Introduction

Planning Issues Limited is a planning and design consultancy acting on behalf of Churchill Retirement Living (CRL). The team is made up of chartered Town Planners, Architects and Housing professionals.

Planning Issues made detailed representations to the draft Supplementary Planning Document in January 2017 and we are now making further representations in accordance with the requirements set out on East Devon District Council’s website. We are, however, disappointed that we were not contacted directly to seek our further views and have had to regularly check the council’s website to ensure that we do not miss any further consultation opportunities.

In this document we specifically refer to the following documents;

- the report to the Strategic Planning Committee (20 February 2017);
- Planning Obligations SPD published in April 2017;
- Planning Obligations SPD Consultation Statement;

We also make reference to the recent appeal decision (24 April 2017) on the site at Rolle College Playing Field (APP/U1105/W/16/3165906) where the inspector was minded not to support the Council’s requirement for an immediate average requirement based on an ‘open book’ approach.

In preparing the SPD the Council are obliged to have regard to the matters set out at section 19(2) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004"). Those matters include national policy and advice contained in guidance issued by the Secretary of State. As regard is to be had to national policy and guidance it is incumbent on the Council to justify and explain any decision to promote a policy which is inconsistent with that policy and guidance.
Vacant Building Credit

Paragraphs 6.23 and 6.24 of the Council’s draft SPD deal with Vacant Building Credit (VBC). In paragraph 6.24 the Council sets out criteria to be applied other than in exceptional circumstances. The Secretary of State has set out his guidance on VBC in the PPG. The PPG advises that VBC applies where the building has not been abandoned and then sets out matters which it may be appropriate for LPAs to consider; the SPD refers to those matters at paragraph 6.23. The application of the criteria set out in paragraph 6.24 of the SPD is inconsistent with national guidance. The Council have provided no adequate justification for taking a different approach to that set out in the PPG. There are clearly cases where sites are vacant for reasons other than redevelopment (such as business relocation, business closure and rationalisation) which should be taken into account. In those cases, vacancy is not part of the development process and in many cases, will arise due to business expansion and relocation. NPPF is also clear at paragraph 22 that where there is no reasonable prospect of a site being used for the allocated employment use, applications for alternative uses of land or buildings should be treated on their merits having regard to market signals and the relative need for different land uses to support sustainable local communities.

Vacant Building Credit should therefore apply where buildings have been made vacant for any business reason. In that case buildings are “empty and redundant” in accordance with the objectives of paragraph 023 of Planning Practice Guidance as well as the overall intention of the credit which is to incentivise the reuse of empty and redundant buildings. This will be the case where buildings are vacant in advance of any planning consideration and the requirement to market land for its “current use”.

It is recommended therefore that specific reference is made to Planning Practice Guidance, to refer to the specific process for determining the Vacant Building Credit in line with our recommendations for the consultation in January 2017. Vacant Building Credit should not be restricted to the criteria set out in paragraph 6.24 of the SPD but instead should comply with National Policy Practice Guidance paragraph 023.

“Open Book” Approach

Our initial response in January 2017 set out the reasons why this was contrary to accepted practice and guidance. As we have pointed out, this position is supported by the RICS guidance (Financial Viability in Planning) which states in paragraph 2.5.2 that applications should disregard the applicant as planning applications “run with the land”. It states that inputs to the financial modelling should “disregard either benefits or disbenefits that are unique to the applicant”. It goes on to say that “the aim should be to reflect industry benchmarks as applied to the particular site in question”. David Lock Associates and Rapleys on behalf of Crown Estates in their respective consultation responses also support this position.

The council draws attention to Paragraph 005 of the Planning Practice Guidance. In particular that viability “should be informed by the particular circumstances of the site and proposed
development in question”. It does not seek an assessment based on actual costs and values (an "open book appraisal") and it is accepted practice, supported strongly by RICS guidance on viability which is built upon this basic principle. Paragraph 2.5.2 confirms that Councils should concern themselves with the particular scheme in question but "disregard who is the applicant". "Only in exceptional circumstances" will the principle of a planning permission not run with the land. Box 10 on page 14 of RICS guidance goes on to emphasise that viability assessments in development management should "reflect industry benchmarks". This supports the principle of Planning obligations running with the land by virtue of section 106(3) of the Town and Country Planning Act 1990, meaning they are enforceable against the original covenantor and any subsequent owners of the land. Preparation of local development documents should be consistent with national policy (section 19(2) Planning and Compulsory Purchase Act 2004).

Therefore, the requirement for an open book requirement is contrary to accepted national policy guidance and accepted best practice and it is recommended that any reference to open book appraisals be removed and replaced by a requirement that viability assessments should be assessed using industry accepted inputs and benchmarks having regard to the particular circumstances of the site.

**Overage**

Strategy 34 in the Local Plan states that "An overage clause will be sought in respect of future profits and affordable housing provision, where the levels of affordable housing fall below policy targets."

As held by the Inspector in the Rolle College Playing Field case, Strategy 34 does not specify the form of the overage clause which is to be imposed. The inspector went on to hold that an overage clause with a 24 month delay would not be in conflict with Strategy 34 (Decision Letter paragraph 8).

Paragraph 6.22 of the SPD states that overage clauses will be applied to all applications including single phase schemes and will be applied without any periods of deferral or other restrictions.

The inclusion of an overage clause in the terms set out in paragraph 6.22 of the SPD is undesirable, and contrary to national policy, as it is likely to render development undeliverable:

(a) Paragraph 173 of the NPPF states that requirements imposed should enable the development to be deliverable.

