

Committee: Planning Applications Committee and Borough Plan Advisory Committee (circulation)

Date: 21 May 2012

Agenda item: circulation

Wards: all

Subject: Application of Merton's Unitary Development Plan policy E.6 in line with the Community Infrastructure Levy Regulations 2010 and 2011

Lead officer: Director for Environment and Regeneration, Chris Lee

Lead member: Cabinet Members for Environmental Sustainability and Regeneration, Cllr Andrew Judge

Forward Plan reference number: N/A

Contact officer: Future Merton Strategic Policy Manager, Tara Butler

Recommendations:

- A. That Members note the content of this report which sets out Merton planning officers' position with respect to planning obligations for the loss of employment land (Policy E.6 of Merton's Unitary Development Plan 2003).

1 PURPOSE OF REPORT AND EXECUTIVE SUMMARY

- 1.1. The Community Infrastructure Levy Regulations (hereafter known as the CIL Regulations) 2010 and 2011 introduced three tests for planning obligations (including Section 106 agreements) into law.
- 1.2. This report is to clarify the approach to planning proposals where Merton's Unitary Development Plan Policy E.6 applies, in the light of the CIL Regulations 2010 and 2011.

2 DETAILS

Background to the report

- 2.1. Regulation 122(2) of the CIL Regulations 2010 (continued in the CIL Regulations 2011) introduced three tests for planning obligations into law, stating that obligations must be:
- necessary to make the development acceptable in planning terms
 - directly related to the development
 - fairly and reasonably related in scale and kind to the development
- 2.2. If a planning obligation does not meet all of these tests it cannot legally be taken into account in granting planning permission and for the Local Planning Authority to take account of S106 in granting planning permission it needs to be convinced that, without the obligation, permission should be refused.
- 2.3. While these tests are a consolidation of the Circular 05/05 advice, they are now a statutory requirement giving them much greater legal force. The Planning Officers Society states that there is evidence that the Planning Inspectorate and the

Secretary of State are taking a much greater interest in S106 agreements to ensure the statutory tests are met (see Appendix 1)

- 2.4. The new statutory weight of the three tests have a particular impact where there is an authority-wide tariff scheme, such as that set out in Merton's Planning Obligations SPD 2006 for some planning obligations including those relating to education contributions, open space and loss of employment land.
- 2.5. To continue to apply Section 106 in this way (the authority-wide tariff scheme) the Local Planning Authority should be able to provide evidence of:
- the specific impact of that particular planning proposal (for example, on education / open space / loss of employment)
 - how any S106 financial contribution would be spent that would mitigate the specific impact of that proposal; this must be directly related to the development and fairly and reasonably related in scale and kind to the development.
- 2.6. This report is to clarify the approach to planning proposals where Merton's Unitary Development Plan Policy E.6 applies, in the light of the CIL Regulations 2010 and 2011.

Planning obligations for the loss of employment land in Merton

- 2.7. To ensure that Merton Council complies with the CIL Regulations 2010 and 2011, and other guidance on planning obligations, Merton's planning officers are pursuing the approach set out in this report when considering the loss of employment land until Merton's Community Infrastructure Levy Charging Schedule is adopted.
- 2.8. Once Merton's CIL is adopted (circa June 2013) the council will have an ability to seek CIL funding towards infrastructure projects previously funded by Section 106 contributions. S.106 agreements can still be used but only in a much reduced capacity, namely for on-site provision of infrastructure and potentially affordable housing.
- 2.9. Merton's UDP policy E.6 is used to assess planning proposals that may result in the loss of employment land outside the designated industrial areas to other uses including residential.
- 2.10. Merton's Unitary Development Plan 2003, policy E.6 states:
- Outside the industrial areas shown on the Proposals Map, development which results in the loss of employment land will be acceptable only under the following circumstances:*
- (i) *if the land is in a predominantly residential area and the development proposed will provide a local community or cultural facility*
 - (ii) *if the land is in a predominantly residential area, residential use will be permitted provided that: the size, configuration, access arrangement or other characteristics of the site make it unsuitable and financially unviable for any employment or community use as confirmed by full and proper marketing of the site for 5 years for employment or community purposes.*
- Compensatory measures comprising employment benefits locally may be sought for the loss of employment land. Such measures will be sought through planning obligations.*
- 2.11. Furthermore paragraph 3.120 of the justification text highlights

"In circumstances where a development is likely to result in a loss of employment floorspace or jobs, the Council may seek to ensure that compensatory improvements

are made to the quality and quantity of the stock of business premises elsewhere in the locality and may seek to help those losing jobs as a result of the development to either find alternative employment or to become self employed. Moreover, in appropriate cases, the Council will enter into agreements under S.106 of the Town and Country Planning Act 1990 as substituted by the 1991 Act, to secure action of this sort by the developer.”

