Isle of Man Government
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Operational Policy on Section 13 Agreements

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Department of Environment, Food and Agriculture

Planning and Building Control Directorate Murray House

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1.0 Introduction

1.1 The purpose of this document

This operational policy is intended to provide clarification on how planning applications will be processed where agreements made further to section 13 of the Town and Country Planning Act 1999 ["agreements" for the purposes of this document] may be required. It is published in light of the commitment in the Isle of Man Strategic Plan to produce Supplementary Guidance in relation to agreements (see paragraph 6.4.2).

It is noted that a number of changes to legislation, policy and process will result from the implementation of the Reform of the Planning System. This operational policy will therefore be kept under review, in light of any updating of the Island Development Plan and/or the introduction of a Community Infrastructure Levy.

In relation to viability assessments, it is noted that the Royal Institution of Chartered Surveyors publishes guidance which may be relevant, as does the Ministry of Housing, Communities and Local Government. Given the complexity of such assessments there may be points which are not covered by this Operational Policy and only in such circumstances may it be appropriate to use guidance from other parts of the British Isles (see paragraph 1.6.1 of the Strategic Plan). Such guidance may be relevant as far as it relates to points about which this Operational Policy is silent. However, in the case of any discrepancies, this Operational Policy should take precedence.

1.2 What is a Section 13 Agreement?

Section 13 of the Town and Country Planning Act 1999 allows DEFA to –

> *"enter into an agreement with any person interested in land for the purpose of restricting or regulating the development or use of the land, either permanently or during such period as may be prescribed by the agreement; and any such agreement may contain such incidental and consequential provisions (including provisions of a financial character) as appear to the Department to be necessary or expedient for the purposes of the agreement".*

An agreement is not the same as a condition attached to a planning approval, nor can conditions be used to require an agreement to be entered into.

1.3 When is an agreement required?

Such agreements can be used as part of the determination of planning applications (for example to deal with issues which could not lawfully be dealt with by conditions). Because agreements are just that (i.e. voluntary), where proposed to be attached to a planning application they must be agreed to by the developer as well as the Department. The Department has no power to issue a planning approval subject to an agreement which the developer refuses to sign. Therefore if the developer does not agree the recourse for the Department would be to refuse the application. It is therefore important that agreements are only used to deal with issues which if not resolved would justify the refusal of the application (for example non-compliance with a development plan policy).

1.4 Who may enter into an agreement?

In some cases it will be appropriate for there to be multiple signatories to an agreement. For example if a developer is going to provide a facility and a third party will then adopt and maintain/run it. However, there is no power for an agreement to be made without the involvement of DEFA. Notwithstanding this, as set out in Section 4 of this policy, guidance will be sought from other bodies as appropriate. Developers may therefore wish to consult with these bodies prior to submitting their applications, to inform the detail of their application.

Depending on the nature of the proposal, agreements will not normally be used where the applicant is a Government Department. It is noted that in relation to applications on land owned by the Department of Infrastructure or Local Authorities there can be separate legislation requirements for ensuring that public sector housing land is provided as affordable and this can involve re-directing the affordable element elsewhere rather than using the site. However, because approvals run with the land, this will be considered on a case-by-case basis.

1.5 How is the content of the agreement finalised?

In the determination of planning applications consideration will be given by the Case Officer as to whether an agreement should be sought. As part of this consideration, the advice of stakeholders will be sought (for example Local Authorities or the Department of Infrastructure) as part of the normal consultation on planning applications. However, such advice is not binding upon the Case Officer, in making a recommendation, nor the Planning Committee in determining an application (see 3.2).

2.0 Policy Context

2.1 Island Development Plan

The Strategic Plan (2016) sets out three specific policies areas in relation to agreements.

- General Policy 4 (and paragraphs 6.4.1 – 6.4.2)
  This policy sets out general support for the use of such agreements to resolve issues which cannot be addressed by the imposition of planning conditions, including in relation to, "open space or parking provision, or other social or cultural provision, including public art, which is necessary and directly associated with the development proposed". It is stressed that, "Planning Agreements will not be used to support the approval of proposals which are not in accordance with the Aim, Objectives and Policies of the Plan".

- Housing Policy 5 (and paragraphs 8.6.1 – 8.6.3)
  This policy indicates that the Department, "will normally require that 25% of provision should be made up of affordable housing. This policy will apply to developments of 8 dwellings or more". The supporting text clarifies that, "In assessing the appropriate percentage in each instance, the Department will have regard to the fact that the figure is a target over the Plan Period as a whole; to evidence of local housing need; to the nature of the land and viability of the scheme; and to the nature of existing adjacent housing". Affordable housing is defines as that which is: "directly provided by the Department; provided by Local Authorities; or meets the criteria for the Department's House Purchase Assistance Scheme 2004 (and any successor schemes approved by Tynwald)".

