

<b>NAME OF COMMITTEE</b>	<b>Council</b>
<b>DATE</b>	<b>17 February 2015</b>
<b>REPORT TITLE</b>	<b>Planning Obligation Thresholds</b>
<b>Report of</b>	<b>Affordable Housing Manager and Natural Environment and Recreation Manager and Development Manager</b>
<b>WARDS AFFECTED</b>	<b>All</b>

**Summary of report:**

This report responds to a change in government policy on the use of S.106 obligations introduced through a Ministerial Statement published on the 28<sup>th</sup> of November 2014. The policy states that affordable housing and tariff-style contributions should not be sought on developments of 10 houses or less. A lower threshold of five units or less may be adopted by certain Local Planning authorities; however, only off site commuted sum financial contributions may be sought on schemes of 6-10 units. Exception sites are not affected by the change.

In response to this new policy, it is proposed that the Council adopts an interim planning contributions threshold consistent with the Ministerial statement and updated National Planning Practice Guidance (NPPG). This interim threshold will be reviewed prior to the submission of the new Local Plan (Our Plan).

**RECOMMENDATIONS:**

The Council resolves that;

- I. The following thresholds for affordable housing are adopted in respect of new applications for planning permission;
  - a) In Tavistock and Okehampton (the towns), the Council will seek 'on site' provision of affordable housing on developments of 11 units or more unless the site lies within an Area of Outstanding Natural Beauty (AONB).
  - b) In the rural areas of West Devon and Areas of Outstanding Natural Beauty (AONB) (excluding Dartmoor National Park) , the Council will seek a financial contribution from developments of between 6 – 10 units and

'on site' provision of affordable housing on developments off 11 units or more.

- II. The following thresholds for tariff - style infrastructure are adopted in respect of new applications for planning permission;
  - a) In Tavistock and Okehampton (the towns), the Council will seek contributions on developments of 11 units or more unless the site lies within an Area of Outstanding Natural Beauty (AONB).
  - b) In the rural areas of West Devon and Areas of Outstanding Natural Beauty (AONB) (excluding Dartmoor National Park ) , the Council will seek a financial contribution from developments of between 6 – 10 units and above.
- III. The interim threshold will be reviewed prior to the submission of the new Local Plan.

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## 1. Introduction

- 1.1 The purpose of this report is to seek approval for new thresholds for Affordable Housing and other s.106 “tariff style” contributions consistent with updated National Planning Practice Guidance (NPPG). The other s.106 contributions that are considered to be “tariff style” may include certain contributions aimed at securing infrastructure improvements Borough wide.

## 2. BACKGROUND

### Current Affordable Housing Policy

- 2.1 The Council adopted the LDF Core Strategy in 2011. The document established the Council’s planning policy for affordable housing including targets and thresholds above which affordable housing would be sought. The relevant policies are SP9 set out below.

### ***Strategic Policy 9 - Meeting Housing Needs***

*Throughout the area of West Devon covered by this Core Strategy all housing development will be expected to contribute to meeting the targets for affordable housing set out below, subject to viability.*

- *On sites of 1-4 dwellings, excluding wholly flatted developments, a 15% off site financial*
- *contribution per dwelling will be required;*
- *On sites of 5-9 dwellings, excluding wholly flatted developments, 25% of the dwellings on site should be affordable;*
- *On sites of 10 or more dwellings 40% of the dwellings on site should be affordable.*

*When the affordable housing policy results in part of a dwelling, the part dwelling shall be provided as a financial contribution where this would not compromise the overall viability of the development.*

*Planning permissions will be subject to conditions or a planning obligation to ensure that the affordable housing remains affordable in perpetuity.*

- 2.2 Since the introduction of the Core Strategy the Council has sought both 'on site' and 'off site' affordable housing provision consistent with the policy.

#### Current Community Services and Facilities Policy

- 2.3 The Council's adopted policy position on requiring Community Services and Facilities is established in the Core Strategy (2011) Strategic Policy 13. Since the introduction of the Core Strategy the Council has sought both 'on site' provision and 'off site' contributions consistent with the policy.

#### **Strategic Policy 13 - Community Services and Facilities**

*Proposals to increase and enhance open space, recreation, leisure, cultural, health and education facilities will be supported where they will contribute to the wellbeing of a community and improve accessibility to services. Any new facilities or open space provision should be as well related as possible to the settlement, ensuring that they are designed so as to be fully accessible, taking into account a range of diverse needs and circumstances.*

*Existing services and community facilities should be retained where there is a continuing need.*

The Council's Supplementary Planning Document 'Infrastructure & Community Facilities to Support New Development' (June 2007) applies a threshold of five dwellings below which contributions will not be sought (noting the different thresholds that apply to affordable housing).

