

TC_V1/18-02180

Sandra Donaldson
Economic Growth and Strategic Planning
Gloucestershire County Council
1st Floor
Block 4
Shire Hall
Westgate Street
Gloucester
GL1 2TP

21 Prince Street
Bristol BS1 4PH

0370 777 6292
info@rapleys.com
rapleys.com

LONDON
BIRMINGHAM
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18 May 2020

Dear Madam

CONSULTATION ON THE GLOUCESTERSHIRE LOCAL DEVELOPMENT GUIDE REFRESH 2020

These representations are submitted on behalf of Crest Nicholson Strategic Projects ('Crest') in response to the Gloucestershire Local Development Guide Refresh (April 2020) document, which has been issued for consultation. The comments are submitted with reference to Crest's interests in the ongoing development of the Hunts Grove new community and in respect of the Hunts Grove Extension allocated in the Stroud District Local Plan (November 2015). They also apply generally to the provisions set out in the draft document and are made with specific reference to the limitations imposed on the use of planning obligations prescribed by R.122 and R.123 of the Community Infrastructure Levy Regulations 2010 (As Amended), namely that for any obligation to constitute a basis for granting planning permission it must be:

- **Necessary** to make the development acceptable in planning terms;
- **Directly** related to the development; and
- **Fairly and reasonably** related in **scale and kind** to the development.

Any requirement for the payment or provision of planning obligations in connection with any development proposal must satisfy these tests and should be sought only on the basis that failure to provide any such obligation would constitute a reasonable and robust ground on which to refuse permission. This test should be applied objectively to every request for the provision of obligations and should inform the document throughout.

Comments are made on matters that are considered to require revision or adjustment only and are submitted in the order they appear in the document. Where no comment is made it can be assumed that no adjustment to the content of the document is considered by Crest to be necessary in the context of their interests and subject to the general comments made in the following paragraphs addressing the Foreword to the Guide.

Foreword

Paragraph 2 of the Foreword implies that all development should provide 'support' for social and economic infrastructure; the implication being that S106 obligations should be levied on all development irrespective of existing capacities or headroom that may already exist. It will not always be 'crucial' that such support is provided to make development acceptable in planning terms. The subsequent paragraph explains the position in respect of the Regulations adequately; paragraph 2 should therefore be deleted.

Paragraph 6 excuses the formulation and cohesiveness of the document and advises that the draft can only operate as an interim policy statement, pending greater clarity being provided by Government on operation of the obligations regime and the application of CIL. It is also indicated (somewhat opaquely) that the County Council has prepared the document independently of its partner planning authorities within Gloucestershire. Acknowledging this position GCC intends to work with the districts and borough as a group to bring forward an 'improved, co-authored guide as soon as practically possible'; the intention being within 12-months of this interim version being published. This sits somewhat uncomfortably with the preceding paragraph, which advises that following the consultation and consideration of the draft by GCC Members the objective is to adopt the Guide and treat it as a material consideration in the determination of planning applications thereafter.

It is worth stating at the outset that the Guide as published for consultation is unduly long and contains too much extraneous information; it is also rather repetitive. It would be appropriate taking on the comments relating to the lack of succinctness and cohesiveness, instead to simply explain with suitable brevity the strict requirements set by the CIL Regulations and subsequently concentrate only on service areas where specific local circumstances will apply, such as the demand for school places and the approach to be taken.

With these caveats issued at the beginning of the document it is inevitable that where any conflict arises in respect of the application of the guidance contained within, a developer will cite the Council's highlighting of the inadequacies of the Guide and argue that its content should be afforded only limited weight. In admitting that it is not wholly fit for purpose and will be subject to an almost immediate review, given the timeframes identified, it would be more sensible to continue to operate using the extant Guide and concentrate efforts on preparing a revised version that reflects a consensus of the views of local authorities within the County. This would then also have the advantage of incorporating any revisions to the operation of CIL and the S106 obligations regime that are introduced nationally in response to the current Covid-19 crisis.

