

## **Economy and Environment Overview and Scrutiny Panel**

### **Friday, 1 July 2016, County Hall, Worcester - 2.00 pm**

		<b>Minutes</b>
<b>Present:</b>		Mr P A Tuthill (Chairman), Ms P Agar and Mr M E Jenkins
<b>Also attended:</b>		Dr K A Pollock, Cabinet Member with Responsibility for Economy, Skills and Infrastructure Mrs E B Tucker  Nigel Hudson (Head of Strategy and Infrastructure), Andy Baker (Transport Planning & Commissioning Manager), Emily Barker (Strategic Planning and Environmental Policy Officer), Adrian Tuck (Development Control Manager) and Emma James (Overview and Scrutiny Officer)
<b>Available Papers</b>		The members had before them:  A. The Agenda papers (previously circulated); B. Presentation handouts for agenda item 5 and a member of the public's examples of Section 106 agreements in Kempsey (circulated at the Meeting) C. The Minutes of the Meeting held on 18 May 2016 (previously circulated).  (Copies of documents A and B will be attached to the signed Minutes).
<b>245</b>	<b>Apologies and Welcome</b>	The Chairman welcomed everyone to the meeting. Apologies had been received from Councillors Adams, Thomas and Vickery. Apologies had also been received from Marcus Hart, Cabinet Member for Highways.  The Chairman also welcomed Cllr Liz Tucker, and David Harrison, a member of the public who was very interested in Section 106, who were both invited to join the discussion.
<b>246</b>	<b>Declarations of Interest and of any Party Whip</b>	None.
<b>247</b>	<b>Public Participation</b>	None.

**248 Confirmation of the Minutes of the previous meeting**

Cllr Vickery, who had chaired the discussion on Transport and Access to Hospital (Minute 242), had forwarded a proposed amendment to the Minutes to rebalance the second complete paragraph on page five - deletion of 'It was believed that initial popularity had tailed off, which could have resulted from many reasons such as changes in preference and staff moved', and addition of 'However, where a Kidderminster to Redditch link did not exist 15 years ago, now the route is commercially established. Additionally, many of the Worcester to Redditch services are now commercially operated.'

The amendment was agreed by panel members who had been present at this meeting, and the Minutes of the meeting held on 18 May 2016 were agreed as a correct record and signed by the Chairman.

**249 Highways Development Management Processes - Section 278 and 106**

In attendance for this item were:

Nigel Hudson, Head of Strategy and Infrastructure  
Andy Baker, Transport Planning and Commissioning Manager, Emily Barker, Strategic Planning and Environmental Policy Manager, Adrian Tuck, Development Control Manager  
Dr Ken Pollock, Cabinet Member for Economy, Skills and Infrastructure

The Panel had requested an overview on the Council's highways development management processes, relating to Section 106 and Section 278, which is part of the Panel's work programme. In particular, members were keen to understand processes and obstacles around more efficient use of funding received from developers for infrastructure development.

The officers had prepared a presentation to provide further detail in addition to the information provided in the agenda papers.

**Section 106 Agreement**

The Strategic Planning Manager provided further background, issues and challenges.

Planning obligations under Section 106 of the Town and Country Planning Act 1990 (as amended), commonly known as s106 agreements, were a mechanism which made a development proposal **acceptable in planning terms, that would not otherwise be acceptable.**

They were focused on **site specific mitigation** of the impact of development – and could not be used on wider

issues. S106 agreements were often referred to as 'developer contributions' along with highway contributions and the Community Infrastructure Levy.

#### The legal tests for when you can use a s106 agreement

Set out in regulation 122 and 123 of the Community Infrastructure Levy Regulations 2010 as amended. The tests were:

- 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

Direct relation to the development was critical; s106 agreements could not be used for example to address issues across the borough, or for employment land development, or to pay for school places.

