

**THE SEEKING OF CONTRIBUTIONS TOWARDS PUBLIC OPEN SPACE FOR DEVELOPMENTS OF 10 UNITS AND UNDER**

The Council has received an appeal decision with respect to the an appeal relating to an application (18/00393/FUL) at 1 Wade Court, Kidsgrove

A report on the appeal decision will be provided to a future meeting of the Planning Committee as normal. The appeal decision has potentially significant implications for the Council in respect of

- its policy of seeking public open space (POS) contributions in respect of developments of 10 or less dwellings
- applications that have been considered both by the Planning Committee and your Officer acting under delegated powers, but where a decision notice on them has not yet been issued because obligations by Section 106 agreement or unilateral undertaking have been sought but have not yet been completed/ received
- appeals both received and which may be received in the future where at least one of the grounds for refusal of the application by the Council as the Local Planning Authority (LPA) relates to the seeking of public open space contributions in respect of developments of 10 or less dwellings

In each of the above timeliness of a response to the consequences of the appeal decision is a critical factor. Where obligations are being drafted legal costs are being incurred by applicants. Similarly where viability appraisals are being undertaken costs are also being incurred. The report is brought to the Planning Committee as an item of Urgent Business in view of the above.

**Recommendations**

- (a) That the appeal decision be noted;**
- (b) That the LPA cease to apply the policy of seeking public open space contributions in respect of developments of 10 or less dwellings, other than in the circumstances expressly stated as possible in the PPG;**
- (c) In the case of each of those (7) applications for 10 dwellings or less which have been determined by the Planning Committee where such a POS contribution has been sought, and the related planning obligation has not yet been secured (and thus no decision notice has been issued), a report should be brought to the Committee at the next meeting so that the Committee can reconsider the position of the LPA;**
- (d) In the case of one single application for 10 dwellings or less which has been determined by the Planning Committee where a POS contribution is being required in the event of the development not being substantially commenced and a subsequent viability appraisal demonstrating that it can be afforded, and the related planning obligation has not yet been secured (and thus no decision notice has been issued), a report should be brought to the Committee at the next meeting so that the Committee can reconsider the position of the LPA;**
- (e) That in the case of those (12) applications for 10 dwellings or less which have been determined by your Officer acting under delegated powers on the basis that planning permission can be granted subject to a Unilateral Undertaking securing a public open space contribution, and that Unilateral Undertaking has not yet been received, your Officer has the authority to issue such permissions without such Unilateral Undertaking; and**
- (f) In any cases involving 10 or less dwellings where in refusing an application a reason for refusal relating to the failure to provide such a contribution has been given and an appeal has been or is now lodged, your officers have delegated authority to (a) withdraw that reason for refusal, (b) not to give any evidence in**

**support of that reason for refusal and (c) if it were the sole reason for refusal to invite the submission of a new planning application, so as to avoid an unnecessary appeal**

### **The Appeal Decision of 13<sup>th</sup> February 2019 now received**

The Council has received an appeal decision with respect to an appeal against the decision to refuse to grant planning permission (18/00393/FUL) for the change of current use (communal area) into a 1 bedroom self-contained flat at 1 Wade Court, Market Street, Kidsgrove.

A full report on the appeal decision will be provided to a future meeting of the Planning Committee in due course. The appeal decision letter is attached as Appendix 1. This report is solely concerned with the implications of the decision with respect to the Council's current policy of seeking financial contributions for public open space when considering proposals for developments of 10 dwellings or less - the grounds for the item being Urgent Business.

The Inspector's letter rehearses the Council's policy basis for seeking contributions for public open space, and explores these in the context of the National Planning Policy Framework and the two additional appeals where open space contributions for developments of less than 10 dwellings has been an issue. Members will see in the letter that, in summary, the Inspector has found that these contributions are tariff style and thus the seeking of them is inconsistent with Government policy. This inconsistency takes precedence over the fact that our approach to these contributions is consistent with our own policy documents, including the Core Strategy and the Open Spaces Strategy.

Members will be aware that this is the second appeal where a Planning Inspector has found this to be the case, and as such, it is important for the Council to act to avoid further appeals being found against the Council on this ground.

### **The seeking of contributions towards public open space for developments of 10 units and under**

National Planning Practice Guidance (PPG) indicates that there are specific circumstances where tariff style planning obligations should not be sought from small scale and self-build development. This follows the order of the Court of Appeal dated 13<sup>th</sup> May 2016 which gave legal effect to a Ministerial Policy that had been set out in a [written ministerial statement](#) of 28<sup>th</sup> November 2014. .

