

Planning Committee

2.00pm, Wednesday, 26 February 2020

Supplementary Guidance on Developer Contributions and Infrastructure Delivery – Update

Executive/routine	Executive
Wards	All
Council Commitments	1, 4, 6 10, 11 16, 17, 22, 26 28, 32 43

1. Recommendations

- 1.1 It is recommended that Committee:
- 1.1.1 notes the Scottish Ministers' direction not to adopt and issue the Council's Supplementary Guidance (SG) on Developer Contributions and Infrastructure Delivery;
 - 1.1.2 agrees that officers prepare non-statutory supplementary planning guidance on developer contributions to primary healthcare infrastructure taking account of the Ministers' decision, with a target to report back to Planning Committee in May; and
 - 1.1.3 agrees that officers review the evidence used for education and transport contribution calculations and assess what needs to be done to establish an agreed methodology and outputs in collaboration with Scottish Government planners, to inform the Council's response to the Scottish Ministers' decision. This could include the preparation of new statutory SG on education and transport contributions.

Paul Lawrence

Executive Director of Place

Contact: David Givan, Service Manager, Planning and Building Standards

E-mail: david.givan@edinburgh.gov.uk | Tel: 0131 529 3679

Supplementary Guidance on Developer Contributions and Infrastructure Delivery – Update

2. Executive Summary

- 2.1 On 17 January 2020 the Scottish Ministers directed the Council not to adopt statutory SG that has been submitted by the Council. The first version of the SG had originally been published in December 2016.
- 2.2 The SG provides the basis for assessing impact of proposals and the developer contributions required to mitigate those impacts. The Council must consider how to progress from this point, including whether or not to prepare new SG which responds to the Ministers' reasons for their decision, including what evidence and methodologies to use.
- 2.3 This report sets out the background to, and analysis of, the implications of the Ministerial decision.

3. Background

- 3.1 The Council as Planning Authority is entitled to enter into agreements under Section 75 of the Town and Country Planning (Scotland) Act 1997 (as amended) for the purpose of restricting or regulating the use or development of land. Such agreements can include financial provisions or 'developer contributions' where appropriate. Policy Del 1 of the Edinburgh provides the policy basis for seeking developer contributions.
- 3.2 Since the Local Development Plan (LDP) was adopted in November 2016 the Council has sought to progress statutory SG on this matter to adoption. The process includes a final stage during which the Council submits its proposed SG to Scottish Ministers for consideration. The Council cannot adopt the SG during the period for consideration and Ministers can extend the period for their consideration from the statutory timescale of 28 days.
- 3.3 Other statutory SG has been produced and adopted, with Scottish Ministers' approval, for all nine of Edinburgh's town centres and for Heat Opportunities Mapping, to assist in the implementation of LDP policies. These projects have all proceeded smoothly, demonstrating the Council's capacity to successfully create,

adopt and issue statutory SG. Since 2014 there has, however, been considerable engagement between the Council and the Scottish Government on the LDP. The key points of which are summarised in the table below.

Scottish Government Request/Direction	Council Action
During 2014-15 , made representations that the LDP should require statutory SG to be prepared, to allow third parties to scrutinise and challenge contribution zones.	Accepted this and provided positive input to LDP examination on practical issues of how to go about this.
In June 2016 the Directorate of Planning and Environmental Appeals (DPEA) report of examination made a binding recommendation which wrote Policy Del 1 into the LDP.	Complied with this in the LDP as adopted (November 2016), and prepared consultation draft SG in December 2016.
In February 2017 the Scottish Government responded to the draft SG with a focus on the reference to a new secondary school and housing in the International Business Gateway (IBG) proposals and on trunk road junction actions.	<p>At that time the Council did not change the reference to a new secondary school in the IBG, but did provide further explanation of its position on this proposal.</p> <p>The Council also made various amendments and clarifications including on trunk road matters and in response to points in representations from some 40 other respondents.</p> <p>The finalised SG was then submitted to Scottish Ministers, with supporting information, on 4 April 2017.</p>
In July 2017 , after the Council submitted its SG and after two extensions of time, Scottish Ministers directed the Council not to adopt SG. The sole reason given for the direction was the issue of a new secondary school in the IBG proposal.	<p>The SG was changed to omit reference to a new secondary school in the IBG proposals.</p> <p>The SG was re-finalised in September 2017 with supporting information and again submitted to Ministers.</p>
In December 2017 , after extensions of time and 83 days, the Scottish Ministers directed the Council not to adopt the revised SG, on procedural grounds as it took the view that the Council should have consulted on the SG as now submitted.	The Council reviewed this decision with legal input, taking account of Scottish Government and other responses to date, appeal decisions and new case law. New SG was subsequently prepared and published for consultation from January 2018 .
In March 2018 the Scottish Government responded to the new draft SG. Its comments related to the provisions of Circular 3/2012, concerns over potential for a new secondary	Detailed consideration with legal input was given to the Scottish Government representations, and all other representations.

