LAND OFF GATEWAY AVENUE, BALDWIN'S GATE
RICHBOROUGH ESTATES LTD **13/00426/OUT**

The application was for outline planning permission for the erection of up to 113 dwellings and associated works at land at Gateway Avenue, Baldwin's Gate. The application was refused by the Planning Authority on the 18th February 2014

RECOMMENDATIONS

That the Committee confirm that

1) **that it wishes officers to now write to the applicant, without prejudice to the Local Planning Authority's case that the proposal is unacceptable (for the reasons indicated in its decision notice), to confirm that the obligations referred to in the recommendation that was provided to the Planning Committee are required by the Local Planning Authority, except that with respect to affordable housing;**

2) **that officers commence immediate enquiries with those parties who sought such obligations to establish that evidence of the nature indicated in the report below exists so as to justify these requirements; and should your officer, upon receipt of that evidence, no longer consider this to be the case, that a further report be brought back to the Planning Committee, if necessary as an item of urgent business, or in the event that there is not sufficient time to do that, your officer resolves the position of the Local Planning Authority, in consultation with the Chairman and Vice Chairman;**

3) **that with respect to the matter of affordable housing that officers write to the applicant confirming that the Borough Council's position is that it is seeking the provision of 25% on site affordable housing and that it considers that such a matter can and should be addressed by an appropriate Section 106 obligation, the terms of which it is willing to discuss with the applicants agents;**

4) **that in preparing the Council's full Statement of Case that officers, or the Council's agents, include reference to these above requirements;**

5) **that should the applicant seek before the appeal is determined to enter under Section 106 of the Town and Country Planning Act, 1990 as amended, into an agreement with the Council containing such obligations, officers have the appropriate authority to enter into such an agreement;**

6) **that, for the avoidance of any doubt, your officers have authority to agree a Statement of Common Ground that takes into account the authority's' reasons for refusal of the application; and**

Reason for report

The application was refused planning permission on the 18th February 2014 and the decision notice of the Authority has been issued in accordance with the resolution of the Committee. According to press reports, which have now been confirmed at a meeting with the applicant's consultants an appeal is expected to be made against the Council's decision. This report is

solely concerned with the issue of planning obligations and the completion of a Statement of Common Ground.

Background

The Planning Authority refused planning permission for this application on the 18th February for the reasons contained in the decision notice, a copy of which is provided as an Appendix to this report.

The recommendation before the Planning Committee was that planning permission be granted subject to the applicant first entering into a Section 106 obligation to secure the following:-

i. **A contribution of £442,146 (on the basis that the development as built is for the full 113 units and of the type indicated) or such other sum as determined by the Head of Planning as appropriate on the basis of policy, towards the provision of education facilities at Baldwin's Gate Primary School and Madeley High School**
ii. **In perpetuity, provision of 16% of the dwellings as affordable units**
iii. **An appropriate financial contribution, as determined by the Head of Planning, towards the off-site provision of the equivalent of 9% of the number of dwellings as affordable units**
iv. **Either a maintenance contribution calculated on a rate per dwelling of £1,920 or a management agreement for the long-term maintenance of the open space on the site**
v. **A contribution of £2,150 towards travel plan monitoring**

The decision notice of the Local Planning Authority, drawn up on the basis of the resolution of the Planning Committee of the 18th February as moved by Councillor Howells, makes no express reference to these obligations, which at the time of the decision of the Committee were not "on the table". The Committee did however include as reason for refusal No. 8 the following:-

"*The development fails to provide 25% of the total number of proposed dwellings as affordable dwellings on site which is required to provide a balanced and well functioning housing market, as referred to in the Newcastle-under-Lyme Borough Council Affordable Housing Supplementary Planning Document (2009) and the Supplementary Planning Document on Developer Contributions (2007). The proposal would thus be contrary to Policies CSP6 and CSP10 of the Newcastle-under-Lyme and Stoke-on-Trent Core Spatial Strategy 2006-2026, Policy IM1 of the Newcastle-under-Lyme Local Plan 2011, and the aims and objectives of the National Planning Policy Framework (2012).*"

Should, as anticipated, an appeal be now be made against the Council's decision it can be expected that the appellant will wish to prepare planning obligations for consideration by the Inspector, or by the Secretary of State if the appeal is recovered for determination by him.

Local Planning Authorities and Inspectors are required to consider whether otherwise unacceptable development can be made acceptable through the use of conditions or planning obligations. Planning obligations as a matter of policy should only be sought were they meet all of the following tests:-

- 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

These are legal requirements set out in Regulation 122 of the Community Infrastructure Lev Regulations 2010

The Planning Inspectorate's Guidance indicates that the following evidence is likely to be needed to enable the Inspector to assess whether any financial contribution provided through a planning obligation (or the local planning authority's requirement for one) meets the above tests:

- the relevant development plan policy or policies, and the relevant sections of any supplementary planning document or supplementary planning guidance;
- quantified evidence of the additional demands on facilities or infrastructure which are likely to arise from the proposed development;
- details of existing facilities or infrastructure, and up to date, quantified evidence of the extent to which they are unable to meet these additional demands;
- the methodology for calculating any financial contribution necessary to improve existing facilities or infrastructure, or provide new facilities or infrastructure, to meet the additional demands; and
- details of the facilities or infrastructure on which any financial contribution will be spent