Inevitably, any obligations sought by the County Council in accordance with this Guide will be subject to the appropriate tests set out within the CIL Regulations; therefore, it is questionable whether there is any need to issue an interim policy statement.

Notwithstanding this position comments are provided on the remaining content.

Introduction

Paragraph 3 alludes to the enduring conflict that arises when any S106 negotiation is embarked upon; namely that requests are made for contributions towards a range of infrastructure items designed to meet the 'aspirations' of an extensive range of different service providers from within various Council and other public sector bodies. The inference is that these aspirations will need to be tempered during periods of economic downturn. The pretext of this paragraph is flawed insofar as any requests for infrastructure contributions should be limited to those that are necessary to make development acceptable and without which there would be a robust and defensible reason to refuse permission, irrespective of the buoyancy of the economy. This should always be the starting position when seeking infrastructure contributions; necessity rather than aspiration is the appropriate epithet to apply to such discussions. On the matter of viability, this then becomes a matter of planning judgement as to the balance between any impact that would arise if such infrastructure is not provided, against other benefits that would accrue through provision of development. This is an important distinction that should permeate the whole document and approach to the seeking of S106 contributions. Any failure to reconcile this conflict succinctly and unambiguously will diminish the weight that can be attribute to the Guide.

In this context it is important to note that ‘aspirational infrastructure’ may of course be sought by service providers, and in cases may be offered by a willing developer, but where such is not necessary its provision can have no bearing on any decision to grant planning permission, as to admit to such would be *ultra vires*.

Developer Contribution Protocol

Paragraph 56 outlines the principles that will apply to the County Council’s approach to seeking contributions, which are reasonable. However, the first bullet point inserts the term ‘sustainable’ in place of the standard test approach of ‘necessary in planning terms’. While it may be argued that the term is seeking the same outcome it is used widely to mean a plethora of different things; it would be prudent to use the terminology adopted in the Regulations in respect of this criterion, which underpins the whole of the planning obligations system.

Paragraph 59 indicates that the County Council will periodically review the data that informs operation of the obligations regime to ensure that the basis on which contributions from development are sought remains up to date and fit for purpose. This approach is supported. Such a response would provide an adequate methodology for reviewing aspects of the Developer’s Guide now, without the need for a full interim review as is countenanced. The provision to consider and potentially accept data and evidence provided by developers that is specific to individual schemes and the impact they will have on infrastructure is welcomed. The abiding principle should be to evaluate the impact that development will have on the capacity of infrastructure necessary to support growth and to plan accordingly to ensure that any negative externalities arising from development are mitigated. A one-size fits all approach should not be applied, and the commitment to consider the best available information is supported.

Paragraph 68 states that it is not unreasonable for S106 contributions to cover the cost of maintaining infrastructure once provided. There is limited guidance within NPPG on the acceptability of adopting this approach and caution should be applied to any practice of seeking maintenance payments for the upkeep of land or facilities on the basis that such costs will often be covered by other funding mechanisms, such as Council tax. Ongoing maintenance and management, where responsibility rests with a local authority or other public body, should transfer to that body and the funding arrangements applicable to it as a matter of principle. It is accepted within the Guide that it will not be reasonable to seek obligations where such are not in accordance with the statutory tests, or where any allegation of ‘double-dipping’ could be applied.

S106 (12) of the principal Act provides that planning obligations may be charged in accordance with Regulations that set out the nature of sums that may be sought in connection with the development of land. The Regulations in this case are the 2010 CIL Regulations (as amended), which make clear that obligations may be sought only in accordance with the three statutory tests and should not themselves constitute a reason for granting planning permission. In clarifying this position R.123 notes that this consideration applies to the funding or provision of relevant infrastructure (as defined by S216 [2] of the 2008 Act), where ‘funding’ is defined as the provision of infrastructure, not its ongoing maintenance. Any practice of seeking payments for the ongoing maintenance of infrastructure should be examined extremely carefully.

