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## The West of England Partnership as sponsored by the South West Improvement and Efficiency Programme

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### Options for Futureproofing Affordable Housing Planning Obligations – A Report of a Study by Ark Housing Consultancy

Final Report – October 2010



## **The West of England Partnership as sponsored by the South West Improvement and Efficiency Programme**

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## EXECUTIVE SUMMARY

### Background

The Housing Delivery Plan, published by S W Councils established four overarching goals for securing more homes. One of those goals was to 'deliver affordable housing through and beyond the recession'.

The housing market recession which began in late 2007 has seriously impaired the production of new homes. Economic conditions overall are likely to mean that the housing market will continue to perform relatively poorly for some time to come.

In recent years the production of affordable housing has become highly dependent on the pace of private sector housebuilding, with around 65% of all new affordable dwellings provided as a result of planning obligations on larger, principally market housing, development sites. With such schemes experiencing viability problems then many have stalled or have become the subject of renegotiation of planning obligations in order to permit their development.

The Section 106 agreement format has not traditionally provided sufficient flexibility to address changing market and viability considerations for schemes which have extended development periods

A range of mechanisms have evolved to attempt to address the impact of changing market conditions on the degree to which schemes can meet established policies on affordable housing provision and other planning obligations. Collectively, these attempts to secure some flexibility can be described as mechanisms to 'futureproof' affordable housing delivery through the planning system.

The four unitary local authorities which comprise the West of England sub-region, and two neighbouring authorities, have collaborated to commission a study of the options available to 'futureproof' affordable housing delivery through the planning system

Ark was appointed to undertake the study on behalf of the six authorities.

### Brief And Study Methodology

The overall objectives for this study, as defined in the brief, are to:

- maximise affordable housing contributions through the recession and beyond,
- ensure that site viability on multi-phased developments is not fixed at the bottom of the market so that affordable housing delivery increases alongside market improvement,
- provide a robust framework for reviewing affordable housing contributions at different stages of a development,
- identify other innovative approaches to unlocking stalled schemes through collaborative working.

The brief and the study are focused on affordable housing contributions through the operation of the planning system. However, the brief does recognise that other planning obligations will also be affected by viability considerations and so the study was expected to give some thought to the inter-relationship of securing affordable housing contributions and other planning obligations.

## **Synopsis of Current Approaches in West of England Area**

Ark personnel made contact with an appropriate officer in each of the four West of England partnership authorities and also with the other two sponsoring authorities.

The purpose of the interviews with the sponsoring authorities was to establish and discuss what approaches and practices were currently or had recently been applied to scheme specific viability assessment and to the need for future-proofing affordable housing obligations.

Appendix 1 of the full report includes a detailed record of the interviews and contact details for the personnel with whom discussions were held.

There is a range of practice evident across the various authorities and generally a good deal of relevant knowledge and practical experience on negotiating agreements which either settle on a fixed contribution between the currently viable position and the policy position or agree some form of review. There is, however, a lack of awareness of approaches and solutions being adopted by other authorities.

There is benefit for all of the authorities in moving towards a more informed and consistent approach to negotiating on planning obligations. It is important that the recommendations made in the report are flexible enough to respond to the varying characteristics of schemes and the many development contexts across the West of England and its immediate hinterland. A 'one size fits all' approach will not work effectively across the whole of the area.

## **Recent Policy and Appeal Case Developments**

### Coalition Government Programme and 'Open Source Planning'

The Coalition Government's position on housing and related planning policy is yet to take full shape but will do in the forthcoming Decentralisation Localism Bill.

However two noteworthy measures on planning have already been implemented, namely the re-classification of brownfield sites to discourage development on amalgamated rear gardens and the abolition of the regional tier of the development plan, the Regional Spatial Strategy (now temporarily reinstated following a High Court case).

The RSS for the South West was explicit on minimum expectations for the proportion of new homes to be affordable. This was set at 35% and given that a significant proportion of regional housing production is achieved on sites below thresholds for affordable housing policies, it effectively implied a target for production on larger sites of 40% or more.

The abolition of the RSS is likely to present some difficulties, at least for a time, for those authorities which are slowest in bringing forward contemporary style targets for affordable housing provision.

It is worthwhile revisiting the Conservative Party manifesto/ opposition policy green paper, 'Open Source Planning' for a steer on planning policy developments. Some of the key relevant proposals include:

- abolishing the power of planning inspectors to rewrite local plans
- stricter limits on appeals against planning decisions at the local level with appellants having to demonstrate an abuse of power or a failure to apply the local plan.
- the aspirations of neighbourhoods are likely to figure more prominently in local plan policies
- accepting the concept of payment of a tariff to capture most development mitigation. The Government has now confirmed retention of CIL
- simplification of national planning guidance

Ultimately, guidance is likely to emerge in favour of the more automated or certain approaches to flexing planning obligations.

#### Consultation on a New Policy Document for Planning Obligations

This consultation exercise took place between March and June of this year. the Coalition Government is likely to issue a new policy document relating to the purpose and application of planning obligations to re-establish the planning obligations framework following the CIL Regulations going live.

The Government's intention is to tighten the scope of planning obligations in the light of CIL. The purposes of CIL and planning obligations should not significantly overlap.

There are refined or distilled versions of the 5 tests included in Circular 5/05. Obligations must be:

- (a) necessary to make the development acceptable in planning terms,
- (b) directly related to the development,
- (c) fairly and reasonably related in scale and kind to the development.

Planning obligations should have the purpose of seeking only essential local contributions towards the granting of planning permission rather than more general contributions which are better suited to the use of CIL.

Affordable housing is identified specifically as a type of obligation not suited to CIL.

### Community Infrastructure Levy (CIL)

CIL was introduced by statutory regulation in April 2010. Effectively it pools or amalgamates contributions for general infrastructure and makes these costs subject to a tariff or charge on new development.

Local planning authorities are offered the choice of whether or not to adopt CIL but there were financial disincentives applied to authorities choosing not to adopt the scheme.

The major issue for affordable housing contributions via the planning system is that these remain planning obligations in the traditional sense and are therefore subject to negotiation whereas CIL is mandatory and based on a fixed charge. The likelihood is therefore that where viability is a problem most of the 'strain' in alleviating the viability problem is likely to be borne by the affordable housing contributions

### Appeal Case Developments

#### *Land at Clay Farm and Glebe Farm, Cambridge*

The scheme in question had experienced viability problems and the developer had included its actual land acquisition costs as an input to the viability appraisal.

The planning inspector rejected the developer's argument that its actual acquisition cost should be treated as an input to the appraisal. The inspector recommended that only a residual land value approach (but one acknowledging the need to achieve a premium over existing use value to induce sale) was the correct approach.

The Secretary of State did agree with the Inspector's recommendations on the appropriate approach to viability assessment and treatment of land value. He concluded in regard to the constrained housing market 'this factor is likely to be a short term problem given the advantages of the sites'. The Secretary of State concluded that the proposed supplementary undertaking to permit 30% affordable housing in the first phase but eventual catch up to 40% overall was not acceptable and that this would conflict with the development plan which requires 40% throughout the development.

A duplicate application by Countryside has now been determined and a consent granted by the Council. The developer signed a S.106 Agreement committing to meet the 40% policy target across the whole development.

#### *Land off Lydney Bypass and Highfield Road, Lydney*

The appellant offered an 18% affordable housing contribution on the site, a percentage it refused to review over time. The Secretary of State judged the 40% policy target to be neither 'unrealistic nor unreasonable'. He further commented that 'in the context of the lengthy timespan of the proposed development, the downturn represented by the "credit crunch" can be regarded as a temporary and relatively short-term element'. The Secretary of State dismissed the appeal.

The appellant subsequently sought a judicial review of this appeal decision and lost that action.

Ultimately agreement was reached between the appellant and the planning authority on a blended rate approach. The agreed obligation is 30%.

## Resume of Good Practice Guidance

### Homes and Communities Agency Good Practice Note – ‘Investment and Planning Obligations, Responding to the Downturn’

- The document suggested that ‘planning policies and practice for securing planning obligations need to accommodate both the current realities and the future dynamic of the land and property markets’.
- A major theme of the good practice guidance is that viability assessments should be modelled transparently, with close collaboration between the various parties involved.
- The practice note acknowledges the possible conflict between overage/clawback deals on affordable housing provision and the requirement for certainty of obligation scope in Circular 5/05. The clear preference and the safest approach is suggested to be deferment or flexing of obligations based on revisiting viability prior to future phases when delivery will be achieved. Implicit is a concern about the applicability of overage provisions which are entirely backward looking.
- In Section 46 of the document it is recommended that there should be one shared viability tool to inform the negotiation between the local planning authority and the developer

### The ATLAS Guide – Topic Practice Paper Note T.1.2.3 ‘ Financial Appraisal and Viability in the Planning Process’ – January 2010

- A collaborative and transparent approach to financial appraisal is the most robust way of achieving workable solutions to viability issues’.
- The paper highlights the relevance of using financial appraisals at different stages of the development, essentially the open book review approach to futureproofing obligations.
- Trigger points for re-appraisal should be agreed.
- The note does imply some sharing of ‘future surplus’ between the developer and the meeting of defined capped obligations. There is recognition of the developer requiring an ‘incentive’ but this reflecting an ‘appropriate return in relation to risk’.

## Approaches to Futureproofing and Case Studies

The three fundamental approaches are:

- (A) Fixing the contribution** – at a level above that deliverable viably based on current values and costs but below the policy target. This option is often described as the ‘mid-market’ or ‘blended rate’ approach.



- (B) Open book review** – of all relevant value and cost factors on an appropriate cycle throughout the life of a scheme.
- (C) Automated review** – of one or only a small number of key value or cost factors affecting viability, usually with reliance on some simple indexation of factors.

Within each of the three distinct and fundamentally different approaches there are variants which virtually amount to options in their own right. Consequently, these 'sub-options' are evaluated separately in Section 7 of the full report. The evaluations examine achievability, complexity, optimisation of affordable homes, certainty, strengths, weaknesses and resourcing. The full range of options therefore are:

- A(i) Fixed contribution
- A(ii) Fixed but contribution deferred in part or in whole
- B(i) Open book review
- B(ii) Open book review with an overage agreement
- C(i) Automated review
- C(ii) Pre-agreed formula for escalating affordable housing – 'escalator' deal

## Consultation Results

Ark facilitated two workshop sessions at a Growth and Delivery event hosted by the West of England Partnership on 13/10/10.

The main outcomes of the workshop consultation were as follows:

- the quality of the process for establishing a project's current viability is crucial
- it is highly desirable to secure a basis for agreement which permits a good distribution of affordable housing throughout a development
- the cost of the negotiation and review processes are major considerations
- for favoured approaches to futureproofing to be adopted widely there is a need to win 'hearts and minds' beyond simply at the hands-on practitioner level
- developers need a reasonable incentive to optimise the future economic outturns of a project so that a greater affordable housing contribution can be secured
- given the diverse nature of projects there does need to be some choice or a range of futureproofing tools
- there was a generally favourable response to Option A(i) because of the certainty it gave and the avoidance of costly future review arrangements
- where a review arrangement is appropriate then this should be automated to a practical extent

## Prioritisation of Planning Obligations

The prioritisation of various obligations is probably the aspect of planning gain with the least national guidance.

Nonetheless the complete package of obligations makes a significant impact on overall viability.

None of the six LPAs currently has a formal protocol to help prioritise the level of obligations, although each LPA does have a view on how this is delivered on a case by case basis.

Clearly every case is different and so whilst on one site affordable housing might be a very high priority, on another site highways improvements might be critical. This flexibility needs to be built into any protocol but nonetheless a consistent approach to process across the West of England would be ideal.

Ark enabled a workshop regarding the prioritisation of planning obligations at the West of England Growth and Delivery Event, held on the 13<sup>th</sup> October 2010. Some key issues were identified which included the following:

- community engagement in the prioritisation of obligations needs to be undertaken at the framework and area policy level
- any hierarchy of obligations will need to reflect that some obligations are absolutely essential for a scheme to proceed
- ideally a methodology for ranking the importance of competing obligations would be welcomed by developers
- consistency throughout the West of England is less of an issue for developers who accept that each LPA has different priorities
- the understanding of viability issues needs to be at all levels, including at Member level

## Conclusions and Recommendations

### Approaches to futureproofing

In Ark's view it will be helpful for the West of England authorities to adopt a common language when referring to futureproofing approaches, and regard the three fundamentally different approaches, i.e:

- A) Fixing the Contribution
- B) Open Book Review
- C) Automated Review

as the basic groupings into one of which any proposed approach should be categorised.

It is appropriate to have a range of approaches which are well defined and understood and where the principles of each are standardised as far as possible. In this vein our recommendations for preferred approaches are as follows:

- i. where it is possible for a local planning authority to agree with an applicant an affordable housing obligation which fixes the contribution at a level well above that which is evidently viable at the time of entering a Section 106 agreement, but is nonetheless below the policy target, this should be regarded as the most desirable outcome. Our recommendation in this regard is qualified of course by needing to be clear that the applicant is taking an appropriate risk in relation to improved scheme viability meeting the costs of this fixed contribution. That can only be assessed properly with good quality and reliable viability evidence and some scenario testing to gauge what level of net improvement in the economic outturns of the scheme are required.
- ii. where the uncertainties of a scheme, say because of the level of infrastructure or abnormal costs still requiring more detailed investigation or because of the position of the applicant, make it very difficult to agree a fixed contribution, we recommend that an automated style review is preferred to an open book approach. This is a pragmatic opinion born of experience because we believe it is exceptionally difficult to secure genuine and sufficient open-book information from applicants.
- iii. for review based approaches, it is lawful for local planning authorities to expect all of the improvements in a scheme's viability position to contribute to meeting foregone planning obligations, until the policy target is met. However, we believe that it is pragmatic for local planning authorities to agree a sharing of the 'upside' with applicants/developers. We would further recommend that the share should always be reflective of the extent to which review arrangements require applicants/developers to accept typical degrees of development risk.

For the sake of compliance with the Circular 5/05 or succeeding tests for the validity of planning obligations, guidance on review provisions should emphasise that the intention of local planning authorities is to seek to secure improved levels of affordable housing contributions via the provision of actual dwellings in appropriate tenures on site.

We remain concerned that the overage provisions identified in some other areas where authorities carry out virtually retrospective reviews and seek monetary overage contributions if outturns exceed those anticipated at the point of entering a Section 106 agreement, run a real risk of conflicting with statutory guidance. Ark recommends that some further investigation be carried out by the West of England to test the veracity of this approach.

#### Prioritisation of Planning Obligations

Ark would recommend that all the West of England authorities introduce a clear protocol as to how, on a case by case basis, the level of obligations will be agreed.



## 1. BACKGROUND

- 1.1 The Housing Delivery Plan, published by S W Councils as one element of the South West Regional Improvement and Efficiency programme, established four overarching goals for securing more homes to meet housing need and demand in the region. One of those goals was to 'deliver affordable housing through and beyond the recession'.
- 1.2 Naturally, whilst the new Coalition Government has a significantly different emphasis in housing policy terms and on the extent to which housing will share the burden of securing substantial reductions in public sector spending, there remains a clear recognition that optimising the delivery of affordable homes within the constraints of a tightened fiscal environment is an important policy objective.
- 1.3 The housing market recession which began in late 2007 has seriously impaired the production of new homes. Through reductions in outturn sale prices, sales rates and the lending criteria applied by providers of mortgage funding (both in terms of deposit/loan-to-value levels and income multiples) the market for new homes has experienced a major downturn. Although prices have risen overall by an average of 10% in the past year this has been largely a product of scarcity of supply by comparison with more typical market conditions and as the supply and demand equation has become more balanced prices have levelled off and in some areas are now reported to be falling again. Economic conditions overall are likely to mean that the housing market will continue to perform relatively poorly for some time to come.
- 1.4 The results of the housing market recession and its immediate aftermath have been dramatic for housing production. For England, in 2006/07 the private sector contributed 146,000 homes for market sale and these were supplemented by 22,000 affordable homes produced by housing associations and other affordable housing providers. In 2009/10, only 88,000 new market sale homes were completed. However, 25,000 affordable homes were produced and this increase on the 2006/07 figure, despite wider market conditions, reflected an acceleration of public investment partly to reduce standing stock levels for market housing producers and partly to stimulate construction sector activity and the economy as a whole. With major reductions in public investment in housing going forward, the trajectory for affordable housing production is downward.
- 1.5 In recent years the production of affordable housing has become highly dependent on the pace of private sector housebuilding, with around 65% of all new affordable dwellings provided as a result of planning obligations on larger, principally market housing, development sites. With such schemes experiencing viability problems then many have stalled or have become the subject of renegotiation of planning obligations in order to permit their development.



- 1.6 The negotiation of planning obligations generally, and especially for affordable housing provision, is notoriously difficult. Adding to this the complication of often unforeseen viability constraints has increased the scope for complexity and disagreement between applicants and local planning authorities. Even where agreement is reached on planning gain contributions, recognising relevant viability factors, the Section 106 agreement format has not traditionally provided sufficient flexibility to address changing market and viability considerations for schemes which have extended development periods or for which there is a material delay in implementing a planning consent.
- 1.7 A range of mechanisms have evolved and been adopted, varying from one planning authority to another, to attempt to address the impact of changing market conditions on the degree to which schemes can meet established policies on affordable housing provision and other planning obligations. Collectively, these attempts to secure some flexibility can be described as mechanisms to 'futureproof' affordable housing delivery through the planning system.
- 1.8 The four unitary local authorities which comprise the West of England sub-region, and two neighbouring authorities which are part influenced by the same housing market, have collaborated to secure funding from the South West Council's Regional Improvement and Efficiency Programme. The funding has been utilised to commission a study of the options available to 'futureproof' affordable housing delivery through the planning system and the policy context within which they operate and to recommend to the six authorities a preferred approach to consider adopting and applying. The objectives of the study are specified in more detail in the following section of this report, 'Brief and Study Methodology'.
- 1.9 Ark was appointed to undertake the study on behalf of the six authorities and this report is the principal output of the assignment. The work, although fairly concise in its scope, has entailed widespread consultation with other organisations and interested parties.
- 1.10 Some of the practical examples of approaches to futureproofing include fairly detailed information on the content of Section 106 agreements. Where possible detail has been confined to appendices and the main body of the report aims to provide information, on what can be a complex topic area, in an accessible and straightforward style. Also, some practical examples relate to schemes which are not as yet subject to final agreement. This is because many futureproofing mechanisms link to schemes which are the subject of lengthy negotiation and for some approaches there are few, if any, working examples of completed agreements. Because of commercial sensitivities we are required to be circumspect about the level of detail provided on the nature of some putative agreements.