## The New National Threshold

2.4 On the 28<sup>th</sup> November 2014, the Government announced the introduction of a new national 10-unit threshold for affordable housing and other s.106 contributions. This policy was first mooted in the 2013 Autumn Statement and subsequently consulted upon in March 2014.

2.5 The policy was introduced through a Ministerial Statement and amendments to the National Planning Practice Guidance (NPPG), which supplements the National Planning Policy Framework (NPPF). The updated section of the NPPG entitled “Planning Obligations”. States that;

*There are specific circumstances where contributions for affordable housing and tariff style planning obligations (section 106 planning obligations) should not be sought from small scale and self-build development.*

- *contributions should not be sought from developments of 10-units or less, and which have a maximum combined gross floorspace of no more than 1000sqm*
- *in designated rural areas, local planning authorities may choose to apply a lower threshold of 5-units or less. No affordable housing or tariff-style contributions should then be sought from these developments. In addition, in a rural area where the lower 5-unit or less threshold is applied, affordable housing and tariff style contributions should be sought from developments of between 6 and 10-units in the form of cash payments which are commuted until after completion of units within the development. This applies to rural areas described under section 157(1) of the Housing Act 1985, which includes National Parks and Areas of Outstanding Natural Beauty*
- *affordable housing and tariff-style contributions should not be sought from any development consisting only of the construction of a residential annex or extension to an existing home*

2.6 The guidance states that contributions should not be sought from developments of 10 units or less. It does however allow for a lower threshold to be introduced in certain circumstances, including in areas designated as rural under s.157 of the Housing Act 1985. West Devon falls within the rural areas designation and may therefore choose to adopt a lower threshold of 5 units in the rural areas. The designation does not however apply to the towns of Tavistock and Okehampton.

## **3. ISSUES FOR CONSIDERATION**

### Affordable Housing Contributions

3.1 This announcement is likely to have a range of implications for the delivery of housing. Over the past 3 years the Affordable Housing Team has secured approximately £420,000 in financial contributions from developments that under the new national thresholds would not be required to provide affordable housing. If the pattern of development remains the same in future years, the new national

thresholds could see the Council lose the opportunity to secure approximately £140,000 p.a. in contributions to support the provision of affordable housing.

### Other Financial Contributions

- 3.2 Alongside Affordable Housing, officers have sought to secure financial contributions for Community Services and Facilities. Over the last three financial years this has secured approximately £50,000 for play, sport and community facilities projects, however this has been generated from schemes which are, in any case, over the 10 house proposed threshold for the towns. The only difference the new proposed thresholds will make will be to curtail the ability to take financial contributions for Community Services and Facilities from schemes of between 6 and 10 units in the towns.
- 3.3 Planning obligations and contributions can still be sought in order to make development acceptable. The statutory tests set out in the Community Infrastructure Levy Regulations 2010 for these obligations have not been changed and Councils will have to continue to demonstrate that the obligation is necessary, fair and reasonable and directly related to the development. The Council would wish to continue to secure this provision even where the contribution is used to fund infrastructure off site but within the Parish as it remains directly related to the development.
- 3.4 The NPPG describes tariff style obligations as those obligations which seek to secure a contribution to pooled funding 'pots' intended to provide common types of infrastructure for the wider area. The revised Guidance states that *"For sites where the threshold applies, planning obligations should not be sought to contribute to pooled funding 'pots' intended to fund the provision of general infrastructure in the wider area"* There is some uncertainty as to the circumstances in which the contributions normally secured by the Council for example in respect of community facilities, sport and recreation would be caught by this description and the Council is seeking further legal advice.

### Issues / Implications

- 3.5 Careful consideration is necessary in order to establish how the Council should respond to this change and how planning applications to which this guidance relates should be determined. The issues arising include:-

#### **a) Extant unimplemented permissions**

Landowners with extant consents may seek to renegotiate the affordable housing and other financial obligations of completed s106 Agreements. In such cases there may be pressure to reconsider these obligations taking account of the new NPPG on thresholds, particularly if the Council amends the thresholds in accordance with the guidance. Enquiries are already being made but officers cannot indicate how many applications may be made.

The ability to renegotiate affordable housing obligations was introduced through Section 106BA of the 1990 Act (inserted by the Growth and

Infrastructure Act 2013). This amendment allows applications to be made to modify the affordable housing requirements of any Section 106 agreement regardless of when it was signed. This review must be based on economic viability and cannot take into account other aspects of the planning consent. It addresses affordable housing requirements only. This legislation has not been amended and nor has the NPPG with regard to this point. The change in Guidance relating to thresholds is not retrospective and therefore this renegotiation procedure remains the same.

