

## Operational Decision Record

Publication Date 06 April 2023	Decision Reference Number 4914
<b>Decision Title</b>	
Allocation of s106 affordable housing developer contributions to the Padstow Ridgeway project to appoint Perfect Circle JV as the Council's agent	
<b>Decision Value</b>	
See exempt appendix	
<b>Revenue or Capital Spend?</b>	
Capital	
<b>Department</b>	
Growth and City Development	
<b>Contact Officer (Name, job title, and contact details)</b>	
David Baillie, Housing Regeneration Officer Email: <a href="mailto:david.baillie@nottinghamcity.gov.uk">david.baillie@nottinghamcity.gov.uk</a> Telephone: 0115 8763960	
<b>Decision Taken</b>	
To allocate currently uncommitted S106 developer financial contributions for affordable housing to support the development of new Council housing at the Padstow and Ridgeway sites in Bestwood ward.  To appoint the Council's agent for the Padstow and Ridgeway development using Scape's National Consultancy Framework.	
<b>Reasons for Decision and Background Information</b>	
<u>Reasons for decision</u>  Financial contributions from developers for affordable housing under S106 agreements made as a condition of planning approvals must be used to provide affordable housing. The City Council currently holds some uncommitted contributions. It is recommended that these be used to increase the approved budget for the Padstow Ridgeway development to cover the cost of appointing an agent because it would be a legitimate use of s106 contributions, since it supports the delivery of new affordable housing, and because it would be imprudent to commit the approved contingency before other foreseeable cost increases have been finalised (see exempt appendix).	

The City Council is contractually obliged (under the development agreement with Countryside) to appoint an external agent to act on its behalf in relation to this mixed tenure development of private market housing (for sale and rent) and Council housing.

The approved budget for the agent's fees needs to be increased for several reasons. It was calculated as a percentage of the contract sum for the Council housing (which has since been increased (see exempt appendix) without a corresponding increase in the amount for the fees) and was based on the assumption that Nottingham City Homes would act as the Council's agent to deal solely with matters relating to the Council housing element of the development, e.g. certifying contract sum payments, handovers, etc. During contractual negotiations with the appointed developer, it was agreed that the Council would appoint a wholly independent, external employer's agent, and that the scope of the service to be provided by the agent would be widened to include responsibilities relating to the delivery of the whole development (see exempt appendix). These involve determining whether the contractual conditions for the transfer of, and payment for, the second and final tranche of development land have been met. Furthermore, the sharp increase in costs across the construction sector since the original approval is likely to be reflected in the fee for an external agent agreed through a commercial procurement process.

The main additional cost against the contingency will be to cover the probable uplift in the market value of the General Fund land at these sites (see exempt appendix) since approval. This land must be appropriated to the Housing Revenue Account at market value in order to build the new Council houses. The estimated land price given in the original approval is subject to a valuation which is currently being finalised. S106 contributions could not legitimately be used to cover this cost increase.

### **Other Options Considered and why these were rejected**

Do nothing. This is not an option as the Council is contractually bound to appoint an external employer's agent to undertake a specified service, and the fee proposal obtained through the procurement process shows that the current approved budget is insufficient to cover that service (see exempt appendix).

Use the current approved contingency to cover the shortfall against the current approved budget for fees. This is not recommended as it is anticipated that the cost of appropriating the General Fund land to the Housing Revenue Account at market value will increase against the estimated amount allowed for in the approval following the valuation currently being undertaken (see exempt appendix). The current contingency would be able to contribute to meeting that increase whereas it would be illegitimate for S106 contributions to be used for this purpose.

Use the capital receipt for the first phase land transfer to cover the increase in fees. This is not recommended because various other costs are to be covered in

this way as legitimate 'costs of sale'. There is a ceiling on the amount that can legitimately be covered in this way (see exempt appendix).

### **Reasons why this decision is classified as operational**

This is an executive decision taken within agreed policies and within the overall agreed budget controlled by the officer taking the decision, and the value of the decision (see exempt appendix) is below £250,000.

### **Additional Information**

#### **Financial advice**

See exempt appendix. The exempt appendix contains financial information relating to the value of the contract for the agent, and details of the contract with the developer, which are commercially sensitive. The public interest in maintaining the exemption outweighs the public interest in disclosing the information because it would reveal details of the value of contracts which would prejudice future commercial negotiations.

#### **Legal advice**

##### **S106 Spend considerations**

The S106 Agreement for the Former Haywood School secured an Affordable Housing Contribution to be paid in the event that affordable housing was not delivered on that site. It is understood that such payment was made and £220,000 is available for allocation. The intention of the Agreement was that such sums would be used by the Council for affordable housing purposes though no further detail is specified within the agreement as to what the Contribution could or could not be spent on nor is there a requirement to repay the contribution if it is not spent within a defined timescale.

It is proposed that the Affordable Housing Contribution is used to pay EA fees and NCC Building Services for certifying monthly valuations prior to the EA's appointment rather than on the physical provision of the buildings themselves. Under s111 of the Local Government Act 1972 Councils have a subsidiary power to do anything (whether or not involving the expenditure of money) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions. The Council arguably therefore has the power to spend the contribution on fees so long as they are directly linked to the provision of affordable housing by the council. This is specifically permitted under the Council's current s106 templates though it was not when the Haywood School s106 Agreement was completed in 2014.

Ann Barrett, Team Leader Planning, Environment and Leisure Solicitors, 9 March 2023.

##### **Procurement and contractual considerations**

This decision seeks to utilise s106 funds (my colleague Ann Barrett has offered legal comment) and to appoint an agent for the Council using Scape's National Consultancy Framework.

It is understood from previous connected reports that Procurement colleagues have advised that the use of the Scape Framework is a route to market that creates no procurement concerns, this meeting the requirements of the Council's own constitution and legal requirements.

Colleagues should still ensure that the form of contract proposed by the Framework is suitable to the prevailing circumstances and that the Council can meet any obligations imposed on it by that contract.

Anthony Heath, Senior Solicitor, 3<sup>rd</sup> April 2023

### **Procurement advice**

Scape frameworks are considered to be compliant with procurement regulations;; their use is permitted under article 18.43 of the Constitution; and the framework is single-supplier, allowing for direct appointment. Thus there are no Procurement concerns with engaging Perfect Circle JV Ltd via Scape's National Consultancy framework as Employer's Agent for this project.

Jonathan Whitmarsh, Lead Procurement Officer, 4<sup>th</sup> April 2023

### **Ward Councillors**

Bestwood ward Councillors were consulted on 7/11/22.

### **EIA**

An EIA is not required as this decision does not propose any changes to policies or services.

### **Capital spend**

This decision was approved by the Capital Board Officers' Group on 6/3/23. Capital Board was advised of the Officers' Group decision on 15/3/23.

### **Risks**

See Legal advice (above) and exempt appendix.

<b>Decision Maker (Name and Job Title)</b>
Sajeeda Rose, Corporate Director for Growth and Development
<b>Scheme of Delegation Reference Number</b>
1. All functions within remit. 7.a Framework Agreements
<b>Date Decision Taken</b>
6/4/23