- Recreational Policies 3 and 4 (and paragraphs 10.3.3, 10.3.6 – 10.3.9)
  These policies indicate a broad approach of,
  a) protecting existing assets;
  b) making good deficiencies in existing provision; and
  c) providing adequate provision within new development",
  and that developments of 10 or more dwellings should make provision for sufficient open space including sports pitches, children's play space and amenity space).

Broad standards are set out (with further guidance in Appendix 6). Particular consideration should be given to the standard –

> *"Open Space in new developments should be provided within the site, but where it is impractical to provide the recreational space within the site, consideration may be given either to*
>
> *(a) provision off-site, but conveniently close thereto; or to*
>
> *(b) the use of commuted sums, which, under the terms of a section 13 Agreement, would be paid to the Local Authority as a contribution towards the provision of community recreational open space".*

In addition to these three specific policy areas, more detailed site allocations and policy proposals are included in Area Plans[1]. These can include requirements which may result in the need for agreements, such as those required to address the site specific requirements set out in Development Briefs.

2.2 Other Policies and Guidance

Section 10 of the Town and Country Planning Act 1999 prescribes what must be considered in the determination of planning applications. This includes the Development Plan and, amongst other things, "Other Material Considerations". There is no definitive list of "Other Material Considerations" and these are often determined as a result of Case Law. However, such Other Material Considerations can include Governments Plans, Strategies and Policies.

Where relevant, consideration will therefore be given to documents such as:

- The Department of Infrastructure - Affordable Housing Standards https://www.gov.im/media/1350123/20150908-housing-standards-final-version-jan2016-lr2.pdf
- The Department of Infrastructure - Manual for Manx Roads https://www.gov.im/media/1359885/mfmr-103.pdf
- The Department for Education, Sport and Culture - Strategy for Sport https://www.gov.im/media/1349540/iom-strategy-for-sport-2014-2024.pdf

Paragraph A.6.6.3 of the Strategic Plan states that, "Children's play space requirements will be assessed using the National Playing Fields Association guidelines". The association has since been renamed, "Fields in Trust" and publishes guidance on its website http://www.fieldsintrust.org/

3.0 Processing Planning Applications

3.1 Provision of Information

The planning system allows public consultation on development proposals. The right of appeal (for the applicant and other interested persons) in front of an independent inspector allows an additional opportunity to robustly test the arguments and evidence of those in support of and in opposition to a given development. It is therefore important that all parties have the same information to consider.

There is no explicit provision within planning legislation for information submitted as part of a formal planning application to be held confidentially. Therefore, other than in very special circumstances (for example in the rare occasions where the applicant's health is a material consideration) all of the information submitted as part of a planning application will be made public.

Information within a viability assessment may be site-specific but need not be specific to a given developer or commercially sensitive. Targeted redacting of a viability assessment will only be carried out where special and case-specific issues are identified which to the satisfaction of the Department necessitate such

[1] In areas not yet covered by an Area Plan, the relevant Local Plan or 1982 Development Plan still applies.

redactions. Furthermore, the legislation requires the Department to determine an application as submitted. Therefore information which is not included within the application will not be considered in the determination of the application.

Pre-application discussions are encouraged as set out in the Department's published guidance https://www.gov.im/media/1223403/pre-application-guidance-draft-20.pdf. Sometimes it will be appropriate for technical issues to be discussed with consultees directly (for example the Department of Infrastructure, Manx Utilities or Local Authorities). However, it is important that the Department, consultees and local residents consider and comment on the application as submitted.

Where information is provided as part of pre-application discussions but not included in the final submitted application, it will not be taken into account. Where it appears that consultees have commented based on such information, the weight attached to their comments will be reduced accordingly. It should be noted that whilst pre-application discussions are not routinely published, they are not automatically exempt from Freedom of Information requests.

Where a development is proposed for 8 or more residential units, it should include some information to outline the proposed approach in terms of affordable housing and (if relevant) public open space. Where information is provided, it will be made publically available to view as would any other part of the planning application. Where such information is not provided, the Department may consider issuing a direction under article 4(3) of the Town and Country Planning (Development Procedure) (No 2) Order 2013 specifying the information required and the timescale (not less than 21 days) within which it must be provided otherwise the application is treated as withdrawn.

3.2 Consideration and Determination of applications by Planning Committee

Paragraph 3 of the Planning Committee Standing Orders (DEFA Standing Order 2018/1) sets out the circumstances in which they may consider and determine planning applications. These circumstances include where the Case Officer recommends that an agreement is entered into.

