

**Section 106 – Time for Review?
RTPI Networks' Event
Bristol Council Offices, 27th March 2009**

Information Note:

This information note has been compiled following the RTPI Networks' event "Section 106 – Time for Review?"

The RTPI would like to thank the speakers, Gary Collins, Major Scheme Co-ordination & Enforcement Manager Planning Services at City Development Bristol City Council, Chris Howarth, Partner at Alder King Property Consultants and Rynd Smith, Director Policy & Partnerships at the RTPI.

This note should be read in conjunction with the slides from the event.

This note is solely a report of the discussions that took place at the event. Appropriate legal advice should be sought on any proposed changes of approach towards s106.

On 27 March the RTPI Networks debated the future of s106 Agreements at a Network event in Bristol which brought together public and private sector planners with representatives from the wider property and development industry.

Rynd Smith introduced the session, setting out the reasons why this has become an important topic and needs addressing by all stakeholders as a priority. The turbulent economic times and uncertainty about the duration and effects of the recession on the development sector has resulted in increasing calls from developers for the renegotiation of s106 Agreements which are no longer viable due to the downturn. However, caution is needed in the renegotiation of s106 Agreements. If the Agreements had been in compliance with [Circular 5/05](#) they should only have provided for gain necessary to ensure that the development was capable of receiving planning permission. A suggestion that some of this gain could be negotiated away might indicate that either the original Agreement had not followed the Circular advice, or that an in principle unacceptable development would now take place.

There is much uncertainty around the current economic climate however recent predictions are giving consideration to re-setting values in the development sector for a considerable period to come. It is therefore vital that consideration is given not just to short term measures but also to longer term economic recovery and the role of s106 in that recovery.

The opening proposition was put by Gary Collins of Bristol City Council. Within Bristol there has previously been a high demand for mixed use development with

a large residential element. However developers are now asking the Council to review the residential element of approved schemes where it is no longer viable. Despite the recession the City Council has to deliver in many areas including affordable homes, the code for sustainable homes, sustainable communities, high quality places etc.

The City Council has agreed an approach with the local property sector, aiming to reduce the burden of some existing planning conditions and s106 Agreements in the hope of maintaining delivery on some key schemes. Actions taken by the LPA included a review of the uses granted permission in mixed-use schemes, re-considering the overall package and timing of s106 planning contributions, re-considering whether pre-commencement planning conditions really need to be discharged before commencement and examining the timing of development.

The LPA is open to dialogue and there is a willingness to be flexible, but there are caveats to having an open dialogue. Developers asking the LPA to review previous agreements are required to submit an open book viability report along with a commitment to cover the Council's costs in obtaining expert opinion on revised viability information. Ultimately if a new scheme is being proposed then a new application is required in order to allow stakeholders and elected Members to engage in this process.

Chris Haworth of the Bristol Property Agents Association welcomed much of the action being taken by Bristol Council and gave a picture of the current situation from a developer's perspective. The current economic climate is very different to what we have seen before. This is a world recession resulting in a correction in property markets and values. Many schemes approved before the start of the recession are now no longer viable.

Chris felt there is a general reluctance from LPAs to reduce the contributions required and there is a reluctance to deliver. As a result major developers are going to appeal on the issue of viability. Chris called for a re-assessment of the need for 100% of the gain from s106 to be realised up front, which could lead to the loss of beneficial development, putting further pressure on developers.

The debate was opened up ...

Affordable housing

Many s106 Agreements were entered before the downturn and developers are finding that some of those schemes are no longer viable. As a result developers are now proposing more affordable housing on sites with previous approvals to make the site viable within the current climate.

Delegates felt that while there is a need for affordable housing it is important that it is located in the right places and not used as a tool to get development off the ground.

What should/can development pay for?

In a growing economy there is the opportunity to ask for a variety of provisions through s106, this has resulted in an expectation that the development will provide or pay, but in the current climate this is not possible if schemes are to be viable. Do we need to look at other ways that society can pay for provisions that were previously provided by s106? If we don't look at other ways of achieving this, will development stop completely?

There are concerns that smaller development companies are under real pressure at this time with many businesses at risk of bankruptcy. This could leave a build and bust situation where the community loses out if the provisions in the s106 Agreement are not carried out.

Local circumstances

Delegates were clear that there are already a number of different practice examples around the country and it is important to encourage local innovation and innovative new ideas.

It is important to give consideration to how we got where we are and where we go from here, tailoring approaches to local circumstances.

Overage, clawback and Circular 5/05

There is a certain amount of uncertainty around s106 because what may be viable today could become unviable in the future.

Given the issues around the renegotiation of s106 Agreements in relation to Circular 5/05 attendees started to consider the timing as opposed to the nature of contributions under s106. A local planning authority could decide to defer payment under an agreement and hence delivery of a component of gain, without conceding that the gain itself was unnecessary, or that development would be unacceptable in the long term.

Can clawback be the solution? If certainty is what we are striving for can clawback help us achieve this? The majority of delegates supported taking out the s106 value at the end of the process or deferring payments where appropriate.

It should be recognised that the objective of deferred payment is to provide relief in the here and now to enable schemes to proceed. Appropriate legal advice should be sought on any proposed changes of approach towards s106.

Delegates felt that there was confusion around some of the language/terms used;

- Clawback is a common term but instead it should be articulated as "future profit to set against a deferral of payment".

- Overage should be referred to as a “deferred payment”.

Community Infrastructure Levy (CIL)

There was some discussion around the use of CIL. Whilst some support the use of CIL others see it as restrictive and a possible blockage to recovery.

It was noted that some local authorities are very poor at spending s106 money and this needs to be addressed.

Working in partnership

We are in a situation where land values aren't high enough to absorb a reduced payment from the Agreement, but this is a difficult message to get across to communities and members. Both communities and members see the value in land and don't necessarily understand the financial pressures that developers are under. Communities may feel that if a development is not viable then too much money was paid for the land. The practice of developers and landowners “writing down” the value of their landholdings was reported as being more common in the current economic climate.

There is a need for all stakeholders to understand the pressures and challenges and recognise the need to compromise. An ongoing dialogue is essential. There was support for the open book system. The biggest frustration around s106 is uncertainty. There is a need for clarity up front so all parties are aware of what is required etc.

Early consideration

The development plan offers an opportunity to consider the requirements of an Agreement at a very early stage. The Agreement could then be linked to the evidence base and transparency of the development plan system - a site specific approach.

Conclusions

There were many different views about the lawfulness and appropriateness of precise approaches to renegotiation. Most participants emphasised the need for a phase of flexibility, innovation and good practice sharing.

The majority of delegates supported deferment of payment through s106, however there are different solutions depending on scale. Site by site and individual reviews may be the short term solution for some LPAs. For the long term, many in the debate suggested that the recent change to our economic circumstances requires a re-assessment of the balance of providing infrastructure, taxation revenue and land values. Some attendees felt that we are returning to a time when the public sector and public expenditure provide a greater share of necessary development infrastructure.

Transparency is needed and an open dialogue with all stakeholders is essential. LPAs have an important role in thinking about their own situation and conveying messages to all stakeholders including members, communities, landowners and developers.