Paragraph 76 lists the indexes that the County Council will apply to phased payments secured via S106 agreements. The Guide should note that the application of an index will need to be agreed with co-signatories and therefore the authority will not be the sole arbiter of which index should be applied in any individual case.

On the matter of viability paragraph 79 should include an undertaking to adopt a flexible approach also in terms of the range and scale of contributions that may be sought.

Providing for Pre-School Childcare

The Guide should adopt a flexible approach towards the provision of pre-school facilities in recognition of the fact that the provision of educational services at this level is spread across the public and private sectors and is in the majority of cases provided on a commercial footing. The Childcare Act 2006/2016 requires local authorities to take a lead role in facilitating the childcare market within the broader framework of shaping children's services in partnership with the private, voluntary and independent sector. Therefore, in many cases provision of pre-school capacity will be brought forward as part of a development proposal in direct contact with the service provider. In such circumstances the use of conditions to secure the provision of an appropriate level of infrastructure to address demands arising, that cannot otherwise be accommodated within the local area, will be the most appropriate response. Again, it will be important for the Guide to ensure there is enough flexibility in the operation of the contributions regime to avoid any risk of protracted and unnecessary discussions.

Paragraph 95 notes that there is 'an assumption' that where new primary schools are being provided pre-school childcare facilities will be incorporated; in this context reference is made to DfE advice *Securing Developer Contributions for Education 2019*, which 'expects' all new primary schools to incorporate nursery facilities. Once again it is important to acknowledge fully the foundation for such expectations and the extent to which discretion should be applied to these statements. The position outlined is not mandatory; the DfE document provides non-statutory guidance only for use by local education authorities during negotiations with housing developers on seeking funding towards the provision of educational infrastructure. The guidance has no statutory force and does not establish any firm requirements in this regard. Accordingly, while an assumption might exist that nursery facilities will form part of new primary-level educational infrastructure it is not incumbent on the developer to fund these facilities if alternative provision is secured to address needs generated by development.

Primary and Secondary Schools / Special Schools

Paragraph 99 introduces the notion of the proportionality of a contribution being relaxed where a requirement for a new primary school (for example) is generated. While the text accepts that the number of new school places required to be funded by a developer should be in line with the number of school-aged children that a development generates (excluding those that can be accommodated within existing schools), there is a clear indication that a minimum size of site for provision of a school will be sought, irrespective of the number of places required. This approach cannot be justified against the Regulation 122 tests.

There is an unjustified conflation of Regulation and non-statutory guidance within the Guide as drafted, which creates ambiguity that will ultimately lead to the protraction of discussions on what is and is not an appropriate starting point in seeking S106 contributions towards primary education infrastructure. The operating principles are established clearly by R.122 and there is no discretion in how these should be applied. Consequently, a development may be required through the provision of planning obligations to mitigate only the impacts arising from the development subject to the legal agreement. Accordingly, if a housing scheme generates around 200 primary-aged school children for whom additional school places are required a proportionate S106 contribution, related in scale and kind to the impact of the proposals, would be sufficient land and financial contributions to build a 1-form entry primary school (210 places). It would not be appropriate in scale and kind to require the developer to fund and provide land for a 2-form entry primary school, because that would exceed the scale of the impact requiring mitigation. In accordance with the provisions of R.123 of the CIL Regulations this could not be a material factor in determining whether to grant planning permission for the development, and as such could not satisfy the test set out at R.122. Such an approach is therefore ultra vires. Therefore, while the DfE may direct education authorities to provide new schools with a minimum of 2-forms of entry, it cannot direct responsible authorities to demand funding/land

for such a scale of provision from developers if schemes do not generate that scale of need. The Guide should be revised to make this position clear. In circumstances where additional land is sought to accommodate a larger school the value attributing to the additional land taken should be reflected in a lower level of financial contribution towards school places to ensure there is no contravention of the Regulations.

