



Report No: **39/2011** Public Agenda Item: **Yes**

Title: **Planning Contributions and Affordable Housing Supplementary Planning Document: Threshold for Contributions**

Wards Affected: **All**

To: **Council** On: **24 February 2011**

Key Decision: **No**

Change to Budget: **No** Change to Policy Framework: **No**

Contact Officer: **David Pickhaver**
☎ Telephone: **01803 208814**
✉ E.mail: **david.pickhaver@torbay.gov.uk**

1. What we are trying to achieve and the impact on our customers

- 1.1 This report recommends removing the £5,000 minimum threshold for developer contributions. This is intended to ensure:
- Developments contribute fairly to the impact that they have on local infrastructure etc.
 - Applicants for planning permission are treated fairly and consistently
 - Legal requirements are met by referring to “deferred contribution” rather than “overage” and “clawback.”

2. Recommendations for decision

- 2.1 That paragraph 6.5 of the Planning Contributions and Affordable Housing Update and Mitigation Paper 2010 be revised to read:

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“Smaller developments must also contribute towards mitigating any adverse impacts they may have, individually and collectively, on Torbay. Consequently there is no minimum threshold for contributions. This approach also avoids creating perverse incentives, or unintended consequences (such as artificial division of planning units), which could result in no contributions towards mitigation of adverse impacts. Due to the cost of drafting and monitoring S106 Agreements, applicants for smaller schemes, specifically those where the contribution would be less than about £5,000 will be encouraged to pay the contribution before grant of permission in exchange for an agreement by the Council to return these sums in the event that development does not proceed. In seeking financial contributions from smaller schemes, regard will be had to the need for them to be reasonable (as per Circular 5/2005), and the need to avoid imposing undue costs on businesses. In addition, regard will be had to whether the application is a standalone scheme or affects part of a larger planning unit (e.g. a block of holiday apartments).”

- 2.2 That the first sentence of Paragraph 4.19 of the **Interim Guidance on Principal Holiday Accommodation Areas (March 2010)** be deleted, as will any other reference to the £5,000 threshold.
- 2.3 That the principle of charging smaller developments for a fair proportion of the infrastructure for which they create a need, be incorporated into the emerging Community Infrastructure Levy.
- 2.4 That all references to “overage” of “clawback” be changed to read “deferred contribution”.

3. Key points and reasons for recommendations

- 3.3 Planning Contributions (also called S106 Agreements and Planning Obligations) are a major way in which development contributes to the infrastructure and other community needs that it creates. S106 Obligations are therefore closely linked to Community Plan objectives.
- 1.2 The Planning Contributions and Affordable Housing Supplementary Planning Document was last updated in June 2010. This update was produced to soften the impacts of planning contributions / affordable housing policy during the market downturn and recovery. The update includes a provision whereby contributions will not be sought when they would be less than £5,000.
- 1.3 Several recent applications have revealed an unintended consequence of the revised guidance, namely an incentive to sub-divide planning units to avoid liability for contributions. A key example is where applications are sought to remove holiday occupancy conditions on individual apartments, rather than an entire block.
- 1.4 This report recommends closing the ‘loophole’, by removing the £5,000 threshold. It is estimated that, over the next three years, this could generate about £250,000 per annum.
- 1.5 It is recommended that this should be applied on applications submitted after the date of the Full Council meeting. The Council could, based on legal advice, seek contributions (below £5000) from applications that have not yet been determined, but were submitted before Full Council meeting. It is estimated this would generate

about £37,500 revenue. However, this could be seen as inconsistent and could result in criticism of the local planning authority from the Ombudsman.

- 1.6 S106 contributions are sought to mitigate the impact of development or pay for infrastructure needed as a result of it. The 2010 Update contains a clawback/overage arrangement where contributions are reduced due to viability problems. Legal advice is that this terminology could be interpreted as an (illegal) tax on developer profits, and should be changed to “deferred contribution”.

For more detailed information on this proposal please refer to the supporting information attached.