## 2. BRIEF AND STUDY METHODOLOGY

2.1 The overall objectives for this study, as defined in the brief, are to:

- maximise affordable housing contributions through the recession and beyond,
- ensure that site viability on multi-phased developments is not fixed at the bottom of the market so that affordable housing delivery increases alongside market improvement,
- provide a robust framework for reviewing affordable housing contributions at different stages of a development,
- identify other innovative approaches to unlocking stalled schemes through collaborative working.

2.2 The brief and the study are focused on affordable housing contributions through the operation of the planning system. However, the brief does recognise that other planning obligations will also be affected by viability considerations and so the study was expected to give some thought to the inter-relationship of securing affordable housing contributions and other planning obligations when considering options for futureproofing.

2.3 As well as an appraisal and assessment of the options for futureproofing and some clear recommendations and guidance on the application of preferred approaches, the study was expected to culminate in some guidance on relevant model clauses for Section 106 agreements. To this end Ark’s draft conclusions are to be shared with an appropriately experienced planning lawyer, to be appointed by a Project Group established to oversee the study.

2.4 Ark’s specific methodology for carrying out the study consisted of the following key phases and tasks.

<b>Phase A – Inception, Information Gathering and Analysis</b>	
1	Conduct an inception meeting with the Project Team and finalise the methodology and expected outputs.
2.	Meet with personnel from the West of England Partnership regarding links between the project and the partnership’s developer charter initiative, affordable housing planning policy guidance and launch event.



3.	Identify the status of development plan policy evolution in the six local authority areas and interview (phone or face to face) a key representative from each authority to identify existing practice and mechanisms on viability assessment, review, other futureproofing arrangements and the relative prioritisation of various planning obligations.
4.	Review general policy developments including the implications of the CLG review of planning obligations, emerging Coalition Govt. policy (mainly by reference to 'Open Source Planning' and the evolution and future of CIL).
5.	Identify and consider relevant good practice guidance and exemplars including HCA and ATLAS publications.
6.	Review recent planning appeal and High Court judgements with relevance to policy concessions related to viability and review of such concessions.
<b>Phase B – Appraising Options for 'Futureproofing' Affordable Housing Obligations</b>	
7.	Define the key dimensions of economic viability for residential development, a protocol for establishing this viability position and the key options for protecting the policy position as far as possible and for enabling appropriate future flexibility on meeting affordable housing obligations. Agree this approach to establishing the 'base case' and the options with the Project Team. Also consider mechanisms for prioritising planning obligations, including affordable housing.
8.	Carry out an appraisal of the relative strengths and weaknesses of the various options and draft an Interim Report to capture findings and conclusions to date.
9.	Present Interim Report to Project Team and discuss and debate findings.
10.	Determine base assumptions for archetype schemes to be appraised by BNP Paribas in 3 scenarios for future change in sales and build price assumptions. Assimilate results for incorporation in Final Report.



Phase C - Consultation	
11.	Facilitate a workshop session for housing providers and other stakeholders agreed with the Project Team to promote understanding and to permit effective debate and influence over the final outputs of the assignment.
Phase D – Final Report	
12.	Draft a final report setting out the findings and conclusions of the assignment including the outcomes of the consultation workshop. Make clear recommendations on viability review protocol and process, an approach to prioritising planning obligations, policy and practice implications for the various authorities and implementation tasks.
13.	Facilitate critique of recommendations by an appropriately qualified planning lawyer. *
14.	Meet with Project Team to review the draft report’s contents and the legal commentary.
15.	Amend report as necessary and issue in final form, suitable to be adopted as good practice reference material by the West of England authorities and by other local planning authorities.

\* The Project Group may decide not to engage the input of a planning lawyer because the outputs of the study do not lend themselves to model Section 106 clauses and so the legal advice is less relevant than anticipated at the project commissioning stage.

2.5 Ark was asked by the Project Group to engage the input of BNP Paribas to assist with some scenario testing of the preferred option for futureproofing and to help gauge its efficacy. We are grateful for this additional input and expertise which is captured mainly in Section 9 of this report.



### 3. SYNOPSIS OF CURRENT APPROACHES IN WEST OF ENGLAND AREA

- 3.1 As an early task associated with the study, Ark personnel made contact with an appropriate officer in each of the four West of England partnership authorities and also with the other two sponsoring authorities, Mendip District and Wiltshire. In most cases information was gleaned via a telephone interview, although there were a couple of instances where face to face meetings took place.
- 3.2 The purpose of the interviews with the sponsoring authorities was to establish and discuss what approaches and practices were currently or had recently been applied to scheme specific viability assessment and to the need for future-proofing affordable housing obligations.
- 3.3 Appendix 1 of this report includes a more detailed record of the interviews with the representatives of the six authorities and contact details for the personnel with whom discussions were held. For the purposes of the main body of the report we have included a brief summary of the findings:



#### **Bath and North East Somerset Council**

In terms of the level of obligations every scheme is viewed on its merits – the development manager (planning) has to give weight to the complete list of material obligations against the level likely be secured due to viability constraints. It is the responsibility of the development manager to recommend to committee which obligations are essential and which are negotiable.

The Council did have a process for agreeing obligations for Bath Western Riverside (BWR) which involved a prioritisation matrix.

In the future viability review mechanisms will be needed and so clear guidance is sought in order to achieve a consistent approach.



#### **Bristol City Council**

There is no formal process for agreeing the prioritisation of planning obligations within Bristol. It is the role of the planning officer to make a judgement as to the merits of any obligation for each scheme.

Bristol introduced the well publicised 'Open for Business' initiative where developers were encouraged to come back and renegotiate S106 obligations in order to deliver schemes in the recession. The Council expected that they would be approached by many developers but this did not materialise.

The issue of viability review has therefore not been addressed in detail but the officers behind the initiative intended there would be an initial reduction in obligations with a stepping up over future phases if a scheme was large



enough to have a number of phases and the market recovered.



### **North Somerset Council**

At the pre-app stage NSC planning officers consult with all internal colleagues to agree a list of obligations and also are trying to involve their members in this pre-app stage but they do currently not have a role in prioritising obligations.

The Council would like to see if it is possible to apply some simple key criteria such as: housing price and build cost indices, employment levels, economic growth rate. If these indices are improving by a certain agreed level it then triggers a viability review on a larger site whilst if these indicators are not improving then there is little point in a viability review



### **Mendip District Council**

To date most schemes have fulfilled or come close to fulfilling objectives so there is little specific procedural framework in place to cater for departures. The Council has some recent experience of conceding a reduction on its affordable target because it felt that the affordable dwelling mix was particularly attractive. There was though no detailed viability assessment in this instance.

Policy in Mendip is dated and reliance has until now been placed on the RSS to effectively have updated the policy.

The Council would welcome flexibility on longer term schemes in part to anticipate changing need or policy although such an approach is questionable in a planning law context.



### **South Gloucestershire Council**

If a viability case for reducing the level of obligations is accepted by SGC then it arranges a S106 Chief Officers Working Group meeting in order to agree priorities and where compromise is acceptable. AH is a high priority within SGC however there often is flexibility on the amount, size and tenure.

SGC does take a view that if the level of obligations offered is too low, even with a viability justification, the members are likely to refuse an application and ask the developer to rethink its proposals in order to make it more viable.

Delivery is recognised as being very important because more housing equals more jobs. In a rising market the Council could reasonably expect to achieve all obligations, but it accepts that for now at least the



market has changed and so compromise is likely to be necessary on many schemes.



### **Wiltshire Council**

The Council is still reliant on an amalgam of saved Local Plan policies from its predecessor districts until a unified Core Strategy is adopted. The Council expects Residual Land Value assessments in viability appraisals and will only accept input land values when an applicant can demonstrate its scheme was viable and could deliver policy at that price when the land was purchased.

Now that pressure on delivery targets has eased the Council is adopting a firmer line on viability, indicating it would wait until market conditions improved. The approach to futureproofing tends to be led by the applicant but transparency of information is a pre-requisite. Monetary overage deals are common on smaller schemes and are outturn based.

- 3.4 There is a range of practice evident across the various authorities and generally a good deal of relevant knowledge and practical experience on negotiating agreements which either settle on a fixed contribution between the currently viable position and the policy position or agree some form of review. Despite the close working relationship between the authorities, particularly the four West of England partners, there is a lack of awareness of approaches and solutions being adopted by other authorities. There is a strong case for better sharing of information and practice and for pooling bright ideas (whether these have originated from the authorities themselves or from applicants).
- 3.5 Ultimately there is benefit for all of the authorities in moving towards a more informed and consistent approach to negotiating on planning obligations and in particular on affordable housing obligations. The outputs from this study will hopefully contribute constructively to this more integrated approach but consequently it is important that the recommendations made are flexible enough to respond to the varying characteristics of schemes and the many development contexts across the West of England and its immediate hinterland. A 'one size fits all' approach will not work effectively across the whole of the area. Each local planning authority needs a range of tools and mechanisms to deal with viability but it should still be possible for there to be a framework consistently applied and for this to be underpinned by continuing sharing of good practice and practical experience.



#### 4. RECENT POLICY AND APPEAL CASE DEVELOPMENTS

- 4.1 Our aim in researching relevant policy and appeal case developments has been to focus on policy changes or appeal decisions which are contemporary or of fairly recent vintage and to highlight the aspects of these which we regard as relevant and material to futureproofing affordable housing (and possibly other) planning obligations.

##### Policy Developments

#### 4.2 Coalition Government Programme and 'Open Source Planning'

- 4.2.1 The Coalition Government's position on housing and related planning policy is yet to take clear shape and practitioners in the sector await the Localism Bill to judge whether the principal planks of the framework for delivering affordable housing via the planning system are likely to be re-engineered to any significant degree.
- 4.2.2 However two noteworthy measures on planning have already been implemented, namely the re-classification of brownfield sites to discourage development on amalgamated rear gardens (so called 'garden grabbing' schemes) and the abolition of the regional tier of the development plan, the Regional Spatial Strategy. The latter measure is of real significance for affordable housing development.
- 4.2.3 Apart from the RSS establishing challenging targets for local planning authorities in terms of new homes provision and the identification of a five year land supply to support this targeting for production, the RSS for the South West was explicit on minimum expectations for the proportion of new homes to be affordable. This was set at 35% and given that a significant proportion of regional housing production is achieved on sites below thresholds for affordable housing policies, it effectively implied a target for production on larger sites of 40% or more. For local planning authorities with dated affordable housing targets, often derived from old saved Local Plan policies, the status of the RSS policies as the top tier of the development plan gave credence to those authorities seeking a higher target than described in adopted local policy (see Mendip District Council example in Section 3.3 earlier).
- 4.2.4 The abolition of the RSS is likely to present some difficulties, at least for a time, for those authorities which are slowest in bringing forward contemporary style targets for affordable housing provision.
- 4.2.5 To gain an appreciation of the direction of Coalition Government policy thinking in relation to planning it is worthwhile revisiting the Conservative Party manifesto/opposition policy green paper, 'Open Source Planning'. Some of the key relevant proposals and ideas emanating from this document which are likely to have a real bearing on the context of the Localism Bill include:



- abolishing the power of planning inspectors to rewrite local plans. If plan policies have been correctly formulated at the local level (and in the case of affordable housing policies have been subject to a strategic level viability assessment in accordance with paragraph 29 of PPS3), then these policies will not be subject to potential amendment at an Inspector's Report stage,
- there will be stricter limits on appeals against planning decisions at the local level with appellants having to demonstrate an abuse of power or a failure to apply the local plan. Only appeals on the grounds of contravention of local plan policy will be handled by the Planning Inspectorate,
- the aspirations of neighbourhoods are likely to figure more prominently in local plan policies, meaning more likelihood of varying targets for affordable housing (in quantum or tenure balance) to reflect community expectations,
- accepting the concept of payment of a tariff to capture most development mitigation (this is in essence acceptance of the Community Infrastructure Levy [CIL] approach to mitigation albeit the document discusses abolition of CIL but replacement with a similar concept and the Government has now confirmed retention of CIL),
- simplification of national planning guidance, probably to involve some rationalisation of guidance notes possibly impacting on PPS3.

4.2.6 Because there is a clear emphasis in Open Source Planning on a streamlined, simpler and cheaper planning system it is quite likely that, ultimately, guidance is likely to emerge in favour of the more automated or certain approaches to flexing planning obligations, especially affordable housing provision, on applications which can demonstrate viability problems. Therefore, authorities which adopt futureproofing measures which are in tune with Government thinking are less likely to find their favoured approaches undermined by emerging national policy guidance.

4.2.7 The Government's proposals to incentivise local authorities to build new homes, despite the removal of the imperative of imposed targets from the region, is to match the expected Council Tax revenue from new homes for a period of 6 years. To particularly incentivise affordable housing production the Government match funding will be 125% of the Council Tax revenue for 6 years. Developers are incentivised to provide affordable housing by its exemption from CIL contributions.

4.2.8 In practice the funding for the Council Tax incentive scheme, now being entitled the 'New Homes Bonus', will be secured through the abolition of the Housing and Planning Delivery Grant and then in future years by top-slicing the Revenue Support Grant to local authorities.



#### 4.3 Consultation on a New Policy Document for Planning Obligations

4.3.1 This consultation exercise took place between March and June of this year. Although the exercise was launched by the outgoing Government our understanding is that the new Coalition Government is likely to issue a new policy document relating to the purpose and application of planning obligations. The policy document is required in order to re-establish the planning obligations framework following the CIL Regulations going live in April 2010.

4.3.2 The Government's intention is to tighten the scope of planning obligations in the light of CIL with the effect of preventing local planning authorities seeking fairly general contributions or mitigation where these requirements should already be captured by the CIL charge. The Government's intention is that the purposes of CIL and planning obligations should not significantly overlap.

4.3.3 In the CIL Regulations, any scheme capable of being charged is subject to statutory tests to check the lawfulness of planning obligations. These are refined or distilled versions of the 5 tests included in Circular 5/05 (which to date has been the instrument governing the relevance of planning obligations). The new tests are that obligations must be:

- (a) necessary to make the development acceptable in planning terms,
- (b) directly related to the development,
- (c) fairly and reasonably related in scale and kind to the development.

Planning obligations should have the purpose of seeking only essential local contributions towards the granting of planning permission rather than more general contributions which are better suited to the use of CIL.

4.3.4 Affordable housing is identified specifically as a type of obligation not suited to CIL. The draft policy document for consultation states specifically, in Section 1.40, that developer contributions towards affordable housing will continue to be made through planning obligations. Also it states that the Government considers that affordable housing is a legitimate planning requirement, which will remain within the scope of the new statutory tests applying to planning obligations.

#### 4.4 Community Infrastructure Levy (CIL)

4.4.1 CIL was introduced by statutory regulation in April 2010. Effectively it pools or amalgamates contributions for general infrastructure and makes these costs subject to a tariff or charge on new development. It is intended to reduce uncertainty and variance in the negotiation of planning obligations for infrastructure.



- 4.4.2 CIL is manifest in a charging schedule at local level meaning that, if CIL is adopted in an area, its costs are clear to developers at the outset of the planning process. Charges are applied to net additional floorspace in developments and the charge rates will be indexed. Subject to what changes the Coalition Government introduce, CIL charging schedules are subject to external examination by the Planning Inspectorate and the inspector's report and determination is binding.
- 4.4.3 Local planning authorities are offered the choice of whether or not to adopt CIL but there were financial disincentives applied to authorities choosing not to adopt the scheme. If maintained these are likely to force its adoption on most authorities.
- 4.4.4 The major issue for affordable housing contributions via the planning system is that these remain planning obligations in the traditional sense and are therefore subject to negotiation whereas CIL is mandatory and based on a fixed charge. The likelihood is therefore that where viability is a problem (and this could well be worsened by CIL charges) most of the 'strain' in alleviating the viability problem is likely to be borne by the affordable housing contributions.
- 4.4.5 There is further discussion on the prioritisation of planning obligations in the West of England and the potential impact of CIL in Section 10 of this report.

### **Appeal Case Developments**

#### **4.5 Land at Clay Farm and Glebe Farm, Cambridge**

- 4.5.1 The local planning authority defending this appeal was Cambridge City Council and the appellant was Countryside Properties. The appeal decision was issued on 25<sup>th</sup> February 2010.
- 4.5.2 The sites in question formed a significant tranche of the Cambridge Southern Fringe development area. Cambridge and surrounding districts are an identified growth area and there is a major impetus for substantial economic and housing growth. The development proposed 2,300 new homes with accompanying community and other infrastructure. The policy expectation on affordable housing provision was 40%.
- 4.5.3 The scheme in question had experienced viability problems and the developer had included its actual land acquisition costs as an input to the viability appraisal. The Council and the developer had negotiated fairly positively over addressing the viability problem but attempting to optimise the affordable housing provision.
- 4.5.4 The planning inspector addressed the viability appraisal methodology in detail and rejected the developer's argument that its actual acquisition cost should be treated as an input to the appraisal. The inspector recommended that only a residual land value approach (but one acknowledging the need to achieve a premium over existing use value to induce sale) was the correct approach. If this left the developer experiencing an immediate loss then this was a natural



product of the speculative housing business and the planning system should not work to compensate developers for or insulate them from this risk.

- 4.5.5 The developer had indicated a willingness to agree a 30% affordable housing contribution in the first phase and, viability permitting, to move to the policy position of 40% for subsequent phases. The developer had resisted the notion of providing more than 40% in any phase to permit some 'catch up' even if viability assessments showed this to be feasible. The inspector's report recommended that the parties should re-negotiate on this point with the developer being asked to accept higher than 40% levels on future phases and a commitment to meet the 40% target across the whole scheme. Whilst this was viewed as a favourable proposition by the local planning authority the Secretary of State rejected this recommendation and dismissed the appeal.
- 4.5.6 The Secretary of State did agree with the Inspector's recommendations on the appropriate approach to viability assessment and treatment of land value. He concluded in regard to the constrained housing market 'this factor is likely to be a short term problem given the advantages of the sites'. The Secretary of State concluded that the proposed supplementary undertaking to permit 30% affordable housing in the first phase but eventual catch up to 40% overall was not acceptable and that this would conflict with the development plan which requires 40% throughout the development (including in the first phase).
- 4.5.7 In the course of conducting this study Ark has spoken with Sarah Lyons ([sarah.lyons@cambridge.gov.uk](mailto:sarah.lyons@cambridge.gov.uk)) of Cambridge City Council. A duplicate application by Countryside has now been determined and a consent granted by the Council. The developer signed a S.106 Agreement committing to meet the 40% policy target across the whole development and the scheme is due to commence in the near future.
- 4.5.8 The very firm line taken by the Secretary of State in deciding on the appeal appears to have been fully justified by events subsequently. Ark's understanding is that even allowing for a RLV viability assessment the developer had an evidenced case for not being able to meet the 40% target initially. However, because the viability gap was not enormous and the scheme is of a long duration, the developer appears to have been willing to take a commercial view on the risks involved, as with other risk aspects of residential development, and judged it worth proceeding.
- 4.6 **Land off Lydney Bypass and Highfield Road, Lydney**
- 4.6.1 The local planning authority defending this appeal was Forest of Dean District Council and the appellant was Robert Hitchins Ltd, a land promoter. The appeal decision was issued on 6<sup>th</sup> October 2009.
- 4.6.2 This large site is adjacent to another parcel of land for which Hitchins had successfully appealed and secured a consent with affordable housing well below the 40% target sought by policy.



