



Llywodraeth Cynulliad Cymru  
Welsh Assembly Government

# **Delivering affordable housing using section 106 agreements:**

## **A Guidance Update**

**September 2009**

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# **DELIVERING AFFORDABLE HOUSING USING SECTION 106 AGREEMENTS: A GUIDANCE UPDATE**

Cambridge Centre for Housing and Planning Research and Three Dragons  
for the Welsh Assembly Government

**September 2009**

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## **1 PURPOSE OF UPDATE TO THE GUIDANCE**

- 1.1 The Welsh Assembly Government published its practice guidance, 'Delivering Affordable Housing Using Section 106 Agreements' in July 2008. Its aim was to assist local planning authorities improve the development, negotiation and implementation of s106 agreements so that more affordable housing is delivered through the planning system. The Assembly Government is aware of the impact of the economic downturn on the housing market and has requested an update to the guidance which helps maintain the delivery of affordable housing.
- 1.2 Wales, like the rest of the United Kingdom, has been affected by the global "credit crunch" and house prices and housing starts have fallen substantially. It is likely that house prices will not speedily return to previous levels and this will pose problems for land bought and schemes conceived in 2007 at the height of the house price boom. However it is important not to be too pessimistic or to make the assumption that a drop in house prices necessarily translates into a long term reduction in housing output. There is ample evidence from the past (particularly the 1930s) to indicate that this is far from being the case.
- 1.3 But lessons learnt then indicate that a recovery in housing activity requires positive intervention by both central and local government as well as flexibility and willingness to consider new ways of doing things in the private, public and social sectors.
- 1.4 This update to the original practice guidance looks at how local authorities can use the planning process to facilitate and bring forward development, whilst ensuring that they continue to deliver the maximum possible amount of affordable housing. It draws on emerging good practice from across the United Kingdom and provides clear protocols for the review of s106s and evaluation of scheme financial viability.
- 1.5 However planning policy alone is not enough to maintain affordable housing delivery. The Welsh Assembly Government has put in place a number of initiatives, such as the Strategic Capital Investment Fund (SCIF), to support the delivery of affordable housing and it is continuing to work with local authorities and its wider delivery partners in the housebuilding industry and the social housing sector to develop new mechanisms to aid recovery.
- 1.6 Equally local authorities need to review the range of powers open to them and consider how they can best support the provision of affordable housing in their area. Although this guide is primarily about planning, it touches on the use of wider local authority powers and provides pointers to a range of new initiatives which are emerging at national and local level as stakeholders come together to develop innovative solutions to the delivery of affordable housing.
- 1.7 This update to the original guidance was prepared for the approval of the Welsh Assembly Government by the Cambridge Centre for Housing and Planning Research and Three Dragons and is based on research undertaken by the consultant team both in Wales and in England during summer 2009.

1.8 The research covered:

- A rapid review of the literature
- An overview of market performance
- Telephone discussions with steering group members
- Consultation with the Planning Inspectorate
- E-mail survey of all local authorities in Wales
- Telephone discussions with selected Welsh local authorities
- E mail survey of Welsh housebuilders
- Round table discussion with a group of Welsh housebuilders
- E mail survey of English housebuilders
- Telephone discussions with 'key players' in England (e.g. Homes and Communities Agency (HCA), The Advisory Team for Large Applications (ATLAS), Home Builders Federation (HBF))
- Identification of good practice local authorities in England and telephone discussions to explore the initiatives further.

1.9 The update covers first, an overview of what has been happening to the housing market recently which demonstrates the extent of the market downturn. Next, current initiatives undertaken by the Welsh Assembly Government are summarised. This is followed by a section on understanding the viability of new development and the way in which affordable housing and other planning obligations impact on viability. The next three sections outline emerging planning mechanisms for dealing with the effects of the downturn on new development, procedures that might be used to deal with the uncertainty of the housing market and finally a range of other options that local authorities might wish to consider. Where possible, examples of Welsh practice are given, while elsewhere examples from England are used, reflecting the current situation.

1.10 The consultant team would like to thank the Steering Group and all the interviewees who gave freely of their time, often at very short notice, to talk to the researchers and explore reactions to the credit crunch. Contributors are not, of course, responsible for any errors or omissions.

1.11 The Steering Group members were:

Vicky Abraham, Vale of Glamorgan Council (Welsh Local Government Association)  
Judith Askew, Housing Directorate, Welsh Assembly Government  
Nikki Cole, Wales & West Housing Association  
Alan Colston, Valuation Office Agency  
Sally Davies, Newport City Council (Welsh Local Government Association)  
Neil Hemington, Planning Division, Welsh Assembly Government

Richard Price, Home Builders Federation  
Paul Robinson, Planning Division, Welsh Assembly Government  
Huw Williams, Geldards LLP

## 2 MARKET OVERVIEW

### House prices

- 2.1 According to Land Registry data house prices in Wales fell by 12.5% in the year to June 2009. The fall was most marked in Caerphilly where house prices fell by 18.3%.