Insofar as the Borough is concerned, having no "designated rural areas" (as defined in the Statement), such tariff-style contributions should not be sought in circumstances involving developments of 10 units or less, which have a maximum combined gross floorspace of no more than 1,000 square metres (gross internal area). This restriction on seeking such planning obligations does not apply to what are termed Rural Exception Sites.

The PPG in addressing the question what are tariff-style contributions states as follows

"Some authorities seek planning obligations contributions to pooled funding pots intended to provide common types of infrastructure for the wider area... 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. "

The PPG does indicate that even in the case of developments of 10 or less units some planning obligations may still be required to make a development acceptable in planning terms. It is indicated that authorities can still seek obligations for site specific infrastructure where this is appropriate to make a site acceptable in planning terms. It will be noted that neither Inspector has accepted that a contribution to off-site public open space falls within this category. Finally the Guidance does indicate that LPAs can still seek contributions to fund measures with purpose of facilitating development that would otherwise be unable to proceed

because of regulatory or EU Directive requirements. Again there is no suggestion that the provision of a contribution to off-site public open space provision could be considered to fall within this category

Your planning Officer's position to date has been that public open space contributions are not "tariff style" because they are calculated on a per dwelling basis, and provided they are intended for specific projects which are not funded by pooled pots they could be sought for developments of 10 units or less.

### **The appeal decisions**

As Members will note this is the third appeal decision involving developments of less than 10 dwellings where the issue of a financial contribution towards Public Open Space was a key consideration.

The first, dated 30<sup>th</sup> January 2018, related to a proposal for 8 Barford Road, 17/00483/FUL, for the proposed demolition of an existing bungalow and construction of three dormer bungalows. The appeal decision is attached as an Appendix 2 to this report. The paragraphs of relevance (to this report) are 26-32. The Inspector in that appeal noted that support for contributions requested by the Council was to be found in Policy CSP5 which refers to the the North Staffordshire Green Space Strategy and any replacement strategy – in this case the Open Space Strategy adopted in March 2017. The Inspector noted there had been a wide consultation exercise, but the document was a non-statutory one in that it did not form part of the approved development plan, but it could be a material consideration in the determination of planning applications, and as a consequence of the very specific details provided of how the money would be spent locally and how it would relate to the development he considered the contribution would meet the statutory tests as set out in the CIL Regulations and that a UU providing financial contribution towards off-site public openspace was required in these particular circumstances. The Inspector raised no issue with the fact that the contribution was for a development of 10 or less dwellings.

As indicated above the Inspector in the Wade Court appeal considered the Barford Road decision to have limited relevance to her decision.

The second appeal decision, dated 22<sup>nd</sup> June 2018, related to Monument House, Madeley Heath, 17/00483/FUL, and involved the conversion of the ground floor of the property into a two bedroom flat. The appeal decision is appended as Appendix 3 to this report. As indicated above the Inspector in that case considered that the contribution was a tariff style contribution, which the PPG indicates should not be sought on a development of this size. Policy CSP5 supported by the OSS which requires a contribution from any residential development regardless of size was held to be contrary to the PPG, the Inspector noting that one of the key aims of the changes made to the PPG was "to reduce the disproportionate burden of developer contributions on small scale developers". Given this, and in the absence of specific details about how the financial contribution would be spent and how it related to the appeal proposal, the Inspector concluded that the contribution requested would not meet the statutory tests set out in the CIL Regulations and the Framework. The appeal was allowed without a planning obligation.

In providing evidence in support of the decision to refuse the Wade Court application, your Officer sought to address the concerns expressed by the Inspector in the Monument House case which led to that appeal being allowed. Despite more detail of the project that the contribution to be secured from the Wade Court development being set out in the LPA's Statement of Case and evidence that the money could be spent without being pooled with other money the Inspector still concluded that there was conflict with national policy on the seeking of contributions with respect to developments of less than 10 dwellings

It is well recognised that appeal decisions are a material planning consideration and that the decision maker must take them into account. Furthermore in listing examples of those situations where a local planning authority's behaviour may give rise to a substantive award of costs, by reason of their unreasonable behaviour with respect to the substance of the matter under appeal, the PPG cites inter alia

- Preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations
- Requiring that the appellant enter into a planning obligation which does not accord with the law or relevant national policy in the NPPF on planning conditions and obligations.

The Monument House and Wade Court appeal decisions are a significant material planning consideration in the determination of all applications involving developments of 10 or less dwellings. Following this latest appeal decision the policy of seeking public open space contributions in respect of developments of 10 or less dwellings is considered no longer to be sustainable. Continued application of that policy would put the Council at risk of an award of cost at any subsequent appeal.