- 2.12. Planning officers consider that Section 106 to mitigate the loss of employment land should not be sought if the decision-maker agrees that the site is unsuitable and financially unviable for employment or community use (for example, by reviewing the marketing evidence or other material considerations).
- 2.13. In this case, the decision-maker has already accepted the principle of the loss of employment uses on the site so it is not reasonable to seek planning obligations to mitigate that loss. Therefore in this case, S106 is not necessary to make the development acceptable in planning terms as set out in the first of the three tests of the CIL Regs 2010.
- 2.14. However if the planning proposal did not provide adequate evidence to satisfy the decision-maker that the site was unsuitable and financially unviable for employment or community uses, then S106 may be sought to make the development acceptable in planning terms, thereby meeting the first of the three statutory tests (set out in paragraph 2.2 of this report).
- 2.15. In cases where S106 is sought for the loss of employment land, the amount sought and the projects it is to be spent on should be directly related to the development and fairly and reasonably related in scale and kind to the development to meet the second and third statutory tests.
- 2.16. Merton's Planning Obligations SPD 2006 sets out how the sum to mitigate the loss of employment land should be calculated.
- 2.17. *“The contribution will be based on the uplift in the value of the land which will vary depending on the type of development proposed and the site in question. Due to the potential site by site variation contributions of up to 50% of the uplift in the value of the land will be required. The developer will be expected to prove the level of their contribution. The contributions will be used to provide for economic development and renewal initiatives including new or improved space or other support for employment. The latter may include training or facilitating access to jobs for example. The agreement will set out what the funding will provide.”*
- 2.18. As the CIL Regulations require that S106 is directly related to the proposed development, and fairly and reasonably related in scale and kind to the development, a blanket approach of seeking contributions of up to 50% of the uplift in value of the land would fail to meet these tests when mitigating the impact of the loss of employment land.
- 2.19. When considering S106 for the loss of employment land, officers must also ensure that the project on which the funds are to be spent relates directly to the site, for example by improving business premises either close to the development site or in an area which is well connected to the homes of people that might otherwise be employed on the development site. At present neither the council nor its partners hold an up-to-date list of projects throughout Merton that seek to improve the quality and quantity of the stock of business premises.
- 2.20. To ensure that planning obligations for the loss of employment land meet the three statutory tests, planning officers will assess each case on its merits and will consider whether contributions would be reasonable, namely whether they are to be

spent on projects that will mitigate the loss of employment land with respect to the characteristics, scale and location of each case.

- 2.21. If adopted, from approximately June 2013, Merton's Community Infrastructure Levy will replace S106 for all tariff-based planning obligations including those currently collected to mitigate the loss of open space, loss of employment land and for educational contributions.

3 ALTERNATIVE OPTIONS

- 3.1. None for the purposes of this report.

4 CONSULTATION UNDERTAKEN OR PROPOSED

- 4.1. None for the purposes of this report.

5 TIMETABLE

- 5.1. Subject to Councillor approval and a successful examination, it is proposed that Merton's Community Infrastructure Levy Charging Schedule will be adopted circa June 2013.
- 5.2. Once Merton's CIL is adopted (circa June 2013) all contributions previously sought through Section 106 agreements that are not usually provided on-site (e.g. education, playspace, biodiversity, loss of employment land etc) will be funded through the Community Infrastructure Levy.

6 FINANCIAL, RESOURCE AND PROPERTY IMPLICATIONS

- 6.1. Following a review of S106 agreements, for S106 agreements received since April 2010 (when the CIL Regs were introduced) the council has received £0 from S106 to mitigate the loss of employment land.
- 6.2. Although it is not possible to accurately predict what S106 agreements may be agreed in the next 12 months (until CIL replaces S106), officers do not expect a significant change in planning obligations negotiated or received to mitigate the loss of employment land. After summer 2013, subject to Council approval, Merton's Community Infrastructure Levy will replace S106 for the vast majority of cases where it is necessary to mitigate the loss of employment land.

7 LEGAL AND STATUTORY IMPLICATIONS

- 7.1 The report identifies that the three statutory tests in the CIL Regulations 2010 and 2011 replace earlier government advice and has provided a mechanism whereby decision taking can take into account the three tests. Government guidance, including Circular 05/2005: Planning Obligations was replaced on 27 March 2012 by the National Planning Policy Framework ('NPPF'). Paragraphs 203-206 of the NPPF follows the three statutory tests also contained in the CIL Regulations 2010 and 2011. This advice applies from 27 March 2012.

