

CABINET

29 March 2016

PROPOSED RESPONSE TO COUNCILLOR TOD'S NOTICE OF MOTION

REPORT OF CORPORATE DIRECTOR (SERVICES)

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RECENT REFERENCES:

None

EXECUTIVE SUMMARY:

The report proposes a response to the Notice of Motion by Cllr Tod which was referred to Cabinet for consideration from the Council meeting on 6 January 2016.

RECOMMENDATIONS:

- 1 That Cabinet considers the proposed response to the Notice of Motion.
- 2 That if Cabinet considers any policy amendments to be appropriate, it determines what these should be.
- 3 That if considered appropriate by Cabinet, it agrees to consultation on the text of Appendix 1 for inclusion in the next update of the Council's Local List of Validation Requirements.
- 4 That Cabinet's decision be reported back to full Council as its response to the Notice of Motion.

CABINET29 March 2016PROPOSED RESPONSE TO COUNCILLOR TOD'S NOTICE OF MOTIONREPORT OF CORPORATE DIRECTOR (SERVICES)DETAIL:1 Introduction

1.1 At the meeting of full Council on 6 January 2016, Cllr Tod proposed the following Notice of Motion:

- *that Local Plan Policy CP3 states "In order to help meet affordable housing needs, all development which increases the supply of housing will be expected to provide 40% of the gross number of dwellings as affordable housing, unless this would render the proposal economically unviable.*
- *that developers are increasingly challenging social and affordable housing contributions on the grounds of viability*
- *that some councils are now successfully introducing policies designed to address this issue*
- *that, in a series of rulings, the Information Commissioner is requiring increasing amounts of the information provided in viability calculations to be made publicly available for proper public scrutiny.*

This Council believes there is a strong public interest in protecting the provision of social and affordable housing in the Winchester District and that it should introduce the toughest possible policies in order to prevent developers and landowners using viability assessments to unjustifiably reduce their contribution to social and affordable housing in the district.

This Council therefore resolves to ask Cabinet to bring forward a policy statement including the following key elements:-

- *All developers putting forward schemes which don't meet our affordable housing policies will be required to submit an Open Book Viability Assessment*
- *Any Viability Assessment submitted by any developer must be reviewed by an independent external expert at the cost of the applicant;*
- *In addition, the Council will require that a statutory declaration is signed by a director of the applicant company and a suitable representative of the organisations providing development finance that all the information in their statement is true and accurate;*
- *The council will also require a legal declaration that the developer's agent is not instructed on a performance related pay basis whereby their fees increase if they are successful in reducing planning obligations;*
- *Throughout any viability review process the Council should follow a policy of*

maximum legal openness - as a minimum, in line with the most recent rulings of the Information Commissioner at that time;

• Where a lower proportion of affordable housing is accepted by the Council as an exception, a clawback clause should be included in the Section 106 Agreement to secure higher affordable housing contributions if sales and viability turn out better than predicted.”

- 1.2 The Notice of Motion was referred to a future meeting of Cabinet for further investigation and report back to Council. This report provides information and a suggested response for Cabinet to assist their consideration of the Notice of Motion.

2 Background

- 2.1 Policy CP3 of the adopted Winchester District Local Plan Part 1 - Joint Core Strategy requires the provision of 40% affordable housing from all qualifying development where this is economically viable. On the basis of this policy, provision of affordable housing is required as a planning obligation. The policy as a whole was considered by a Planning Inspector as part of the Examination of Local Plan Part 1 and was found to be sound. Most, possibly all, local authorities have similar policies in their Local Plans, although the percentage of affordable housing which they seek to obtain differs, based on local circumstances.

- 2.2 The Government’s National Planning Policy Framework (NPPF) provides the framework for planning policy and decision making which all local planning authorities must comply with, and it requires the inclusion of viability as a consideration in decision making. The NPPF (Para 173) says:

Pursuing sustainable development requires careful attention to viability and costs in plan-making and decision-taking. **Plans should be deliverable. Therefore, the sites and the scale of development identified in the plan should not be subject to such a scale of obligations and policy burdens that their ability to be developed viably is threatened.** To ensure viability, the costs of any requirements likely to be applied to development, such as requirements for affordable housing, standards, infrastructure contributions or other requirements should, when taking account of the normal cost of development and mitigation, provide competitive returns to a willing land owner and willing developer to enable the development to be deliverable.