- 4.6.3 The appellant offered an 18% affordable housing contribution on the new site, a percentage it refused to review over time on the basis of the potential for improving market conditions. The Secretary of State agreed with the planning inspector that taken alone, or with the other Hitchins site, these strategically important sites represented the best opportunity to achieve affordable housing in the district. He judged the 40% policy target to be neither 'unrealistic nor unreasonable'. He further commented that 'in the context of the lengthy timespan of the proposed development, the downturn represented by the "credit crunch" can be regarded as a temporary and relatively short-term element'.
- 4.6.4 The Secretary of State concluded that the degree to which the appeal proposal fell short of the affordable housing target was a significant disadvantage and the appeal was dismissed.
- 4.6.5 The appellant subsequently sought a judicial review of this appeal decision and lost that action.
- 4.6.6 Ark contacted Keith Chaplin, Housing Strategy and Enabling Officer at Forest of Dean District Council (contact [keith.chaplin@fdean.gov.uk](mailto:keith.chaplin@fdean.gov.uk)) to discuss developments on this Lydney site since the appeal and High Court action. Keith confirmed that review could have been most relevant to this Lydney site rather than the earlier one. However, Hitchins remained completely resistant to the review concept and indicated a willingness to continue to lodge appeals until some sort of fixed position could be agreed.
- 4.6.7 Ultimately agreement was reached with Hitchins on a blended rate approach and a Section 106 agreement is in place. The agreed obligation is 30% across the whole scheme based on a tenure split of 60% social rented and 40% intermediate. The local planning authority has also reserved the right to increase the affordable provision to 40%, or the tenure split to 70% social rented, if and when grant investment can be secured.
- 4.6.8 In arriving at the requisite grant required to increase the affordable percentage an independent valuation of market dwellings is required and a deduction for affordable housing provider contributions is based on a market testing exercise controlled by the Council.



## 5. RESUMÉ OF GOOD PRACTICE GUIDANCE

5.1 This section is focused on some national good practice guidance published by the Homes and Communities Agency and its specialist planning team, ATLAS. The content herein is not intended to be exhaustive but rather to give a flavour for the type of approaches regarded as appropriate when viability threatens the deliverability of housing schemes. These guidance documents can be regarded as material considerations when attempting to resolve the determination of a planning application including when an application (or its refusal) have become the subject of an appeal.

### 5.2 **Homes and Communities Agency Good Practice Note – ‘Investment and Planning Obligations, Responding to the Downturn’**

- The document was published in July 2009 and was produced to help encourage effective resolution of negotiations between local planning authorities and developers where schemes had become stalled as a result of viability considerations. The document explicitly acknowledged that ‘the continued downturns in the housing and commercial property markets have significantly reduced the scope for achieving viable developer contributions for affordable housing via planning permissions’.
- The document suggested that ‘planning policies and practice for securing planning obligations need to accommodate both the current realities and the future dynamic of the land and property markets’. There is a clear implication in this statement that any approach to agreeing affordable housing planning obligations where short of policy targets, needs to reflect current economic dimensions but then embrace changing conditions as they become evident in future.
- A major theme of the good practice guidance is that viability assessments should be modelled transparently, with close collaboration between the various parties involved.
- In Section 19 of the note there is emphasis on the need for any robust affordable housing planning policy to be founded on good evidence including financial viability. Also it is expected that policy stage viability assessments (usually described as strategic viability assessments) do not reflect only a short term view of the housing market. Whilst reasoned assumptions of what might be ‘normal’ market conditions are expected the need for flexibility and review is highlighted.
- The document suggest that a flexible approach to managing planning obligations might ‘relax or defer policy requirements and be linked to a developer commitment on the timing of delivery’.



- Flexibility should only be offered on the basis of a transparent approach to appraisal. ‘Full disclosure of financial information should be expected alongside arrangements to validate assumptions’. An example of a deferred affordable housing obligation is offered where a 35% target is reduced to at least 20% subject to an updated viability appraisal for future phases (This is close to the inspector’s proposed Clay Farm/Glebe Farm approach which ironically was rejected by the Secretary of State – see 4.5 earlier).
- The practice note acknowledges the possible conflict between overage/clawback deals on affordable housing provision and the requirement for certainty of obligation scope in Circular 5/05. The clear preference and the safest approach is suggested to be deferment or flexing of obligations based on revisiting viability prior to future phases when delivery will be achieved. Implicit again is a concern about the applicability of overage provisions which are entirely backward looking, i.e. examining outturn and then aiming to secure additional contributions if these have proven to be better than anticipated. This does highlight a real issue for some overage provisions examined by Ark in the course of this study (see section 6 case studies).
- In Section 46 of the document it is recommended that there should be one shared viability tool to inform the negotiation between the local planning authority and the developer (and where appropriate the HCA). It is recognised the HCA’s Economic Assessment Tool is suited only to modelling single phase developments where planning obligations are fixed.
- In the main body of the advice note and in Annex 1 helpful illustrations are provided to indicate the factors affecting viability including historic land cost. Whilst the content does acknowledge the relevance of RLV, or alternative use value assessments, it is less clear-cut on the primacy of this approach to viability assessment than recent appeal decisions (see paragraph 4.5.4 earlier).

### 5.3 **The ATLAS Guide – Topic Practice Paper Note T.1.1.1 ‘Developing a Strategy for Addressing Stalled Schemes’ – January 2010**

- The paper includes a brief case study on an approach adopted by Norwich City Council to schemes where the normal package of developer contributions would make a scheme unviable.
- The approach should only apply in defined ‘exceptional’ circumstances, be based on an open book approach to financial evidence, require the developer to meet the cost of independent valuation, use deferred payments and similar to ‘capture back’ funding.

### 5.4 **The ATLAS Guide – Topic Practice Paper Note T.1.2.3 ‘ Financial Appraisal and Viability in the Planning Process’ – January 2010**



- ‘A collaborative and transparent approach to financial appraisal is the most robust way of achieving workable solutions to viability issues’.
- The paper highlights the relevance of using financial appraisals at different stages of the development, essentially the open book review approach to futureproofing obligations.
- An agreed and shared viability appraisal is recommended for establishing the baseline for viability and the template for review. Independent verification of inputs is suggested as a solution where the parties cannot agree to an independent shared viability assessment.
- The paper recommends capping the level of potential obligations should viability improve in the future.
- The virtues of making any re-appraisal mechanism as simple as possible are emphasised.
- Trigger points for re-appraisal should be agreed. Examples given include requiring appraisals to accompany specific phases or reserved matters applications.
- The note does imply some sharing of ‘future surplus’ between the developer and the meeting of defined capped obligations. There is recognition of the developer requiring an ‘incentive’ but this reflecting an ‘appropriate return in relation to risk’.

**5.5 The ATLAS Guide – Topic Practice Paper Note T.1.3.1 ‘Reviewing Section 106 Agreements’ – January 2010**

- This paper suggested that it may be appropriate to renegotiate some existing Section 106 agreements where the obligations could not now be delivered if schemes were to be viable. As with other papers there is an expectation that any flexibility offered would need to be underpinned by open book and independently audited viability data.

**5.6 The ATLAS Guide – Topic Practice Paper Note T.1.3.2 ‘Contingent Deferred Obligations’ – January 2010**

- This paper examines in more detail than others described above the basis upon which some obligations might be deferred in a Section 106 Agreement, contingent on future project viability.
- The paper suggests that care is needed when applying terminology to contingent deferred obligations. ‘Overage, clawback and profit share are terms that are sometimes used – these can have alternative meanings, elicit strong views and do not align with Circular 5/05’ (Ark’s emphasis).
- Generally, this paper and others propose that contingent deferred obligations are only appropriate in ‘exceptional cases, such as where a site is helping deliver strategic vision and/or policy such as a key regeneration or housing role’.



## 6. APPROACHES TO FUTUREPROOFING AND CASE STUDIES

- 6.1 Section 7 of this report examines a range of options for futureproofing affordable housing obligations and does this in a reasonably detailed fashion and in a form that hopefully enables the reader to readily compare and contrast the relative strengths and weaknesses of each approach.
- 6.2 The options identified are a product of Ark's experience and of a number of case studies we have examined in the course of this assignment. This section of the report is intended to summarise the key characteristics of each of the options available and then to present a number of helpful and informative case studies, sorted by reference to the option illustrated by each of them.
- 6.3 Fundamentally, in Ark's opinion, there are three principal approaches which a local planning authority can adopt to agreeing an affordable housing planning obligation which is not fixed at the viability position pertaining to a scheme when a Section 106 Agreement is entered into and a planning consent is granted. This means that future changes in market conditions likely to impact (preferably positively) on the scheme in question will have a bearing on the amount or type of affordable housing provided.
- 6.4 The three fundamental approaches are:
- (A) **Fixing the contribution** – at a level above that deliverable viably based on current values and costs but below the policy target. This option is often described as the 'mid-market' or 'blended rate' approach.
  - (B) **Open book review** – of all relevant value and cost factors on an appropriate cycle throughout the life of a scheme.
  - (C) **Automated review** – of one or only a small number of key value or cost factors affecting viability, usually with reliance on some simple indexation of factors.
- 6.5 The following case studies provide examples of the application of the different approaches to futureproofing affordable housing contributions:

### Option (A) – Fixing the Contribution

- (i) - Clay Farm/Glebe Farm, Cambridge (see Section 4.5 earlier)
- (ii) - 'Lydney B' Site, Forest of Dean (see Section 4.6 earlier)
- (iii) - Higher Newham Farm, Cornwall (a hybrid approach)
- (iv) - Elephant & Castle scheme, LB Southwark
- (v) - LB Southwark



(vi) - Cornwall Council

**Option (B) – Open Book Review**

(vii) - 121/123 Heath Road, Twickenham

(viii) - Williams Lane, Mortlake

(ix) - Stroud District Council

**Option (C) – Automated Review**

(x) - Sherford, South Hams

(xi) - Plymstock Quarry and various others, Plymouth

(xii) - Cornwall Council

(xiii) - Kew Bridge, LB Hounslow

**Futureproofing Approach: Option (A) – Fixing the Contribution**



**(i) Clay Farm/Glebe Farm, Cambridge**

This important and relevant appeal case is described earlier in this report in Section 4.5.



**(ii) Land off Lydney Bypass and Highfield Road, Lydney**

This important and relevant appeal case is described earlier in this report in Section 4.6.



### (iii) Higher Newham Farm, Cornwall

#### Mix of Phased Viability Review, Fixed Contribution and Deferred Contributions.

##### **Negotiated Deal:**

This site covers a large development in excess of 1,000 homes which was subject to an appeal.

The baseline within the S106 was that the developer agreed to a contribution (albeit conditionally) of 35% affordable housing which was policy compliant.

However there is an agreed viability review mechanism to be carried out prior to start on site of the next phase. If the viability case is proven to be reasonable the affordable housing contribution can be reduced for the next phase.

In terms of phase 1 only 10% affordable housing was shown to be viable but the Council regarded this as too low from a mixed sustainable communities perspective and so insisted on 20% provision in phase 1. The developer agreed on the proviso that any reduced profit on phase 1 will be taken into account when there is later overall reconciliation.

The planning inspector involved at the appeal regarded this review mechanism as robust.

##### **Ark Commentary:**

This approach is interesting because the S106 starts with the policy position being the relevant affordable housing target. There is the opportunity for a phase by phase viability review if the developer can show that the scheme is rendered as unviable due to the affordable housing requirements.

In addition the Council effectively set a minimum acceptable target on any one phase of 20% affordable housing, which is partly like the blended rate approach.

It could be argued that this methodology gives the Council the best of two options i.e. full viability reviews on a phase by phase basis and a baseline blended rate.

As always the agreed detailed assumptions are critical, such as what level of profit is reasonable etc. Any review clause is only as good as the detailed viability assessment and the drafting of the S106.

It is also possible that many developers could regard this as significantly favouring the Council and so this approach could be strongly resisted by some more robust applicants.

It is an option worthy of further investigation.



**(iv) Elephant & Castle Scheme, LB Southwark**

**Reduced Obligations with a Time Limited Approval**

In spring 2008, the London Borough of Southwark agreed a scheme of 470 homes as part of a mixed-use development at the site of a former hotel at the Elephant and Castle. It was proposed that 40% of the dwellings would be affordable.

Reflecting a revised viability assessment, it was agreed in September 2008 that the affordable housing could be reduced to 32% of dwellings and the mix of affordable housing tenures changed.

A Deed of Variation of Section 106 Agreement was made in November 2008 with the reduced level of affordable housing. The agreement was time-limited with the developer agreeing to enter an unconditional contractual commitment prior to June 2009, to complete the development within an appropriate time period. Otherwise, the original levels and mix of affordable housing would apply.

The Borough made it clear that this type of arrangement would only be accepted in exceptional circumstances, where the development, for example, made a significant regeneration contribution. In other cases, development would be expected to provide policy compliant levels of affordable housing and to make other appropriate contributions.



**(v) LB Southwark**

**Responding to Poor Viability Resulting in Reduced AH Provision – Deferred Contributions**

Southwark rely on their current affordable housing policy (Affordable Housing SPD 2008, and S106 SPD 2007) to deliver 35% on-site provision. This policy has been viability tested and so the Council expects to deliver this level of AH in most cases.

They therefore have judged each case on its merits and do not believe it is necessary to create a specific obligations mitigation strategy.



On individual schemes where the level of obligations may be preventing delivery of the project the developer will need to submit an 'open book' viability appraisal to convince the Council to accept less than policy position of obligations.

When the viability case has been robustly challenged but accepted then Southwark would on larger schemes still expect the developer to deliver an average of 35% affordable housing across all the phases. In simple terms on 4 equal phases they may accept 25% on phase 1, 30% phase 2, 37.5% phase 3, and 42.5% on phase 4.

To achieve this they try to negotiate a deferred contributions structure that avoids viability reviews but still gives all concerned certainty. The Council will consider including viability review mechanisms as a last resort if agreement cannot be reached with the developer over the level of deferred contributions.



#### (vi) Cornwall Council

##### **Commuted Sum with Possible Deferred Contributions**

The Council agreed to a commuted sum that was equivalent to the full policy compliant level of affordable housing target within the S106 agreement. This totalled £980,000.

In the event that the developer could provide evidence that the relationship between market values and costs meant that the anticipated 15% return was no longer viable then the Council would accept a deferred benefits obligation.

##### **Ark Commentary**

This has the advantage that the onus is on the applicant to prove their viability case. Nonetheless this provides a high risk that the Council will achieve a reduced contribution once the revised viability appraisal is agreed.

This approach must also be difficult to sell to some housebuilders as they are uncertain at the outset as to whether they will have to pay the full amount or if the Council may accept less.



## Futureproofing Approach: Option (B) – Open Book Review



(vii) 121/123 Heath Road, Twickenham

**Full Review, Subject to Key Triggers**

### **Negotiated Deal:**

On site provision:-

14 Market Sales

Affordable Units

- 4 x 1bed flat
- 4 x 2bed flat
- 8 (36%) Total AH Units

Plus payment of an off-site commuted sum, subject to viability review if the developer's margin improves beyond 19% of GDV

**Policy Position** target 50% affordable housing

### **Ark Commentary:**

This approach is there mainly to cover off the risk of the Borough agreeing to below policy position only to find the housing market improves prior to start on site. Nonetheless the same principle could be applied to other larger or complex schemes where phased development is expected.

At the least, if housing market values have not increased, then there would be no trigger for an automatic viability review. This helps developers who are concerned that viability may need to be reviewed regardless of the changes to the housing market which could waste time and incur consultant costs.

In Arks view this approach is a good one and if applied to multi-phased projects could avoid the need for some unnecessary reviews when we are in a stagnant or falling housing market.

If this approach was combined with a simple formulaic calculation in terms of build cost inflation then you could easily come to a conclusion on whether a full viability assessment review is justified.

It would be possible to judge if gross profit (or developers margin) had increased by taking build price inflation (using BCIS indices) from house price inflation in real terms. If the gap between sales income and build costs has widened then a trigger for a full viability review is justified.

The formulaic approach is not used to determine the level of AH obligations but whether or not a review is needed. This probably works well on a scheme which is predominantly residential but is more complex when a significant part of the project is commercial development.



**(viii) Reids Meadow, Williams Lane, Mortlake**

**Overage Clause with Long Stop Date**

**Negotiated Deal**

On site provision :-

45 Market Sales

Affordable Units on site:

- 25 social rented units
- 6 intermediate home ownership
- 31 (41%) Total AH Units

**Ark Commentary**

This overage deal, as an approach, is there mainly to cover off the risk of the Borough agreeing to below the AH policy position only to find the housing market improves prior to completion. It effectively puts a long stop date for a viability review (final sales of the market units must be achieved 2 years after start on site).

It then includes an overage clause where any increase in the actual development profit compared with the base developer's profit is shared on a 50/50 basis up to a cap that takes the level of AH contributions in line with the Borough's policy position.

This will create a potential commuted sum which can be spent on affordable housing elsewhere in the Borough.

In Ark's view this methodology will help to ensure that developers are not trying to sit on projects with planning approvals where a package of obligations have been agreed based on viability calculations in a relatively poor housing market.

The level of overage which is reasonable is debatable. A number of LAs have accepted overage and a 50/50 split of increased profit is regarded as reasonable. However if compared to a scheme with a full viability review mechanism the developer would still benefit from a rising market (as the GDV rises so does the baseline profit - in real terms).

There is an argument that any overage is too generous to the developer as really any super profits beyond the agreed baseline profit should first be spent on delivering policy compliant planning obligations. The agreed proportion of base profit is a relevant factor i.e. if the LPA agrees on viability to allow a developer 20% profit or more, then overage seems very generous in a rising market. In this case study LB Richmond agreed with the applicant a base development profit of just 12.7% which makes the overage deal seem far more acceptable to the LPA.



### (ix) Stroud District Council

#### Monetary Overage Assessed Retrospectively

##### Background

In December 2009 Stroud District Council published an addendum to its Supplementary Planning Document for Affordable Housing. This dealt with the Council's approach to deferring or compromising on affordable housing planning obligations where 'there is a robust economic justification for reducing this (30%) proportion because the economic viability of the scheme is threatened by the inclusion of affordable housing'.