However, in order to circumvent this, Landowners with an extant permission for a development which includes affordable housing and other financial obligations, either 'on site' or through a financial contribution, could submit a new application to effectively remove the obligation. This may lead to a number of additional applications coming forward.

Members therefore need to consider whether they wish to support a practice of allowing a variation of affordable housing obligations taking account of the revised NPPG on thresholds. Alternatively the Council may continue to require each application to modify a s.106 affordable housing obligation to be considered on its individual merits in accordance with Section 106BA, regardless of the revised NPPG on thresholds.

Officers view is that bearing in mind the legislation has not been amended and the value of contributions which are currently the subject of planning obligations is significant, the Council should not generally accept a change to the obligations unless the change is demonstrated to be necessary because the development would otherwise be economically unviable. The Council may however wish to adopt a pragmatic approach in relation to single dwelling applications and allow a variation of the affordable housing requirements. The justification for such an approach is to avoid the resubmission of a substantial number of planning applications for single dwelling developments.

#### **b) Previously implemented permissions**

There is the potential for applications to be made to cancel/remove contributions or obligations. Given that the government's aim is to bring forward development which was being held back by onerous planning obligations, it is considered that the new threshold policy should not be applied to schemes already built.

#### **c) Thresholds**

At the consultation stage the proposal was for a blanket 10 unit threshold. The opportunity to seek affordable housing from developments of 6-10 units in the rural areas therefore provides a welcome concession. However, when considered against the Council's adopted threshold of 1 dwelling, the reduced threshold falls well short of the existing position. Furthermore, the fact that sites of 6-10 units can only be required to provide a financial contribution does not guarantee the delivery of affordable housing where there is an identified

need. Provision 'on site' remains the most effective and efficient delivery mechanism.

The upper threshold applies to developments of 10 units or less, and which have a maximum combined gross floor space of no more than 1,000 square metres; it should be noted that there is no equivalent floor space threshold applicable to the five unit threshold proposed by CLG. On this basis, excessively large houses on schemes of five units or less may not be captured by the adoption of the lower threshold. Instead it is assumed that authorities will have to apply their own reasonable controls in terms of what is appropriate in respect of design and an effective and efficient use of land. Officers will seek further legal advice to establish whether a 500 square meter threshold may be applied to the 5 unit threshold.

#### **d) Timing**

The fact that financial contributions for schemes of 6-10 dwellings are not payable until after completion weakens the Council's ability to secure the contribution. Currently the Council requires payment of contributions up front but typically allows payment prior to occupation in recognition of viability issues associated with cash flow. The payment of contributions prior to occupation of the market dwellings avoids the risk of developer insolvency or the developer 'leaving site' without making payment as required. The Guidance suggests an approach as to how the contributions will be secured and officers will need to negotiate an appropriate s.106 mechanism which will mitigate the risk.

#### **e) Loopholes**

The use of arbitrary numerical thresholds can lead to loopholes which are open to exploitation in order to avoid payment of contributions. In the rural areas the most obvious risk will be a developer who splits a site into more than one planning application in order to avoid an affordable housing contribution. In the towns the risk is that developers will submit applications for schemes of 10 units where a site can reasonably provide more. A further loophole may be where a larger site in the same ownership comes forward in two phases with an under-threshold number of dwellings on each phase.

The Council should continue to take a robust approach on the assessment of sites and the most efficient use of land; there should be a clear position that proposals which are not an efficient use of land (i.e. lower density or split sites), should not be supported on the basis that they fail to deliver sustainable development. The Council will therefore continue to assess applications consistent with the approach set out in paras. 7.2 and 7.3 of the AH-DPD in order to prevent circumvention of site size thresholds.

#### Planning Policy Considerations

- 3.6 Department for Communities and Local Governmental (DCLG) officials have stated that the Written Ministerial Statement has the status of national planning

policy and ranks with the National Planning Policy Framework. This stance is one that is being debated nationally. It is the opinion of many within the legal profession that Guidance does not have the same weight as either Statute or indeed the NPPF. It has already been noted in this Report that there has been no amendment to Section 106 of the Town and Country Planning Act 1990 and the ability to enter into agreements remains unchanged. However, the Council cannot disregard the change in Guidance and would have to demonstrate in every case where it did not follow the Guidance that it was able to justify its position. In such circumstances It is not unreasonable to anticipate the Council being put to additional expense in the event of an appeal.

