

## **CABINET MEMBER FOR ENVIRONMENT – 16 JULY 2020**

### **INFRASTRUCTURE SECURITY BOND POLICY**

**Report by Director for Planning and Place**

#### **RECOMMENDATION**

1. **The Cabinet Member is RECOMMENDED to:**
  - (a) **approve the revised Security Bond Policy as summarised in paragraphs 16-21 and attached as Annex 1 to this report;**
  - (b) **approve the use of the policy in relation to security bonds secured through section 106 agreements for County Council infrastructure and services.**

#### **Executive Summary**

2. An update of the council's Security Bond Policy was identified as a requirement following an internal audit of Bond processes.
3. The current policy has been reviewed and this has led to the requirement for the bond policy to be reviewed taking into account the other mechanisms the County Council has to seek payment but also the delay it causes to progressing S106 agreements.
4. The security bond policy focuses on where there is a residual risk for the County Council when delivering infrastructure.
5. There are a number of mechanisms that the County Council can use to ensure that S106 contributions can be received on time or obligations are enforceable. These include, staged payments, legal mechanisms within the S106 agreement, financial incentives and an ability for developers to renegotiate triggers.
6. The new bond policy defines the future requirements and criteria for a security bond to be sought from a developer. It also sets out a review mechanism to ensure the policy and its application remain relevant and up to date.

#### **Introduction**

7. An update of the council's Security Bond Policy was identified as a requirement following an internal audit of Bond processes.
8. The current policy has been reviewed and this has led to the requirement for the bond policy to be revised taking into account the other mechanisms the

County Council has to seek payment but also the delay it causes to progressing S106s.

9. The new bond policy defines the future requirements and criteria for a security bond to be sought from a developer.
10. The Cabinet Member for Environment is asked to approve the new bond policy at Annex 1.

## **Background**

11. The existing bond policy states that all developments with contributions over £1m should have a bond however, this is a blanket requirement which does not take into account other mechanisms for enforcement. The update to the policy has included an assessment of those other mechanisms, alongside the requirement for a bond, in managing the financial risk for the County Council.
12. Negotiating bonds can delay the production of a Section 106 agreement as providing a bond can be complex and is an additional cost to a developer for the lifetime of the Section 106 obligations. Any delay in Section 106 negotiations impacts on the granting of planning permission and therefore the delivery of housing and employment growth within the county.
13. The revised Security Bond Policy reduces and simplifies the requirement of a bond to certain pieces of infrastructure and services and in certain scenarios, as outlined below. This reduces both staff time in calculating and negotiating the bond but also in needing to assess bondsman supplying the bond.
14. The revised Security Bond Policy still allows the same level of financial protection for the County Council but uses a number of mechanisms, a security bond being one option.
15. The Security Bond Policy does not cover bonds or security deposits required in relation to Section 278 or Section 38 agreements for highway works. Nor does it cover bonds or security deposits required further to the Advance Payments Code under the Highways Act 1980.
16. Section 106 agreements (S106 agreements), as defined in the Town and Country Planning Act 1990, are a mechanism for the County Council to secure the delivery of infrastructure and services through financial contributions, and the provision of land and works in kind (direct delivery) by a developer. The infrastructure requested within a S106 agreement must be necessary to mitigate the impact of a development and to make it acceptable in planning terms. Section 106 obligations (S106 obligations) can also be provided by unilateral undertaking and for the purpose of this report, S106 agreements should be read to include unilateral undertakings made under S106 provision in the Act.
17. The S106 agreement outlines the timing and method of delivery of the planning obligations on the developer. The value to be paid under a planning

obligation can vary with the scale of the development. The small to medium developments will pay smaller amounts towards improving existing infrastructure whereas the larger strategic developments will be paying substantial amounts towards new primary and secondary schools or strategic infrastructure to support the area and the Local Plan requirements in that area.

18. In most cases Oxfordshire County Council will collect contributions for delivery of the mitigating infrastructure required by the county council and this comes with an element of risk. To mitigate the financial risk to the council the S106 agreement triggers for payment are carefully worked out and in some cases a bond is required.
19. Development Bonds are to ensure that the planning obligations as set out in a S106 agreement for the specific development are met. It is the policy of the County Council to ensure that all bonds remain in place until the obligations that are bonded have been met.
20. To date the requirement for a bond for new housing and commercial development coming forward has been where the aggregate of contributions due to be paid post implementation exceed £1m including indexation. There was a recommendation by the Capital Asset Programme Board in January 2016 that the bond should be for key pieces of infrastructure where contributions were deferred, however the policy was not updated to reflect that change.
21. The change was needed as bonds are not always easy to secure from a developer as they are an additional cost to the developer and, unless the developer has a good credit rating, can be difficult to secure. Therefore, developers can be reluctant to provide and on occasions refuse to provide the bonds, and this can lead to long drawn out negotiation of S106 agreements which slows down the planning process and subsequently the grant of planning permission.
22. The impact of COVID19 has increased uncertainty within the development industry, for example housing developments being stopped due to restrictions. Effects on the housing market and investments and the shortage of materials and labour are still being assessed. These issues reinforce the need for OCC to improve certainty of infrastructure delivery, reduce financial risk and provide assurance to investors and the development industry.
23. The recommended approach will support housing and commercial development in the county by increasing flexibility in negotiation and scheduling of S106 payments and using the planning mechanisms available to the Council to deliver on the Council's priorities of growth.

### **Key Issues**

24. The Security Bond Policy has been updated as a requirement of an internal audit focusing on bonds. The bond audit, published in April 2018, identified

where the bond process could be improved and where further guidance was needed to improve the robustness of the process. One of the key findings from the bond audit was:

“It was noted that there is currently a lack of clarity over when a security bond should be sought.”