- 2.3 Prior to the introduction of the Community Infrastructure Levy (CIL), there was some scope for discussion about the scale of a range of planning obligations for such things as education, off site highways infra structure, open space and affordable housing for almost all residential development proposals. However, CIL (which is a non-negotiable item) now stands in place of all but affordable housing contributions for most applications. This means that affordable housing is usually the only element of a scheme about which there can be any discussion as to whether or not it is viable for the development to meet the full policy requirement.

- 2.4 It is important to note that, when carried out correctly and fairly, the assessment of viability to determine whether a scheme can provide the full policy requirement of 40% affordable housing is a necessary and reasonable part of the development process. It ensures that development which is otherwise acceptable and potentially beneficial is not prohibited by a requirement to meet societal costs it cannot afford. This is why the policy includes a mechanism to assess how much affordable housing can be delivered by a particular development whilst allowing that development to remain viable. If the Council had not adopted this approach, the Inspector dealing with the Local Plan would most likely not have supported the policy or would at least have recommended changes to make it more flexible and responsive to development constraints. On the other hand, there has been a great deal of public concern, generated mainly by major schemes in London, that the figures presented in viability assessments have been skewed by developers to minimise the amount of affordable housing they deliver, and that local planning authorities are not sufficiently robust in assessing and (if necessary) rejecting them. The availability of figures for public inspection is seen as a safeguard against property developers taking advantage of their greater resources and experience in negotiations with local authorities.
- 2.5 Developers and land owners accept the requirement to provide viability assessments where they assert that their schemes are not able to provide 40% affordable housing in line with the policy. However, they have generally been averse to those figures being provided to the general public, primarily because of the information they contain which they consider to be commercially sensitive, such as land acquisition costs, profit targets and financing costs.
- 2.6 The City Council always requires the submission of a financial viability assessment if the applicant claims that their development cannot provide the full amount of affordable housing. This is a longstanding requirement in the 'Validation List' of those items which the City Council requires to be submitted in support of a planning application. (No viability assessment is required when the applicant proposes to meet the full policy requirement since there is nothing for it to show). Assessments are scrutinised, either in-house or using external consultants, to test whether they present a fair picture of the economics of development using normal rules of valuation set down by the RICS and the guidance given in the NPPF and NPG as to how land cost valuation (which is usually the key issue) is assessed. The developer's viability assessment and the report of the Council's advisors is available to Members of the Planning Committee. It is not expected that Members, who are not experts in property valuation, will themselves analyse the figures but they are able to ask questions of officers and advisors and seek reassurance as to why they have reached the conclusions they have whilst having figures and analysis in front of them.
- 2.7 All viability assessments are already 'open book' in the dialogue between the Council and the applicant. The Council's advisors will expect an applicant to provide supporting information for their figures, and will scrutinise these

against benchmark figures. It should be noted however that it is the economics of a particular development which is being assessed, not the status or circumstances of the applicant. The fact that a company or individual has made large profits from other developments or pays high salaries to its executives cannot be introduced as an argument that it can afford to do less well on the scheme under scrutiny.

- 2.8 It should also be noted that the recommendation from officers or external advisors as to what figures may be accepted as reasonable are not necessarily those shown in a first submission. There will sometimes be negotiation with an applicant and the final recommendation may be a compromise between two positions, based on a variety of issues surrounding the planning application.
- 2.9 With all of this in mind, it is important to be clear that an applicant cannot be prevented from putting forward a viability assessment to justify a reduction in affordable housing units or financial contributions, nor can the Council introduce policies which force the provision of the affordable housing where it is genuinely not financially viable to do so.
- 2.10 Given that the Council already has robust procedures for dealing with assessments of viability, the question which remains is whether requiring that a full and unredacted version of every assessment is placed in the public domain as a matter of course is lawful, and whether it is likely to influence (for better or worse) the outcome of the planning process.