It is important that the Planning Committee has sufficient information to understand the Case Officer's recommendation. Therefore applications will not be presented to the planning committee without at least a draft Heads of Terms for the agreement. Whilst it is not necessary to complete the agreement ahead of the Planning Committee, not least as they may decline to accept the officer's recommendation, the planning decision notice cannot be issued until the agreement has been signed. If the applicant wishes to complete an agreement in advance of the planning committee (on a without prejudice basis) the Department will endeavour to accommodate such requests. In any case, the applicant is responsible for meeting all costs incurred in the production of an agreement.

If the Planning Committee does not accept the officer's recommendation (either because they have concerns with the Heads of Terms or that approval is recommended without an agreement) it is anticipated that they will either:

- Approve the application without an agreement;
- Refuse the application; or
- Defer the application to enable the Heads of Terms to be further negotiated.

In the event of the third option, it will be important that the committee set out their broad concerns with the draft Heads of Terms.

Article 7(1) of the Town and Country Planning (Development Procedure) (No 2) Order 2013 states that,

> *"as soon as practicable after the determination of the application… the Department must give notice in writing of the decision…".*

Therefore, if the Committee accept a recommendation to approve subject to an agreement, then a 'decision' on the application has been made. Any representations received after this date will not be considered. Officers will carry out the necessary administrative steps to implement the Committee's decision and enable the decision notice to be issued. These steps will include ensuring that there is a fully drafted and signed agreement which complies with the Heads of Terms approved by the Committee prior to the decision notice being issued.

In the event that officers are unable to implement the decision within 6 months (for example because the applicant is unwilling to sign the agreement) the application will normally be brought back before the committee so that they may reconsider the application.

4.0 Content of 13 Agreements

4.1 Affordable Housing

Guidance may be sought from the Department of Infrastructure and the relevant Local Authorities in relation to the provision of affordable housing – in particular the type of affordable housing and whether provision is on or off-site. The level of detail that is necessary in the actual agreement will vary on a case-by-case basis.

Where provision is made on-site and 25% would result in a fraction of a house (e.g. a development of 17 houses would result in a requirement of 4.25 affordable units) the remainder (i.e. 0.25 of a unit) should either be reflected in a commuted sum to contribute to off-site provision or rounded up and provided on-site as a unit. Where provision is offsite and so the developer is to make a financial payment, the requirement will not need to be rounded up or down. 'Credit' will not be given for previous developments by a developer in an area which included more than 25% affordable housing. In exceptional circumstances where affordable housing would be better located in one area rather than another (e.g. close to amenities) it may be appropriate to link two separate developments together through one or more S13 agreements. However it is important that the decision on a specific planning application does not prejudice any future decision on a planning application.

4.2 Open Space

Guidance may be sought from the relevant Local Authority, Isle of Man Sports Council and any sport-specific groups in relation to the provision of open space.

Where a development includes the on-site provision of open space it should include details of how this will be laid out, equipped and maintained in perpetuity. Local Authorities may be willing to adopt open space, but cannot be compelled to do so without an order from Tynwald (Section 12 of the Local Government (Miscellaneous Provisions) Act 1984) therefore Section 13 agreements may say that the land will be offered to Local Authorities for a nominal sum and then set out a fall-back position in the event that the Local Authority is unwilling to acquire the land. In order for open space to be useful it is important the development results in it being provided in a suitable location, of a suitable size shape and in a fit-for-purpose condition (which may include the provision of relevant equipment).

4.3 Public Works of Art

In the event that public works of art are to be provided through an agreement, advice may be sought from the relevant Local Authority and the Arts Council.

5.0 Viability Assessment

5.1 Purpose and requirement for assessments

Where a development complies with the relevant policy requirements, there is no requirement to provide any information in relation to viability. However it may, on rare occasions, be helpful for a planning application to include a viability assessment. This section sets out some broad guidance on how such assessments should be undertaken. Such assessments should be funded by the applicant (and form part of their planning application) but must be carried out by suitably qualified (e.g. Chartered Member of relevant professional body) and experienced practitioners.

5.2 Financial Viability

Financial viability can be defined as the ability of a development project to meet its costs. The viability of a development can be tested by calculating the gross development value (GDV) of the completed development (i.e. the market value of the completed development – either sale value and/or capitalised net rental income, factoring in any grant or other external funding sources) and comparing this to the development costs (DC). If the DC are higher than the GDV then the development is not viable.

5.3 Development Costs

The DC are made up of the following components.

