

New Estate Developments – Lessons Learnt



Report to: Scrutiny Committee

Date: 5 December 2023

Portfolio Holder: Councillor Michael Hardware, Portfolio Holder for Economic Development

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Recommended that:

- A** The council maintains a robust stance against the developers on major housing sites when it negotiates and monitors Section 106 Agreements, to ensure that the best possible benefits are achieved for the community.
- B** That sufficient officer resource and expertise is identified in the Planning department to hold developers to account and to provide sufficient monitoring capacity.

Background

1. Section 106 (S106) Agreements are legal agreements between the local planning authority (LPA) and a developer/landowner. The name refers to the relevant paragraph of the 1990 Town and Country Planning Act. The aim of the Agreement is to ensure that works are undertaken as part of a development to mitigate the impact of that development on the community.
2. The works and infrastructure can include, but is not limited to, roads, footpaths, affordable housing, education, public open space, play space, health provision, community and leisure facilities etc.
3. Regulation 122 of the Community Infrastructure Levy (CIL) Regulations (2010) states that any contributions/ obligations required from a developer must meet the following tests:
 - a) The obligation must be necessary to make a development acceptable in planning terms.

- b) The obligation must be directly related to the development.
 - c) The obligation must be fairly and reasonably related in scale and kind to the development.
4. Local Plan policies are the starting point for negotiations with a developer on a S106 Agreement. For example, the council has a policy requirement for 30% of housing to be affordable on sites with more than ten dwellings. The negotiations will also centre on exactly what is needed on any site, such as school places, roads access, a community centre etc.
 5. Such requests are routinely sought from consultees, such as Essex County Council (ECC), through the planning application process, and must be founded on evidence and meet the tests of the CIL regulations (as listed in paragraph 3 above).
 6. Contributions can be in cash or kind. For example, the developer may choose to build the affordable housing units and roads infrastructure themselves to the Highway Authority's specification. At other times they might provide funds for the District or County Council or a third-party contractor to deliver the work.
 7. Sometimes (more commonly on smaller sites) the developer may pay upfront for the infrastructure. In addition, the LPA can ask for contributions in advance if the facility is needed immediately, and before any of the houses are occupied. An example of this is that a local school is already full, and it will need to be extended or even a new school provided as soon as the new houses start to be occupied to ensure that suitable education provision is provided for new residents.
 8. All these varied options will be included in the schedules of the relevant legal agreement.
 9. However, on larger sites, the most common process is that that a developer pays in instalments via key trigger points (specified number of units completed) as the building out process progresses. Once again, trigger points will vary depending on the individual agreement and again must meet the test of reasonableness.
 10. Often there will be a trade off on what can be provided. If roads infrastructure is very expensive for example, an LPA may have to accept lower than desired contributions towards other areas, such as community facilities. This is done via an "open book" approach, where a developer must demonstrate the costs of the development and how much profit they can make, and the LPA can subject this to an independent viability test.
 11. Whilst failure to sign a S106 can be grounds for refusing an application, the LPA must exercise the fairness and reasonableness set out in the test. It must be noted that private developers are entitled to make a reasonable profit and this will be factored into viability appraisals. It is often the case that a development granted on appeal, rather than being locally determined, often secures a much lower level of community infrastructure.

12. Usually, an acceptable level of contributions is achieved via negotiations, though it can take time, and this can often delay the planning process, whereby where possible, officers will seek to engage the Extension of Time mechanism to ensure that it can secure and deliver the best development for its communities. Best practice is when a developer and their legal team engage with the council and their lawyer at an early stage, alongside the technical planning process – but this does not always happen. It is preferable that, as is required with appeals, application submissions are accompanied by a draft Heads of Terms for S106 Agreements. This is a matter that officers will consider when reviewing the Local Validation Requirements in 2024.

Issues/Proposals

13. Members have expressed interest in looking at two large housing sites in Harlow which have come forward in recent years and where they see that contributions provided have not been in line with the legal agreement.

Gilden Park

14. One of these is the Gilden Park development in Harlow, where three developers- Barratt David Wilson Homes, Taylor Wimpey and Persimmon Homes obtained permission under application reference HW/PL/11/00055 for the following development:
 - a) “Erection of 1,200 Dwellings, New Primary School, Community Buildings and Retail/Business/Live Work Units together with Associated Uses Comprising Allotments and Public Open Space, Plus Associated Infrastructure and Engineering Works, with Vehicular Access from Gilden Way”
15. An appeal was submitted to the Planning Inspectorate on 20 December 2011 against the council’s failure to determine the application within the prescribed timescales. The appeal was granted, following a Hearing, on 15 November 2012, however, condition 11 of the permission limited the development to 1,100 dwellings.
16. Subsequent reserved matters and full applications have been submitted to the council and duly approved to enable development to proceed. These were all determined locally.
17. The legal agreement for this large site made provision for an extensive range of community facilities including (with the initial delivery date):
 - a) A retail area (to be transferred before the occupation of 70% of dwellings);
 - b) Allotments (to be provided and transferred prior to the occupation of 900 dwellings);
 - c) Landscaping/Open space scheme (to be provided before the occupation of 900 dwellings);