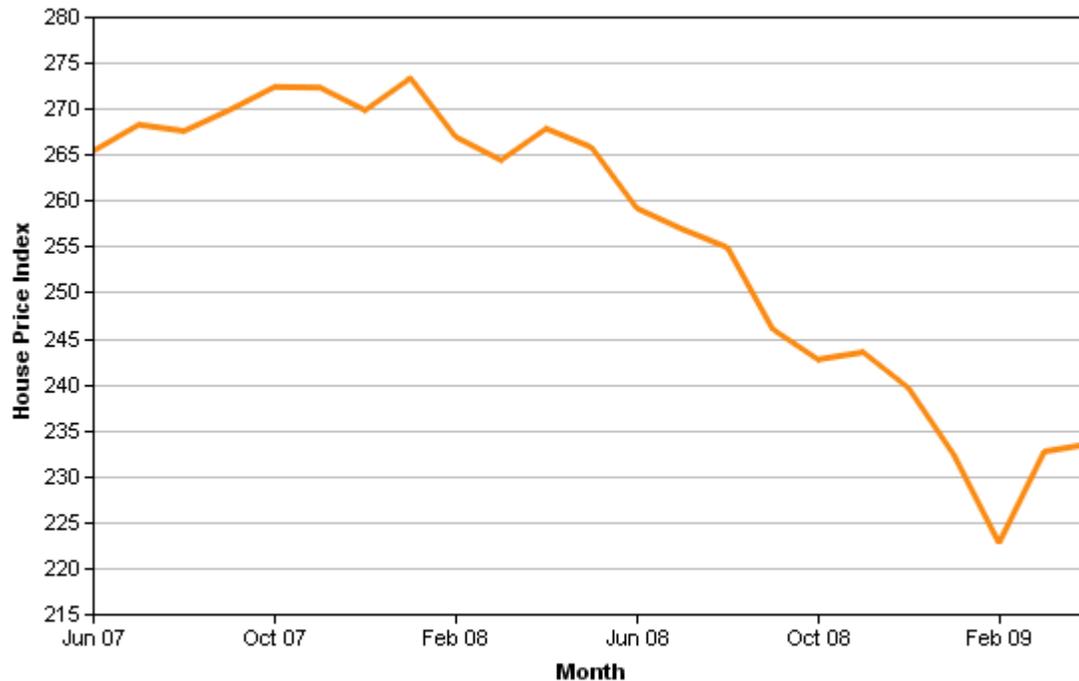
**Table 2.1: House price and changes – by local authority**

Local Authority	Ave. House Price June 2009 (£)	Annual Percent Change
Blaenau Gwent	78,671	-14.8
Bridgend	119,095	-13.9
Caerphilly	97,800	-18.3
Cardiff	135,468	-12.7
Carmarthenshire	116,211	-9.9
Ceredigion	154,895	-15.0
Conwy	133,533	-15.7
Denbighshire	117,287	-13.2
Flintshire	126,183	-12.9
Gwynedd	135,825	-14.5
Isle of Anglesey	132,453	-15.0
Merthyr Tydfil	77,014	-9.0
Monmouthshire	164,238	-14.6
Neath Port Talbot	93,706	-12.3
Newport	115,470	-18.2
Pembrokeshire	145,314	-14.8
Powys	149,911	-10.5
Rhondda Cynon Taff	79,874	-15.1
Swansea	108,873	-15.4
The Vale of Glamorgan	155,967	-9.0
Torfaen	114,145	-8.7
<b>Wales</b>	<b>118,607</b>	<b>-12.5</b>
Wrexham	122,727	-13.8

Source: Land Registry  
<http://www1.landregistry.gov.uk/assets/library/documents/hpi-june2009.pdf>

- 2.2 The house price index (1995 = 100) for Wales had fallen to 222.8 in January 2009 and by April had risen to 233.6.

**Chart 2.1: House Price Index – Land Registry data**  
**House Price Index - Wales Region**

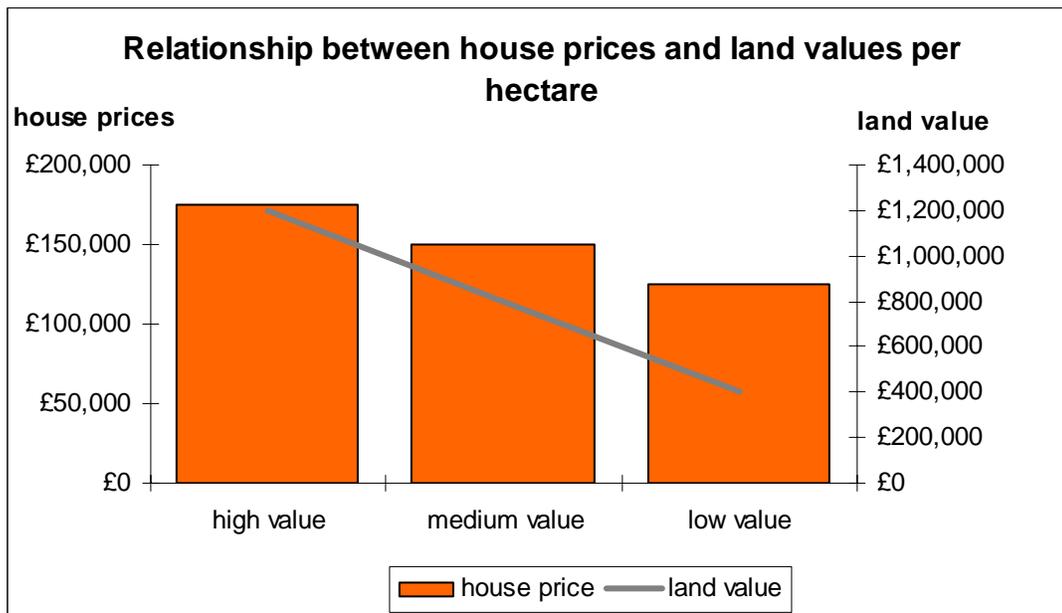


Source: Land Registry

<http://www1.landregistry.gov.uk/houseprices/housepriceindex/report/default.asp?step=3&locationType=0&area=Wales&reporttype=1&image.x=9&image.y=7>