**Les Crump
Executive Head of Spatial Planning**

Supporting information to Report 39/2011

1. Introduction and history

- 1.1 The Council adopted **Planning Contributions and Affordable Housing Supplementary Planning Guidance** in February 2008. The Council adopted a **Planning Contributions and Affordable Housing Update and Mitigation Paper** on 24 June 2010 in order to soften the impacts of s106 requirements and to encourage landowners / developers to continue to invest in the Bay in difficult financial circumstances. Paragraph 6.5 states that contributions would not be sought where they would be less than £5,000. This “threshold” was introduced partly to ease the burden on small businesses and partly to avoid costs of administering S106 contributions exceeding the value of those contributions. Note that this threshold does not have the status of development plan policy, but is practice advice on implementing the Local Plan.
- 1.2 Since the Update and Mitigation Paper was adopted, there has been Member concern, prompted by a spate of planning applications, that it creates a ‘loophole’ where applications for single units, rather than the entire building, fall artificially below the £5,000 threshold. An example is where applications are sought to remove holiday occupancy conditions on individual apartments, rather than the entire block.
- 1.3 In addition, Legal Services have advised that it can be cost effective to collect contributions where they are less than £5,000. In particular, administrative costs for financial contributions can be significantly reduced if the sums are paid before permission is granted (with agreement by the Council to repay the money in the event that the development is not carried out).
- 1.4 It is important that s106 contributions do not create undue burdens on small business. However, other clauses in the Update and Mitigation Paper seek to lighten the impact on business, for example by providing mitigation where valuable jobs are created in the Bay.
- 1.5 Section 106 contributions are levied to mitigate the impact of development or pay for infrastructure etc for which development creates a need. They are not sought in order to tax developer profit or betterment of land value. In the case of smaller developments, there will be individual and cumulative impacts, for example regarding open space and education, for which a contribution can and should be sought. To avoid s106 agreements being seen as a tax on developer profits, it is recommended that the phrases “clawback” and “overage” be replaced by the term “deferred payment”.

2. Risk assessment of preferred option

2.1 Outline of significant key risks

- 2.1.1 There is a need to ensure that seeking contributions does not impose an undue burden on businesses etc. The 2010 Update and currently recommended revised wording seeks to avoid this.
- 2.1.2 If an inconsistent approach is taken on planning applications, there is a risk of

legal challenge or the ombudsman finding against the council. The currently proposed change is intended to ensure consistency.

2.2 Remaining risks

- 2.2.1 There is a risk that applying the change of approach on the £5,000 threshold retrospectively to applications already submitted could be seen as inconsistent and attract complaints. For this reason it is recommended that the change be applied to applications submitted after the date of Council.

3. Other Options

- 3.1 Retaining a £5,000 threshold is an option. However this would not close the loophole of sub-dividing sites, and smaller developments would not contribute towards their individual and cumulative impact. A rough assessment is that about 100 applications per year would fall into the category of requiring a contribution of up to £5,000. Assuming an average of £2,500 per application, this could generate about £ 250,000 per year (for a maximum of 3 years when the current system of S106 contributions will be superseded).
- 3.2 The change could be applied retrospectively: i.e. contributions could be sought from all undetermined applications. It is estimated that this would generate about £37,500 revenue. (This calculation is based on around 15 relevant applications currently in the system, assuming an average of around £2,500 per dwelling (15X£2,500= £37,500). Legal services have advised that applying the change retrospectively would be technically legal, but is likely to attract complaints, possibly to the Ombudsman.

4. Summary of resource implications

- 4.1 The application currently affects about 6 applications, so the current loss of money is less than £30,000. However, over time removing the threshold could increase significantly the amount of money raised through contributions.
- 4.2 By 2014, the council will need to have a Community Infrastructure Levy in place, as there will be very limited scope to “pool” contributions after this time. Removing the £5,000 threshold establishes a principle that smaller developments should contribute to offset their impact on infrastructure etc.

5. What impact will there be on equalities, environmental sustainability and crime and disorder?

- 5.1 Planning Contributions are an important way in which the social and environmental impacts of developments are mitigated. Seeking to maximise contributions therefore allows more to be spent for the benefit of society, for example on open spaces, sustainable transport etc.

6. Consultation and Customer Focus

- 6.1 The Planning Contributions and Affordable Housing SPD (Adopted 2008) was the subject of extensive consultation in 2007-8.

7. Are there any implications for other Business Units?

- 7.1 A number of other Business Units' services are recipients of s106 contributions (e.g. sustainable transport, public open space, education and lifelong learning and safer communities).

Appendices

Appendix 1: Local Development Framework Working Party Report LDF/BP/2011/01: Planning Contributions and Affordable Housing Supplementary Planning Document: Threshold for Contributions (12 January 2011).

Background Papers: The following documents/files were used to compile this report:

Local Development Framework Working Party Report LDF/BP/2011/01: Planning Contributions and Affordable Housing Supplementary Planning Document: Threshold for Contributions (12 January 2011).

Briefing Paper to the Local Development Framework Working Party - 12 January

LDF/BP/2011/01

Planning Contributions and Affordable Housing Supplementary Planning Document: Threshold for Contributions.

1. Introduction

- 1.1 The Planning Contributions and Affordable Housing Supplementary Planning Document was last updated in June 2010. This update was produced to soften the impacts of planning contributions / affordable housing policy during the market downturn and recovery. The Update includes a provision whereby contributions will not be sought when they would be less than £5,000.
- 1.2 However, several recent applications have revealed an unintended consequence of the revised guidance, namely an incentive to sub-divide planning units to avoid liability for contributions. A key example is where applications are sought to remove holiday occupancy conditions on individual apartments, rather than an entire block.
- 1.3 This paper recommends the means to close that 'loophole', by removing the £5,000 threshold, whilst maintaining the fundamental purpose of the SPD.