“It was found that there is no documented guidance in place for Planning Negotiators in relation to identifying the need for or negotiating a security bond as part of the S106 process.”

25. The existing bond policy was outdated, there was not clear guidance on when a bond should be sought nor on the other mitigating measures which could protect the recovery of S106 obligations.
26. The updated policy now outlines clearly when a security bond is needed but also, by assessing the other methods of recovery and enforcement, has reduced the circumstances for when a bond is required whilst still protecting the County Council from financial risk.
27. The main objectives for the Security Bond Policy are:
  - reducing the risk to an acceptable level for the Council;
  - simplifying the approach to bonds;
  - speeding up issuing planning permissions by quicker resolution over the provision of bonds; and
  - reduced financial burden on smaller developments for bond provision.

### *Future Security and Bond requirements*

28. The proposed requirements for a Security Bond are now:
  - a) Bonds will be required where:
    - i. the developer is required to contribute 25% or more of the cost of a piece of infrastructure costing £7.5m or more (including indexation) i.e. a new primary school, new secondary school or strategic transport infrastructure and the triggers for the payment of the contributions are or likely to be after the letting of the contract for the works
    - ii. the developer is directly delivering a school or other works in kind on behalf of the County Council
    - iii. the developer is providing or contributing to a new or enhanced bus service supporting the development, and the aggregate value of the bus service contribution payable post implementation exceeds £1m (including indexation)
  - b) A bond may also be required where:
    - i. Payments are significantly in arrears of occupations
    - ii. There is a concern about the financial position of the developer
    - iii. There is a history of late or non-payment to OCC

- iv. Any other reason that in the opinion of the Assistant Director of Finance and Assistant Director of Growth and Place and Strategic Infrastructure & Planning that a bond is required to protect OCC's position.
29. The other legal and negotiation mechanisms relating to protecting payments under S106 agreements are set out in the policy and include:
- a) **Staged payments**  
Ensure that the developer cashflow can support the s106 requirements and to enable that the development is viable
  - b) **Legal mechanism**  
Ensure that the wording of the S106 has both negative and positive clauses to enable enforcement
  - c) **Financial incentives**  
The use of indexation to ensure that the value of the contribution remains in line with inflation and late payment interest to cover additional costs incurred by OCC as a result of late payment
  - d) **Renegotiation of payments**  
If a developer is struggling with meeting the S106 contributions due to unforeseen exceptional circumstances, then there is an ability to renegotiate payment schedules and for a deed of variation to the S106 agreement to be put in place.

## **Risk Management**

- 30. The risk of non-payment to the County Council is deemed to be low as there have only been a small number of enforcements of developers for non-payment needed to date. However, the bond provision protects the County's position where there is a risk of non-delivery of large infrastructure or services, especially where the County are in contract or need secured funding to enter a contract for delivery.
- 31. The revised security bond policy will reduce the risk to the Council in delivering infrastructure. The policy outlines all the mechanisms that can be used to seek payment along with the enforcement measures for perusing the payments through court if necessary.
- 32. The bond policy and process will be regularly reviewed to ensure it is effective in mitigating the financial risk to the Council.

## **Communications**

- 33. Internal service teams have been consulted during the development of the updated policy, including Finance, Legal, Planning Obligations, Public Transport, Transport Development Control teams, Developer Funding and Infrastructure Delivery.
- 34. Feedback received from developers in relation to the challenges they face in providing bonds has been taken into account in drawing up the policy.

## **Conclusions**

35. Procedures to support the new Security Bond Policy are being drafted so when the Policy is formally signed off it can be enacted and used in current negotiations
36. As stated in the policy the notification of whether a development is required to provide a bond will be in the Single Response that goes back to the Local Planning Authorities. The Single Response templates will need to reflect the changes.
37. All teams involved in the process will need to be notified and trained in relation to the changes in policy. New process documentation will be finalised.
38. Local Planning Authorities will be notified of the county council's revised requirements and how this will be reflected in the current and future S106 agreements.
39. A formal review of the operation and effectiveness of the Security Bond Policy will be completed following 12 months of its implementation, with any significant revisions reported back through the Cabinet Member Decision process.

## **Financial and Staff Implications**

40. The new policy should provide the financial risk mitigation for the County Council with the legal mechanisms that can be used to enforce a S106 agreement.
41. The reduced requirement for bonds will reduce the staff time in checking the bond mechanism put forward by a developer.
42. A reduced number of bonds may reduce the time spent by the Planning Obligation Team in managing the bond process on by arranging and registering the bonds. However, the bonds that will be in place may be complex and large and will need careful monitoring and management to ensure that payments are prompt where linked to critical infrastructure. This will require resources to be redirected.
43. Enforcement will still take place through other mechanisms so the overall staffing implications for the Planning Obligations Team and Litigation Solicitors will remain the same as at present. This will be assessed annually to ensure that the bond objectives are being met and monitor any rises in enforcement.
44. The main benefit will be limiting the occasions a bond is required. This will also speed up the negotiation process for planning applications, with less time in calculating complex bond arrangements and limiting discussions with the developers.

45. The early indication of a bond through the Single Response process will ensure that developer have early sight on the requirement and therefore factor the bond amount and timing into their development calculation. Thereby making the S106 negotiation process quicker and assisting in the delivery of planning permissions.

### **Equalities Implications**

46. This policy has taken into account the equality implications of the change. It is a fair and transparent policy that does not have any equality implications.

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Background papers: Annex 1 - Security Bond Policy

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