- 2.3 Land values are closely associated with house prices, with a fall in house prices having a more significant impact on land prices because development costs, although now starting to decline, have not fallen at anything like the same rate. Chart 2.2 below shows the impact on land values of a fall in house prices from £175,000 to £125,000. In the example shown house prices fall by just under one-third, but land values fall by two-thirds from £1.2m per hectare to £400,000 per hectare.

**Chart 2.2: House prices and land values**



Source: Consultant team's own modelling

- 2.4 Fuelled by the continued rise in house prices, land values in Wales rose at an unprecedented rate over the past five years (to 2008). However, since then land values have been falling and the number of transactions has dropped.

### **Mortgage availability**

- 2.5 Council of Mortgage Lenders (CML) statistics<sup>1</sup> show that in 2008 there were 21,600 loans for house purchase in Wales. This is a 48% decline from 41,700 in 2007 and the lowest number of loans since 1974. In the first quarter of 2009 there were 3,300 house purchase loans in Wales, down 30% from 4,700 in the previous quarter and 42% from 5,700 in the first quarter of 2008.
- 2.6 The CML report<sup>2</sup> comments that *“the UK as a whole experienced a similar decline (-49%) as lending activity slowed due to a shortage of funding for mortgages and reduction in the number of active lenders in the market. Consumer demand for mortgages has also waned in the face of an uncertain economic outlook, rising unemployment and falling house prices.”*

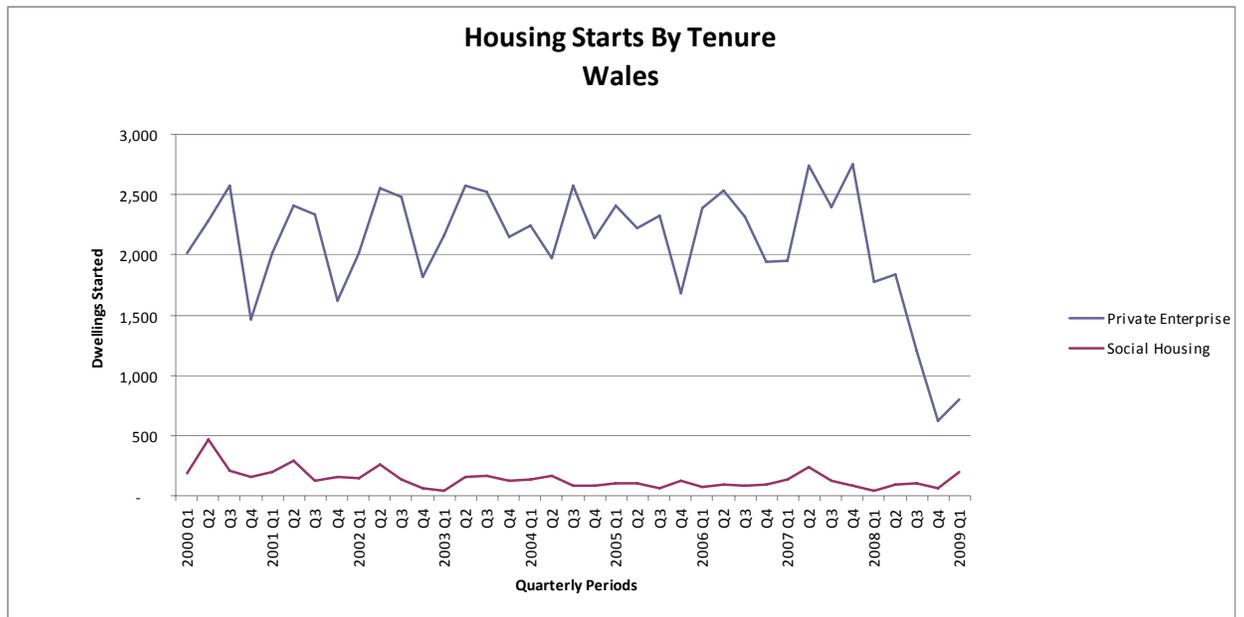
<sup>1</sup> Council of Mortgage Lenders (2009), Cymru Factsheet, housing and mortgage market update

<sup>2</sup> *ibid*

## Housing starts

- 2.7 Chart 2.3 below shows that private housing starts in Wales, which had been averaging around 2,235 per quarter during the period from 2000-2007, began to fall in early 2008 and in quarter 4 2008 there were only 620 private sector starts, although this rose to 802 in the first quarter of 2009. Social sector housing starts have also tailed off, averaging 145 per qtr in the period to end 2007, but only 73 per qtr during 2008 and reaching 203 in the first quarter of 2009.