3 Legal Position on Public Disclosure

- 3.1 In common with other local authorities, the City Council has taken the view that the information contained in a viability assessment will be at least partly exempt from public disclosure because it contains commercial material which the applicant has a reasonable expectation will not be shared outside of those who require to see it for the purposes of decision making. As a result, the Council does not routinely publish or otherwise make available viability reports submitted to support planning applications.
- 3.2 The Information Commissioner (who deals with appeals against decisions of public authorities to refuse to provide information under Freedom of Information legislation), has generally been unsympathetic to arguments that a viability appraisal should not be disclosed simply because it contains commercial information. The exemption that allows commercially sensitive information to be withheld in response to an FOI request is subject to a public interest test to be applied by the decision maker (the Council or the Commissioner). It is necessary to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In most cases involving viability appraisals in planning and development situations, the Commissioner's decision has been that a redacted version of the appraisal should be released.

3.3 In the light of the direction of travel indicated by the Commissioner's decisions, it would seem reasonable for the Council to adopt the practice that viability appraisals will be published on the Council's website unless the applicant can make a specific and reasoned case as to why any part of their viability appraisal should not be out in the public domain, for reasons of commercial sensitivity and the prejudice that would be caused to their commercial interests if the information becomes public. The starting point would be that if an applicant asserts that their development will not be viable if they are required to make provision of 40% affordable housing, their viability appraisal will be published in full.

4 Proposed Response to the Notice of Motion

4.1 To the extent that the Notice of Motion might be taken to suggest that the Council has not been robust in considering viability assessments and rejecting unsubstantiated arguments, it is considered that this is not correct. The Council has adopted recognised good practice in dealing with issues of viability. Though Members are understandably disappointed that it has not been possible to secure 40% affordable housing on all developments, this is a product of development economics and would not be altered by any amount of third party assessment or by 'tougher' policies. As explained above, there would be little to be gained by the Council always insisting on 40% affordable housing as this would render some schemes unviable and would hinder housing delivery in general. Such an approach would be likely to be contrary to the NPPF (paragraph 173, set out in paragraph 2.2 above). It is unlikely that Government or the Planning Inspectorate would support such a policy approach.

4.2 The Council already engages external experts to examine viability assessments where this is necessary. The Council does not have the power to recharge the cost of such an assessment to the applicant, as the planning fee paid is deemed by the Government sufficient to cover all the costs of the process. Some local authorities do ask developers to pay for the cost of the examination of their appraisals, but it is not clear on what statutory basis they do this or what other complications might arise especially where a developer refuses. Cabinet may wish to consider a policy that applicants should be asked to pay for these assessments, noting that some may refuse and that the Council does not appear to have any powers to compel payment.

4.3 The economics of development, especially on complex sites, are such that the proceeds of the development may not greatly exceed the costs, especially where the local planning authority justifiably requires a high specification for design, materials and landscaping.

4.4 Officers do not consider that a policy of always requiring a clawback mechanism to be included in an Section 106 agreement would be practical. The NPPF requires that the basis for a planning consent is the appraisal fairly and reasonably evaluated at the point of decision. All appraisals, especially for development which may take place over a number of years, have variables

which may prove inaccurate for entirely honest reasons – whether it is the price of materials, levels of taxation, labour costs or sales income. Government Planning Practice Guidance (Para 017) says, inter alia, that ‘Planning applications should be considered in today’s circumstances’. It may well be reasonable to include a clawback mechanism for a particular development where there are uncertainties beyond these normal commercial variables and therefore a case by case approach should be adopted.

