

**OVERVIEW AND SCRUTINY MANAGEMENT COMMITTEE**  
**8<sup>th</sup> SEPTEMBER 2006**

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**SECTION 106 AGREEMENTS**

**Purpose of Report**

1. To set out the County Council's position on the requirement for planning agreements related to applications determined by the local planning authorities, with particular regard to the impacts on decision times.

**Background**

2. The Chairman made a request for an information report and the Committee agreed to add it to its work programme. This report sets out the process followed by the County Council in putting together Section 106 agreements including the County Council's working relationship with the Planning Departments of the District Councils, the involvement of Legal Services, and any timescales/targets/performance indicators which are used.

**Process**

3. The planning agreement process is currently influenced substantially by the Education and Transport interests of the County Council. The body of this report will focus on the highway authority approach to planning agreements, which tend to cover a wider range of issues than agreements in relation to education matters. Education issues are covered in **Appendix 1** to this report.
4. The County Council is a strategic planning authority and therefore able to enter into agreements under the provisions of Section 106 of the Town and Country Planning Act 1990.
5. The highway authority is a statutory consultee in the planning process for those applications that fall under the provisions of the Town and Country Planning (General Development Procedure) Order 1995, Article 10.
6. All applications are considered on their merit. In those cases where there is an identified need for transport interventions to mitigate the impact of development, requirements for mitigation will normally be sought either by way of planning conditions or through a planning obligation (Section 106 agreement). Guidance on the use of conditions (Circular 11/95) and planning obligations (Circular 05/2005) is issued by Central Government and informs the way in which the highway authority approaches decisions on the options available.
7. The highway authority recognises that there are pressures on the local planning authorities to determine planning applications within defined target periods (generally 8 weeks, but extended to 13 weeks for major applications). Pressure to determine applications within the target period has been more intense in the past few years, when performance management has been a primary focus of Government. This pressure has been reinforced through the mechanism (Planning Delivery Grant) that rewards planning authorities that can demonstrate good performance. Planning Delivery Grant can be worth a substantial amount to an individual authority.

8. Local planning authorities prefer the use of planning conditions to secure the requirements of the development. These can be rapidly drafted and agreed (if appropriate) with the applicant and presented to Committee in detail. The highway authority has traditionally favoured the use of planning agreements because of the enhanced level of security they offer (legal strength for enforcement, flexibility, no ability to appeal within the first five years). Typically, those applications that are to be permitted subject to an agreement will be presented to the Planning Committee where only heads of agreement are usually presented. There will then follow a process to draw the agreement together on the basis of such heads and further input from the technical side of both (all) parties. The lawyers involved on both sides will oversee the drafting, taking instructions, as appropriate, from technical officers in relation to desired outcomes and outputs from the agreement.
9. The actual process of concluding a legal agreement is not generally time determinate. Whilst the County Council has a standard form of agreement that constitutes the basis of most agreements made, these are seldom immediately accepted by the developer's solicitors. There is not necessarily a defined area where disagreement might emanate. The process can therefore be drawn out and frustrating for all parties concerned. There are certain areas that are critical for the County Council to protect itself against, such as ensuring indemnity against claims arising from the developers proposals – this is an area that is clearly one of concern to the developer, as the consequences cannot readily be costed. Uncosted implications are always an issue of concern to developers, who are not generally prepared to accept an 'open cheque book' commitment.
10. The County Council does not keep a register of the time it takes to conclude legal agreements, but it is accepted that long delays can occur, and these can be attributed to any number of factors. However, it is not the case that the County has a record of complaints about time taken on agreements being down to mismanagement. Most delays are caused by the need to resolve issues between the parties. It is also pertinent to note that District Councils also experience delays in securing agreements, eg Hilpertown Relief Road - resolution to grant permission on 28<sup>th</sup> January 2005, agreement signed 21<sup>st</sup> August 2006.
11. Since the introduction of the Planning Delivery Grant, the local planning authorities and the County Council have an unwritten understanding that Grampian or negative conditions will be used where such conditions can achieve the objectives sought. However, if breach occurs on a highway related issue, then the County has to rely on the District Council to take enforcement. It will not always be the case that priorities to address breach will be coincident.
12. There are circumstances where agreements will be the only sensible approach in relation to making applications suitable for approval. For example, it is not generally considered that arrangements for the payment of financial contributions required to meet objectives (eg traffic regulation, traffic signals upgrades) by way of condition is acceptable. Whilst it might appear to be axiomatic that a standard agreement for contributions would be a quick solution, even simple standard drafts are frequently challenged by solicitors on matters such as pay-back arrangements, interest payments, defined use of contribution, time limitations etc. In reality, though, simple agreements for contributions alone are few and far between. Most agreements cover an array of issues that cannot necessarily be incorporated into workable conditions.