- d) Pitches and a sports pavilion (to be provided prior to the occupation of 900 dwellings); and
 - e) A community centre (to be transferred before the occupation of 70% of dwellings).
18. However, despite extensive promises from the consortium of the three developers, the facilities remained largely unprovided through the build out of the housing until almost all units were completed. This is despite extensive dialogue over a couple of years. This involved senior Officers, Councillors and senior representatives from the housebuilders to impress upon the Consortium the need and urgency of providing the community facilities. During this period, new milestones were proposed by the developers and then subsequently unachieved.
19. In July 2023 Harlow Council, having sought legal advice, announced its intention to take out an injunction to prevent any more units being occupied until the infrastructure was in place. This is a highly unusual, if not unprecedented, move by a LPA, but was considered necessary due to the great detriment of residents living on the development who were quite understandably aggrieved at the lack of delivery of the planned infrastructure on the site.
20. The intention to issue the injunction and the wait for a court decision led to extensive local and national publicity announcing the council's intentions to take out the injunction, with articles in the national "Planning" and "Inside Housing" magazines amongst others.
21. Before the court date was reached (scheduled to sit on 18 October 2023), the consortium's lawyers offered up a revised timetable to deliver the infrastructure which would be binding on both parties. Legal advice to the council, was that since the original timeframe had slipped, this was the most reasonable and secure way of the council being able to ensure that the community benefits were finally delivered, but with the possibility of the injunction still in the background to hold the developers to account, not to mention the extensive reputational damage to the three housebuilders caused by all the negative publicity and local interest. The agreed trigger point are now as follows:
- a) Open space scheme – condition submitted and discharged;
 - b) Seeding of football pitches – End of October 2023 to seed following which pitches will take 12 months to establish;
 - c) Pavilion – December 2023/January 2024 to start;
 - d) Community centre – December 2023/January 2024 to start with delivery completed by December 2024;
 - e) Allotments – Mid November 2023 anticipated for completion and transfer by deadline;

- f) Landscaping -End of November 2023; and
 - g) Provision of retail units – December 2025.
22. At time of writing the consortium are sticking to the revised schedule, except where issues such as adverse weather means that the timetable has moved slightly and regular meetings and monitoring are in place to ensure that this remains the case.

Land at New Hall Farm and Hubbards Hall Farm

23. Application reference HW/PL/04/00302, was granted outline permission on 27 June 2012 for the following development:
- a) “Outline planning permission is sought for the erection of 2,300 Dwellings Including Parkland and Recreation, Employment and the Development of the Local Centre into a Full Neighbourhood Centre”.
24. A S106 Agreement was signed between parties in relation to the following:
- a) Affordable housing provision (at a provision of 15% for tranche 1 – the first 250 dwellings - with future tranches being subject to further viability reviews);
 - b) Highway and transport works;
 - c) Provision of two primary schools (one 330 place and one 420 place);
 - d) Provision and maintenance of open space and sports fields within the development;
 - e) Contribution to art provision; and
 - f) Funding for health care facilities.
25. Queries have been raised regarding the delivery of the bus route through the site in conjunction with the agreed trigger point within the S106. The S106 required the provision of high-quality bus stops along the spine road including raised height kerbs, shelters and real time information and these are to be provided prior to the occupation of the appropriate bus service or services using such facilities. The Schedule goes on to state that the bus service should begin no later than January 2012 or if later twelve months following implementation and should be maintained until completion of construction of the 2000th residential unit of the development with further frequency targets stipulated. There is also a requirement for a bus turnaround facility at the proposed neighbourhood center or at such location as may be agreed by the developer and the bus operator.
26. The final requirement was for the developer to make available or enter into an appropriate dedication agreement, to allow for the land to be dedicated as highway maintainable at public expense.

27. The June 2012 S106 (dubbed the Essex Agreement) has been varied three times, however it is unclear that those variations have moved the parties from the original understanding in 2012. Schedule 3 of the Essex Agreement clearly states that the Developer covenants with ECC. As party to the Agreement, the breach of any S106 relating to ECC functions, remains their responsibility to enforce as opposed to the LPA.
28. So, in short, ECC may wish to consider its options if:
 - a) the developer is found not to have provided a high-quality passenger transport service linking the application site with both the Town Station and the Town Centre. This obligation triggered no later than January 2012, and was to be maintained until the completion of construction of the 2,000th residential unit.
 - b) The developer has failed to provide a bus turnaround facility at a neighbourhood centre or some other agreed location, which should have been in place prior to the start of the transport service.
 - c) The developer has failed to make available or enter into an appropriate dedication agreement, to allow for the land to be dedicated as highway maintainable at public expense.
29. This report has been shared with colleagues at ECC in advance of it being made publicly available. Any responses or comments received will be shared with Councillors at the meeting. Obviously in a two-tier council area, both tiers of local government are responsible for monitoring the relevant aspects of a S106 agreement, adding further complexity to the process.