- 4.5 There is undoubtedly a public interest in the operation of this aspect of the planning process. Where the societal benefit of an affordable housing contribution is not to be provided, there is an argument that it is reasonable for the viability appraisal on which that decision is based to be seen by the wider public on behalf of whom the policy is operated. Some developers and landowners (especially smaller and more local ones) may feel that all of this information is confidential to them, but this position is not generally supported by the Information Commissioner.
- 4.6 It is therefore suggested that in response to the Motion, whilst it is not adopted in detail, Cabinet may wish to consider whether in future the presumption will be that all of a viability assessment will be accessible to the public as part of any relevant planning application. Only if an applicant is able to demonstrate that they will suffer commercial disadvantage if the information is published will the Council consider making some of the information confidential. It would only be in a truly exceptional case that a viability assessment would be withheld in its totality.
- 4.7 There are two mechanisms for achieving this. The Council could, like the London Borough of Islington, adopt a Supplementary Planning Document, setting out the details for all viability assessments and the methodology for their presentation. Officers consider this would be time-consuming and take the view that the Islington approach is unnecessarily complex. An alternative approach, adopted by the London Borough of Greenwich, is to set out the requirements for the submission of a viability assessment in its Local List of Validation Requirements (‘Local List’), something which all Local Planning Authorities are required to produce so that applicants know what information they need to submit with their applications in order for the Council to make a decision. The Local List would state that these viability assessments will be public documents, just as the plans or Design and Access Statement are public. This approach seems relatively simple and easy to implement and leaves some flexibility for applicants in how they present their information. Winchester already has a requirement for a viability assessment to be provided where necessary as a Local List requirement.
- 4.8 Amendments to the Local List are due in April so the timing of this new proposal would be ideal. It is a requirement that there is a six week consultation period on updates to the Local List and this would give an opportunity for comment by individuals, local representatives and regular users of the planning system. If there are any consultation responses which

require consideration by Members before the introduction of amendments to the Local List, they will be reported to a subsequent meeting.

- 4.9 The proposed wording of the new requirement is provided at Appendix 1. Cabinet is asked to consider this as the basis for consultation if it decides to move forward with this as the response to the Notice of Motion.

OTHER CONSIDERATIONS:

5 COMMUNITY STRATEGY AND PORTFOLIO PLANS (RELEVANCE TO):

- 5.1 Meeting the needs of the District for a sufficient supply of affordable housing is an important community strategy objective. Although a policy amendment is unlikely to have a significant impact on supply, it might be considered an important statement of transparency and expectation in dealing with relevant planning applications.

6 RESOURCE IMPLICATIONS:

- 6.1 There is no reason why the introduction of this policy should necessarily lead to an increase in workload or on consultancy costs in relation to viability assessments. The number submitted for consideration is unlikely to change. There may be some additional legal workload in considering any representations or challenge to the implementation of the policy which can be met from existing resources or reviewed if it is likely to become substantial.

7 RISK MANAGEMENT ISSUES

- 7.1 There are a number of possible risks associated with the any policy change.
- 7.2 Anyone objecting to the proposed policy may decide to do so through legal challenge as well as providing a response to consultation. This would require the Council to incur costs on legal representation if it decided to pursue the policy. This risk is considered to be low.
- 7.3 If an applicant were to insist that a viability appraisal remains confidential either in whole or part then the Council may be at risk of a claim for breach of confidentiality if it proceeds to publish the information – even having given clear warning that this would occur. In circumstances where a dispute arose, the Council would have to make a decision in accordance with its best interpretation of FOI legislation, which may subsequently be found to be incorrect. The Council may occasionally have to err on the side of caution if significant disputes arise.
- 7.4 Members should be aware that if the policy is introduced, it is unlikely that it will lead to an increase in the number of affordable homes. Officers are not aware of any current case in which a developer has admitted that it would have provided different figures if they believed these were likely to be seen by the public. There appear to be very few cases nationally, if any, where public examination of figures released on the orders of the Information

Commissioner has revealed that the local authority concerned accepted figures which the applicant knew to be false.

- 7.5 It is possible that the introduction of the policy could deter an applicant from bringing forward development proposals, for the principal reason that they did not wish to reveal information regarding the financial performance of the development or because some aspect of the financial appraisal was personally sensitive. This is considered unlikely to occur on a regular basis and provision will be made for appraisals which have a genuine requirement for confidentiality (taking the Information Commissioner and Tribunal decisions as a benchmark for what might be appropriate) to be submitted with an argument for the redaction of specific information.

BACKGROUND DOCUMENTS:

None

APPENDICES:

Appendix 1: Proposed Amendment to Local List.

Appendix 1

Additional wording to be added to Local List requirement:

“All viability assessments should be submitted in a form which meets professional standards appropriate to the scale and complexity of development signed as an accurate statement by the applicant. Unless circumstances dictate otherwise the assessment should be based on a residual land valuation methodology.

The applicant will subsequently provide any additional information reasonably required by the Council to reach its assessment of the material relevance of the viability assessment to the determination of the application.

The viability assessment and supporting information, including exchanges with the applicant, will form part of the public planning register and will therefore be placed in the public domain.”