Members are reminded that one of the examples given of unreasonable behaviour (in the determination of applications or the defence of appeals) which may lead to an award of costs against a Local Planning Authority is "requiring the appellant to enter into or complete a planning obligation which does not accord with the tests set out in Circular 05/2005 on planning obligations" (since replaced by the national Planning Policy Framework). An award of costs may be made in favour of an applicant if the Planning Authority fails to provide sufficient evidence on appeal to support the requirement for a planning obligation or the authority's stance is inconsistent with national planning policy guidance on the use of planning obligations.

Although your officers will now have to approach the concerned consultees to obtain the most up to date information and evidence, there is no reason **at this stage** to suggest that it would not any longer be appropriate to seek the obligations referred to in the recommendation to the Committee. If as the matter proceeds to appeal it becomes apparent that the Council would not be able to provided sufficient evidence to support the requirement for a particular obligation, the intention would be to come back to the Planning Committee for approval of that revised position, provided there is sufficient opportunity to do so. If not it is proposed that the Chair and Vice Chairman be consulted. The above recommendation seeks approval of that procedure.

The decision of the Authority has been made and the decision notice has been issued. there is no suggestion that the Council either can or should add to its grounds of refusal of the application. The Costs circular 03/2009 gives as an example of unreasonable behaviour the introduction of a new issue or reason for refusal. Your officers would submit that given the relatively recent nature of the decision (which was issued on the 10th March 2014) and the recent confirmation of an intent to lodge an appeal, it is appropriate and timely to make the Local Planning Authority's position with respect to planning obligations absolutely clear –

Indeed Paragraph B26 states

Authorities may wish to consider using an informative note attached to the decision notice on an application for proposed development, in addition to stating a reason (or reasons) for refusal, to advise applicants that certain matters are capable of resolution by the submission of a planning obligation or by a condition….

No informatives were used to achieve this end in the decision notice as issued

It is also anticipated that the appellant will wish to request the Borough Council, and other parties including the County Council, to enter into an agreement under Section 106 that would become operative should the appeal be allowed - there are limitations in the use of unilateral agreements as they cannot impose requirements or obligations upon any person other than the signing party. The obligations that were sought in this case should be secured by agreement rather than by unilateral undertaking.

Generally the authority to enter into planning obligations by agreement lies with the Planning Committee.

Prior to the submission of the application your Officer entered in a Planning Performance Agreement with the applicant, as commended by national guidance. That agreement includes that in the event of a refusal of the application, "work shall progress to enable an agreed position on Section 106 agreement matters as an area of common ground in any subsequent appeal, and that furthermore the parties will work collaboratively and in a timely manner on any Statement of Common Ground required as part of any appeal".

Members are reminded that costs can be awarded in appeal proceedings should either party exhibit unreasonable behaviour of either a procedural or substantive nature.

In terms of procedural awards a failure to comply with statutory requirements as set out in Appeal Regulations, which are in turn the subject of Planning Inspectorate Guidance will run the risk of an award of costs. The Costs circular advises that "*discussion of, and agreement on, outstanding issues between the principal parties throughout the planning process is likely to reduce the risk of a confrontational attitude developing at appeal stage, may reduce the risk of a successful costs application and minimise the overall cost of the process to all concerned. Costs applications are less likely to be justified where parties take responsibility for their behaviour and act reasonably*"

The latest procedural guide on planning appeals published on the 6th March 2014 states that the appellant and the local planning authority should include with their appeal documentation any certified (or draft) Section 106 obligation which they wish to consider. Under the new appeal requirements the appellant is required to submit their full Statement of Case at the time of the lodging of the appeal, and the LPA is then required to provide their's within 6 weeks of the lodging of the appeal. It is in the interests of both parties to prepare wherever possible common appeal material in advance of these statutory requirements.

The detailed guidance on planning obligations (Annexe O to the same Guidance) reminds all parties that "*there should be a continuous dialogue between the parties in the run up to the hearing or inquiry about the state of the draft Section 106 to ensure that the final draft is as good as it can be"*, that " *if the appellant intends to send a planning obligation they should make sure that a final draft, agreed by all parties to it, is received by the Planning Inspectorate no later than 10 working days before the inquiry opens, the planning obligation should normally be executed before the…. inquiry closes, without the need for an adjournment…however if that is not practicable the Inspector will agree the details of the receipt of the executed planning obligation with the appellant and the local planning authority at the …inquiry; that the planning obligation must give details of each person's title to the land (and) this should be checked by the Local Planning Authority and in … inquiry cases the Inspector will ask for its assurance*.

Finely with respect to the involvement of the Local Planning Authority in agreeing a Statement of Common Ground, members are reminded that not completing a timely statement of common ground or not agreeing factual matters common to witnesses of both

principal parties, resulting in more time being taken at an inquiry than would otherwise have been the case is given as a further example of unreasonable procedural behaviour