The Council reserved a right to adopt a cascade approach to addressing a viability problem. Firstly it will support the investment of public subsidy to close the viability gap. Secondly it will consider adjusting the tenure mix and only thirdly will it consider altering the affordable housing percentage.

Where the Council does adopt the third approach, an overage clause will be included in the S.106 Agreement 'to capture any market improvement value either in whole or part between the time of the viability validation and the commencement of the site'. The expectation is that a commuted sum should be payable rather than an upward adjustment to the on-site affordable housing. Although described as 'overage' the SPD addendum appears to suggest that the Council captures all of the improvement between entering the agreement and site commencement.

##### Ark Commentary

Ark contacted Stroud District Council to check on whether the policy clarification in the SPD addendum had resulted in any specific agreements so far. To date none had been secured albeit the provisions had been agreed with a developer in connection with an application but this had failed to proceed for other reasons.

As with commuted sum overage provisions which are based on outturn review close to the completion of schemes, Ark is concerned that these type of arrangements are close to local planning authorities participating in the economic outturn of development and securing a 'betterment levy' (see B7 in Circular 5/05 Planning Obligations).

We are aware that some authorities have taken external legal advice in framing their outturn and commuted sum overage provisions and assume therefore that it is reasonable to apply these arrangements in the context of the five tests of a legitimate planning obligation as set out in Circular 5/05).



## Futureproofing Approach: Option (C) – Automated Review



### (x) Sherford, South Hams District Council

#### Automated Review – ‘Clawback’

#### Background

Sherford is a planned urban extension to the east of Plymouth, largely on greenfield land. The new community is intended to provide for up to 5,500 new homes plus a new town centre, consisting of community and retail uses, various employment uses and new schools and health facilities. Around 30% of the designated area for Sherford will take the form of a country park and within this area it is intended that two large wind turbines will be erected to generate renewable energy for the locality.

The scheme has overall a 15 year development timeframe and has been the subject of assembly and planning for the last decade. The development area straddles both South Hams district and Plymouth city. Both local planning authorities produced a joint Area Action Plan to govern planning policy for Sherford and there is an established joint working framework to manage the planning process. The bulk of the development area is in South Hams so SHDC leads the negotiations with the developer, Red Tree, and the consideration of the planning application. SHDC’s Planning Committee passed a resolution in July 2009 that it was minded to grant an outline consent for the whole project but this was subject to agreeing satisfactory terms for a S.106 Agreement including for the operation of a clawback mechanism to futureproof affordable housing provision. The S.106 Agreement is yet to be finalised and the negotiations on the detail of the operation of the clawback mechanism have been protracted and there are unresolved issues. Ark has advised SHDC on aspects of the affordable housing obligations including the operation of the clawback.

#### Policy Position

The AAP requires between 30 and 50% of the housing provided at Sherford to be affordable in a mix of 15% social rent and the remainder Newbuild Homebuy and ‘intermediate other’ which is likely to be discounted to market sales by 20% and potentially not PPS3 compliant. Sherford is subject to a comprehensive Town Design Code, with the aim of creating a distinctive and high quality physical environment.



### **Provisional Agreement on Affordable Housing**

Because of the impact of the housing market recession, the LPAs accepted that the AAP affordable housing target would not be achievable initially.

The developer and the LPAs appointed special advisers and eventually they agreed a basic viability position with value and cost assumptions. This included an assumed cost for land acquisition across the many landowners on an equalised basis but at, effectively, a fixed price. The viability appraisal suggested that no affordable housing provision was viable. The developer proposed 12% in phase 1 (700 units) only and this is expected to be supplemented by a similar proportional percentage funded by grant. Provision for future phases is entirely dependent on the operation of the clawback mechanism.

Clawback reviews, which are intended to occur at 500 unit intervals throughout the life of the scheme, track movements in two variables: sales prices and dwelling construction costs (ignoring infrastructure and abnormals).

The developer proposed application of a regional house price index to sales and BCIS to construction costs. The LPA has insisted on reviewing actual sales prices at Sherford for the former but accepted BCIS for the latter.

40% of any improvement in the margin between the two variables contributes to a notional 'fund' for which a mechanism exists to determine how much affordable, dependent on tenure, can be purchased in the next phase.

### **Ark Commentary**

Negotiations on the final detail of the operation of the clawback mechanism are still proceeding and so there are constraints on the depth of commentary Ark can provide. Certainly we can say that the basepoint viability upon which subsequent negotiations have taken place (April 2009) presents a very depressed viability scenario for the scheme, particularly given that South Hams generally is a high value market and this scheme is intended to achieve a distinctive and premium sense of place.

The developer believes that retaining 60% of the 'upside' is necessary as an incentive and to reflect the investment risk in the scheme and the fact that infrastructure cost increases should not be accounted for in the operation of the clawback. However, infrastructure and abnormal cost reductions, though value engineering, will not benefit affordable housing provision in the way this clawback operates so Ark would suggest that there is already a fair balance of risk and potential reward in relation to these costs without conceding such a large proportion of any upside to the developer.



The clawback mechanism is intended to reflect reasonable assumptions for the contributions likely to be secured by the developer from an affordable housing provider. It also attempts to reflect the better cash flow profile, lower risk and lower direct cost of selling affordable housing to an AHP rather than selling on the open market to individual purchasers.

The developer attempted to cap affordable provision on any phase to the AAP target meaning that no catch up would be possible even where the clawback fund could afford this. There is now provisional agreement on phase caps higher than the AAP targets.

The principles of this clawback deal could create a workable and reasonably simple review mechanism but as ever 'the devil is in the detail' and it has proven to be very difficult indeed to resolve issues of detail with the developer despite the overall attractiveness of the framework from a developer's perspective.



#### **(xi) Plymstock Quarry and Various Others, Plymouth**

##### **'Clawback'**

#### **Deal Structure and Background**

Plymstock Quarry is one of a number of large scale residential development schemes over which Plymouth City Council has encountered viability challenges presented by applicants as justification for a reduction below policy target for affordable housing planning obligations.

Ark had some involvement in key stages of appraising the viability evidence for Plymstock Quarry and so has a reasonable knowledge of the project and the likely basis for agreement between the Council and the developer. At the time of issue of this report on the West of England study, Plymstock Quarry is still not the subject of a finalised Section 106 Agreement. Therefore some details cannot be provided at this stage and there are obvious sensitivities surrounding the likely basis for agreement.

Plymstock Quarry is a large mixed use development consisting of 1,650 dwellings and some commercial uses and community facilities. The site is owned by a large house-building organisation and was acquired at a point in the housing market cycle when land values exceeded considerably those which would be applicable in current market circumstances.

The Council has a well founded policy target of 25% affordable for Plymstock Quarry and expected that the majority of this housing would be provided in the form of social rented homes.



Two particular issues presented themselves during negotiation on the extent of the viability constraint. Firstly, the developer wished to treat its acquisition price for the site as an input to the viability appraisal and it was not entirely clear what that figure actually was or the extent to which it had already been written down by impairment charges. Also, despite its ownership of the site and fairly advanced site appraisal, there was no specific information on dwelling construction costs. There were scheme specific abnormals and infrastructure costs and given the nature of the site and its previous use, these were significant. However, the developer was reluctant to provide its own unit construction cost information notwithstanding this obviously being readily available.

Initially the Council sought to establish a clear viability position based on the provision of transparent information by the developer and appropriate assumptions including rejecting the notion of including an historic land value. If the case for viability constraint was then clearly established, it wished to incorporate review provisions on an open book basis in the style of Option B.

In the event, the parties agreed on an automated or 'clawback' style review relying mainly on indexation, in the case of sales values from an agreed Plymstock Quarry base figure and in the case of unit construction costs indexed from a BCIS base cost by the BCIS published index. Plymstock Quarry actual sale values will be tracked and where there is a divergence greater than 10% from the external index then the Plymstock figures will apply. The external index will be the average of the Halifax, Nationwide and Land Registry regional percentages.

Overage as a principle is accepted but at the time of checking with the Council the actual split is to be agreed. The developer is seeking 50/50. Where there is an improvement in the scheme's viability the Council wishes to secure its 'clawback' in the form of affordable housing on the upcoming phase of the scheme.

On other larger schemes like Plympton Cattle Market, Oceanique (Derry's Cross) and Shepherd's Wharf, Coxside, the Council is also seeking to agree automated viability reviews and 'clawback' arrangements similar to Plymstock Quarry. On some smaller single phase schemes, the Council expects an open book review near the end of a project and an overage arrangement requiring the payment of a commuted sum (see Option B).

### **Ark Commentary**

The Council is a party to the Sherford scheme and has drawn on some of its experiences in connection with the viability negotiations on that project to inform its approach to Plymstock Quarry.



The recognition of the improved simplicity of an automated review, plus the reduced scope for argument over viability assumptions and inputs, is a pragmatic response by the Council. Ark would question the reasonableness of accepting an external base price for dwelling construction costs on Plymstock Quarry given the undoubted depth of relevant and scheme specific information held by the developer. It is for an applicant to evidence a case for viability constraint with real and scheme specific information. However, no doubt this developer would counter that having to accept a RLV approach to determining the worth of the site and this being significantly less than its true acquisition cost, already establishes a principle of departing from real scheme cost data in the viability appraisal.



#### (xii) Cornwall Council

##### **Overage with Simple Index Formula**

##### **Negotiated Deal:**

The Council agreed to an overage clause that related simply to one factor – any rise in house prices. The overage was to be in the form of a commuted sum.

##### **Ark Commentary:**

This approach has many advantages including its simplicity and transparency. There would be little need for complex viability reviews.

This is a very good deal for the Council because whilst the overage is shared on a 50/50 basis the gross overage is calculated purely on house price inflation. It ignores build price inflation and as such is likely to deliver a significant uplift in any commuted sum due to the Council in a rising housing market.

As always with overage clauses these are relatively easy to apply to uplifts in commuted sums and more complex when you try to achieve increased on-site provision on larger sites. This approach is likely to be very good on smaller sites particularly where a commuted sum is accepted by the LPA.



### (xiii) Kew Bridge, Key Bridge Road, Brentford - LB Hounslow

#### Overage 'Escalator' with Simple Index Formula

##### **Deal Structure and Background:**

This is a major mixed use development which includes 164 residential units together with retail, restaurant, office and leisure uses.

Fairly recently LB Hounslow entered into a S.106 Agreement with the developer of the scheme which accepted that, for viability reasons, the scheme could not afford to meet the Council's normal affordable housing target of 50%. The parties agreed a significantly reduced on-site obligation of 21 dwellings or only 13% of the dwelling numbers overall. However, the S.106 Agreement permits Hounslow to secure a deferred commuted sum contribution which is calculated by reference to an agreed formula.

The calculation formula is based on a specific viability appraisal which appears to have treated the developer's land acquisition price as an input to the appraisal but has produced a result which shows the scheme in deficit. The deferred contribution escalates in amount dependent on the extent to which the scheme outperforms this estimated deficit. The contribution is a percentage of the improvement in performance and the percentages increase in steps as the performance gets better and better until a capped contribution level is reached.

##### **Ark Commentary:**

Although this scheme could appear initially more as a fixed and deferred contribution approach in reality, for the commuted sum element, it is effectively an 'escalator' deal, albeit the escalating contribution is secured in the form of cash rather than additional dwellings.

Whilst the notion of allowing the actual acquisition price for the site to be regarded as an input is at odds with recent appeal decisions and accepted good practice, in reality the scheme is in deficit by reference to the base viability appraisal so the developer is not really recovering the land cost unless viability improves.

The viability assessment upon which the commuted sum escalator calculation will be based is expected to be carried out between 3 and 6 months before practical completion of the scheme and Ark assumes that this approach has been adopted in order to avoid any conflicts with the tests for the application of planning obligations in Circular S/05.



- 6.6 Within each of the three distinct and fundamentally different approaches described there are variants which virtually amount to options in their own right. Consequently, these 'sub-options' are evaluated separately in Section 7 to give that section of the report maximum usefulness as reference material. The range of options therefore are:
- A(i) Fixed contribution
  - A(ii) Fixed but contribution deferred in part or in whole
  - B(i) Open book review
  - B(ii) Open book review with an overage agreement
  - C(i) Automated review
  - C(ii) Pre-agreed formula for escalating affordable housing – 'escalator' deal

## 7. EVALUATION OF OPTIONS

<b>OPTION</b>	<b>A(i)</b>
<b>TITLE/BRIEF DESCRIPTION – Fixed Contribution</b>	
‘Mid-market’ or ‘blended’ rate applied to sales values to give fixed affordable target (and probably fixed other planning obligations).	

<b>KEY CHARACTERISTICS</b>
<ul style="list-style-type: none"> <li>• The scheme based percentage is above what is currently viable (as evidenced) but below the policy targets.</li> <li>• A very robust viability assessment would be needed to satisfy LPA that the offer was fair.</li> <li>• Would ordinarily fix contribution at agreed percentage throughout scheme. If only fixes for early phases and then reverts to policy or something higher then this is an option A(ii) approach.</li> <li>• No further review required giving maximum certainty and no ongoing cost of review or scope for argument.</li> </ul>

<b>ACHIEVABILITY</b>
<ul style="list-style-type: none"> <li>• Tends to be most realistic when blended rate is not too far distant from policy target.</li> <li>• Becoming more achievable as housing market has strengthened a little. Also recent appeal decisions are reinforcing this type of approach.</li> </ul>

<b>COMPLEXITY</b>
<ul style="list-style-type: none"> <li>• Difficult to agree terms because of the risk to both parties. There is a need for clear cut detailed data in the initial S.106 negotiations so that LPA can be satisfied. So, all the energy and hard work is focused on one key stage of negotiation. Longer term, the simplest of all options short of a commitment to deliver policy.</li> </ul>

<b>OPTIMISATION OF AFFORDABLE HOMES</b>
Depends on agreed percentage and on actual outturn values and costs. Leaves both parties with a risk of underperformance – key is to share that risk fairly. Examples Ark is aware of tend to suggest quite high levels of affordable provision.



**CERTAINTY/RELIABILITY**

- Once agreed gives real certainty of outcome. However, if a deal placed the developer in a financially invidious position, would they be able to sustain the agreement? Risk of developer having purchased an individual parcel of a site showing an inability to meet the blended rate target and insisting on a viability based review of the S.106. S.106 obligations should be enforceable though – they cannot be appealed like planning conditions.

STRENGTHS	WEAKNESSES
<ul style="list-style-type: none"> <li>• Particularly popular with land promoters because it enables clear cut obligations to be passed on to purchasers of parcels of oven-ready land.</li> <li>• Easy to quantify what external subsidy would be required in order to 'top up' to full policy position.</li> <li>• Don't need to speculate on what AHPs will pay for affordable as part of negotiating the deal.</li> <li>• Does rely on hard factual data to agree.</li> <li>• Given that percentage is likely to be reasonably high this promotes good balance, especially across all phases.</li> </ul>	<ul style="list-style-type: none"> <li>• If developer replans or re-engineers significantly to add value the LPA will not feel the benefit of this (directly). In some ways this is an integral characteristic of the scheme.</li> <li>• If re-engineered to focus, say, more on larger high value properties, but thus reduce density, percentage based contribution will mean fewer affordable units. (This can be ameliorated In other ways).</li> <li>• Heavy reliance on quality of initial negotiations and on, by definition, very estimated costs for abnormals, infrastructure, etc.</li> <li>• Could end up with a poor deal if market performs strongly and, say, policy was actually achievable.</li> </ul>

**RESOURCING**

Heavy up front costs of negotiation and professional advice and likely protracted arguments. Longer term no real cost and very predictable.



**OPTION**

**A(ii)**

**TITLE/BRIEF DESCRIPTION – Fixed but Deferred Contribution [variant of Option A(i)]**

Deferred contribution applied to give a fixed level of affordable housing (and probably other planning obligations) which steps up over subsequent phases.

**KEY CHARACTERISTICS**

- The average scheme based percentage is above what is currently viable (as evidenced) but below the policy targets and so avoids the need for future reviews.
- A very robust viability assessment would be needed to satisfy LPA that the offer was fair.
- Would ordinarily fix contribution at agreed percentage for the whole scheme. Typically a reduction from policy position is agreed for one or two early phases.
- An above policy contribution could be agreed on later phases in order to average the policy compliant target
- No further review required giving maximum certainty and no ongoing cost of review or scope for argument.

**ACHIEVABILITY**

- Tends to be most realistic when the current viability supports an initial level of affordable housing that is not too far distant from policy target.
- Becoming more achievable as housing market has strengthened a little. Also recent appeal decisions are reinforcing this type of approach.

**COMPLEXITY**

- Difficult to agree terms because of the risk to both parties. There is a need for clear cut detailed data in the initial S.106 negotiations so that LPA can be satisfied. All the energy and hard work is focused on one key stage of negotiations. Longer term, a simple option with the potential in some cases ultimately to deliver policy.

**OPTIMISATION OF AFFORDABLE HOMES**

Can achieve policy compliant affordable housing stepped over a series of phases. If this approach is agreed then the LPA achieves the maximum provision of affordable housing.

If a reduction in early phases is agreed with policy compliant levels of provision in later stages then the total provision is more akin to a blended rate [see option A(i)]



**CERTAINTY/RELIABILITY**

- Once agreed gives real certainty of outcome. However, if a deal placed the developer in a financially invidious position, would they be able to sustain the agreement? Risk of developer having purchased an individual parcel of a site showing an inability to meet the relevant deferred rate target and insisting on a viability based review of the S.106. S.106 obligations should be enforceable though – they cannot be appealed like planning conditions. There is also a complication for land promoters on large sites which will be sold in parcels that there is effectively a cross-subsidy from later to earlier parcels in meeting the affordable housing obligations.

STRENGTHS	WEAKNESSES
<ul style="list-style-type: none"> <li>• Helps promote scheme delivery in the short term by softening obligations in early phases</li> <li>• Can deliver the policy compliant levels of affordable housing over the life of a large scheme</li> <li>• Possibly attractive to land promoters if it enables clear cut obligations to be passed on to purchaser of parcels of oven-ready land (but note cross-subsidy problem).</li> <li>• Easy to quantify what external subsidy would be required in order to 'top up' to full policy position.</li> <li>• Don't need to speculate on what AHPs will pay for affordable as part of negotiating the deal.</li> <li>• Does rely on hard factual data to agree.</li> </ul>	<ul style="list-style-type: none"> <li>• If developer replans or re-engineers significantly to add value the LPA may not feel the benefit of this if the overall % of affordable is less than policy.</li> <li>• If re-engineered to focus, say, more on larger high value properties, but thus reduce density, percentage based contribution will mean fewer affordable units. (This can be ameliorated in other ways).</li> <li>• Heavy reliance on quality of initial negotiations and on, by definition, very estimated costs for abnormals, infrastructure, etc.</li> <li>• Could end up with a poor deal if market performs strongly and the step up does not achieve an average contribution equal to policy compliant targets.</li> </ul>

**RESOURCING**

Heavy up front costs of negotiation and professional advice and likely protracted arrangements. Longer term no real cost and very predictable.