8 HUMAN RIGHTS, EQUALITIES AND COMMUNITY COHESION IMPLICATIONS

- 8.1. None for the purposes of this report.

9 CRIME AND DISORDER IMPLICATIONS

- 9.1. None for the purposes of this report.

10 RISK MANAGEMENT AND HEALTH AND SAFETY IMPLICATIONS

- 10.1. None for the purposes of this report

11 APPENDICES – THE FOLLOWING DOCUMENTS ARE TO BE PUBLISHED WITH THIS REPORT AND FORM PART OF THE REPORT

- 11.1. Appendix 1: extract from Planning Officers Society advice note: Section 106 obligations and the Community Infrastructure Levy

12 BACKGROUND PAPERS

- 12.1. The National Planning Policy Framework (28 March 2012)
- 12.2. Planning Officers Society advice note: Section 106 obligations and the Community Infrastructure Levy
- 12.3. The Community Infrastructure Levy Regulations (Amendments) 2011
- 12.4. The Community Infrastructure Levy Regulations 2011
- 12.5. The Mayor's London Plan (August 2011)
- 12.6. Merton's Core Planning Strategy (July 2011)
- 12.7. Merton's Unitary Development Plan (October 2003)

Appendix 1: Planning Applications Committee (circulation report on planning obligations and loss of employment land)

Extract from the Planning Officers Society advice note: *Section 106 obligations and the Community Infrastructure Levy* (April 2011)

http://www.planningofficers.org.uk/downloads/pdf/POS_Advice_Note_S106_and_CIL_final_version_Apr_2011.pdf

Paragraphs 11-15: the statutory tests for the use of S106

11. "Regulation 122(2) of the CIL regulations 2010 introduced into law three tests for planning obligations in respect of development that is capable of being charged CIL. This includes most buildings. Obligations should be:-
 - necessary to make the development acceptable in planning terms
 - directly related to the development
 - fairly and reasonably related in scale and kind to the development
- 12 For other non-CIL development e.g. Golf Courses, wind turbines, and quarries, the statutory tests do not apply – any S106 for such development remains subject to the policy tests set out in Circular 05/05.
- 13 If an obligation does not meet all of these tests it cannot in law be taken into account in granting planning permission. While these tests are a consolidation of the 05/05 advice, they are now a legal requirement giving them much greater force. Whereas previously there was a view among LPAs and developers that if a S106 had been signed voluntarily (or if a unilateral undertaking had been freely offered) it would not be scrutinised too closely, the statutory status of the tests brings a much greater need to demonstrate that the terms are lawful. There is clear evidence that the Planning Inspectorate and the Secretary of State are taking a much more forensic interest in S106 agreements to ensure the statutory tests are met.

S106 Financial Contributions failing to meet the statutory tests – recent examples from Secretary of State decisions

Mersea Homes CBRE, Land at Westerfield Rd: The Secretary of State gave no weight to a number of financial contributions, for education, playing fields and a Country park on the grounds that they did not meet the statutory tests. The site was considered to already make a good contribution to open space, the country park was not directly related to the development and there was sufficient capacity within existing schools. The Contributions were not fair and reasonable.

Doepark Ltd, American Wharf Southampton: The Secretary of State gave no weight to financial contributions for public open space, play space, sports pitches and transport infrastructure on the basis that there was insufficient information to decide whether they met the tests of being necessary to make the development acceptable in planning terms, directly related to the development and reasonable in scale and kind.

Tesco Springfields Retail Park, Stoke on Trent: The Secretary of State found that contributions to environmental improvements related to off-site work not directly related to the development and employment contributions were not necessary in planning terms to make the development acceptable

- 14 For the LPA to take account of a S106 in granting a permission it needs to be convinced that without the obligation permission should be refused. It is not sufficient to rely on a generic LDF policy or adopted SPD. This is particularly relevant where there is an authority wide tariff scheme. The LPA should be able to provide evidence of the specific impact of the particular development, the proposals in place to mitigate that impact and the mechanisms for implementation.
- 15 This has been the position since the CIL regulations came into force in April 2010 and applies irrespective of whether an authority has or intends to adopt CIL.

Example:

An authority has a S106 based tariff system in place to require payments for school places from residential development. To receive monies under the tariff for a specific planning application, it should be able to demonstrate that there is a deficit of school places within the local catchment area which make the application unacceptable in planning terms and that the Education Authority has measures in place to remedy that deficit, to be funded in whole or in part from S106 contributions.

If this is not the case and the reality is that contributions are being sought as a fund to support school places generally across the LPA area, there is the risk that a decision to grant permission could be taken unlawfully, as the contribution should not have been taken into account.”