

## CABINET 18 JUNE 2013

### THE PRINCIPLE OF DIRECT DELIVERY BY DEVELOPERS OF ON-SITE INFRASTRUCTURE & MAJOR OFF-SITE HIGHWAY WORKS

#### Report by Director for Environment & Economy

#### Introduction

1. New developments bring with them a need for investment in infrastructure and services that are provided by the County Council. The approach to date has been to secure this using financial contributions and works from the developer through the planning process, as follows:
  - Non-highway infrastructure;
    - Financial contributions towards on- and off-site provision, for both major (e.g. schools) and small infrastructure
  - Highway infrastructure<sup>1</sup>;
    - Financial contributions towards off-site major (typically costing over £1m) works.
  - Direct provision of the routine off-site schemes (under £1m) via a S278 agreement; including access works linking to the public highway
2. The proposed change is to enable the direct delivery of major infrastructure:
  - non-highway on-site; and
  - highway off-site
3. Increasingly, proposers of substantial developments are expressing a desire to design and construct major infrastructure rather than make a financial payment to the County Council to in turn deliver the infrastructure.

#### Exempt Information

4. Legal issues associated with the principle of direct delivery of major infrastructure have been considered in detail – a summary of that assessment and received advice is in **Annex 3**.

The public should therefore be excluded during consideration of the Annex because their discussion in public would be likely to lead to the disclosure to members of the public present of information in the following categories prescribed by Part 1 of Schedule 12A to the Local Government Act 1972 (as amended): paragraph 3 – Information relating to the financial or business affairs of any particular person (including the authority holding that information). Since it is considered that, in all circumstances of the case, the

---

<sup>1</sup> These works are/include changes to the public highway. Highways within a development (e.g. the estate roads & spine roads) are directly delivered and may be offered for adoption as public highways through the S38 agreement process.

public interest in maintaining the exemption outweighs the public interest in disclosing the information, in that disclosure would be to the detriment of the Council's ability properly to discharge its fiduciary and other duties as a public authority.

### **Key Issues**

5. The argument put forward by developers is that 'direct delivery' of on-site infrastructure and major off-site highway works will be more cost effective.
6. Direct delivery could also bring significant benefits to the County Council arising from the transfer to the private sector of financial risks associated with delivering new infrastructure, thereby helping reduce the level of risk on the Council's Capital Programme. It also offers the potential (once established) to simplify and speed up the S106/S278 negotiation process thus reducing costs for both the developer and the County Council.
7. In order to satisfactorily mitigate risks to the county council key principles to be adhered to in S106/S278 agreements when allowing direct delivery of major infrastructure are set out in **Annex 1**. These risk areas are considered below.

### *Specification of Infrastructure Requirements*

8. Enabling developers to undertake direct delivery of major infrastructure must not result in a reduction in the standard of that infrastructure provided. The County Council would therefore need to ensure that it has clearly defined, and up to date, specifications in place that define the standard of infrastructure which is to be delivered by the developer.
9. With regard to highway infrastructure the County Council uses a combination of existing national and local standards. These standards are kept under regular review and are updated where necessary.
10. With regard to property, and in particular the construction of new schools, the County Council would rely upon the use of specifications that set out the expectations in terms of design and build requirements. As a matter of good practice Carillion Capita Simonds have been instructed to review and update our current requirements. The outcome of this work could then form the basis for agreeing with a developer the basis for direct delivery of on-site infrastructure. There will also need to be comprehensive (documented) procedures to ensure satisfactory delivery akin to the Standard Conditions used for direct delivery of off-site highway works. Contractually the developer (and the professionals/contractor) would be responsible for ensuring that any defects arising from the design and build process are appropriately remedied.
11. The review of our current requirements provides the opportunity to ensure that any works undertaken by a developer take full account of the need to meet mandatory requirements in respect of energy efficiency. It also provides the opportunity to ensure that the design process takes account of the need to

minimise the on-going maintenance and operational costs of any new building.

12. In parallel with the consideration of this issue a review of school space standards is currently underway following the outcome of the James' review. The outcome of the review of school space standards will be considered in September. Were the Cabinet to agree to a change in school space standards these would be reflected in the requirements placed upon developers.
13. Compliance by the developer in meeting the County Council's requirements for new infrastructure would be monitored during the design and construction phase as appropriate. Contract supervision of this kind is already a part of the highway construction process.
14. As part of the package of measures needed to enable direct delivery by developers the standard conditions (for S278 agreements) for the control of highway works in conjunction with development have been reviewed and updated by Environment and Economy and Legal Services; the updated conditions are suitable for use with both routine and major highway infrastructure schemes but the major schemes will require additional collateral warranties.
15. In updating the standard conditions, provisions have been incorporated to ensure compliance with the Noise Insulation Regulations 1975, with the position on compensation regularised and clarified so as to require developers discharge mandatory compensation. The Cabinet's approval of the revised standard conditions (**Annex 2**) is sought and so too the revocation of a previous determination by the Council's Highway Committee in May 1976 on noise insulation compensation requirements.
16. A pre-condition of any S106/S278 agreement would be the developer's acceptance of the relevant County Council requirements ~~specification~~ for the proposed infrastructure.

#### Managing Contractual Relationships

17. If the County Council were to permit direct delivery of major on-site infrastructure there would be a need to ensure that the County Council can hold the design suppliers and design teams employed by the developer to account for resolving any design and/or construction faults that might arise.
18. This risk would be managed through the County Council insisting on having a role to play in the selection of the design and construction teams employed by the developer. This would be backed up by the use of collateral warranties to provide the necessary level of assurance.