#### S106 and pooling issues – use was now very specific

- site specific mitigation measures
- pooling issues – a planning obligation may not constitute a reason for granting planning permission
- maximum of 5 planning obligations could be secured for one piece of infrastructure within the area of the charging authority (each district) – this was to address the issue that the focus must be on site specific, rather than generic issues, and to have more transparency about what payments were collected for and spent on
- backdated to 2010

#### S106 and policy making

Policies for seeking planning obligations should be set out in a:

- Local Plan
  - Infrastructure Delivery Plan (IDP) – this refers to infrastructure needs and supports the Local Plan
  - Local Transport Plan
- Neighbourhood plan – only two had been adopted in Worcestershire

This was to enable a fair and open testing of the policy examination. It was clarified that Local Plans were set, with a formal review process, whereas IPDs were active documents. The IDP could be viewed on South Worcestershire Development Plan website.

#### What do local authorities ask for?

- For the County Council, the majority of s106 agreements included capital sums for **transport and education**; contributions for other matters were rarely requested.
- Districts, as local planning authorities, may secure contributions for other matters such as open space, sport and recreation and affordable housing.
- They were a legal agreement, which once signed could only be used in accordance with the matters stated on the agreement.

Generally, agreements lasted for 5-10 years and had to be returned if funds had not been spent at the end of that period, or if the Council had asked for something inappropriate. It was possible to change what the funds were used for, with the developer's agreement.

#### Current approach to developer contributions

- housing, retail or employment land
- infrastructure development plans
- negotiated – generally by the local planning authority (district councils) on the County Council's behalf
- subject to site viability

Since 2008 the viability of s106s was considerably tighter, which could deter developers from coming forward. There was an appeals process, with viability being grounds for an appeal – which had occurred in Worcestershire.

The district planning authorities had a high level of control. The County Council could make representations which the districts could choose to ignore if they so wished.

The Panel was shown examples of s106 agreements, which showed the range and amounts secured, and included sites for open space, leisure, arts and culture, recycling, education and highways/transport. Some schemes did not include a figure for education, which could be because there was a sufficient space at the local school, or the scheme was below 30 homes, which generally did not contribute.

The Panel was also shown the current level of live s106 agreements, by district, which was monitored by officers to ensure funds were spent within the appropriate time – live agreements would either be in progress, or would be

so within the 5-10 year period.

#### Discussion points

It seemed unfair that a developer would not need to contribute to education if the local school had capacity, whereas a subsequent development would likely require contribution.

Some schemes had small contributions for transport compared with others, and it was explained that developers were asked to make a statement on transport, and that any developers for over 80 homes required a full detailed statement.

A Panel member who was also a member of Worcester City Council Planning Committee could not recall many applications which included requests for support for public transport, however the Panel was advised that the County Council did request this, when appropriate; it was a significant requirement for Droitwich, but it may be that within Worcester the public transport market was more commercially viable.

Regarding lack of public transport to support developments in the Nunnery ward of Worcester, the Transport Planning Manager undertook to discuss details further with Cllr Agar.

Member of the public David Harrison commented that bus services had doubled in Kempsey, with every developer contributing to transport.

#### **Highway works to facilitate new development – Section 38 Highway Act 1980 and Section 278 highways Act 1980**

The Development Control Manager provided further commentary on the presentation slides.

#### Section 278 process

Where a development is required to undertake works on the public highway, the developer will be required to enter into a legal agreement with the County Council, in its role as Local Highway Authority (LHA), to deliver these works. As part of this agreement, the developer, through their consultants, would submit detailed designs of their proposed highway works, which were subsequently checked by the Council to ensure safety and durability, with minimal impact on existing highway network.