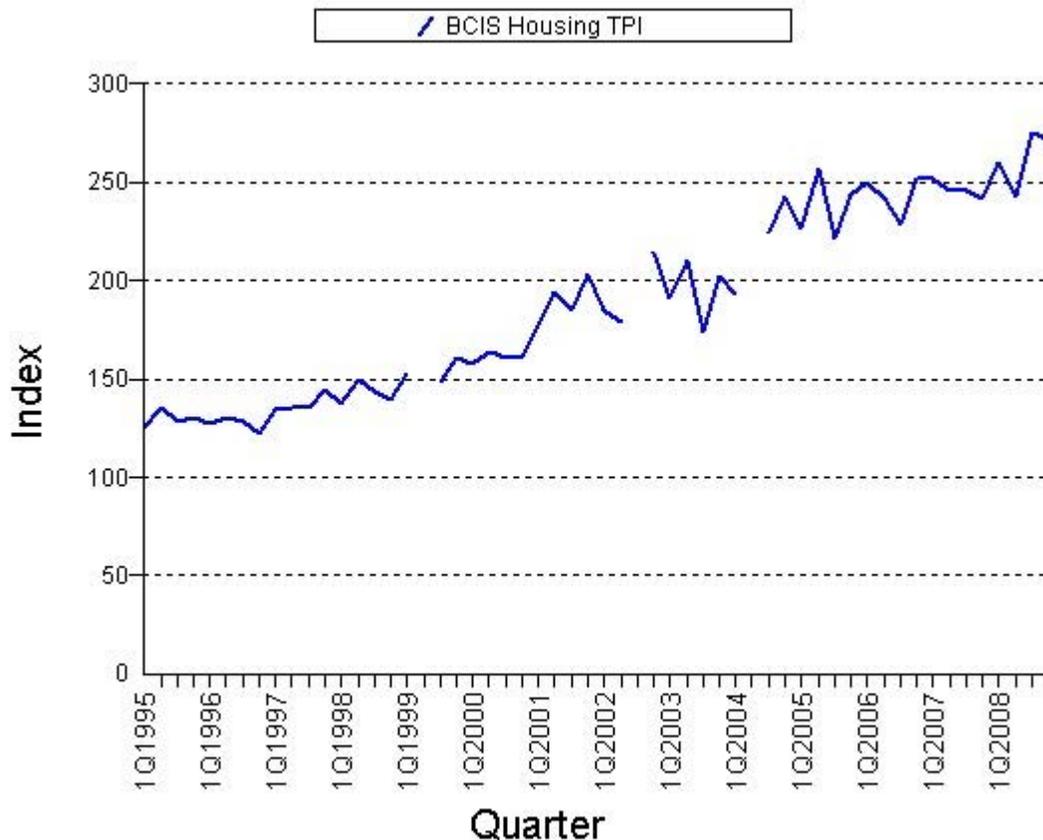
**Chart 2.3: Housing starts by tenure**



Source: CLG live table 214 house building in Wales by tenure  
(now includes Q1 data, Q2 out 16<sup>th</sup> Sept 2009)

## House Building Costs

The Building Cost Information Service (BCIS) housebuilding tender price index (which predominantly reflects tenders to RSLs) peaked at 275 in the 3<sup>rd</sup> quarter of 2008 and has since fallen to 261 in the first quarter of 2009.



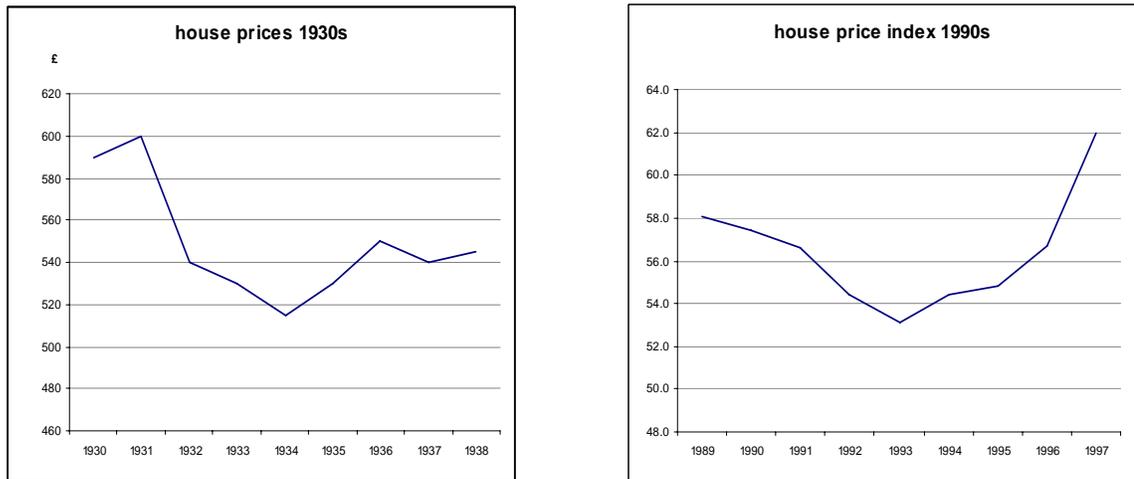
Source; BCIS Housing Online Housing Tender Price Index September 2009