Commencing at paragraph 101 the Guide addresses Pupil Product Ratios (PPR), which are set out at Appendix 2. Crest, in association with Redrow and Taylor Wimpey, was responsible for commissioning further research into the numbers of pupils generated by large-scale new housing developments within Gloucestershire in 2019. This research supplemented and expanded work commissioned by the County Council in 2018. The same research company and methodology were deployed in each case, with the objective being to widen the sample area to increase the robustness of the evidence produced. In so doing the initial sample of two large-scale urban extensions was increased to seven and the area of coverage expanded from two to five of the district/borough areas.

This work revealed that a ‘one-size fits all’ approach based on pupil yields at the various levels of educational provision is not sufficiently accurate to be applied rigidly across the board. The Appendix 2 PPR proposed for primary, secondary and post-16 pupils is subject to significant variation depending on the type of dwellings provided within a development. The proposed figures are skewed too far towards an assumption that developments will be dominated by 3-4 bedroom properties, which will generate higher numbers of school-aged children, and do not give sufficient consideration to the much lower incidence of school-aged children that will live in two-bedroom properties.

The table below (13a) is taken from the Cognisant Population Forecasting Study commissioned by the County Council/Crest/Redrow/Taylor Wimpey, which shows that the ‘blended’ figures are unduly biased towards a higher PPR that in many cases will not reflect the actual impact of a development.

Table 13a – PPR Across all Sizes of Dwelling

	No. of Bedrooms in Dwelling			
	1	2	3	4+
Total Number of Pre School Children	0.03	0.28	0.33	0.31
Total Number of Primary School Children	0.00	0.24	0.44	0.54
Total Number of Secondary School Children	0.00	0.07	0.20	0.32
Total Number of Post 16 Children	0.00	0.02	0.12	0.17

The Guide should acknowledge that the evidence commissioned to support the PPR refresh shows significant variation in pupil generation as a factor of dwelling size and include an express provision that where development proposals are specific with regard to dwelling schedules the Council will adopt the PPR within Table 13a. Where developers are unable to commit to dwelling schedules through the application process a default PPR in accordance with the approach outlined at Appendix 2 may be used, but this should be blended to more accurately reflect the findings of the Cognisant research and any SHMA objectives committed to locally with regard to appropriate/target dwelling mixes for development. The flexibility alluded to within paragraph 107 of the Guide should be adopted during all negotiations.

The assumption set out at paragraph 109 regarding school expansion land is subject to the comments above regarding appropriate site size for new school provision. Development proposals are required only to mitigate impacts arising from them and not to future-proof school expansion without adequate recompense.

The remaining sections of the Guide deal with a range of sectors and services in respect of which the County Council may seek planning obligations. It is necessary only to re-state that all such requests must meet the tests set out at R.122 of the CIL Regulations. Failure to comply with such will render any request for a contribution or other form of obligation unreasonable and therefore incapable of being taken into consideration in determining an application.

These comments are provided in a constructive spirit to assist in the formulation of a concise and effective Guide for use in the negotiation of planning obligations. The Guide as drafted is unlikely to provide an enhanced level of clarity or efficiency when negotiating on future applications considering the shortcomings highlighted within the Foreword to the document. It is recommended that the Council postpone publication and concentrate efforts on reviewing the extant version of the Guide in consultation with its local planning authority partners to produce a version that, on its own terms, is suitably concise, effective and fit for purpose. In the meantime, there is facility to review aspects of the guidance to reflect more up to date information that should in any event inform negotiations in the context of the statutory tests set out within the CIL Regulations.

Yours sincerely,

Tony Clements

Tony Clements (May 18, 2020)

Tony Clements

BA (Hons) MCD MRTPI

Partner - Town Planning

Tony.clements@rapleys.com

07768 046616