### Agreements

The two legal agreements most commonly associated with the delivery of developments were:

- Section 38 of the Highways Act 1980, which allowed the Council in its role as LHA, to adopt new highways for future maintenance at the public expense, provided they were considered to be of sufficient public utility (serving more than 6 dwellings) and constructed to the Council's approved conditions and specifications. This agreement involved the owner of land over which the new highway passed to surrender all of their rights to that land and in view of this requirement, entering into the agreement was entirely voluntary. This agreement was used almost exclusively for residential developments where the developer wished to absolve themselves of long term maintenance liabilities.
- Section 278 of the Highways Act 1980, which allowed the Council as LHA to delegate its powers to undertake works on the highway to developers and their agents. Since neither the developer nor their contractors had the right to work on the existing highway, entering into an agreement under s278 was mandatory for any developer required to undertake works on the highway to facilitate their development and the agreements needed to be sealed, prior to works commencing.

### Process

The s278 process commenced with the submission of details of the proposed highway works by the developer, which should include details of planning permission and land title, a detailed design of the proposed works, capacity calculations for all proposed junctions, traffic signals or roundabouts, drainage, geotechnical information, highway construction specification, street lighting, highway structures and road safety audit of the proposal. This submission should be accompanied by a non-refundable payment of £1000 to cover initial costs of the design check.

Upon receipt of all the required information, the design check commenced, which could be carried out either by council officers or council term highway consultant CH2M. The most suitable auditor of the submission was based on the scale of the submission and the specific technical expertise required to assess the proposal. The submission was assessed against national design standard from the Design Manual for Roads and Bridges

and Manual for Streets, where appropriate and against the local design standards contained within the Council highway Design Guide and Highway Specification, to ensure proposals were safe, resilient with the minimum of impact the operational capacity of the existing highway network.

This iterative process continued unless all outstanding issues had been resolved, at which point the scheme was technically approved and then the Council's Legal Services would draft the legal agreement. The technically approved drawings were embedded into the legal agreement and upon completion, all fees for the design checking and site inspections were paid, alongside the surety for the scheme.

The developer was required to provide a financial security, to ensure adequate provision for the s278 works to be completed if the developer defaulted on their obligations the terms of the s278 agreement, which may include unfinished or defective works. The amount to be secured must be equal to the total cost of the s278 works as determined by the Council.

Surety – advice from legal services, based upon case law was that unless a developer refused in writing to meet their obligations under the terms of their legal agreement or went into liquidation, an attempt to call upon the surety to complete a scheme could be successfully challenged in the courts. In situations where developers had gone into administration, the process required to call upon the surety to complete the works had taken over two years. In order to commence works, the developer or their contractor needed to reserve the road space to construct the scheme, through a Streetworks Permit. As part of this process the contractor was required to submit details of the temporary works and traffic management proposals to ensure the safe and efficient construction of their scheme with the minimum of to the existing highway network.

Upon completion of the legal agreement and obtaining the relevant Streetworks permits, works commenced and were regularly inspected by council officers. Once completed, the developer had to request issue of a provisional certificate of completion (PCC), and the works were then inspected to ensure compliance with the approved drawings. A list of all defective works was then provided to the contractor and once all of the defects had been remediated to the Council's satisfaction, a PCC was issued and the scheme was able to commence within a

12 month maintenance period, where the developer was responsible for the maintenance of all the works covered by s278 agreement.

Upon completion of the maintenance period, the developer must request issue of the final certificate of completion (FCC) and the works were then inspected again and once any defects had been remediated, the FCC was issued and the scheme was adopted and formed part of the public highway and was then the Council's responsibility to maintain.

Developers were good at building houses, but often less so at the technical management of schemes, and problems often materialised during the transition from two dimensional plans to three dimensional work. A developer may be asked to resubmit plans but still fail to address the issue.

#### Workload

From April 2013 to April 2014, the Council received 70 new s278 submissions, technically approved 65 submissions, completed 68 s278 legal agreements, issued 29 Provisional Certificates and issued 44 Final Certificates.

#### Issues affecting S278 schemes

Although s278 schemes mainly involved works to the existing highway, there could be new areas of highway to be adopted as part of the process – this required the owner of the land over which the new highway passed to surrender their rights to this land. Obviously, if the developer did not control all of the land required to deliver the scheme, this represented a major barrier – a situation which could occur when the land had been conveyed to a third party or when additional land was required to deliver satisfactory highway works, which weren't considered at the planning stage when the preliminary design was agreed.