**OPTION**

**B(i)**

**TITLE/BRIEF DESCRIPTION – Open Book Review**

Open book review of relevant economic data at key or appropriate intervals and at the outset.

**KEY CHARACTERISTICS**

- Based on a transparent sharing of relevant information (or acquisition of relevant information) by applicant/developer.
- Need to establish an acceptable appraisal template which forms the base-point position and will be the basis for inputting updated information at reviews.
- There will need to be independent validation of figures or information plus arbitration where disputes arise.
- Intention is to test scheme's potential to fulfill policy and this at each review stage with developer benefitting relatively little from upside, other than in Gross Development Value improvements = higher actual profit if based on an agreed %.

**ACHIEVABILITY**

Although the basis for agreement can be fairly straightforward, i.e. a RLV template, developers are highly resistant to the uncertainty and to allowing access to the required level of open-book data.

Also, the developer benefits less than with an overage based deal and because there are now many examples of these, developers will generally insist on that type of approach.

**COMPLEXITY**

The review process can be fairly time-consuming and validation arrangements can complicate the process but fundamentally this approach is reasonably simple as the key is agreeing a template and open sharing of information. In practice these deals are exceptionally difficult to negotiate and the review process can be fraught with arguments. It is tantamount to re-negotiating for every phase.

**OPTIMISATION OF AFFORDABLE HOMES**

If it were possible to apply this option correctly it should satisfy the LPA completely that it is getting the most the scheme can afford. Still there is the risk that it will deliver less than a fixed contribution approach dependent on market conditions.



**CERTAINTY / RELIABILITY**

It is less certain than the fixed contribution approach. However, what should be certain is that the LPA gets the best the scheme can afford and doesn't have to concede a proportion of super-profits to the developer. The scope for further argument and validation difficulties actually makes this a less reliable approach than might appear to be the case.

STRENGTHS	WEAKNESSES
<ul style="list-style-type: none"> <li>• Transparency</li> <li>• Strong audit trail</li> <li>• Promotes a partnership approach to the negotiations and to review</li> <li>• Flexible to changing market conditions but also needs as tenure and product types could flex at future reviews. It is possible even that reviews could reflect future policy change</li> <li>• Initial negotiations should be reasonably straightforward IF the parties are motivated</li> </ul>	<ul style="list-style-type: none"> <li>• Will be resisted by most developers and other applicants</li> <li>• Leaves LPA carrying a significant risk of lower levels of affordable housing</li> <li>• Principle suggests that affordable housing % could go down as well as up because developer doesn't really share in upside until policy is met</li> <li>• Review process leaves a lot of scope for argument/disagreement</li> <li>• Expensive and time-consuming to deal with reviews</li> <li>• Sometimes difficult to identify convenient or appropriate review points (this is a more general weakness of review)</li> </ul>

**RESOURCING**

Potentially reasonably manageable resourcing levels for initial negotiation but resource intensive for reviews. Valuation process could be costly although LPA would normally look for developer to meet this. Even if developer meets cost this impacts adversely on the scheme.



**OPTION**

**B(ii)**

**TITLE/BRIEF DESCRIPTION – Open Book Review with Overage [variant of Option B(i)]**

An overage clause is introduced to share the benefit of any improvement in viability based on an open book review of relevant economic data at key or appropriate intervals and at the outset.

**KEY CHARACTERISTICS**

- Based on a transparent sharing of relevant information (or acquisition of relevant information) by applicant/developer.
- Need to establish an acceptable appraisal template which forms the base-point position and will be the basis for inputting updated information at reviews.
- There will need to be independent validation of figures or information plus arbitration where disputes arise.
- Intention is to test scheme's economic performance at each review stage.
- The Council and the developer share the benefit of any uplift in scheme profitability

**ACHIEVABILITY**

Although the basis for agreement can be fairly straightforward, i.e. a RLV template, developers are highly resistant to the uncertainty and access to the required level of open-book data.

The developer does benefit from a share in any super-profit which improves the appeal of this option compared with Option B(ii) and can act as an incentive to accept the transparent assessment of economic outturns.

**COMPLEXITY**

The review process can be fairly time-consuming and validation arrangements can complicate the process but fundamentally this approach is reasonably simple as the key is agreeing a template and open sharing of information. In practice these deals are exceptionally difficult to negotiate and the review process can be fraught with arguments. However because both parties benefit from the review then there is more likelihood of agreeing the approach and more of an incentive for the developer to achieve improvement in scheme's performance and to collaborate constructively in the review process.

**OPTIMISATION OF AFFORDABLE HOMES**

Principle of overage means accepting that LPA won't get as much affordable as a scheme can 'strictly' afford.



**CERTAINTY/RELIABILITY**

It is less certain than the fixed contribution approach. The scope for argument at review and validation difficulties make this approach less reliable than it ought to be.

STRENGTHS	WEAKNESSES
<ul style="list-style-type: none"> <li>• Transparency</li> <li>• Strong audit trail</li> <li>• Promotes a partnership approach to the negotiations and to review</li> <li>• Usually fixes a minimum level of affordable housing contribution as a trade-off for allowing overage</li> <li>• Easy to agree commuted sum contributions in future reviews (less so additional affordable provision)</li> <li>• Affordable housing contributions can only improve with no risk of a reduction in obligations</li> </ul>	<ul style="list-style-type: none"> <li>• Does not achieve the maximum level of affordable housing possible</li> <li>• Leaves LPA carrying a significant risk of lower levels of affordable housing than might have been achievable with a fixed contribution</li> <li>• Review process leaves a lot of scope for argument/disagreement</li> <li>• Expensive and time-consuming to deal with reviews</li> <li>• Sometimes difficult to identify convenient or appropriate review points (this is a more general weakness of review)</li> </ul>

**RESOURCING**

Potentially reasonably manageable resourcing levels for initial negotiation but resource intensive for reviews. Valuation process could be costly although LPA would normally look for developer to meet this. Even if developer meets cost this impacts adversely on the scheme's viability.



**OPTION**

**C(i)**

**TITLE/BRIEF DESCRIPTION – Automated Review – ‘Clawback’**

Overage or ‘clawback’ (*clawing back to policy and delivering obligations on site*) based on a review of movements in agreed indices relating to value or value and cost. Sometimes these deals can take the form of ‘escalator’ arrangements and this is set out as Option C(ii).

**KEY CHARACTERISTICS**

- Adopts the principle that the developer should share in the upside at review point, i.e. overage.
- Also, looks to automate the review as far as is practicable without sacrificing reliability/applicability of data.
- At agreed review points, there will be a review of identified factors in appraisal particularly sales values and unit build costs.
- Infrastructure or abnormal costs may need to be subject to detailed assessment or validation but this doesn’t apply to every clawback deal.

**ACHIEVABILITY**

Very difficult to negotiate an agreed basis for the operation of the clawback mechanism because the process becomes fairly automated at review and the only prospect for really influencing the outcome is in initial negotiation.

It is difficult to find applicable indices which relate to a particular scheme’s characteristics.

**COMPLEXITY**

Difficult to negotiate deal initially and methodology can become very complicated despite principles of simplicity.

Review process should be straightforward.

Ideally ought not to be too complicated overall.



**OPTIMISATION OF AFFORDABLE HOMES**

Principle of overage means accepting that LPA won't get as much affordable as a scheme can 'strictly' afford. If index is only sales values then there is more scope for optimisation because developer has to deal with cost increase implications.

**CERTAINTY/RELIABILITY**

Applicants have reasonable certainty that they will achieve an agreed minimum profit and share super-profits, so there is the likelihood of a favourable outcome for them. Indices may not be very relevant to individual scheme contexts so this is a risk for both parties. Once a formula is agreed the operation of review should be fairly reliable.

STRENGTHS	WEAKNESSES
<ul style="list-style-type: none"> <li>• Review process is theoretically simple.</li> <li>• The number of factors to assess is minimal.</li> <li>• Reliance on published and verifiable data.</li> <li>• Review process costs should be kept down by minimising validation work.</li> <li>• Motivates developer to add value.</li> <li>• Principles are usually acceptable to land promoters and developers and accord with land-sale type overage deals.</li> </ul>	<ul style="list-style-type: none"> <li>• Can be very difficult to establish a formula for translating clawback/ overage into affordable unit numbers.</li> <li>• Indices may not reflect scheme characteristics including value premium for location.</li> <li>• Scope for developer to re-engineer or re-plan to add value will not necessarily be taken into account unless there are separate provisions addressing these issues which then creates challenges in negotiation and review process [see Option B(ii)].</li> <li>• Difficult to achieve any flexibility in this mechanism if needs change or there are significant design or reserved matter changes</li> </ul>

**RESOURCING**

Difficult to negotiate the initial clawback deal because of the impact on future provision and reviews. Need for expert input to resolve issues around infrastructure or abnormals or translating clawback funds into affordable housing.



**OPTION**

**C(ii)**

**TITLE/BRIEF DESCRIPTION – Automated Review - Escalator (variant of Option C(i))**

This option is in effect an overage or ‘clawback’ based on a review of movements in agreed indices relating to value or value and cost. The escalator spells out how many additional affordable units can be delivered if there is a positive uplift to one or more key indices or how much a commuted sum should increase.

**KEY CHARACTERISTICS**

- Spells out how much any overage will deliver in terms of the amount of affordable housing on future phases. If the identified index or indices move by x% then this is y% additional affordable housing – a strict formula. It could just as easily spell out by how much a commuted sum would increase.
- Adopts the principle that the developer should share in the upside at review point, i.e. overage.
- Also, looks to automate the review to an even greater extent than an ordinary clawback arrangement.
- At agreed review points, there will be a review of identified factors in appraisal particularly sale values and possibly unit build costs.
- Infrastructure or abnormal costs may need to be subject to separate detailed assessment or validation but this is less likely than in ordinary clawback deals because there is an even greater impetus to achieve simplicity and a highly automated process.

**ACHIEVABILITY**

Very difficult to negotiate an agreed basis for the operation of the escalator mechanism because the process becomes very automated at review and the only prospect for really influencing the outcome is in initial negotiation.

It is difficult to find applicable indices which relate to a particular scheme’s characteristics.



### COMPLEXITY

Difficult to negotiate deal initially and methodology can become very complicated despite principles of simplicity.

Review process should be straightforward.

Ideally ought not to be too complicated overall.

### OPTIMISATION OF AFFORDABLE HOMES

Principle of overage means accepting that LPA won't get as much affordable as a scheme can 'strictly' afford. If index is only sales values then there is more scope for optimisation because developer has to deal with cost implications.

### CERTAINTY/RELIABILITY

Applicants have reasonable certainty that they will achieve an agreed minimum profit and share super-profits, so there is likelihood of a favourable outcome for them. Indices may not be very relevant in individual scheme contexts so this is a risk for both parties. The formula as to how much affordable housing can be provided as a result of index improvements will be inflexible over a long term scheme. Once formula is agreed the operation of review should be fairly reliable.

STRENGTHS	WEAKNESSES
<ul style="list-style-type: none"> <li>• Review process is theoretically very simple.</li> <li>• No of factors to assess is minimal.</li> <li>• Reliance on published and verifiable data.</li> <li>• Review process costs should be kept down by minimising validation work.</li> <li>• Motivates developer to add value.</li> <li>• Principles are often acceptable to land promoters and developers.</li> </ul>	<ul style="list-style-type: none"> <li>• Can be very difficult to agree the stepped increases in affordable provision achievable by index improvements.</li> <li>• Indices may not reflect scheme characteristics including value premium.</li> <li>• Scope for developer to re-engineer or re-plan to add value will not necessarily be taken into account unless there are separate provisions addressing these issues which somewhat defeats the simplicity principle.</li> <li>• Difficult to achieve any flexibility in this mechanism if needs change or there are significant design or reserved matter changes</li> </ul>



## RESOURCING

Difficult to negotiate the initial escalator deal and the calculation of the stepped increases in affordable provision or in commuted sums. Need for expert input to resolve issues around infrastructure or abnormals or translating index improvements into additional affordable housing provision.



## 8. CONSULTATION RESULTS

- 8.1 In order to secure some constructive engagement with developers and affordable housing providers, Ark facilitated two workshop sessions at a Growth and Delivery event hosted by the West of England Partnership on 13/10/10.
- 8.2 The Ark workshops had complementary topic areas and were related specifically to our work in connection with this study. The first explored our findings and emerging recommendations on the prioritisation of planning obligations. The outcomes of that session are summarised in Section 10 of this report. The second concerned our findings on the different approaches to futureproofing affordable housing obligations and the results of this second workshop form the bulk of the content of this section.
- 8.3 The workshop participants numbered 20 in total. It included employees of housebuilding and developer organisations, employees of affordable housing providers, planning and other consultants advising developers and land promoters and officers from a number of West of England local authorities. The discussion was constructive and full and focused mainly on the differing characteristics of the options described in sections 6 and 7 and the views and experiences of the participants about the relative strengths and weaknesses of each.
- 8.4 Very much in summary, the main outcomes of the workshop consultation were as follows:
- the quality of the process for establishing a project's current viability and the reliability of the base input information is crucial to agreeing robust futureproofing arrangements,
  - for a local planning authority it is highly desirable to secure a basis for agreement which permits a good distribution of affordable housing throughout a development,
  - the cost of the negotiation and review processes are major considerations for both developers and local planning authorities when seeking agreement on a futureproofing approach,
  - there is recognition that agreeing terms is about finding the level or approach at which deliverability of a project and the amount of affordable housing are in appropriate balance,
  - for favoured approaches to futureproofing to be adopted widely there is a need to win 'hearts and minds' beyond simply at the hands-on practitioner level. This is especially relevant at local authority member level,



- developers need a reasonable incentive to optimise the future economic outturns of a project so that a greater affordable housing contribution can be secured. Therefore, the principle of overage or sharing of the upside is appropriate,
- when considering the options for improving viability to close a gap between what is currently deliverable and a policy level affordable housing obligation, the potential for adjusting tenure in favour of other intermediate products should not be overlooked,
- given the diverse nature of projects there does need to be some choice or a range of futureproofing tools in order to establish the most effective approach in each circumstance,
- there was a generally favourable response to Option A(i) because of the certainty it gave and the avoidance of costly future review arrangements. For local planning authorities such an approach should always reserve the right to make up an affordable obligation to policy level by the investment of public subsidy. However, there was recognition that land promoters/owners and housebuilders would be differently motivated and have a different view on this approach,
- where a review arrangement is appropriate then this should be automated to a practical extent to reduce the potential variables at review and the simplicity and cost-effectiveness of the process. Whilst the local authority representatives recognised that additional on-site affordable housing should be the default position on review, all parties recognised the sense in having flexibility to permit commuted sums in appropriate circumstances.



## 9. SCENARIO TESTING

- 9.1 BNP Paribas was commissioned by the West of England Partnership to carry out some theoretical financial modelling which would help to highlight the relative merits of the differing futureproofing tools. The modelling was intended to test a series of assumptions including site size, the length of time to deliver, sales and build inflation.
- 9.2 The detailed results of the modelling are included in Appendix 2. The remainder of this section is a commentary on the BNP Paribas results.
- 9.3 Option A does relate to the option 1 identified by Ark as a potential approach which involves agreeing a fixed affordable housing contribution up front. Whilst the modelling on this option is limited in its story telling ability, it is clear that achieving a fixed contribution up front can represent a good deal.
- 9.4 Options B(i) a and b both look at what affordable housing would be delivered with a full viability review and all of the uplift being used to deliver more affordable housing.
- 9.6 This confirms that prima facie this option is likely to deliver the best outputs from a local authority perspective. Whilst in reality the affordable housing contribution would be capped at a policy position of 35%, option 2a(i) shows that it is possible to achieve a fully policy compliant position, even on a 5 year project. For a bigger project delivered over 15 years then achieving policy compliant affordable housing and super profits for the housebuilder are both very achievable.
- 9.7 The modelling for option 2a(ii) shows a different set of outputs compared with 2a(i). In 2a(i) the rates of inflation assumed are 10% sales inflation and 5% build inflation per annum. In the 2a(ii) model the rates of inflation have been halved to 5% (sales) and 2.5% (build). As a result the outputs in terms of affordable housing delivery could be worse than the option 1 fixed rate, or at best slightly enhanced as in site 3, which would deliver 29.4% affordable housing.
- 9.8 The scenario testing does emphasise that all of these options are tools, pure and simple. The quality and fairness of the deal can only be judged on the merits of the scheme, but it is clear that in periods of reasonable sales inflation a review mechanism is beneficial whilst in periods of low sales inflation then a fixed rate is often a good choice.
- 9.9 However, it is important to bear in mind that options B(i)a and B(i)b are unlikely to be agreed by housebuilders. In order to achieve delivery, all parties need to feel positive about the basis for negotiating agreement. Therefore options B(ii)a and B(ii)b, which are based on an overage deal splitting super profits on a 50/50 basis, are far more likely to be achievable.



- 9.11 The modelling for option B(ii)a illustrates the fact that even with a 50/50 share on super profits the local authority and housebuilder will do well in a time of reasonable house price inflation. Even the 5 year profit (site 1) achieves policy compliant levels of affordable housing and site 3 achieves that with some 'room to spare'.
- 9.12 On the other hand B(ii)b does not match the level of provision delivered up front for a fixed rate of 27.5%.
- 9.13 This re-emphasises that it is the data and assumptions entered into a viability model which are critical, and this is more important than which futureproofing model is selected.
- 9.14 A requirement to secure a high quality baseline viability assessment is critical for all of the options. Understanding the housing market and making a reasonable estimate of likely rates of sales and build inflation will influence whether or not a local authority should favour a fixed affordable housing contribution or agree to a review mechanism with overage.

## 10. PRIORITISATION OF PLANNING OBLIGATIONS

- 10.1 The prioritisation of various obligations is probably the aspect of planning gain with the least national guidance and also of case law as this issue is rarely tested at a planning appeal.
- 10.2 Nonetheless the complete package of obligations makes a significant impact on overall viability. In simple terms if an LPA asked for other planning contributions of £20,000 per dwelling rather than £10,000 per dwelling, then the pressure on reducing the level of affordable housing provision would increase significantly.
- 10.3 All LPAs should apply the tests referred to in 5/05 as to whether or not an obligation is justified.
- 10.4 Beyond that there is a slightly different approach applied between the LPAs within the West of England. None of the six LPAs currently has a formal protocol to help prioritise the level of obligations, although each LPA does have a view on how this is delivered on a case by case basis.
- 10.5 For example, South Gloucestershire has a process where all internal consultees ask for their contributions. In the event that the viability study suggests that all the obligations are not affordable then a Chief Officers Group is called upon to help agree on which obligations the softening should be focused.
- 10.6 Another good example from within the West of England was used to help negotiate the reduction of a viability gap at Bath Western Riverside (BWR).