Under the Scheme of Delegation it is only the Planning Committee that can authorise the drawing up of Agreements under Section 106 that include planning obligations, but officers are able to take into account and determine applications which are accompanied by a Unilateral Undertaking, provided such decisions are in accordance with the policies of the development plan, local finance considerations and any other material considerations. In a number of cases officers have invited the submission of such Unilateral Undertakings with a view to granting permission upon their completion. Where it is proposed to allow a less than policy compliant contribution the application will have come to the Committee for determination. Any application for Major Development which for residential development means 10 or more dwellings, or where the number to be provided is not known sites with an area of 0.5 ha or more, comes to the Planning Committee for decision regardless.

This report therefore seeks the agreement of the Planning Committee that the Local Planning Authority should **cease to apply the policy of seeking public open space contributions in respect of developments of 10 or less dwellings, other than in the circumstances expressly stated as possible in the PPG**. In making this recommendation it should be noted, however, that in all other respects, the OSS remains a material planning consideration and it should be given appropriate weight in the determination of planning applications where relevant.

#### **Further consequences of a change of policy**

The Council's position has been to seek such contributions. In some cases, where evidence of a lack of financial viability for a policy compliant scheme has been established, the Council has asked applicants to enter into a planning obligation to secure a reappraisal of the financial viability of the development should it not be substantially commenced within a certain period of time, and if that appraisal indicates that the scheme can then make such a contribution the making of it

Where no decision notice has yet been issued but the Council has resolved to grant planning permission subject to the prior completion of obligations the Council will, if it changes its policy position, need to consider the application again. As explained above in some cases the original decision to grant planning permission subject to the securing of such obligations will have been made by the Committee, in other cases the decision will have been made by officers acting under delegated powers. Where non-policy compliant contributions have been accepted those decisions will have been made by Committee.

The following action is recommended:-

1. **That in the case of each of those (8) applications for 10 dwellings or less which have been determined by the Planning Committee where such a POS contribution has been sought either immediately or in the event of a subsequent reappraisal, and the related planning obligation has not yet been secured (and thus no decision has yet been issued), a report should be brought to the Committee so that the Committee can reconsider the position of the LPA..** The applications involved are as follows:-

Application	Address	Proposal	Date considered by Planning Committee (agenda item no)
18/00016/FUL	Land adjacent to 16 St.Giles Road, Knutton	4 flats for affordable rent	29 <sup>th</sup> January 2019 (9)
18/00243/FUL	Former Playground Brutus Road Chesterton	4 semi-detached houses and 1 detached house	29 <sup>th</sup> January 2019 (9)
18/00441/FUL	Land between 155 and 161 Knutton Lane	2 flats for affordable rent	29 <sup>th</sup> January 2019 (9)
18/00465/FUL	Land adjacent 45 Moran Road	2 flats for affordable rent	29 <sup>th</sup> January 2019 (9)
18/00461/FUL	Land adjacent to 25 Arthur Street, Knutton	2 Houses for affordable rent	29 <sup>th</sup> January 2019 (9)
18/00443/FUL	Land off St Bernards Road, Knutton	8 houses for affordable rent	29 <sup>th</sup> January 2019 (9)
18/00559/FUL	Land off Sandford Street	10 flats	6 <sup>th</sup> November 2018 (6)
18/00467/FUL	121-123 High Street, Wolstanton	Change of use of former Co-op Bank to form offices and 4 flats over	6 <sup>th</sup> November 2018 (10)

There are also two applications on the agenda of this evening's meeting (agenda items 12 and 14) where the current policy has been a significant consideration and the Committee will note the supplementary reports that have now been provided in relation to these two applications, and the revised recommendations given

2. **That in the case of those (12) applications for 10 dwellings or less which have been determined by your Officer acting under delegated powers on the basis that planning permission can be granted subject to a Unilateral Undertaking securing a POS contribution, and that Unilateral undertaking has not yet been submitted, your officers have the authority to issue such permissions without such Unilateral Undertaking being obtained, and to take such an approach in future applications**
3. **That in any cases where in refusing an application for 10 dwellings or less a reason for refusal relating to the failure to provide such a contribution has been given, and an appeal has been or is now lodged, your officers have delegated authority to (a) withdraw that reason for refusal, (b) not to give any evidence in support of that reason for refusal and (c) if it were the sole reason for refusal to invite the submission of a new planning application, so as to avoid an unnecessary appeal**

Appendix 1 – Wade Court Appeal Decision

Appendix 2 – 8 Barford Road Appeal Decision

Appendix 3 – Monument House, Madeley Heath Appeal Decision

Date report prepared: 22<sup>nd</sup> February 2019