#### Implications for the Highways and Property Contracts

19. Implications on the County Council's existing highway and property contracts by allowing developers to undertake the direct delivery of major off-site highway works and on-site infrastructure have been discussed with the corresponding Programme Boards.
20. The contract with Carillion Capita Simonds specifically excludes projects in relation to S106 agreements under which the County Council agrees that a developer can undertake the work (or other arrangements whereby the developed undertakes relevant works to mitigate the impact of the development). However, Carillion Capita Simonds would be able to bid for work commissioned by developers on a commercial basis.
21. For both contracts the management overhead is distributed across the programme of work: in other words it is in the interest of the County Council that its delivery partners maximise their workload.

Timing of Delivery

22. Where major off-site highway works and/or on-site infrastructure is being delivered by the developer the County Council would include within the legal agreements restrictions on the occupation of dwellings/buildings that may occur before a piece of infrastructure is opened. This is standard practice for S278 works.

Procurement Requirements

23. A developer wishing to undertake direct delivery of infrastructure would have to satisfy the County Council that the procurement process for appointing the design and construction teams is undertaken using an open, fair and competitive process. This would safeguard contractors and design professionals and thereby in practice reduce the risk of potential challenge from third party contractors and professionals that the direct delivery agreement contravenes public procurement law. There are also important processes which must be adhered to where the full rigours of the Public Contract Regulations 2006 apply (i.e where the estimated value of the works is in excess of the EU threshold) so as to prevent a challenge which might lead to cancellation of the direct delivery agreement.

Guaranteeing Availability of Pupil Places

24. In the case of on-site provision of a school the freehold ownership of the site and building will transfer to the County Council upon completion of the works, with the facility then leased to the Academy/Free School/University Technical College provider

Direct Delivery of Infrastructure off-site.

25. There are potentially some circumstances where direct delivery of infrastructure might fall outside the remit of S106 agreements – for example

where a developer's obligations are met through direct delivery (by him/her) on land owned by a third party (private land or land of the Council).

26. The County Council must comply with public procurement law and the related requirements of the Contract Procedure Rules contained in the Council's constitution. Where the full rigours of the Public Contract Regulation 2006 do not apply (i.e. where the value of the works is below the EU threshold c£4.3m), it will be necessary to seek an exemption from the Contract Procedure Rules and ensure that the developer advertises and awards the works following a fair and transparent competitive process. Where the full rigours of the Public Contract Regulations are engaged (because the value is above the EU threshold) an exemption is not permissible.

### **Financial and staff implications**

27. Developer contributions secured through S106 agreements are often insufficient to deliver the required capital infrastructure schemes in full. Permitting direct delivery of major off-site highway works and on-site infrastructure offers the potential of delivering schemes on a more cost effective basis and with a reduced risk of overspend. While this cannot be quantified, the removal of potential shortfalls in funding would strengthen the council's position to deliver wider infrastructure elsewhere to support the growth of the economy in Oxfordshire.
28. In order to properly manage the capital programme and provide transparency [to the overall consideration] how the relevant mitigation works (infrastructure) associated with a development are to be delivered, through contributions or direct delivery, will need to be made explicit prior to the completion of the appropriate S278/S106 agreements.
29. The potential for increased revenue costs, such as legal/technical expertise, would be mitigated by making appropriate provision within the agreements secured through the planning process. It is not envisaged that there will be any effect on current staffing levels.
30. In order to ensure the delivery of infrastructure (whether through direct delivery or contributions) the County Council will continue to require bonds to guarantee payment/delivery.
31. The transfer of financial risk to the developer offers significant benefit to the County Council. The extent of any residual risks to the authority and to the building occupier can be mitigated. In the light of potential benefits to infrastructure delivery and to the Council, the principle of potential direct design and construction of infrastructure by developers (within Section 106 and 278 agreements) is recommended
32. In exceptional circumstances where best value to the authority can be demonstrated, a developer should also be able to deliver infrastructure on a third party site in lieu of contributions provided that there is compliance with the Council's constitution. This must however be the subject of review on a

case by case basis in the light of the competencies of the developer and the outcomes experienced by the Council.

## RECOMMENDATIONS

### 33. Cabinet is **RECOMMENDED** to:

Approve:

- a. In relation to development proposals the principle of direct delivery of
  - i. major on-site infrastructure, and
  - ii. major off-site highway infrastructure
- b. The entering into of S106/S278 agreements (subject to the prior approval of the Director for Environment & Economy) to secure the direct delivery of major infrastructure in line with the key principles as set out in Annex 1.
- c. The standard conditions (for S278 agreements) for the control of highway works in conjunction with development (as in Annex 2).
- d. Development of school space standards for subsequent approval by Cabinet (Paragraph 4.5).

Revoke:

- e. Previous determinations in relation to the standard conditions for highway works in conjunction with development and in relation to noise insulation compensation requirements taken by the Highways Committee on 18 May 1976.

HUW JONES

Director for Environment & Economy

June 2013

Contact: Martin Tugwell - Deputy Director (Strategy and Infrastructure Planning)  
T: 01865 815113 E: [Martin.Tugwell@Oxfordshire.gov.uk](mailto:Martin.Tugwell@Oxfordshire.gov.uk)

Roy Newton - Service Manger Infrastructure Development  
T - 01865 815647 E: [Roy.Newton@Oxfordshire.gov.uk](mailto:Roy.Newton@Oxfordshire.gov.uk)