### Anticipated length of the recession

- 2.8 Possible mechanisms to help alleviate the current fall in housing output and affordable housing provision in particular will be influenced by whether the recession in the housing market is believed to be short or long term. If housing markets and housing activity are expected to revive within 2-3 years then a strategy of bringing forward public spending now and letting the market look after itself in the future may be a realistic option. If house prices (and housebuilding) are expected to remain flat over the medium to long term then a wider range of mechanisms is required.
- 2.9 As chart 2.4 below shows, during the two previous recessions in the housing market in the 1930s and 1990s house prices remained below peak levels for up to 8 years. Whilst the future is not necessarily like the past local authorities

should consider the possibility that house and land prices will not return to 2007 levels for several years and that this will have an impact on sites purchased at the peak of the market, which will remain “toxic assets” on the books of housebuilders and RSLs.

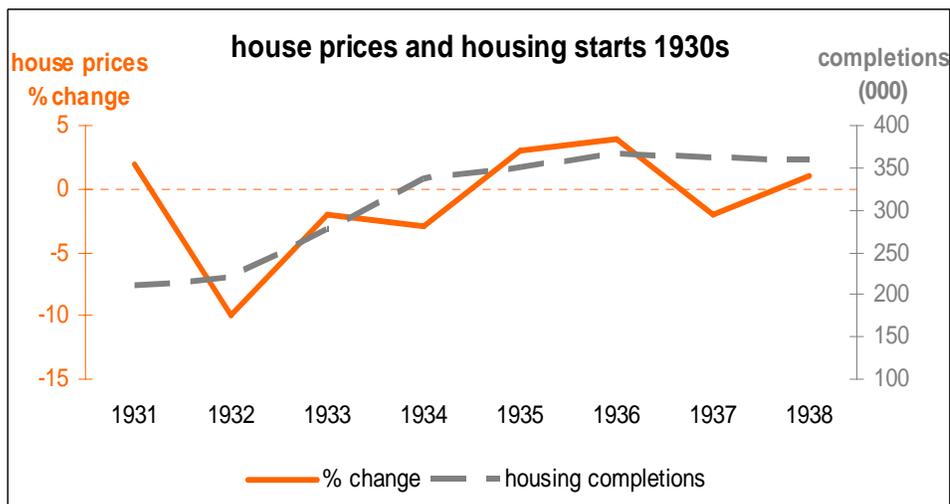
**Chart 2.4: House price change 1930s and 1990s**



Source: CLG live table 502: 1930s actual house prices, 1990s index Q1 2002 = 100

2.10 However it should not be assumed that falling house prices automatically equate to a fall in housing output. In the 1930s, although house prices remained depressed for most of the decade, housing starts remained buoyant, largely because of an active programme of public and private sector intervention to support the market.

**Chart 2.5: House prices and housing starts 1930s**



Source: CLG live table 502 and Abstract of British Historical Statistics

## **Summary**

- House and land prices in Wales have fallen from their 2007 peak.
- Mortgage availability remains problematic.
- Housing starts have fallen in both the private and the social sectors.
- House price change of this magnitude normally takes some years to resolve, but it is not necessarily associated with a continued fall in housing output.

### **3 WELSH ASSEMBLY GOVERNMENT INITIATIVES**

#### **Affordable Housing Delivery Statements**

- 3.1 All local planning authorities (including the National Park Authorities, NPA) have been asked to produce Affordable Housing Delivery Statements (AHDS) (2007 to 2011) as an interim measure, prior to the adoption of Local Development Plans. The Statements may be used to assess housing need and therefore potentially may inform the allocation of Social Housing Grant in the future.
- 3.2 The final guidance on AHDS issued in January 2009 made reference to current market conditions in awareness that it was more difficult to achieve affordable housing through s106 routes at the current time. However, it is important that affordable housing policies still seek to obtain affordable housing contributions as the housing market downturn may continue for some time.
- 3.3 The overall aim of AHDS is to provide a clear statement of how a local authority intends to improve delivery of affordable housing as part of its strategic housing and planning functions. The local authority should assess housing need in the area; set out a local target for the delivery of affordable housing 2007 to 2011 (2007/08 and 2008/09 will be numbers of units actually delivered) and the mechanisms by which this should be achieved, including targets for the amount of affordable housing to be sought on new developments.
- 3.4 AHDS are to be informed by a robust shared evidence base and planning departments and housing services have equal and key roles to play in the preparation of AHDS. The preparation of AHDS should be carried out in with local stakeholders, building on their existing strategic housing partnerships.
- 3.5 AHDS were due to be submitted to the Welsh Assembly Government by end of May 2009. However some local authorities and NPAs have negotiated extensions for final drafts up to September 2009.

#### **Strategic Capital Investment Fund (SCIF)**

- 3.6 The Welsh Assembly Government has introduced a number of initiatives to maintain momentum in house building and to support the delivery of affordable housing – to help meet the One Wales commitment of providing an additional 6,500 affordable homes.
- 3.7 SCIF resources of £42m have been made available as Social Housing Grant over a three year period from 2008/09 to 2010/11. In 2008/09 over 200 additional affordable homes have been delivered and 25 developers assisted.
- 3.8 Under SCIF criteria completed or semi-completed properties and private land could be bought if Value for Money could be demonstrated. This has helped to boost numbers of affordable homes and support the construction and development industry during the housing market downturn. The Welsh Assembly Government is working with the Home Builders Federation to identify key sites across Wales where development has stalled, with a view to identifying opportunities to bring development forward in the short-term.