<b>Case Study – Bath Western Riverside LPA – Bath &amp; North East Somerset Council Prioritisation of Obligations - Matrix</b>			
<b>Obligation Items</b>	<b>Priority Factor</b>	<b>Cost to Viability</b>	<b>Possible Savings</b>
Transport			
Education			
Open Space			
Leisure			
Housing			
Public Realm			
<p>The priority factors were ranked as follows:</p> <ul style="list-style-type: none"> <li>(1) National legislation</li> <li>(2) National policy</li> <li>(3) Regional policy</li> <li>(4) Local policy - essential</li> <li>(5) Local policy – negotiable</li> </ul>			

- 10.7 In the BWR case study the matrix helped both officers and members debate what could be agreed on the Council's side of the viability debate in order to help achieve deliverability.



- 10.8 Despite these good examples from within the West of England the lack of any formal protocol is a potential weakness. From an audit trail perspective a more consistent approach may need to be documented.
- 10.9 A good example of a policy guidance note that was drafted in response to the economic downturn was that produced by Norwich City Council. It addressed prioritising planning obligations:



### Case Study – Norwich City Council

#### 'A clear process for negotiations' – Norwich City Council

Norwich City Council recognised that it may need to reduce the level of planning obligations on individual schemes to ensure that scheme viability was maintained.

In May 2009 the Council agreed a framework for prioritising the planning obligations. The Council very much wanted to achieve a consistent approach to agreeing the appropriate level of planning obligations applicable to a wide range of schemes.

They felt this would strengthen their negotiating stance when dealing with viability arguments regarding the appropriate level of obligations, including if any scheme reached an appeal, and add transparency for developers, officers and members. In addition it was intended to improve the delivery of major projects at a time of difficult viability conditions.

In addition to the framework, the Council set out its process for negotiations where a developer raises viability concerns.

Within the paper the Council identifies corporate priorities for s106 contributions. The framework itself states the corporate priorities and the Council negotiates with developer to secure requirements in priority order on the basis of the economic assessment.

A report is then made to the planning committee to explain the exceptional circumstances, including a robust viability report, and the reduced s106 obligations on offer – coupled with: a) a limited timeframe for which the assessment remains valid; b) an overage clause to allow the Council to clawback any contributions (up to the level of the full obligations normally required by the Council) if development viability improves.

In practice, talking to the Council one year on, the prioritisation framework was adopted (in 2009) but not yet applied in terms of viability review/deferred payments/clawback on any schemes.



- 10.10 The Norwich approach ensures that every scheme is considered in a consistent way even if a different balance of obligations is achieved on a case by case basis.
- 10.11 Clearly every case is different and so whilst on one site affordable housing might be a very high priority, on another site highways improvements might be critical. This flexibility needs to be built into any protocol but nonetheless a consistent approach to process across the West of England would be ideal.
- 10.12 One community led approach to the prioritisation of obligations was considered by LB Southwark. This type of approach is likely to be very much at the forefront of the localism agenda over the coming years.

**Case Study – London Borough of Southwark**



The Southwark approach is good at establishing what local communities see as their priorities, and fits well with the main thrust of the coalition Governments’ localism agenda. It helped create a policy in the LB Southwark S106 SPD 2007 which reads as follows:

**‘Community Involvement**

55. Circular 05/2005 Planning Obligations sets out the Governments policy for planning obligations. Paragraph B41 states that: “The process of setting planning obligations policies and negotiating planning obligations should be conducted as openly, fairly and reasonably as possible and members of the public should be given every reasonable assistance in locating and examining proposed and agreed planning obligations which are of interest to them.”

56. Local priorities for each of the community council areas have been collated. Community councils present forums for determining local area priorities, with democratic constitutions and regular community meetings administered by council officers involving the determination of planning applications. The community council areas are also identical to the education planning areas for the Borough. These areas are illustrated below. Planning negotiations will be aiming to focus on achieving the following top five priorities for each area. However this is not an exclusive list and other priorities may be appropriate for certain applications.

**Bankside and the Borough**

- 1. Increasing the quality and quantity of open spaces
- 2. Increasing the quality of public realm
- 3. Improving community safety & reducing crime
- 4. Improving community & leisure facilities
- 5. Increasing access to employment through training and other schemes

**Walworth**

- 1. Increasing the quality and quantity of open spaces
- 2. Improving community safety
- 3. Increasing access to employment through training and other schemes
- 4. Improving access to high quality education in schools
- 5. Increasing the quality and quantity of community facilities

.....



- 10.13 Whilst time consuming at the initial stage of consulting residents, this is very much a 'bottom up' approach which could be developed to form a robust prioritisation matrix.
- 10.14 Ark enabled a workshop regarding the prioritisation of planning obligations at the West of England Growth and Delivery Event, held on the 13<sup>th</sup> October 2010. Some key issues were identified which included the following:
- ii. There are still many stalled schemes out there waiting to be delivered. Kick start funding helped to deliver some projects but that pot of funding is no longer available and yet many developers still own land with planning approvals that are uneconomic to deliver. There will be plenty more instances where existing S106 packages need to be renegotiated or else delivery will be limited. The prioritisation process may be different at pre-application stage compared to post-consent.
  - iii. Community engagement in the prioritisation of obligations needs to be undertaken at the framework and area policy level. All consultation and engagement mechanisms need to be robust so that the views of all members of the community are represented and events are not dominated by a vociferous minority.
  - iv. Any hierarchy of obligations will need to reflect that some obligations are absolutely essential for a scheme to proceed and can therefore be seen as non-negotiable. Affordable housing will always be a significant part of the 'ask' because the cost of this provision on a grant free basis is high to the landowner.
  - v. A clear process for agreeing priorities is essential, and ideally a methodology for ranking the importance of competing obligations would be welcomed by developers. They need clarity and consistency within each LPA and so the housebuilders welcome a senior officers group such as that at South Glos. to agree priorities, a major projects team within the LPA to guarantee dealing with the same team on all major applications, and a major projects team such as that at B&NES who are seen as advocates of delivery and help get pre-application discussions held with Senior Officers and Members at a Gateway Group.
  - vi. Consistency throughout the West of England is less of an issue for developers who accept that each LPA has different priorities.
  - vii. The understanding of viability issues and the impact on the delivery of projects and planning obligations needs to be fully understood at all levels, including at Member level.



10.15 Section 4.4 of this report described the scope of the CIL regulations and the intention that the consequent charge embrace all items of general infrastructure in an area. If and when adopted, CIL will leave only scheme specific mitigation to be subject to planning obligations included within a Section 106 agreement. The main item applying in most cases will be the affordable housing obligation. So, notwithstanding the need for authorities to clarify the prioritisation of planning obligations, as discussed in this section of the report, where CIL is introduced this will in effect do that job for the authority, making affordable housing take most of the strain when viability problems prevent a scheme from delivering all of the planning obligations required by policy.



## 11. CONCLUSIONS AND RECOMMENDATIONS

### 11.1 Approaches to futureproofing

11.1.1 Although at the detailed level there are many different approaches adopted by local planning authorities or by applicants to creating some flexibility in the application of affordable housing planning obligations, we believe that these can be categorised in accordance with the definitions set out in Section 6.4 of this report and developed further in Section 7. In Ark's view it will be helpful for the West of England authorities to adopt a common language when referring to futureproofing approaches, to encourage applicants and development partners to do likewise and regard the three fundamentally different approaches referred to in 6.4, i.e:

- A) Fixing the Contribution
- B) Open Book Review
- C) Automated Review

as the basic groupings into one of which any proposed approach should be categorised. We recommend that any reference to preferred approaches included in documentation supporting planning policy uses the categories and terminology adopted in this report.

11.1.2 Because the circumstances and characteristics of development projects, and the developers or landowners promoting them, vary substantially from one scheme to another, it is not sensible to suggest a single approach to futureproofing affordable housing planning obligations. Rather, it is appropriate to have a range of approaches which are well defined and understood and where the principles of each are standardised as far as possible. In this vein our recommendations for preferred approaches are as follows:

- i) where it is possible for a local planning authority to agree with an applicant an affordable housing obligation which fixes the contribution at a level well above that which is evidently viable at the time of entering a Section 106 agreement, but is nonetheless below the policy target, this should be regarded as the most desirable outcome. In Ark's view the certainty of this approach, combined with the fairly even distribution of affordable housing throughout a scheme and the avoidance of costly and/or contentious future reviews, outweighs the risk of failing to maximise the affordable housing provision or meet fully the policy target. Our recommendation in this regard is qualified of course by needing to be clear that the applicant is taking an appropriate risk in relation to improved scheme viability meeting the costs of this fixed contribution. That can only be assessed properly with good quality and reliable viability evidence and some scenario testing to gauge what level of net improvement in the economic outturns of the scheme are required, over time, to support the agreed fixed contribution and would be needed to support the policy target,



- ii) where the uncertainties of a scheme, say because of the level of infrastructure or abnormal costs still requiring more detailed investigation or because of the position of the applicant, make it very difficult to agree a fixed contribution (or one at a level considered fair by the local planning authority) we recommend that an automated style review is preferred to an open book approach. This is a pragmatic opinion borne of experience because we believe it is exceptionally difficult to secure genuine and sufficient open-book information from applicants. In addition, open book review requires extensive investigation, appraisal and re-negotiation at each review stage, whereas a more automated approach can significantly reduce both the degree of assessment work and the scope for disagreement. In Ark's view it is desirable, where possible, to aim to give the maximum certainty of output for affordable housing provision by seeking to agree predetermined levels of provision for identified improvements in agreed indicators of the economic performance of schemes (sales prices gross or net of build costs). This approach is described in Section 7, pages 45-46 of this report as Option C(ii) 'Automated Review - Escalator'. Where negotiations become bogged down on agreeing exact 'step-ups' in contribution based on improved performance, then it may be appropriate to rely on the C(i) 'Clawback' approach,
- (iii) for review based approaches, it is lawful for local planning authorities to expect all of the improvements in a scheme's viability position to contribute to meeting foregone planning obligations, until the policy target is met. However, we believe that it is pragmatic for local planning authorities to agree a sharing of the 'upside' with applicants/developers. This will incentivise applicants/developers to optimise the economic performance of schemes. This overage based approach is now widely established and our consultation work associated with this study evidenced widespread support for it. We would further recommend that the share should always be reflective of the extent to which review arrangements require applicants/developers to accept typical degrees of development risk, for example for increases in infrastructure or abnormal costs. We do not believe it is ever appropriate for less than 50% of the 'upside' to contribute to improved affordable housing provision.

11.1.3 For the sake of compliance with the Circular 5/05 or succeeding tests for the validity of planning obligations, guidance on review provisions should emphasise that the intention of local planning authorities is to seek to secure improved levels of affordable housing contributions via the provision of actual dwellings in

appropriate tenures on site. Where this is impractical or affordable housing needs could most effectively be met on other sites then local planning authorities should reserve the right to secure the additional contributions as a commuted sum.

11.1.4 We remain concerned that the overage provisions identified in some other areas (see Section 6) where authorities carry out virtually retrospective reviews and seek monetary overage contributions if outturns exceed those anticipated at the



point of entering a Section 106 agreement, run a real risk of conflicting with statutory guidance. We recognise that these types of overage arrangement are increasingly commonplace and that some authorities deploying them claim to have obtained legal advice to support that approach. Ark recommends that some further investigation be carried out by the West of England to test the veracity of this approach. If it was demonstrably a defensible policy position then it would have a part to play in the overall range of tools to futureproof affordable housing obligations.

11.1.5 There is a further point worth emphasising on the subject of overage based planning obligations. In our consultation and research work associated with this assignment we have noted that most people we have talked to about the overage principle start from an assumption that this relates to financial contributions. In Ark's view this is unhelpful and inappropriate. Where a local planning authority is accepting (for the pragmatic reason of incentivising an applicant/developer to optimise the future outturns of a scheme in the interests of securing more affordable housing) that it should share in the improved performance, its share of this overage should always be thought of as more affordable dwellings, not money. If, for the reasons mentioned in 11.1.3, the affordable housing contribution ends up being money rather than dwellings, then so be it, but the mindset of the local planning authority on affordable housing overage should be focused on homes. The West of England authorities need to encourage this basic thinking at member, officer, applicant and development partner level.

## 11.2 Prioritisation of Planning Obligations

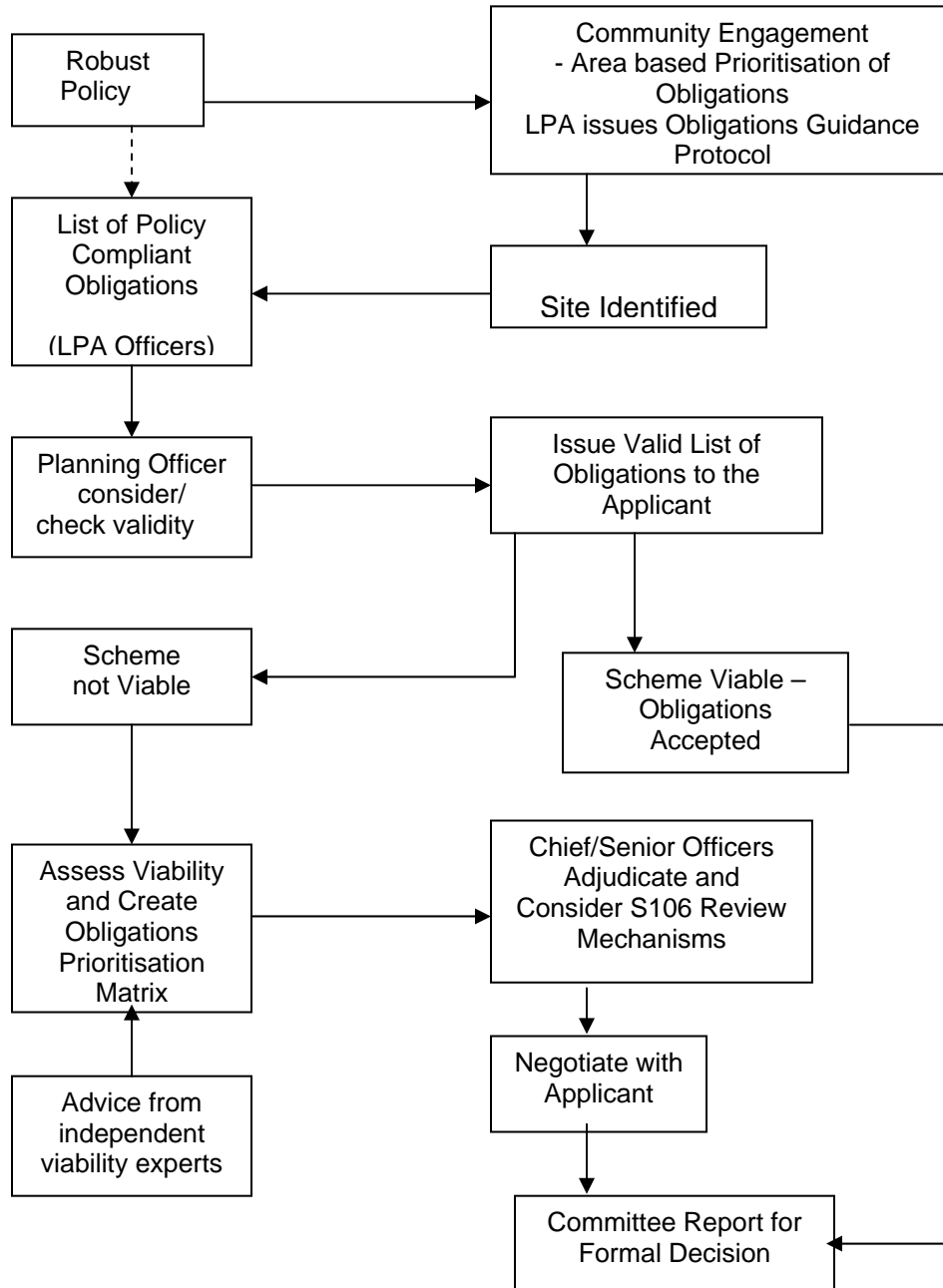
11.2.1 Ark would recommend that all the West of England authorities introduce a clear protocol as to how, on a case by case basis, the level of obligations will be agreed. The protocol should include the following steps:

- Secure where appropriate local community input into the decision making process on the prioritisation of obligations but at framework/area stage,
- The LPA should try and give a clear steer in policy documents as to what are the Council's priorities, accepting that each case must be viewed on its merits
- Officers of the LPA produce a list of the full policy compliant 'ask' in relation to a residential application
- Planning to check obligations against local policy and 5/05 (or updated) test (remove any from the list that cannot be supported)
- Issue the list to the applicant – agree format
- Applicant to consider in the light of project viability
- Viability case made by developer, if appropriate, Council to validate
- Identify the extent to which the Council may have to accept a reduced level of obligations
- Produce a prioritisation matrix
- Chief/Senior Officers/Members to meet and discuss priorities
- LPA negotiates a compromise with applicant
- Report to planning committee for formal decision



- It should also be noted that it could be advantageous for each LPA to have a major projects team that deals with planning applications on all multi-phased sites in order to achieve a consistent approach
- A pro-delivery advocate within the Council may help balance arguments, resulting in improved delivery.