The developer may be required to complete additional legal agreements with third parties, in order to be able complete the legal agreement with the Council, for example the requirement that all highway drainage discharges into a drainage system which is controlled and maintained by a statutory body and in order to achieve this, the developer would need to enter into an agreement under s104 or 106 of the Water Industry Act 1991 with Severn Trent Water, in order to get the drainage infrastructure for the scheme adopted. The time taken to go through all the technical information and



complete this additional agreement often delayed the overall s278 process.

### Summary

The s278 process from inception to completion was a time consuming, complex narrative process and the preparation of the agreement and approval of the designs could take anywhere from 3 to 12 months or longer when submissions were delayed. Much depended on the quality of the initial plans. Despite the complexity, the vast majority of s278 completed their design and legal processes within the 3 to 12 month time frame, with some notable schemes completing much quicker than expected.

Despite pressures exerted by developers, care had to be taken to ensure that the scheme was designed and constructed safely and effectively. At the end of the day, it would be the LHA which would have to maintain these works and pick up the pieces should the works prove to be unsatisfactory or deficient.

Once a scheme had been agreed, a developer was required to have financial capacity, as well as reserving road space, which again could cause delays, and could impact on advertisement of the house sales. Works were regularly inspected.

### Discussion points

It was explained that developers would be kept aware of potential contributions, although an exact value could not be known until the site plans had been fully explored. Some development plans crumbled if the level of contributions became too expensive.

An incentive for developers to obtain the certificate of completion was the bond they had to lodge with the Council, which was returned on completion. However, developers often 'ebbed and flowed', with months of little action, and then expecting the Council 'to jump'. This made it difficult for the development control team to manage its resources, and it took time to pick up the technical detail of a project after a lapse. Sometimes developers complained about this.

A Panel member reported that lack of advance notice about streetworks had led to problems accessing and leaving driveways. A similar example in Kempsey was referred to by David Harrison. The officers advised that the Council was not necessarily informed of the timing of

works and with over 400 live agreements at any one time, it was difficult to manage issues. It was up to the developers to notify residents, although there was no actual requirement for them to do so. Officers undertook to consider potential ways to encourage developers to give residents greater notice of streetworks.

### **Development Management Process**

The Transport Planning Manager provided further detail on the current and proposed development management process, including the evidence base, control statistics, the Council's transport-related development control process, issues and involvement of county councillors.

#### Evidence base

In seeking s106 agreements, the Council would consider its evidence bases, including the Infrastructure Delivery plan, traffic modelling data and the Local Transport Plan.

This would form the basis for the s106 request which, subject to complying with the three tests outlined earlier, would be submitted to the developer and the district councils with negotiations to follow.

#### Statistics

During 2015/16, 2006 planning applications had been received, of which the majority were dealt with within 21 days (81.7%), with an average response time of 16.3 days. The Development Control team dealt with just over 2000. 60% of applications came from Wychavon, Malvern or Worcester.

Only 36 were refused; the Council's views were sought as a statutory consultee, but decisions were made by the district council planning committees.

#### The Council's Transport-related Development Control Process

The Council:

- Insisted on planning of development through the Transport assessment/Transport Statement Process
- asked developers to identify and optimise use of existing infrastructure – also to maximise accessibility by passenger transport, walking, cycling and private car for new developments
- had responsibility to identify and deliver the transport infrastructure and transport services required to mitigate the impact of new developments.