## Other measures

- 3.9 The Welsh Assembly Government is considering further housing support measures to boost the supply of affordable housing and support the construction industry. Wales requires around £250m of private finance per annum to support its existing social housing investment programmes. One option would be to do this through a Welsh Housing Bond. A range of options is being considered by the Welsh Assembly Government. A Bond could fund traditional schemes but could also potentially create substantial new funding (an *estimated* £500-£600m) for a range of ownership and rental products such as intermediate rental products or Local Housing Companies.
- 3.10 The Welsh Assembly Government is also working to release key Welsh Assembly Government and Assembly Sponsored Public Bodies Land across Wales through the “Land Release Protocol for Affordable Housing”. Funding for these sites is currently under consideration. The Assembly Government is also working with local authorities to ensure that local authority sites are released for affordable housing.

## 4 UNDERSTANDING VIABILITY AND THE IMPACTS OF AFFORDABLE HOUSING AND OTHER PLANNING OBLIGATIONS

### The relationship between house prices and viability

- 4.1 The 2008 Practice Guidance included sections on *Development Economics: The Basics* and *Making Use of Development Appraisals*. It is not intended to repeat this information here. However, economic viability can be even more critical during an economic downturn when following a period of boom in the housing market, house prices begin to fall, perhaps meaning that planned new development is no longer viable.
- 4.2 In these circumstances, local planning authorities may find that developers come to them with requests to renegotiate s106 agreements. Developers may argue that the terms of the s106 agreement were set in the context of rising house prices and that the recent fall has made the scheme unviable unless the s106 contributions are reduced. The Welsh Assembly Government does not wish to see affordable housing contributions reduced but it is recognised that there may be a need for flexibility to ensure that schemes go ahead and contributions are delivered.
- 4.3 The viability of a development depends ultimately on what price the developer can get for the new homes. The number of new units that can be delivered on a given site multiplied by the average likely dwelling price determines the gross development value. Development costs, including the developer's profit margin are deducted from this, giving the total amount left available to pay for the land (the residual value). S106 contributions must also be deducted from the gross development value, and the higher these contributions, the more the land value will be squeezed. So s106 contributions will impact on the overall profitability or viability of a scheme and this sets a limit on the amount of s106 contributions that can be negotiated.
- 4.4 In a recession when house prices are falling, the gross development value of a scheme will be reduced and this could be so severe as to make the scheme unviable in its present form.
- 4.5 It is not just affordable housing that impacts on viability, all other s106 contributions do so as well, such as education, open space, community facilities, transport and highways and public art. In addition, the Code for Sustainable Homes makes development more costly, and this too has an impact on scheme viability.
- 4.6 However in a recession construction costs may also fall, making new development cheaper to deliver. This appears to be the case in the current climate. Cost reductions will need to be taken into account in assessing viability.
- 4.7 The issues facing local planning authorities in these circumstances are the same whether they are considering re-negotiating an existing s106 agreement or starting to negotiate a new s106 agreement. The only difference is that where an agreement already exists, there is a fall-back position – if the authority decides to 'stick to the policy' and do nothing, then (subject to the statutory modification

procedure in s106A and B) the existing agreement remains legally binding, although there is a chance that the development will not go ahead and achieving wider authority objectives would be put at risk.

### **The key issues facing planning authorities**

- 4.8 The two key issues for local planning authorities in terms of viability in a volatile and uncertain market are:
- how to be convinced that the scheme is unviable with s106 contributions in full as in the agreement;
  - what to do once they are convinced.
- 4.9 This section outlines what is required for local authorities to be convinced that a scheme is unviable in the present economic situation. The next sections address what they should do if they are convinced that a scheme is no longer viable.

### **Circumstances in which adverse viability is an issue**

- 4.10 The circumstances in which viability can become an issue include falling house prices, falling sales rates and reduced payments for the affordable housing. Rising costs, such as those associated with higher quality standards, can also affect viability.

### **Negotiating with a developer in these circumstances**

- 4.11 In circumstances where the developer is claiming that the scheme as agreed is no longer viable, or that the scheme cannot meet the local planning authority's (LPA) policy requirements, it is important that local authorities are clear about what is needed as a pre-requisite before making a decision. It is also important that while local authorities must undertake viability assessments to ensure that their policies, thresholds and percentage targets for affordable housing are economically viable, developers will need to provide the necessary up to date information to demonstrate that an individual scheme would not now be viable. It will not be enough simply for the developer to assert that this is the case, evidence will need to be provided.