<p>school in West Edinburgh, the West Edinburgh Transport Appraisal updates, and the status of Transport Scotland work on trunk road junctions.</p>	<p>A step-by-step consideration of points raised was undertaken by officers, and included in supporting information. A statement of conformity with the tests in Circular 3/2012 was included, with legal input.</p> <p>The SG was then finalised accordingly and submitted to Scottish Ministers with supporting information in September 2018.</p>
<p>In November 2018 the Scottish Government informed the Council that a DPEA Reporter has been asked to prepare a report on certain matters in the Council SG. There is no formal or statutory process for SG being examined in this way.</p>	<p>Officers advised they would provide any further information requested by the Reporter. No further information was requested by the Reporter.</p>
<p>In January 2019 the Scottish Ministers received the DPEA report.</p>	<p>No action – report was not made available to Council until January 2020, after the Ministers’ decision.</p>
<p>During March- June 2019 the Scottish Government carried out a process during which Council and parties who had made representations on draft SG answered written requests for information and commented on one another’s submissions.</p>	<p>Responses with legal input were provided to all requests by the deadlines given by the Scottish Government.</p>
<p>In Dec 2019 the Council received the last of several letters extending the time period of consideration, from the default period of 28 days to the final period of 497 days from the Council’s submission in September 2018.</p>	<p>Noted and communicated to Planning Committee as for all of the previous letters of extension.</p>
<p>In January 2020 the Ministers directed that the Council not adopt SG.</p> <p>The reasons stated were the four points listed in bullet points above.</p>	<p>Met with Scottish Government Chief Planner to seek guidance on how Council should prepare satisfactory SG.</p>

- 3.4 On 17 January 2020, the Scottish Ministers wrote to direct the Council not to adopt the SG. The reasons for the direction are summarised at 4.1 below. This response was provided 497 days from the submission of that SG, and 1,018 days since the Council’s first submission of a SG for adoption.
- 3.5 Following that decision, the Scottish Government made available the report produced for their Chief Planner by a DPEA reporter on 29 January 2019. The critical parts of the report raise new matters not previously raised by the Scottish

Government and not communicated to the Council until the publication of the Ministers' decision. There are also parts of the report which are useful in the Council's consideration of future action on the SG.

- 3.6 The Council's Chief Planning Officer has met the Scottish Government's Chief Planner to discuss how the Scottish Government can work with the Council on this matter, as discussed in section 4.7 below.
- 3.7 Throughout the above extended timescale, the Council has sought to follow and implement policy and advice provided by the Scottish Government.
- 3.8 During the above timeframe the Scottish Government published draft planning delivery advice on housing and infrastructure. This was intended to set out how the Scottish Government expects local authorities to ensure that infrastructure is funded, including developer contributions, and delivered to support housing growth. It was published as a draft in February 2016. Its finalisation was a commitment in the Scottish Government's July 2016 [response](#) to the independent review of the planning system. However, it was never finalised. The Scottish Government [withdrew](#) the draft in December 2017, citing disagreement and concerns. No other advice has been published in its place. The upfront presentation of requirements for developer contributions has been part of the Scottish Government's agenda for planning authorities throughout that timeframe.
- 3.9 In this time other local authorities have also experienced difficulties progressing their SG on developer contributions to adoption, in part due to directions from Scottish Ministers (e.g. Fife Council) and legal challenges (e.g. Aberdeen and Aberdeenshire Councils). The attempt to establish a firmer development plan context for infrastructure delivery through developer contributions in SESplan Strategic Development Plan 2 failed due to a lack of support from Scottish Government.
- 3.10 The Planning (Scotland) Act 2019 changes the relationship between development plans and supplementary guidance. After the provisions come into force, new statutory SG requiring Ministers' approval will no longer be allowed and will not be able to be a requirement of new Local Development Plans. However, the transitional and commencement arrangements for this provision in the 2019 Act are still being prepared by the Scottish Government and at this time the previous legislative basis remains. In the meantime, the current LDP provision expects that statutory Supplementary Guidance be prepared to inform use of Policy Del 1, and submitted to Scottish Ministers.

4. Main report

- 4.1 The reasons given in the Ministers' direction are as follows:
 - 4.1.1 the inclusion of details of healthcare actions, contributions and contribution zones within the SG does not meet the requirements of regulation 27(2) of the Town and Country Planning (Development Planning) (Scotland)

Regulations 2008. These matters are not expressly identified in a statement contained in the LDP as matters which are to be dealt with in SG;

4.1.2 it has not (on the evidence presented) been demonstrated that the contributions sought through the SG, in particular levels of education and road transport contributions:

4.1.2.1 fairly and reasonably relate in scale and kind to the proposed development; and

4.1.2.2 reflect the actual impacts of, and be proportionate to, the proposed development.