11.2.2 The anticipated prioritisation of obligations process flow chart would be as follows:





## APPENDIX 1

# DETAILED INTERVIEW PRO-FORMAS FOR WEST OF ENGLAND AND NEIGHBOURING LOCAL AUTHORITIES



## APPENDIX 1

### 1. B&NES:

<b>Local Authority</b>	<b>Bath and North East Somerset Council</b>
<b>Name of Officer and Title</b>	Lisa Bartlett, Development Manager
<b>Contact Details</b>	01225 477281 <a href="mailto:lisa_bartlett@bathnes.gov.uk">lisa_bartlett@bathnes.gov.uk</a>
<b>Process for Prioritisation of Planning Obligations</b>	<p>No formal process.</p> <p>The Council did have a process for agreeing obligations for Bath Western Riverside (BWR) which involved a prioritisation matrix, a summary of which is included in section 9 of this report. This process could be used again but has not been adopted as the standard way forward on all major schemes.</p> <p>In reality every scheme is viewed on its merits – the development manager (planning) has to give weight to the complete list of material obligations against the level likely be secured due to viability constraints. It is the responsibility of the development manager to recommend to committee which obligations are essential and which are negotiable.</p> <p>Sometimes affordable housing is not the top priority and yet it is normally the most expensive item.</p>
<b>Process for Viability Testing on a case by case basis</b>	<p>The Obligations SPD gives the policy basis for viability assessments and asks the developer to pay for the cost of the Council obtaining expert advice.</p> <p>The developer prepares a viability report and the Council appoints experts to test the applicant’s submission in order to agree a reasonable level of obligations.</p> <p>This process seems to work well.</p>



	<p>The Council does rely on its consultants and does not feel confident about viability issues as they have only looked at a small number of schemes.</p> <p>It may also be a factor that B&amp;NES has the benefit of a major projects team which sometimes takes the lead on viability issues, meaning that the development management team have less input in the viability process than they might do in other LAs.</p>
<p><b>Examples of good practice of viability review or overage mechanisms</b></p>	<p>There is an overage clause included in the Corporate Agreement for BWR. The Council will undertake regular viability reviews before the start of the next phase and any super profit will be shared on a 50/50 basis up to a maximum. The annex below shows an extract from the draft Corporate Agreement relating to BWR.</p> <p>B&amp;NES is also considering including a clause in future S.106 agreements that a viability review is needed after 18 months or 2 years. This has not been delivered as yet, but would avoid the risk of a developer gaining an approval and then waiting for 3 years before starting on site.</p> <p>Also there will be occasions where a reasonable level of AH will be accepted and there will be no future viability review. If the viability suggested a low level of AH was viable and the developer offered a level of provision reasonably above the current viability position then the Council may be minded to accept this 'blended rate' approach, giving everyone certainty.</p> <p>There is only any point in viability reviews if this is likely to be in favour of higher provision in the end. A blended rate may work well.</p>
<p><b>Examples of poor practice in terms of viability review or overage mechanisms</b></p>	<p>None – viability review is a recent phenomenon and has been considered for BWR thus far. Other schemes are in the pipeline where viability reviews will be required.</p>
<p><b>Other Key Issues</b></p>	<ul style="list-style-type: none"> <li>• B&amp;NES does have a general focus on protecting the heritage and environment but is keen to achieve delivery</li> <li>• Planning (development managers) need a range of viability review tools – one size does not fit all.</li> </ul>



	<ul style="list-style-type: none"> <li>Achieving consistency in terms of viability and prioritising obligations across one district is challenging although there are some checks and balances in place.</li> </ul>
<b>Date of Consultation</b>	<b>11.08.10</b>

**Annex to B&NES Pro Forma**

**Extract from Draft BWR Corporate Agreement**

'Schedule 5: Surplus Proceeds

- 7.1 Surplus Proceeds is the amount calculated in accordance with the following formula  
(Sale proceeds + [Total Income x Multiplier]) – (Development Expenditure + (X% x Sales Proceeds))
- 7.2 The parties shall calculate Surplus Proceeds within one month of each Settlement Date

PHASE 1 OVERAGE

- 49.1 Available Proceeds shall be calculated on the Settlement Dates and the provisions of Schedule 5 (Surplus Proceeds) shall be applied in order to determine the amount of any Surplus Proceeds.
- 49.2 Available Proceeds shall be paid to the Council on the Overage Payment Dates
- 49.3 The Council shall not be paid more than X Million Pounds pursuant to the provisions of this clause and schedule 5 (surplus proceeds).....'



## 2. Bristol City Council

<b>Local Authority</b>	<b>Bristol City Council</b>
<b>Name of Officer and Title</b>	Gary Collins, Major Scheme Co-Ordination and Enforcement Manager
<b>Contact Details</b>	0117 9223762 <a href="mailto:gary.collins@bristol.gov.uk">gary.collins@bristol.gov.uk</a>
<b>Process for Prioritisation of Planning Obligations</b>	<p>There is no formal process for agreeing the prioritisation of planning obligations within Bristol.</p> <p>It is the role of the planning officer to make a judgement as to the merits of any obligation for each scheme. Bristol did set up an Obligations Officer Co-ordination Group that has met to discuss all potential contributions for the scheme at the Elizabeth Shaw site. Bristol would support this becoming a regular forum to discuss all major projects.</p> <p>It is ultimately the planning officer (development manager) who must decide what package of obligations should be recommended as acceptable to members with any compromise justified on viability grounds. Members often challenge such recommendations and make final decisions.</p> <p>A matrix to help prioritise obligations might be beneficial.</p>
<b>Process for Viability Testing on a case by case basis</b>	<p>In the event that an applicant claims to be unable to deliver the policy levels of obligations then the Council will ask for a viability case to be submitted, adopting a standard pro-forma. The applicant chooses whichever model it feels is appropriate (there is not a consistent approach on how the data is presented although SPD 4 and the Affordable Housing Planning Advice Note does give policy guidance on the matter).</p> <p>The housing team then appoints viability experts to assess the developers' viability report. It is the housing team that has the knowledge and budget to lead on this but planning is ultimately responsible and the team have reasonable/good knowledge themselves.</p> <p>Bristol may consider whether in the future it is better for the planning team to appoint viability consultants as at present the process may be slightly 'affordable housing centric'.</p>



	<p>Bristol do rely on expert consultants for viability advice but are confident on viability issues generally and have to deal with a reasonable number of cases and so have built a reasonable level of experience and data base. They also benefit from a S106 Officer who gets involved at the front end of negotiations.</p>
<p><b>Examples of good practice of viability review or overage mechanisms</b></p>	<p>Bristol introduced the well publicised ‘Open for Business’ initiative where developers were encouraged to come back and renegotiate S106 obligations in order to encourage schemes to come forward in the recession.</p> <p>The Council expected that they would be approached by many developers but this did not materialise.</p> <p>The issue of viability review has therefore not been addressed in detail but the officers behind the initiative intended there would be an initial reduction in obligations with stepping up over future phases if the scheme was large enough to have a number of phases and the market recovered.</p> <p>Those developers that have come forward are usually interested in deferring S106 payments as well as reducing payments. Ark should consider how this should be covered in a viability review process?</p>
<p><b>Examples of poor practice in terms of viability review or overage mechanisms</b></p>	<p>One project, Plymouth Brethren site, Bath Road is not really a poor example nor is it a good example of a viability review mechanism.</p> <p>Extracts from the draft S106 <b>are attached</b>. In essence there is an overage clause as the baseline viability justifies no affordable housing whatsoever. The Council hope that viability improves and some affordable housing contributions can be made in the future.</p> <p>However if the current viability report is realistic there is not much prospect of the Council benefitting from significant overage.</p>
<p><b>Other Key Issues</b></p>	<p>Is there much point in a viability review if it will make little difference?</p>
<p><b>Date of Consultation</b></p>	<p><b>11.08.10</b></p>

## Annex to BCC Pro Forma

### Extract from Plymouth Brethren Site S106 Agreement

#### Definitions

- Affordable Housing Contributions - the lower of:  
(a) the Net Profit Share  
(b) £1,530,000
- The Costs - the sum of the following:  
(a) all sums expended in relation to the Development...  
(b) the Existing Land Value
- Existing Land Value - £900,000
- Net Profit Share - the product of the following formula calculated at the trigger date:  
 $A = 40\% \times [R - (C \times 115\%)]$   
Where  
A = affordable housing contribution,  
R = receipts and  
C = costs
- Overage Period - a period of 10 years, ending at the 10<sup>th</sup> anniversary herewith
- The Receipts - the Owners actual and accredited estimated Capital Receipts from the sale of the residential units



### 3. North Somerset Council:

<b>Local Authority</b>	<b>North Somerset Council</b>
<b>Name of Officer and Title</b>	<b>Roger Willmot</b> Team Leader Major Applications
<b>Contact Details</b>	<b>Tel:</b> 01934 426793 <a href="mailto:Roger.Willmot@n-somerset.gov.uk">Roger.Willmot@n-somerset.gov.uk</a>
<b>Process for Prioritisation of Planning Obligations</b>	<ul style="list-style-type: none"> <li>• At the pre-app stage planning officers consult with all internal colleagues to get a list of obligations</li> <li>• Planning relay the list to the applicant</li> <li>• Developer considers the obligations and may come back and negotiate on viability grounds</li> <li>• Also NSC are trying to involve their members in this pre-app stage but they do not have a role in prioritising obligations</li> <li>• In the event of a legitimate viability case NSC then reconsiders and reviews all of the obligations including affordable housing to ensure they are all adequately justified.</li> </ul>
<b>Process for Viability Testing on a case by case basis</b>	<ul style="list-style-type: none"> <li>• Developer has to provide a detailed viability study to evidence its case</li> <li>• The Councils' own Valuer carries out the assessment as to validate the viability case. In recent cases external advice has been sought at the expense of the developer. Most frequently this has required use of the HCA toolkit.</li> <li>• Then NSC expect some dialogue and negotiation between the applicant and the Council</li> <li>• If the scheme is not viable then planning go back to all officers who have asked for a contribution in order to scrutinise their own figures – testing against 05/05 what do you need, how much, has it been calculated correctly, when will the money be spent, policy to support the 'ask' etc</li> <li>• Planning then discuss with all colleagues whether and where consideration of alternative ways of providing for requirements might be acceptable</li> <li>• However, regardless of viability, there is a bottom line where if the developer cannot pay to mitigate certain aspects of the development then the Council are likely to refuse planning</li> <li>• Affordable housing is the one policy area where there is a clear context and guidance that allows for consideration of viability issues.</li> </ul>



<p><b>Examples of good practice of viability review or overage mechanisms</b></p>	<p>The Council have achieved 30% affordable housing on many sites. There are no current examples of overage mechanisms. However it is expected that this will now become necessary and members views on the approach to use need to be clarified.</p>
<p><b>Examples of poor practice in terms of viability review or overage mechanisms</b></p>	<p>There are no examples of poor practice on viability review as the Council is yet to see the results of any cases.</p>
<p><b>Other Key Issues</b></p>	<ul style="list-style-type: none"> <li>• NSC has a very large emphasis on the creation of jobs and growth in retail and tourism in Weston-S-Mare – employment led regeneration</li> <li>• The Council may be prepared to compromise on other obligations, including AH, if a scheme helps create jobs</li> <li>• Need to consider if a review can cover schemes where over time a project is re-planned to create higher densities or a more profitable mix of housing</li> <li>• Can we develop some simple key criteria such as : housing prices, build cost indices, unemployment levels, economic growth rate if these are improving by a certain agreed level it then triggers a viability review on a larger site whilst if these indicates are not improving then there is little point in a viability review</li> <li>• Need to consider how best to include this within policy</li> </ul> <p>Note: Since the consultation interview the Council’s approach has been developing especially mindful of the three statutory tests mentioned in the CIL regulations.</p>
<p><b>Date of Consultation</b></p>	<p><b>20.08.10</b></p>



#### 4. South Gloucestershire Council

<b>Local Authority</b>	<b>South Gloucestershire Council</b>
<b>Name of Officer and Title</b>	<b>Donna Whinham, Major Sites Team Manager</b>
<b>Contact Details</b>	01454 865204 <a href="mailto:Donna.Whinham@southglos.gov.uk">Donna.Whinham@southglos.gov.uk</a>
<b>Process for Prioritisation of Planning Obligations</b>	<ul style="list-style-type: none"> <li>• Every set of obligations and each site is different</li> <li>• Council officers are asked to produce their list of obligations</li> <li>• The Council applies a rigorous test (05/05) to see if the list is reasonable and can be defended at an appeal</li> <li>• The acceptable list is forwarded to the applicant</li> <li>• If the scheme is viable but below the obligations are delivered</li> <li>• If developers feel that the level of obligations makes their schemes unviable then they must make their viability submissions</li> <li>• If a viability case for reducing the level of obligations is accepted by SGC then it arranges a S106 Chief Officers Working Group meeting in order to agree priorities and where compromise is acceptable</li> <li>• AH is a high priority within SGC however there often is flexibility on the amount, size and tenure of that AH provided</li> </ul>
<b>Process for Viability Testing on a case by case basis</b>	<ul style="list-style-type: none"> <li>• Ask applicant to submit their own viability report</li> <li>• SGC employ the DV to scrutinise the viability report</li> <li>• Sometimes the DV agrees with the report with little or no negotiation necessary</li> <li>• On other projects there may be a difference of opinion which can take many months to resolve and at worst result in a likely appeal</li> <li>• Ultimately a decision by members is made on any application</li> <li>• SGC does take a view that if the level of obligations offered is too low, even with a viability justification, the members are likely to refuse an application and ask the developer to rethink its proposals in order to make it more viable</li> <li>• Any compromise has to be reasonable</li> <li>• The appointment of the DV works well and all colleagues in both housing and planning have a good understanding of viability issues</li> </ul>



<p><b>Examples of good practice of viability review or overage mechanisms</b></p>	<p>SGC have recently concluded protracted negotiations in relation to Emersons Green East. An extract from the recent committee papers is attached in <b>Appendix.....</b> The Council has accepted a blended rate of AH at 28.5% (grant free) which is above the level that was shown to be currently viable but below the policy position of 33.3%. This has two major advantages:</p> <ol style="list-style-type: none"> <li>1. It gives clarity to all parties, avoiding the need for any future viability review – reducing risk for the Council (would overage clauses deliver as many AH units in the long run?)</li> <li>2. It creates a balanced sustainable community on each phase (the risk with a viability review mechanism is that you may achieve very little AH on early phases and end up with too much AH provision on later phases).</li> </ol>
<p><b>Examples of poor practice in terms of viability review or overage mechanisms</b></p>	<p>None</p>
<p><b>Other Key Issues</b></p>	<ul style="list-style-type: none"> <li>• SGC has the benefit of larger ‘greenfield’ sites and a more balanced planning agenda compared to its other WoE Partners</li> <li>• Delivery is recognised as being very important because more housing = more jobs.</li> <li>• In a rising market the Council could reasonably expect to achieve all obligations, but it accepts that for now at least the market has changed and so compromise is likely to be necessary on many schemes</li> <li>• A key component is to have a thorough testing of any viability report at the outset, regardless of whether or not there is a review mechanism</li> </ul>
<p><b>Date of Consultation</b></p>	<p><b>20.08.10</b></p>

## Annex to South Glos Pro Forma

### Extract from South Glos Committee Paper – Emersons Green

#### **'Affordable Housing**

##### Headline figures

One of the key elements in the creation of a successful community at EGE is the provision of affordable housing across the whole site.

Policy H6 of the SGLP states that, on those sites allocated in Policy H1 (such as EGE), the Council will negotiate with developers to provide up to 33.3% affordable units. In seeking to negotiate this maximum level, the Council will have regard to the economic viability of site development, likely costs, existing market conditions, the availability of public subsidy with the overall aim of achieving balanced and sustainable communities.

Members will recall, the duplicate application for this site at EGE was refused planning permission in July 2008, on the grounds of inadequate affordable housing provision, (and absence of contribution towards a Children's Centre). Following this, the applicants submitted a viability appraisal relating to the current application, in accordance with Policy H6 of the SGLP and the adopted Affordable Housing Supplementary Planning Guidance.

This guidance states that applicants who cite non-viability as a reason for not complying with H6 must support their case with sufficient evidence for the Council to assess it in detail. In this case, and in order for the Council to reach an informed decision regarding the level of affordable housing provision, an independent surveyor (appointed by the Council) considered the supporting evidence submitted by the applicant.

He has confirmed that the scheme is currently unviable on the basis of the current amount of S106 contributions including the provision of affordable housing and would render the scheme undeliverable in current market conditions.

Having regard to this accepted deficit, the Council sought to engage the developers to maintain an acceptable package of S106 contributions whilst maintaining the principle of providing a mixed and balanced community. In this regard, the applicant has proposed a level of nil-subsidy affordable housing at 28.5%. Critically to ensure the success of the scheme, this will be provided across the site, for the entire build-out period, hence providing certainty regarding the ability of the Council to achieve its overall aims for this site.

The S.106 obligations have been rigorously tested throughout the determination of this proposal with a final review being undertaken prior to the consideration of the affordable housing percentage to ensure compliance with Circular 05/2005. The Affordable Housing SPD makes it clear that where the Council is satisfied that the financial appraisal has confirmed that the affordable housing target renders the scheme unviable, the Council can consider supporting the introduction of alternative funding mechanisms to achieve the 33.3% target. Current indications are that there is grant funding available for EGE to enable the target of 33.3%, to be achieved.



Grant funding for 116 units would be required, to increase the total from 684 units (28.5%), to the maximum target of 800 affordable units, which is 33.3%, of an assumed 2400 dwellings in total for the GHQ site. It is assumed that over the lifetime of the build-out period that grant funding will be available.

Of importance for Members to consider is the net increase in the provision of affordable housing over and above that originally envisaged in the SGLP. The Local Plan envisaged 'approximately 2,000 dwellings' for EGE, 33.3% of which is 666 affordable units.

The current application is for up to 2550 dwellings, which at 28.5% would equate to a maximum of 727 affordable homes. Even taking into account the more likely outcome of 2400 dwellings on the GHQ site alone this would make a provision of 684, which is greater than the 666 maximum envisaged by the Local Plan for EGE.

Furthermore, as the GHQ application does not cover the whole of EGE, it is likely that the remaining sites will add to this number of affordable units: 400 dwellings are currently proposed at the 'Gateway site' (this site lies opposite the District Centre, and is currently undetermined, PK05/1009/O), and 100 dwellings at the David Wilson site. At present, the Gateway site applicant has indicated a willingness to conform with the GHQ applicants S 106 obligations, including affordable housing. This application is pending a viability review, but is likely to come before the DC Committee in the next few months. Taking these other sites into account therefore, the possible total number of dwellings at EGE would therefore be 3,050, 28.5% of which is 869.

For Members' information, the above figures exclude the Safeguarded site, at the eastern end of EGE, which the SGLP safeguards for longer term development.

The development of the site with 33.3% affordable housing is currently unviable without subsidy. The applicant has however offered 28.5% of affordable housing without subsidy, which would enable the Council's target of 33.3% affordable housing to be achieved through the introduction of alternative subsidy arrangements. The applicants have agreed to this approach, and therefore officers would recommend this to Members. This would enable the delivery of 800 affordable homes at EGE on the current application site alone, which would be greater than the numbers envisaged in the Local Plan.'