### **Principles of viability appraisal**

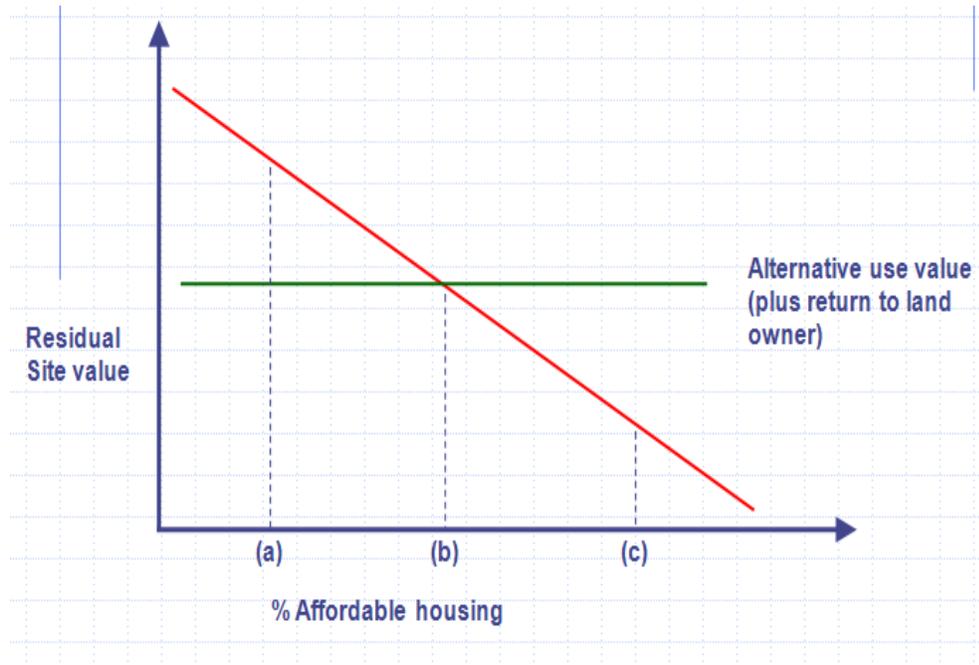
- 4.12 There is a range of possible models for viability appraisal of development sites. In Wales the model which is most commonly used is the Development Appraisal Toolkit (DAT)<sup>3</sup>. Viability appraisal models rely on the principle of residual valuation which seeks to compare revenue with development costs in order to derive a residual land value and then see how this residual land value compares with either existing use or alternative use value.
- 4.13 Put crudely, development will not go ahead unless there is a positive residual value and the land value exceeds both the existing use and the alternative use

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<sup>3</sup> A excel based model developed for a consortium of local authorities in Wales by Three Dragons

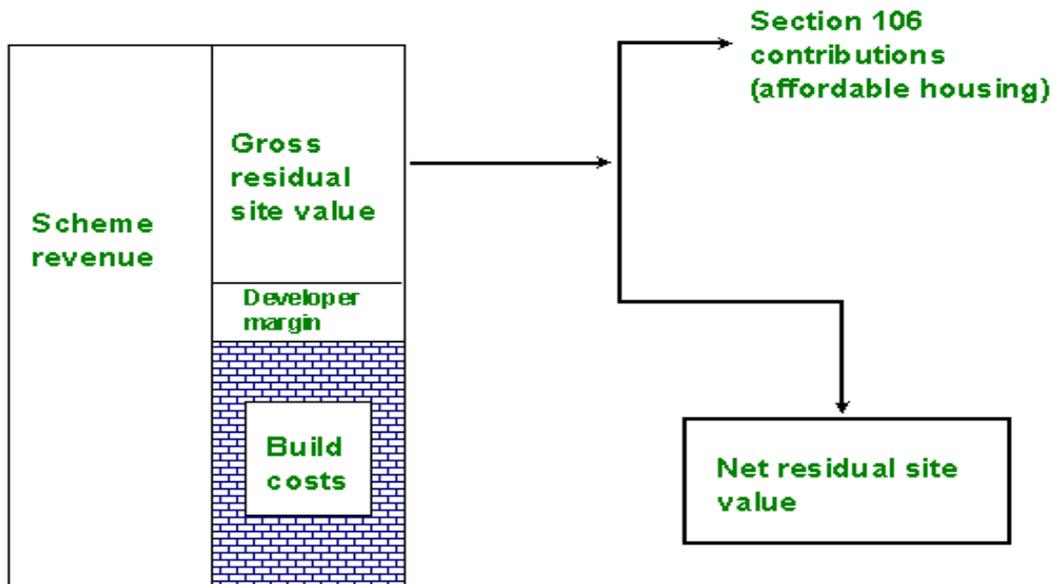
value by a margin which the landowner considers to be reasonable in the current market, taking account of any tax obligations associated with the sale of land.

**Figure 4.1 Affordable housing and existing/alternative use value**



4.14 It is possible to use a residual valuation model to test the impact of the requirement to provide affordable housing both with and without grant and to test the impact of wider planning obligations and any increases in development costs. This is illustrated in Figure 4.2.

**Figure 4.2: Residual valuation model**



4.15 In carrying out a viability appraisal in conjunction with a developer, a local authority will want to take into account:

- What would have been a realistic land value at the time the site was bought: taking into account known requirements for affordable housing and wider planning obligations at that time (and how did this compare with alternative/existing use value);
- Impact of any change in house prices or base development costs since the site was bought;
- What assumption was made about the availability of grant and whether or not that assumption is still realistic;
- Whether wider planning obligations or development cost requirements have changed and what is the impact on the development;
- Whether the proposed density or mix of housing has changed to reflect current market conditions and what impact this has on viability;
- Impact of any known abnormal site constraints and the costs associated with remediation.