4.1.3 As presented, the SG does not provide sufficient certainty that contributions sought on the basis of it will be always be used for the purpose for which they were gathered.

4.2 As noted above, these matters were not raised with the Council in any previous feedback or advice and were only communicated to the Council as questions in March 2019 and stated as the Scottish Government's opinion with the Minister's decision in January 2020.

4.3 In terms of the first of these matters the Annex to the direction issued by the Chief Planner sets out that it is open to the Council to prepare separate non-statutory supplementary planning guidance incorporating similar provisions in relation to health care contributions. It is proposed to proceed on that basis by preparing new standalone non-statutory guidance on contributions to primary healthcare infrastructure. This can take account of the findings of the Scottish Government report on the finalised SG.

4.4 It is proposed to bring a draft of non-statutory guidance on health care contributions to Committee in May 2020 for approval to undertake a consultation exercise. This will assist in the implementation of LDP Policy Hou 10 Community Facilities by continuing to clarify the circumstances in which new housing development will be expected to contribute to necessary healthcare facilities.

4.5 The other matters relating to education and road transport identified in the reasons indicate a need to address the level and proportion of developer contributions attributable to some of the sites in some of the contribution zones in the finalised SG, which will require detailed cross-service work to be undertaken. The Minister's letter, with annex, gives usefully specific reasons for their direction. The DPEA reporter's report also provides useful feedback from that Reporter on both matters where he considers the Council's approach to be appropriate and matters where it needs to be developed further.

4.6 It is proposed that this detailed cross-service work on education and road transport matters be undertaken in collaboration with Scottish Government.

4.7 In discussions with the Council since the Minister's decision, the Scottish Government Chief Planner has given a commitment to provide support and guidance to the Council on how it could meet the Scottish Government's expectations with regard to statutory SG for this authority. It is critical that this

commitment is delivered on to ensure that the Council can address the Scottish Government's newly raised concerns.

- 4.8 The proposed approach will minimise the time in which there is uncertainty for stakeholders. In the meantime, applicants must comply with LDP Policy Del 1 in respect of a Council assessment of developer contributions as required to mitigate the impacts of their proposed developments.
- 4.9 For existing Section 75 agreements for previously issued planning permissions, it remains the case that developers have a statutory right to apply to vary these under Section 75A of the Planning (Scotland) Act 1997 (as amended 2006). Applications will continue to be assessed under LDP Policy DEL1 and this will be on the basis of whether there are any material considerations which justify the change proposed by the applicant. The rejection of the SG is not in itself a reason to approve an application to amend an agreement made under the SG values. The decision will depend on an assessment of the requirements of the development and an up to date assessment may not support the proposed change.

5. Next Steps

- 5.1 New guidance will be prepared as described in this report.

6. Financial impact

- 6.1 Any financial impacts arising from the preparation of new SG will be met from existing budgets.
- 6.2 LDP Policy Del 1 is used to support timeous delivery of essential infrastructure actions identified in the LDP Action Programme. There are previously identified risks associated with actions in the Programme. SG provides detail which helps manage that risk. Accordingly, the requirement to prepare new guidance, and the associated period of uncertainty, prolongs some of the risks associated with the LDP Action Programme. These have been the subject of [separate reports](#).

7. Stakeholder/Community Impact

- 7.1 Fresh statutory SG documents are published in draft for consultation responses prior to finalisation.
- 7.2 Guidance on this issue is intended to help ensure that impacts of planned growth are mitigated by any essential infrastructure capacity enhancements.
- 7.3 The SG is subject to the same governance as the related LDP Action Programme.

8. Background reading/external references

- 8.1 Letter to CEC instructing not to adopt Supplementary Guidance, [18 January 2020](#).
- 8.2 CEC submissions responding to Scottish Government and other parties, [5 April 2019](#) and [6 June 2019](#).
- 8.3 Scottish Government's letter requesting further information, [7 March 2019](#).
- 8.4 DPEA reporter's 29 January 2019 [report to Scottish Ministers](#) regarding City of Edinburgh Council Supplementary Guidance.
- 8.5 Supplementary Guidance on Developer Contributions and Infrastructure Delivery – Update, Report to Planning Committee, [27 February 2019](#).
- 8.6 CEC submission to Scottish Government, [7 September 2018](#).
- 8.7 Finalised Supplementary Guidance on Developer Contributions and Infrastructure Delivery, [August 2018](#).
- 8.8 Supplementary Guidance: Developer Contributions and Infrastructure Delivery – Finalisation, Report to Planning Committee, [22 August 2018](#).
- 8.9 Edinburgh Local Development Plan: Action Programme – adoption – Report to Planning Committee, [23 January 2019](#).

9. Appendices

- 9.1 None.