

# Planning Alert

October 2017

## Warning: Inspectors Read S106 Agreements!

A recent Secretary of State appeal decision underlines the importance of getting the S106 agreement right when there is a planning appeal. The decision concerned an application for a mixed use scheme including 705 residential dwellings at King George's Gate, Surbiton. The inspector concluded that the scheme was acceptable in all respects but noted several deficiencies with the S106 unilateral undertaking. The Secretary of State agreed and refused planning permission.

At the appeal the Council had tabled a paper setting out its concerns regarding the undertaking. The inspector did not agree with all of the Council's comments but he did highlight the following substantive and drafting issues which caused him particular concern:

- There was confusion in the drafting as to how many phases there would be, despite there being specific obligations linked to particular phases.
- The amount of affordable housing reduced automatically in the event of there being a requirement to contribute to offsite highway works. However there had been no evidence to demonstrate that the amount of the highways contribution equated in value to the reduction in affordable housing units.
- There was further ambiguity regarding additional reductions in the amount of affordable housing.
- Certain payments were linked to triggering events, but these were not defined in the undertaking. The inspector felt that such ambiguities made the contributions less secure.
- Certain obligations were unenforceable because there was no date by which they had to be complied with.
- With regard to the occupancy of the affordable housing units the undertaking made no provision for agreeing rent levels, household earnings limitations or affordable housing management strategies. The inspector felt it important for these matters to be included to provide clarity, certainty and security of provision.

Overall the inspector concluded that there were such deficiencies within the unilateral undertaking that if planning permission were to be granted they presented a risk that the obligations would not be delivered. The relevant obligations were necessary to make the development acceptable and without them the development would conflict with development plan policies. Accordingly he recommended refusal of the permission and the Secretary of State agreed.

This decision highlights the attention to detail that inspectors pay with regard to S106 agreements and unilateral undertakings and the need for appellants both to justify the contents of S106 agreements and to avoid drafting ambiguities. Whilst it would be possible to reapply for planning permission with these various matters corrected that is an expensive solution and the terms of option agreements etc. may not always allow that to happen.