The Council was responsible for:

- funding of transport infrastructure and services (Section 106, 38 and 278 agreements)
- linking development related infrastructure and service requirements with the Infrastructure Delivery Plan and the Local Transport Plan
- monitoring developments (Travel Plans)

Development Control Issues – included:

- poor quality of information submitted by applicants
- conflicting priorities between local authorities when seeking contributions – local planning authorities and the Highways Authority
- lack of understanding from members of National Planning Policy Framework – for example, what could be asked for
- viability – a growing issue
- transport modelling – essential for major schemes, evidence base requirements and support future requirements. The Council tried to take a common sense approach, rather than expensive, extensive modelling

Current management process – consisted of:

- Pre-application process – an opportunity to scope
- Planning application received by the Local Planning Authority (8-13 weeks)
- Development Control consult relevant officers
- Development Control formulate recommendations to the planning authority (21 days to respond)
- Decision notice issued by the Local Planning Authority
- Developer submits technical approval under s278 process

Some developers were prepared to pay in advance for the Development Control Manager's expertise.

#### Proposed management process

The end to end process was being discussed with the Cabinet Member for Highways, and included potential changes such as:

- a much better pre-application process would be key
- agreed scoping document
- early technical assessment
- involve the term highway consultant CH2M (costs/timescales)
- key officer involvement
- councillors involved through Highways Liaison

Engineers – another key area for improvement

The new process would therefore be:

- Planning application submitted
- Development Control consult relevant councillors/officers – in theory nothing should change if pre-applications done properly
- Technical approval obtained
- Development Control formulate recommendations to the planning authority
- Decision notice issued
- Developer formally submits pre-approved drawings and the legal process could start.

The proposed process would aim to reassure developers that they were on the right track, so that when the planning application was submitted, they more or less knew whether it would be approved.

#### County Councillor's Involvement

To date County councillor involvement had been minimal unless they were pro-active. The proposed process would bring more input and awareness, with involvement at the pre-application stage, and after receipt of an application.

It was emphasized that the County Council would be consulting county councillors on the basis of local knowledge and awareness, which **MAY** influence the Council's response but the Council was not able to override policy or legislation – since this could be appealed against and lead to judicial review.

It was also important to note that the County Council was only a consultee in the process; it was the responsibility of district councils to discharge the conditions attached to approval of each scheme.

The Chairman invited member of the public David Harrison to contribute his experiences, and a table of s106 agreements in Kempsey was circulated, which included developments, categories of contribution and the total cost of all infrastructure.

Regarding the impact on highways junctions, officers explained that this was calculated by looking at the likely number of trips per day from each home on a development.

### Discussion points

Cllr Tucker appreciated the technical nature of the management process, however educating councillors would be really help them to understand judgements made.

Officers clarified what information on applications was available to view. Pre-application dialogue was given in confidence and may be commercially sensitive. The Council would not necessarily release information related to s278, mainly because intellectually it was still not the Council's information.

However, when the planning application was submitted the information was absolutely available; it was a requirement for all evidence and information relating to the decision to be made available and it could be viewed on the local district planning authority's website, or by visiting the relevant district council offices.

The process was timescale-driven. Officers acknowledged the frustration of trawling through applications on district council websites and sometimes councillors only became aware of applications once the 21 day consultation timescale had passed - it may be desirable to approach councillors, but there was a huge volume involved. The Cabinet Member for Economy, Skills and Infrastructure pointed out that it was far simpler for each councillor to scan each week, as he did, rather than looking to officers to contact 57 councillors.

When asked, the Development Control Manager summarised that many of the problems occurred when a developer did not do what it was meant to in implementing conditions attached to the planning application, which then gained media coverage and was a difficult situation. It was difficult for the Council to be proactive in a developer-driven process.

The Panel Chairman was keen to look at examples of schemes, and to revisit progress with implementing the new management process. The presentation slides would be circulated to panel members who had been unable to attend the meeting.

The officers and Cabinet Member emphasized the fact that the County Council was only a consultee in the process; it was the responsibility of district councils to oversee the conditions attached to approval of each scheme.

The Panel enquired about progress with the Local Transport Plan (the broader Strategy, which would be LTP4) and was advised that the process had begun, with a view to consulting on the Plan in the Autumn, including with the Scrutiny Panel.

The Chairman thanked everyone for their attendance and input.

The meeting ended at 4.15 pm

Chairman .....