Mechanism to Monitor S106 Agreements and Conditions

30. Under the new Levelling Up Bill, Part 3, Chapter 4, there are more rigid mechanisms and powers available to local government to monitor and enforce S106 Agreements which will assist in holding developers to account moving forward. These relate to the requirement to issue commencement notices for all developments to the council.
31. Consequently, Harlow Council have started issuing commencement notices with planning decisions from 13 November 2023. The information we receive back will be documented in a spreadsheet to enable more robust monitoring of conditions and S106 triggers points. This has not been possible previously due to the standard 'three year commencement condition' without any requirement to advise of commencement, meaning any enforcement was a result of formal notification. Processes are now being put in place to monitor Harlow Council triggers.
32. The council will duly notify ECC of commencement dates of developments where they are party to the S106, however the responsibility for any action to be taken in such respect remains with ECC.

Lessons Learnt

33. The Committee has asked Officers to consider what lessons have been learned from the monitoring and delivery of S106s on these two developments. Whilst it can be evidenced that Harlow Council has attempted throughout to communicate with and engage the developers to ensure they met their obligations, in hindsight, the council may have been somewhat over-trusting and reticent in holding them to account. Nonetheless, this must also be seen in the light of the Covid-19 Pandemic, when little development was happening over a two-year period and all delivery ground to a halt.
34. Nonetheless, having reached the end of a negotiated scenario and deciding to take unprecedented legal action on Gilden Park, the council has demonstrated that it is perfectly prepared to use all mechanisms in its power to ensure facilities are delivered for the community and has gained a reputation as a result as a tough council to deal with. The longer-term benefits of this lengthy and difficult process should not only mean good outcomes on existing sites but that in the future, developers will be keen to fulfil their obligations due to the potential risk of financial and reputational damage, should they be subjected to legal action for failing to do so.
35. In conclusion, it remains important that the Planning Service retains sufficient staff, both at professional planning and technical support levels, to enable S106 agreements to be monitored and any discrepancies in payments or provision picked up immediately. Planning has looked to strengthen the technical support side to assist with this and also because there is a national shortage of planning officers, due to older officers retiring and insufficient young planners entering the profession. The council has also recruited a Graduate Planner who is learning on the job and mechanisms like that will be important to give the Service the right capacity in future.
36. Statutory Planning fees are rising nationally from 4 December 2023 with an expectation from the government that any increases will be invested in planning services. Moreover, the council's planning officers have also undertaken a benchmarking exercise of discretionary charges to place the council on a par with other authorities, and Councillors will be able to scrutinise these as part of the 2024/25 budget setting process. This should also supply additional capacity to strengthen the service.
37. Investing in the Service's future will ensure that the council is best placed to secure and monitor developers' contributions and deliver the community benefits which local people need and expect.

Implications

Equalities and Diversity

Positive effects on equalities and diversity, given the recommendations will ensure developers are held to account regarding the delivery of infrastructure through Section 106 agreements, thereby delivering the best possible benefits for all members of the community.

Climate Change

The recommendations will ensure developers are held to account regarding the delivery of infrastructure through Section 106 agreements. Such infrastructure includes provision of public open space, sports fields, cycleways, bridleways, allotments and landscaping. These types of infrastructure contribute to and enhance the wider Green and Blue Infrastructure network. This, in turn, assists in the mitigation of climate change due to the benefits of such infrastructure. These benefits include assisting with a change towards more-sustainable transport modes, and provision of areas for insect & wildlife habitats, natural water soakaways and growth of flora, fauna & trees. In combination, these benefits mitigate against climate change reducing harmful emissions, providing cooling & shade and reducing flood risk.

Finance

None directly other than the contributions set out have a bearing on the affordability and viability of delivering key infrastructure improvements across the town and without them those improvements cannot be achieved/delivered.

Author: Simon Freeman, Deputy Chief Executive and Director of Finance

Governance and Corporate Services

The recommendations will support officers in securing robustly managed contractually sound contracts to facilitate successful delivery of infrastructure improvements, and/or availability of legal remedy. Regulations require all local planning authorities that enter into section 106 planning obligations during a reporting year to publish an infrastructure funding statement at least annually.

Author: Simon Hill, Director of Governance and Corporate Services

Housing

We agree and support the recommendations outlined in the report. It is vital that the council's development partners work closely with the council to negotiate and deliver section 106 agreements on all new developments. The council must have powers to ensure that all aspects of these agreements are delivered for the local community and residents of HDC.

Author: Neil Euesden, Interim Director of Housing

Strategic Growth and Regeneration

The report identifies the experiences of managing two large scale developments over many years. This experience will be vital as Harlow moves into the next stage of its growth through the Garden Town developments. The report highlights the need for additional resource to robustly manage S106 Agreements and this will be one of the priorities for expenditure that increased planning fees from December 2023 will enable.

Author: Andrew Bramidge, Chief Executive

Appendices

None.

Background Papers

None.

Glossary of terms/abbreviations used:

CIL – Community Infrastructure Levy

ECC – Essex County Council

LPA – Local Planning Authority

S106 – Section 106 Agreement