2. Recommendations:

- 2.1.1 That the LDF Working Party recommends to Council that paragraph 6.5 of the **Planning Contributions and Affordable Housing Update and Mitigation Paper 2010** be revised to read as follows:

“Smaller developments must contribute towards mitigating any adverse impacts they may have, individually and collectively, on Torbay. Consequently there is no minimum threshold for contributions. This approach also avoids creating perverse incentives, or unintended consequences (such as artificial division of planning units), which could result in no contributions towards mitigation of adverse impacts. Due to the cost of drafting and monitoring S106 Agreements, applicants for smaller schemes, specifically those where the contribution would be less than about £5,000, will be encouraged to pay the contribution before grant of permission in exchange for an agreement by the Council to return these sums in the event that development does not proceed. In seeking financial contributions from smaller schemes, regard will be had to the need for them to be reasonable (as per Circular 5/2005), and the need to avoid imposing undue costs on businesses. In addition, regard will be had to whether the application is a standalone scheme or affects part of a larger planning unit (e.g. a block of holiday apartments).”

- 2.2 The first sentence of Paragraph 4.19 of the **Interim Guidance on Principal Holiday Accommodation Areas (March 2010)** will be deleted, as will any other reference to the £5,000 threshold.
- 2.3 The principle of charging smaller developments for a fair proportion of the infrastructure for which they create a need for be incorporated into the emerging Community Infrastructure Levy (see below).

3.0 Discussion

- 3.1 The Council's policy on s106 planning obligations is set out in the Saved Adopted Torbay Local Plan 1995-2011, specifically Policies H5 and H6 on affordable housing, CF6 "Community Infrastructure Contributions" and CF7 "Education Contributions". The Local Plan has legal weight in determining planning applications. The Supplementary Planning Document carries less weight than the Local Plan, but is still a material consideration in determining planning applications.
- 3.2 The Council adopted **Planning Contributions and Affordable Housing Supplementary Planning Guidance** in February 2008. The Council then adopted a **Planning Contributions and Affordable Housing Update and Mitigation Paper** on 24 June 2010 in order to soften the impacts of s106 requirements and to encourage landowners / developers to continue to invest in the Bay in difficult financial circumstances. Paragraph 6.5 states that contributions would not be sought where they would be less than £5,000. This "threshold" was introduced partly to ease the burden on small businesses and partly to avoid costs of administering S106 contributions exceeding the value of those contributions. Note that this threshold does not have the status of development plan policy, but is practice advice on implementing the Local Plan.
- 3.3 Since the Update and Mitigation Paper was adopted, there has been Member concern, prompted by a spate of planning applications, that it creates a 'loophole' where applications for single units, rather than the entire planning unit, fall artificially below the £5,000 threshold. An example is where applications are sought to remove holiday occupancy conditions on individual apartments, rather than the entire block.
- 3.4 In addition, Legal Services have advised that it can be cost effective to collect contributions where they are less than £5,000. In particular, administrative costs for financial contributions can be significantly reduced if the sums are paid before permission is granted (with agreement by the Council to repay the money in the event that the development is not carried out).
- 3.5 It is important that s106 contributions do not create undue burdens on small business. However, other clauses in the Update and Mitigation Paper seek to lighten the impact on business, for example by providing mitigation where valuable jobs are created in the Bay. In addition, the proposed revised wording in 2.1 above notes the need to avoid undue costs on businesses.
- 3.6 Section 106 contributions are levied to mitigate the impact of development or pay for infrastructure etc for which development creates a need. They are not sought in order to tax an element of development profit or betterment of land value. In the case of smaller developments, there will be individual and cumulative impacts, for example regarding education, for which a contribution can and should be sought.
- 3.6 Because the Update and Mitigation Paper was approved by Council and has financial implications, it is recommended that the proposed revision to remove the £5,000 threshold be reported to full Council.

4.0 Looking Forward

- 4.1 The Coalition Government has confirmed that it will retain the Community Infrastructure Levy (CIL). After 2014 the scope to seek s106 contributions will be much more restricted. Contributions will not be able to be pooled for more than 5 developments, and will need to relate to site specific matters rather than wider infrastructure. Councils will be able to charge CIL on new developments, which will help pay for wider infrastructure. Infrastructure to be funded through CIL must be identified in a Charging Schedule, which will be developed in parallel with the Core Strategy.
- 4.2 Together with New Homes Bonus, CIL is expected to be a significant way in which physical, economic and community infrastructure is funded. For this reason it is important that the principle of charging smaller developments for their impact is established.

Name of Author: David Pickhaver david.pickhaver@torbay.gov.uk 01803 208814

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