13. The Department for Communities and Local Government has recently issued a model planning obligation (Section 106) agreement prepared by the Law Society's Planning and Environmental Law Committee for use by all parties involved in the planning obligations process to adapt to their needs. It remains to be seen whether the adaptation process and the availability of the document will reduce the time taken to achieve agreement.
14. The Government has recently consulted on the possible introduction of a Planning Gain Supplement, which might be used, in effect, as a land development tax. The consultation document suggests that there should be developed a system of defined infrastructure payments to which sites should contribute. Whilst transport might feature as a pot to which contributions could be directed, it appears that the ability of highway authorities within two tier arrangements to collect contributions for off-site transport improvements could be curtailed. It is too early in the process to second guess the possible outcome of the consultation, but there is concern that future opportunities to mitigate transport impacts will be detrimental to the interests of the County Council.

#### Relationships with District Councils

15. Advice given on planning consultations to the local planning authorities is offered on the basis of protecting those interests for which the County Council has responsibilities. Sometimes that advice is not wholly consistent with the objectives of the local planning authority, and the local planning authority has to make planning decisions on this basis. There are times when the County Council seeks planning mitigation works with which the Planning Committees might not necessarily agree. Sometimes there can be conflict when 'planning gain' sought by various consultees becomes unaffordable. In such circumstances the Committees will be guided by their planning officers as to the priorities that should be considered. In some circumstances Planning Committees will challenge the advice offered by consultees. All of the foregoing can have an impact on the relationship between consultee and planning authority. The single most important issue, however, generally relates to the timely provision of information between the parties. Whilst there is no objective measure of the nature of the relationship between the County and Districts on planning matters, there does not appear to be any solid evidence to suggest that there is a problem. Indeed, a review of the service undertaken in 2004 concluded as follows:

*'District Council planning officers have expressed a general view that there are good working relationships with the Transportation and Development Group but would like to see the following:*

- *consistent and high quality responses on applications which are not necessarily forthcoming from the WCC Divisional Offices;*
- *Faster response times on applications particularly in relation to target applications so that response deadlines can be adhered to, good performance indicators achieved and delivery targets met; ... ..*
- *Agreement where possible on the use of planning conditions rather than S106 Agreements where improvements are required to avoid extra work and to keep to response deadlines.*

### The Involvement of Legal Services

16. Some years ago nearly all planning agreement work was undertaken by in-house legal staff. However, in recent years much of the work has been outsourced to private sector solicitors, at no additional cost to the County Council, in that their fees are paid by developers. The use of external staff has been constantly under review, particularly with regard to the quality of service provided, the adequacy of the client/solicitor relationships, and the ability to turn around agreements in appropriate timescales. A recent decision to appoint an in-house planning specialist lawyer will have a bearing on the balance of in-house/externalised work undertaken. The Legal Services' first responsibility is to the client, the County Council. Time constraints will be a secondary consideration compared with protecting the County Council's name in the drafting of the agreement. There is some potential, therefore, for the drafting process to undermine the local planning authorities' turn-around statistics. This appears to be a conflict to which no universal solution has been found.

### Target times of the County Council

17. The highway authority has a duty under the provisions of Section 54 of the Planning and Compulsory Purchase Act to respond to planning applications and pre-application enquiries. The target for responding is 21 days from the receipt of information required to make a substantive response. Each year the Council has to report to the DCLG on its performance. Response times for the year to the end of March 2006 were 98% in relation to planning application responses to District Council and 88% in relation to pre-application enquiries.
18. The requirement for a Section 106 agreement does not necessarily undermine the County Council's targets, but can impact on the Districts' decision time targets. The County Council does not set itself specific targets for the completion of planning agreements, as the ability to succeed rests only partly in its hands. Where three or more parties sign up to agreements, the process can be further frustrated. It is not considered to be appropriate to set time targets for such work, but professional ethics dictate that unreasonable delays should be avoided and that work should proceed in a diligent and professional manner.

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**The following unpublished documents have been relied on in the preparation of this Report:**

None