- 3.7 The Development Plan has primacy and Section 34 of the Planning & Compulsory Purchase Act 2004 requires decisions to be based upon development plan policies unless material planning considerations indicate otherwise. Despite the recent change in national policy, the Council is bound to continue to determine applications in line with its development plan, unless material planning considerations indicate otherwise.
- 3.8 Given the new national policy, the Council must consider how it will determine applications where the Development Plan would require the provision of affordable housing. A decision is required as to whether applications would be considered on a case by case basis, refused because affordable housing can no longer be required, or approved as market housing.
- 3.9 The Council may choose to continue to apply its existing adopted policies for the time being or adopt the new thresholds during the interim period prior to adopting a new Local Plan.

#### Current Legal Challenges

- 3.10 In considering the Council's position, Members should be aware of a legal challenge by two Berkshire Councils. Reading Borough Council and West Berkshire Council have jointly applied for a judicial review of the new policy. The Councils have served the claim including grounds of challenge on DCLG and as at 1<sup>st</sup> February are awaiting a response.
- 3.11 In addition to the above legal challenge, a Private Members Bill has been proposed and sponsored by Tim Fallon MP. The Bill is designed to give local planning authorities the power to determine the requirements for affordable housing contributions from sites of fewer than 10 units as part of planning obligation agreements under Section 106 of the Town and Country Planning Act 1990; and for connected purposes. This Bill was presented to Parliament on 9 September 2014 and is expected to have its second reading debate on 6 March 2015.



## Options / Proposed Thresholds

- 3.12 The Ministerial Statement and revised guidance in the NPPG are material planning considerations and the Council must have regard to them in respect of planning applications where affordable housing or other contributions are sought. The intention of the Guidance is to enable development and to ensure that local authorities are not placing an undue burden on applicants, particularly in terms of viability. Were the Council to continue with its existing position it would need to demonstrate, with evidence in respect of every application, that local circumstances justified a different approach.
- 3.13 Given the suggested weight of the new guidance and the risks associated with an appeal, it is recommended that the Council adopt the new national threshold guidance.
- 3.14 It is unclear when the outcome of the legal challenge by Reading Borough Council and West Berkshire Council will be known. It seems sensible therefore to adopt the new thresholds on an interim basis. This approach provides the opportunity to review the position prior to adopting the new thresholds within the new local plan.

## **4. LEGAL IMPLICATIONS**

- 4.1 The legal implications have been discussed in the report.

## **5. FINANCIAL**

- 5.1 Implications include the potential loss of financial contributions from previously approved planning applications together with a loss of contributions from future planning applications which fall below the proposed new thresholds. The potential future loss arising from the new thresholds amounts to an estimated £140,000 p.a in respect of affordable housing. For other tariff style contributions there will no longer be an ability to require contributions for schemes in Tavistock and Okehampton between 6 and 10 units.

## **6. RISK MANAGEMENT**

- 6.1 The Risk Management implications are shown at the end of this report in the Strategic Risks Template.

## 7. OTHER CONSIDERATIONS

<b>Corporate priorities engaged:</b>	Homes, Economy, Health and wellbeing.
<b>Statutory powers:</b>	
<b>Considerations of equality and human rights:</b>	None. This matter is assessed as part of each specific project.
<b>Biodiversity considerations:</b>	This matter is assessed as part of each specific project.
<b>Sustainability considerations:</b>	This matter is assessed as part of each specific project.
<b>Crime and disorder implications:</b>	None. This matter is assessed as part of each specific project.
<b>Background papers:</b>	Capital Programme Report, Executive 6 <sup>th</sup> December 2012.
<b>Appendices attached:</b>	None

## STRATEGIC RISKS TEMPLATE

No	Risk Title	Risk/Opportunity Description	Inherent risk status				Mitigating & Management actions	Ownership
			Impact of negative outcome	Chance of negative outcome	Risk score and direction of travel			
1	Retaining existing thresholds	Should the Council decide to retain its existing threshold of 1 dwelling, there is a significant risk of appeal which may have financial implications.	4	3	12	↔	Any planning application which is determined in accordance with existing thresholds would need to demonstrate that it was able to justify its position.	Affordable Housing Manager Development Manager, Environment and Recreation Manager
2	Adopting new thresholds	The adoption of the new thresholds provides the opportunity to secure contributions from schemes of 6 – 10 units in the rural areas.	2	2	4	↔	Appropriate assessment of sites will be required to ensure new applications deliver an efficient use of land and are not phased or under developed in order to avoid the provision of financial contributions.	Affordable Housing Manager Development Manager, Environment and Recreation Manager

Direction of travel symbols ↓ ↑ ↔