## 5. Mendip District Council

<b>Local Authority</b>	<b>Mendip District Council</b>
<b>Name of Officer and Title</b>	<b>Nina Richards – Housing Development Officer John Meeker – Senior Policy Officer</b>
<b>Contact Details</b>	01749 648999 <a href="mailto:nina.richards@mendip.gov.uk">nina.richards@mendip.gov.uk</a> <a href="mailto:john.meeker@mendip.gov.uk">john.meeker@mendip.gov.uk</a>
<b>Process for Prioritisation of Planning Obligations</b>	<p>It has never really proved necessary to mediate between the delivery of affordable housing obligations and other planning obligations. Most schemes have fulfilled or come close to fulfilling affordable housing targets and other obligations.</p> <p>As a consequence of the lack of challenge and contention to date then it has not been necessary for a specific prioritisation framework to be developed.</p>
<b>Process for Viability Testing on a case by case basis</b>	<p>The only recent example provided was a fairly small scheme where the affordable contribution was below the typical target of 30-35%. The applicant argued that its offer was the maximum viable but that it should be accepted on the basis it offered family houses and these were specified to a high standard. The Council accepted this case albeit no specific viability assessment was carried out. However, the Council was satisfied of the quality argument, was keen to avoid further delay and protracted negotiations on the scheme and was very keen to secure family houses. In effect this was a case of the Council accepting a 'blended rate' approach.</p> <p>There is a close working relationship between development management staff and housing enabling (Nina's post is based in the Development Control team). Generally the Council will need to grow its expertise in viability assessment and related tasks as other larger schemes present challenges.</p>
<b>Examples of good practice of viability review or overage mechanisms</b>	<p>There are no specific examples. The policy context is a saved Local Plan policy and SPG of 2002 vintage.</p> <p>This expects a minimum of 22% affordable supplemented by 18% low-cost market. In practice negotiations now usually commence with a target of 35% affordable (derived from the RSS). The new Core Strategy will reach draft plan stage in January 2011 and probably be adopted in 2012. It will seek to reduce thresholds to 1 or 2 dwellings in parts of the district.</p>



<b>Examples of poor practice in terms of viability review or overage mechanisms</b>	Not applicable.
<b>Other Key Issues</b>	Nina felt that for longer term schemes some flexibility on planning obligations should be regarded as a sensible general expectation to enable changes in need or policy to be addressed. This would prove difficult, as regards policy changes in particular, from a planning law perspective but it is nonetheless a definite issue for schemes with a long development timescale.
<b>Date of Consultation</b>	<b>26.08.10</b>



## 6. Wiltshire Council

<b>Local Authority</b>	<b>Wiltshire Council</b>
<b>Name of Officer and Title</b>	Janet O'Brien – Head of New Housing
<b>Contact Details</b>	janet.o'brien@wiltshire.gov.uk
<b>Process for Prioritisation of Planning Obligations</b>	<p>This is still evolving at present. Prior to the amalgamation of the county and districts, the County Council tended to insist on its standard contribution levels. Now the Council is trying to assess the relevant priorities for each site.</p> <p>There is some interest in establishing a general hierarchy.</p> <p>Wiltshire has not decided yet whether it will adopt CIL but recognises that this could supersede any debate on prioritisation. There will be a clearer policy by the end of this calendar year.</p>
<b>Process for Viability Testing on a case by case basis</b> <ul style="list-style-type: none"> <li>- Protocol used</li> <li>- Open book approach?</li> <li>- Modelling used</li> <li>- Links to existing policy</li> <li>- Use of expert consultants</li> <li>- Practical outputs and constraints</li> <li>- Levels of understanding amongst development management staff regarding viability (poor/satisfactory/good/very good)</li> </ul>	<p>Targets vary dependent on the applicable level in one of the 4 different saved local plan policies. The new Core Strategy is still being developed.</p> <p>The Council expects a RLV assessment to be carried out. Doesn't take a hard line on historic land cost provided that a developer can demonstrate that when it bought the land, at that purchase price it would have been able to deliver the full affordable housing target applicable at the time.</p> <p>The Council's attitude is hardening and it may now suggest that it is willing to wait until conditions improve and policy targets can be met. However, if a site has strategic significance (say delivering important infrastructure) the Council is more likely to compromise.</p> <p>Approach to futureproofing tends to be led by developer. Larger schemes tend to be ones with review provisions but are also more likely to suit a blended rate approach (gives time for market to improve).</p>



<p><b>Examples of good practice of viability review or overage mechanisms</b></p>	<p>Usually the Council expects transparency of information and will revisit viability assessments at reserved matters applications. Usually the Council fixes the land value and the profit (either as a % or sometimes as a fixed sum).</p> <p>Generally the Council expects the whole of an improvement in viability to meet additional affordable housing contributions.</p> <p>On smaller sites the Council has tended to agree overage deals which are monetary. Scheme outturns are examined and surplus is split 50/50. Janet believes one agreement, which is in place, with this overage provision was subject either to appeal or a legal opinion; she will identify and provide supporting information.</p> <p>However, no scheme with this kind of overage provision has yet completed so no payments have yet been secured.</p>
<p><b>Other Key Issues</b></p>	<p>The Council has appointed to a S.106 monitoring role to improve delivery of obligations.</p> <p>Janet is shortly intending to take a report to Council members on the whole topic of scheme viability assessments because the issue affects most schemes currently and the Council wants to have more clarity on members' preferred approaches.</p>
<p><b>Date of Consultation</b></p>	<p><b>02.09.10</b></p>

The foregoing highlights that there is a lot of good practice already in operation across the West of England but perhaps there is a case for needing to share good practice and bright ideas. Then this could be translated into appropriate policy guidance and protocols so that each LPA can achieve a coherent approach to the issue of planning obligations, the impact of viability and the need for viability review mechanisms.

The findings from the consultation confirm that a 'ONE SIZE FITS ALL' approach will definitely not work in the West of England. Each LPA will need a range of tools to deal with viability review in order that they can pick appropriate tools or mechanisms dependent on the circumstances of particular schemes or applications.



## Appendix 2

### Assumptions:

Assumptions	Site 1	Site 2	Site 3
Site Size (net developable area)	10 hectares	20 hectares	30 hectares
Residential density	50 per hectare	50 per hectare	50 per hectare
Total number of units	500	1,000	1,500
Mix of all residential units – affordable housing to take same mix as market housing on a pro rata basis	10% 2 bed flats 25% 2 bed house 50% 3 bed house 15% 4 bed house	10% 2 bed flats 25% 2 bed house 50% 3 bed house 15% 4 bed house	10% 2 bed flats 25% 2 bed house 50% 3 bed house 15% 4 bed house
Build period	5 years	10 years	15 years
Sales rate	8 units per month	8 units per month	8 units per month
Preferred Tenure Split Rent/shared ownership (shared ownership to be sold at a 40% tranche with rent at 1% of retained equity)	75% / 25%	75% / 25%	75% / 25%

- Private sales values: £2,000 per square metre
- Affordable housing values assume no grant
- Developer's profit: 20% of private housing GDV; 6% of affordable housing GDV
- Build costs: average £840 per square metre plus additional £154 for Greenfield infrastructure (based on an assumption of £700,000 per hectare)
- 5% addition to base build costs for Code for Sustainable Homes Level 3. No account taken of future requirements for higher code levels
- Section 106 contributions of £10,000 per unit
- Marketing costs: 3% of private housing GDV
- Development finance: 7%
- Land value: £500,000 per hectare
- Site acquisition costs: 5.75% of land value

### Option 1 – LPA and Developer negotiates 27.5% affordable housing

	Residual Land Value (£ millions)	Site purchase costs (£ millions)	Residual Land Value less site purchase costs (£ millions)	Developer's profit (£ millions)
Site 1	-0.62	5.00	-5.62	12.7
Site 2	-3.88	10.00	-13.88	25.39
Site 3	-3.83	15.00	-18.83	38.09

All 3 sites generate negative residual land values (before site purchase costs). However, the developments might be able to go ahead, as the Developer's profit exceeds the sum of the negative residual land values and site purchase costs.



**Option 2a(i) – Open book review, every two years. Developer return of 20%, with any excess profit used to provide affordable housing until a policy compliant position is reached, assuming sales value inflation at 10% per annum and build cost inflation of 5% per annum**

Affordable housing quantum adjusted in each subsequent phase, by using any 'surplus' (ie where the residual land value exceeds the site purchase costs), to provide more affordable housing until the residual land value equals the site purchase costs. The appraisals assume a 'catch-up' of lower overall quantum in the previous phase in the current phase. The 'Adjusted affordable housing quantum' is therefore the percentage of affordable housing achieved across the scheme, not just in each subsequent phase.

Minimum affordable housing at planning – 20%.

#### Site 1

	Residual Land Value (£ millions)	Site purchase costs (£ millions)	Residual Land Value less site purchase costs (£ millions)	Adjusted affordable housing quantum	RLV following adjustment to Aff Hsg Quantum (£ millions)
At Planning	0.80	5.0	-4.20	n/a	0.80
Year 2 review	5.34	5.0	0.34	21.2%	5.0
Year 4 review	9.68	5.0	4.68	34.1%	5.0
Year 5 review	6.65	5.0	1.65	37.9%	5.0

#### Site 2

	Residual Land Value (£ millions)	Site purchase costs (£ millions)	Residual Land Value less site purchase costs (£ millions)	Adjusted affordable housing quantum	RLV following adjustment to Aff Hsg Quantum (£ millions)
At Planning	-1.63	10.00	-11.63	n/a	-1.63
Year 2 review	5.29	10.00	-4.71	No adjustment	5.29
Year 4 review	12.80	10.00	2.80	25%	10.00
Year 6 review	16.74	10.00	6.74	34.7%	10.00
Year 8 review	15.48	10.00	5.48	41.4%	10.00
Year 10 review	14.52	10.00	4.52	46.3%	10.00

#### Site 3

	Residual Land Value (£ millions)	Site purchase costs (£ millions)	Residual Land Value less site purchase costs (£ millions)	Adjusted affordable housing quantum	RLV following adjustment to Aff Hsg Quantum (£ millions)
At Planning	-0.66	15.00	-15.66	n/a	-0.66
Year 2 review	8.29	15.00	-6.71	No adjustment	8.29
Year 4 review	16.52	15.00	1.52	22.5%	15.00
Year 6 review	22.75	15.00	7.75	32.8%	15.00
Year 8 review	21.64	15.00	6.64	39.9%	15.00



<b>Year 10 review</b>	20.82	15.00	5.82	45.1%	15.00
<b>Year 12 review</b>	20.06	15.00	5.06	48.9%	15.00
<b>Year 14 review</b>	19.20	15.00	4.20	51.7%	15.00

**Option 2a(ii) – Open book review, every two years. Developer return of 20%, with any excess profit used to provide affordable housing until a policy compliant position is reached, assuming sales value inflation at 5% per annum and build cost inflation of 2.5% per annum**

**Site 1**

	<b>Residual Land Value (£ millions)</b>	<b>Site purchase costs (£ millions)</b>	<b>Residual Land Value less site purchase costs (£ millions)</b>	<b>Adjusted affordable housing quantum</b>	<b>RLV following adjustment to Aff Hsg Quantum (£ millions)</b>
<b>At Planning</b>	0.80	5.0	-4.20	n/a	0.80
<b>Year 2 review</b>	3.02	5.0	-1.98	No adjustment	3.02
<b>Year 4 review</b>	5.14	5.0	0.14		5.00
<b>Year 5 review</b>	5.85	5.0	0.85		5.00

**Site 2**

	<b>Residual Land Value (£ millions)</b>	<b>Site purchase costs (£ millions)</b>	<b>Residual Land Value less site purchase costs (£ millions)</b>	<b>Adjusted affordable housing quantum</b>	<b>RLV following adjustment to Aff Hsg Quantum (£ millions)</b>
<b>At Planning</b>	-1.63	10.00	-11.63	n/a	-1.63
<b>Year 2 review</b>	1.79	10.00	-8.21	No adjustment	1.79
<b>Year 4 review</b>	5.20	10.00	-4.80	No adjustment	5.20
<b>Year 6 review</b>	8.19	10.00	1.81	No adjustment	8.19
<b>Year 8 review</b>	10.77	10.00	0.77	21.5%	10.00
<b>Year 10 review</b>	12.08	10.00	2.08	25.4%	10.00

**Site 3**

	<b>Residual Land Value (£ millions)</b>	<b>Site purchase costs (£ millions)</b>	<b>Residual Land Value less site purchase costs (£ millions)</b>	<b>Adjusted affordable housing quantum</b>	<b>RLV following adjustment to Aff Hsg Quantum (£ millions)</b>
<b>At Planning</b>	-0.66	15.00	-15.66	n/a	-0.66
<b>Year 2 review</b>	3.85	15.00	-11.15	No adjustment	3.85
<b>Year 4 review</b>	8.15	15.00	-6.85	No adjustment	8.15
<b>Year 6 review</b>	11.66	15.00	-3.44	No adjustment	11.66



<b>Year 8 review</b>	14.72	15.00	-0.28	No adjustment	14.72
<b>Year 10 review</b>	17.45	15.00	2.45	23.9%	15.00
<b>Year 12 review</b>	17.23	15.00	2.23	27.1%	15.00
<b>Year 14 review</b>	16.72	15.00	1.72	29.4%	15.00

**Option 2b(i) – viability review, every two years with a 50% / 50% split of any ‘super profit’ above agreed 20% developer profit, assuming sales value inflation at 10% per annum and build cost inflation at 5% per annum. 20% minimum affordable housing on-site.**

**Site 1**

	<b>Residual Land Value (£ millions)</b>	<b>‘Super profit’ (ie RLV less land cost) (£ millions)</b>	<b>50% payment to Council (£ millions)</b>	<b>‘Revised target site cost (£ millions)</b>	<b><sup>2</sup>Potential enhanced Aff Hsg quantum, using Council’s 50% share of super profit</b>
<b>At Planning</b>	0.80	n/a	n/a	n/a	n/a
<b>Year 2 review</b>	5.34	0.34	0.17	5.17	21.1%
<b>Year 4 review</b>	9.86	4.69	2.35	7.51	31.9%
<b>Year 5 review</b>	9.22	0.85	0.43	7.94	35.4%

**Site 2**

	<b>Residual Land Value (£ millions)</b>	<b>‘Super profit’ (ie RLV less land cost) (£ millions)</b>	<b>50% payment to Council (£ millions)</b>	<b>Revised target site cost (£ millions)</b>	<b>Potential enhanced Aff Hsg quantum, using Council’s 50% share of super profit</b>
<b>At Planning</b>	-1.63	n/a	n/a	n/a	n/a
<b>Year 2 review</b>	5.29	n/a	n/a	n/a	n/a
<b>Year 4 review</b>	12.80	2.80	1.40	11.40	24.0%
<b>Year 6 review</b>	18.21	6.81	3.41	14.80	31.5%
<b>Year 8 review</b>	20.52	5.71	2.86	17.66	36.8%
<b>Year 10 review</b>	22.51	4.85	2.42	20.83	40.6%

**Site 3**

	<b>Residual Land Value (£ millions)</b>	<b>‘Super profit’ (ie RLV less land cost) (£ millions)</b>	<b>50% payment to Council (£ millions)</b>	<b>Revised target site cost (£ millions)</b>	<b>Potential enhanced Aff Hsg quantum, using Council’s 50% share of super profit</b>
<b>At Planning</b>	-0.66	n/a	n/a	n/a	n/a
<b>Year 2 review</b>	8.29	n/a	n/a	n/a	n/a
<b>Year 4 review</b>	16.52	1.52	0.76	15.76	28.9%
<b>Year 6 review</b>	23.58	7.82	3.91	19.67	34.8%
<b>Year 8 review</b>	25.86	6.95	3.48	23.22	34.8%
<b>Year 10 review</b>	29.02	5.80	2.90	26.51	38.2%
<b>Year 12 review</b>	36.28	6.83	3.41	29.49	41.4%
<b>Year 14 review</b>	34.50	5.01	2.51	31.99	43.9%



<sup>1</sup> The Developer's share of the super-profit is added to the site purchase cost, to increase the 'hurdle rate' that the scheme residual value must exceed before additional affordable housing can be provided.

<sup>2</sup>These calculations assume that the Developer and the Council run an appraisal of the scheme at 20% affordable housing. The Council's 50% share of any super-profit is then handed back to the Developer to subsidise the scheme (assumed to be paid at the end of the year in which the review is undertaken), which increases its ability to provide a greater quantum of affordable housing.

**Option 2b(ii)– viability review, every two years with a 50% / 50% split of any 'super profit' above agreed 20% developer profit, assuming sales value inflation at 5% per annum and build cost inflation at 2.5% per annum. 20% minimum affordable housing on-site.**

**Site 1**

	Residual Land Value (£ millions)	'Super profit' (ie RLV less land cost) (£ millions)	50% payment to Council (£ millions)	<sup>3</sup> Revised target site cost (£ millions)	<sup>4</sup> Potential enhanced Aff Hsg quantum, using Council's 50% share of super profit
<b>At Planning</b>	0.80	n/a	n/a	n/a	n/a
<b>Year 2 review</b>	3.02	n/a	n/a	n/a	n/a
<b>Year 4 review</b>	5.14	0.14	0.07	5.07	20.4%
<b>Year 5 review</b>	5.92	0.85	0.42	5.49	22.9%

**Site 2**

	Residual Land Value (£ millions)	'Super profit' (ie RLV less land cost) (£ millions)	50% payment to Council (£ millions)	Revised target site cost (£ millions)	Potential enhanced Aff Hsg quantum, using Council's 50% share of super profit
<b>At Planning</b>	-1.63	n/a	n/a	n/a	n/a
<b>Year 2 review</b>	1.79	n/a	n/a	n/a	n/a
<b>Year 4 review</b>	5.20	n/a	n/a	n/a	n/a
<b>Year 6 review</b>	8.19	n/a	n/a	n/a	n/a
<b>Year 8 review</b>	10.77	0.77	0.33	10.33	21.2%
<b>Year 10 review</b>	12.42	2.09	1.05	11.38	23.9%

**Site 3**

	Residual Land Value (£ millions)	'Super profit' (ie RLV less land cost) (£ millions)	50% payment to Council (£ millions)	Revised target site cost (£ millions)	Potential enhanced Aff Hsg quantum, using Council's 50% share of super profit
<b>At Planning</b>	-0.66	n/a	n/a	n/a	n/a
<b>Year 2 review</b>	3.85	n/a	n/a	n/a	n/a
<b>Year 4 review</b>	8.15	n/a	n/a	n/a	n/a
<b>Year 6 review</b>	11.66	n/a	n/a	n/a	n/a
<b>Year 8 review</b>	14.72	n/a	n/a	n/a	n/a
<b>Year 10 review</b>	17.45	2.45	1.22	16.22	22.5%
<b>Year 12 review</b>	18.50	2.28	1.14	17.36	24.7%
<b>Year 14 review</b>	19.15	1.79	0.89	18.26	26.3%



<sup>3</sup> The Developer's share of the super-profit is added to the site purchase cost, to increase the 'hurdle rate' that the scheme residual value must exceed before additional affordable housing can be provided.

<sup>4</sup> These calculations assume that the Developer and the Council run an appraisal of the scheme at 20% affordable housing. The Council's 50% share of any super-profit is then handed back to the Developer to subsidise the scheme (assumed to be paid at the end of the year in which the review is undertaken), which increases its ability to provide a greater quantum of affordable housing.