1. A reasonable site value for the landowner. This is not necessarily the same as the actual price paid, and should not take account of any 'hope value'. It should be based on a consideration of:
    - the current use;
    - plus the potential uplift in value resulting from the designation in the relevant extant local/area plan and/or planning approval;
    - a premium for the land owner (the minimum price at which a rational landowner would be willing to sell their land);
    - minus the cost of complying with all relevant planning policy requirements (including site-specific Development Briefs and generic island-wide policies); and
    - minus any site-specific abnormal development costs (i.e. if a site will cost more to develop due to its condition, then it is worth less).

2. The cost of building the development. Build costs should be based on appropriate data. They should be based on consideration of:
    - inclusion of site-specific infrastructure costs – such as access roads, drainage or connections to utilities (these should also be reflected in the land value);
    - inclusion of site specific abnormal build costs – such as remediating contaminated land or mitigating flood risk (these should also be reflected in the land value);
    - inclusion of the costs of complying with planning policy requirements, including financial payments (these should also be reflected in the land value);
    - inclusion of the costs of payments to 3rd parties (for example ransom strips) but it may also be appropriate to reflect such costs in the (reduced) value of the land if they could reasonably have been anticipated prior to purchase;
    - inclusion of general financing costs and professional/marketing fees (professional site fees should also be reflect in the land value)
    - inclusion of project contingency costs only where this can be demonstrated to be necessary and the level justified in relation to the specific project and risks; and
    - exclusion of either holding costs, income received from the site prior to its development or the costs of any work/maintenance undertaken prior to development (unless such works are not related to the current use and directly connected with the proposed development).

3. A reasonable return to the developer. This is in part a reward for taking the risk to carry out the development and so will take into account both site specific and wider market risks. This will take into account the market at the time of the decision and the availability of finance, and any anticipated changes to these over the life of the build. A scheme with a secure end-user (for example affordable housing) may therefore represent a lower level of risk. Emerging UK guidance suggests 6-20% of Gross Development Value is a suitable return for housing built for sale, depending on the type of scheme and the level of risk.

4. The cost of complying with the terms of a Section 13 agreement. This will be based on the relevant policy framework and any additional issues raised by a particular development/site.

Comparison with other policy compliant sites may also be helpful however, given the more limited number of transactions within the Island, such comparisons may be of less weight than in parts of the UK. Where uncertainty exists in relation to the above factors (or elements of each) scenario testing may be helpful to inform a final estimate.

5.4 Unviable Development

If a development is unviable then it must be decided whether there are grounds to reduce the planning 'asks' in terms of the Section 13 agreement.

The Development Plan sets out policy requirements – including general requirements in terms of affordable housing and public open space, or site-specific requirements within a development brief. If a development is unable to comply with these (including due to viability issues) it is unlikely to be supported. However, the Development Plan is not the only material consideration in the determination of planning applications. There may be cases where a proposal does not comply with the development plan but can demonstrate 'other material considerations' which may include that there is an overriding and immediate need for the development and it is rendered unviable by the policy requirements.

Notwithstanding the above, Housing Policy 5 sets out that the 25% requirement for affordable housing will 'normally' be sought, however this may vary (either up or down) depending on a number of considerations, including the viability of the scheme. Where a scheme can be demonstrated to be unviable it may therefore be appropriate to consider reducing the affordable housing provision. In such circumstances it will be necessary to understand the implications of this in terms of meeting local demand for affordable housing. It is noted that the 25% requirement is across the plan period and development allocations within Development Plans are not placed into phases within the plan period. It is important not to lose the opportunities to deliver affordable housing due to the timing of developments and consequently if a development proposal suggests affordable housing is not viable at the current time, then consideration should be to refusing the application and waiting until such time as it is viable.

Where there is a longer anticipated build-time for a development (for example for larger housing estates) and it is accepted that a lower affordable housing contribution is acceptable, a requirement to reassess whether this can be increased prior to commencement of each phase may be included in the Section 13 agreement. Nevertheless, where a development can only provide a reduced level of affordable housing due to viability issues this will weigh against the development in reaching a balanced decision as to whether it should receive planning approval.

6.0 Enforcement of Agreements

6.1 Approach to Enforcement

A separate Operational Policy has been prepared in relation to Planning Enforcement. Whilst this does not deal specifically with non-compliance with agreements, it still provides the broad approach to investigating and responding to alleged non-compliance.

6.2 Legal Powers

In addition to the tools normally available to the Department to address breaches of planning Control, Section 28 of the Act gives additional powers in relation to agreements. Furthermore, because agreements are in effect contracts, non-compliance could results in the Department taking action as a breach of contract through the civil courts.