect a return to the developer, but to strengthen local authorities’ ability to seek compliance with relevant policies over the lifetime of the project’. This approach can be helpful in allowing development to proceed while protecting the delivery of public benefit as required by the relevant plan policy.

4 June 2020