(b) The inclusion of an overage clause of the type proposed in the SPD is inconsistent with that advice as:

   i. As explained in the RICS Guidance Note on Financial Viability in Planning (3.6.4.3) overage clauses are not appropriated as development risk at the time

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of implementation cannot be accounted, and as they undermine the basis of a competitive return which may affect funding.

ii. Developers are unlikely to proceed with scheme were such clauses to be imposed.

(c) The imposition of an average clause in the terms set out in the SPD is also inconsistent with the advice given in the PPG that viability assessment in decision taking should be based on current costs and values and that planning applications should be considered in today’s circumstances. It is inconsistent with that guidance to apply average clauses to single phase schemes.

The Council has provided no justification for departing from the guidance given by the Secretary of State and from national policy.

If the Council adopt the SPD in its present form, its policy is likely to deter developers from proposing much needed development.

We referred to a number of appeal decision in our original representations where average requirements have not been appropriate especially for single phase developments. This has now been further supported by the recent appeal decision on the Rolle College Playing Field site. The inspector concluded, quite rightly in our opinion, that access to finance would be impeded and that this would “jeopardise” the likelihood of the development coming forward. Our experience bears this out. Our funders are insistent that there is certainty and funding will not be available for schemes where costs are unknown going forward.

If the interpretation of Strategy 3 of the adopted local plan seeks to capture future profits then this will be contrary to paragraph 173 of the NPPF which specifically states that the costs of any requirements should “provide competitive returns to a willing land owner and a willing developer”. By introducing post development average, you are introducing uncertainty – costs will not be known when bidding for land and making development decisions. Our schemes have a prolonged sales period and costs post completion are uncertain depending on the state of the market, the length of time sales take and future values all of which can fluctuate greatly during the long sales period for retirement housing.

Instead development appraisals and, therefore, viability appraisals are undertaken as a snapshot in time and reflect current costs and values. National Planning Practice Guidance, at paragraph: 017 (Reference ID: 10-017-20140306) confirms this principle and that “planning applications should be considered at today’s circumstances”.

A significant number of recent appeal decisions are clear that average mechanisms are not appropriate for single phase schemes for several important reasons which include:

- Risk to delivery caused as there will be added risk that funding or alternative developers will not be forthcoming due to unknown future payments;

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1 See especially appeal Reference APP/N0410/A/14/2228247 (Former Inn on the Green PH, North Orbital Road, Denham Green, Buckinghamshire UB9 SNR)

2 Appeal ref: APP/U1105/W/16/3165906

3 Appeal refs: 2228247, 3143743, 3133603, 3153625,2207771, 3005876 and 3119819

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- On single phase schemes, overage is contrary to national policy (NPPF, NPPG) as well as RICS guidance;
- There is generally no commitment to ‘underage’ whereby the risk of investing in a project is not shared between the parties.

Furthermore, by introducing a requirement that 50% of future uplift in profit is sought, then this would have to be in the form of a commuted payment. This, effectively, becomes a tax on profit which is not the purpose of the planning system. Policies for seeking planning obligations should be set out in a Local Plan to enable fair and open testing of the policy at examination. Supplementary planning documents should not be used to add unnecessarily to the financial burdens on development and should not be used to set rates or charges which have not been established through development plan policy. This is enshrined in NPPG (Paragraph: 003 Reference ID: 23b-003-20150326). Furthermore, the NPPF (paragraph 153) requires that SPD “should not be used to add unnecessarily to the financial burdens on development”.

The proposed approach to overage in the SPD is inconsistent with the approach in NPPF, PPG and RICS guidance. It would require a post implementation review on all schemes including small scale, single phase developments. By requiring this it introduces

- Uncertainty – it hinders the ability of developers to bid for land as costs will not be known when bidding for that land and making development decisions thereby contradicting the requirements of paragraph 173 of NPPF (providing competitive returns to a willing land owner and a willing developer).

- Inconsistency – Policy and appraisals should be applied in a consistent manner. RICS guidance note 12 seeks a consistent approach to development appraisals. Undertaking a reassessment on a different basis to the appraisal undertaken at the outset is an inconsistent approach.

- Non Industry benchmarks – Best practice in viability appraisals is that they reflect industry benchmarks in order that benefits or disbenefits of the applicant are ignored. The overage requirements in the SPD run contrary to this by seeking developer specific inputs.

- Restricting Commercial Activity – As planning permission runs with the land it should there be the ability to transfer the land with that planning permission. With an onerous requirement such as the overage requirement in the SPD there would be an unacceptable encumbrance which would, effectively, restrict the value of the land and the saleability of that land.

- Uncertainty before building – Development funding and long term programming require that costs are known. Profit is predicated on taking into account known against future unknown costs and values and the margin set accordingly. By introducing further uncertainty (values, holding costs, sales periods will not be known) this would mean that margin would have to be adjusted to reflect this risk. Introducing uncertainty would mean that returns would have to be set at a margin higher rate to compensate.
A requirement for an overage clause in the terms set out in paragraph 6.22 of the SPD, is contrary to national policy and guidance and is likely to deter much needed desirable development. The requirement for an overage clause in the terms set out in paragraph 6.22 of the SPD should be omitted, or alternatively replaced by provision for a review of viability if development is not carried out within a specified period. Such an alternative would be consistent with Strategy 34 in the Local Plan and with national policy and guidance.