4.16 When assessing what would have been a realistic land value when the site was bought, local authorities need to know whether the developer actually bought the site or whether it is held on option. If the latter, then with falling land values the price should be renegotiated to improve viability, rather than requiring public subsidy or reduced s106 contributions which would simply accrue to the landowner.

- 4.17 The 'valuation date' or appraisal date should be the date of the renegotiation, therefore revised land values should also be taken into account when assessing the viability of the scheme for affordable housing.
- 4.18 An example of a specimen financial appraisal for a 30 unit site is provided in Box 1. This is based on notional values and does not represent any particular scheme.

**Box 1 Viability appraisal of a 35 unit site bought in 2007**

**35 three bed houses on a 1 hectare site, market value £170,000**  
**20% social rent, 10% Homebuy, full grant available on all affordable units**

**Option 1**

2007 base residual value = £1.96m

**Option 2**

House prices fall by 20%

Residual value = £1.34m

**Option 3**

House prices fall by 20%, grant is no longer available and developer is required to provide affordable housing at a 25% discount on ACG

Residual value = £903,000

**Option 4**

House prices fall by 20%, grant is no longer available and developer is required to provide affordable housing at a 50% discount on ACG

Residual value = £475,000

**Option 5**

House prices fall by 20%, grant is available and scheme costs increase by a notional £5,000 per dwelling. (This could be a result of, for example, a more expensive planning obligations package and/or higher quality of development sought. But note that the £5,000 cost increase is entirely illustrative and does not represent any view on how future costs might change).

Residual value = £1.16m

**Option 6**

House prices fall by 20%, grant is available and scheme costs increase by a notional £15,000 per dwelling. (This could be a result of, for example, a more expensive planning obligations package and/or higher quality of development sought. But noting that the £15,000 cost increase is entirely illustrative and does not represent any view on how future costs might change).

Residual value = £815,000

- 4.19 The output of the appraisal process will be a series of figures on land value showing both the original base land value taking into account planning policies in place at the time and the current land value. Where it can be shown that the developer bought the land without taking into account existing planning policies and that those policies would have generated a viable land value, the LPA will need to take this into account and may be justified in refusing planning permission if the developer cannot meet the planning obligations without making the scheme unviable.
- 4.20 Actual prices paid for land are available post 2002 from the Land Registry website<sup>4</sup> for a small fee. Therefore for recent developments it is possible for the local authority to verify when the site was bought and what was paid for it. The Valuation Office Agency<sup>5</sup> may also be able to assist with verifying land values. Where it is known that developers or RSLs have written down land values across their portfolio by £X amount the local authority may also wish to take this factor into consideration.
- 4.21 Where the developer had paid a realistic price for the land taking into account existing plan policies, but either market change or changes in development costs have rendered the scheme uneconomic, then the local authority needs to consider its priorities and take a pragmatic view on affordable housing sought which will enable the site to come forward. Planning authorities should not accept schemes where wider planning policies (e.g. provision of supporting infrastructure) cannot be satisfied because of site viability issues and the development would therefore be unacceptable in planning terms.
- 4.22 The Planning Inspectorate's (PINS) view is that it is not reasonable for local authorities to ignore economic realities and simply stick to a policy requirement that was drafted and approved in different times. This reflects the general principle that planning decisions should take into account all material considerations existing at the time of the decision.
- 4.23 Viability appraisal works best where there is co-operation between local authority and developer. Should it come to appeal, PINS report some difficulty in being given complete evidence on viability; it tends to be from the developer with little from the LPA side other than a challenge without any rebuttal evidence. Agreement on baseline assumptions around viability will do much to enable the Inspectorate to take a clear view on the planning arguments underlying each case.

#### **Undertaking viability assessments**

- 4.24 Provided that the policy, threshold and targets accord with national policy and have been subject to a viability appraisal, the onus must lie with the developer to explain why a scheme is not viable. It is not for the planning authority to second

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<sup>4</sup> <http://www.landregistry.gov.uk/>

<sup>5</sup> <http://www.voa.gov.uk/>

guess which schemes may or may not still be viable in the absence of developer information. Therefore the developer must provide sufficient information to show the planning authority how the scheme revenue is generated, what the scheme costs are and how they have changed, and how these elements affect the outcome in terms of residual value and s106 obligations.

- 4.25 The ideal solution is to use a single, shared, financial appraisal model. It will be important to ensure that all inputs to the model are agreed. If this cannot be achieved, then either independent advice will be sought on these inputs or the model will be run with different assumptions to see what difference this makes.
- 4.26 Alternatively the developer should provide the necessary information as 'open book' and the LPA and the developer agree a mechanism for an independent review of this.
- 4.27 It will be useful for the developer to indicate what has changed, for example, the scale of the fall in market value, increase in costs etc., since the original s106 was agreed or the local policy was set out.
- 4.28 For large schemes with a long development period, it will be important to ensure that everyone has the appropriate information about phasing.
- 4.29 In sum, there are two main ways to test whether a scheme has become unviable because of the fall in house prices and/or increased costs. These are:
- to use the local planning authority's own resource (modelling) but with inputs agreed with the developer;
  - to go 'open book' with the developer, using an independent assessor.

In both cases, the authority can either use in-house expertise or use experts from outside the authority. The latter includes the District Valuer as well as consultants.

- 4.30 Modelling in-house involves using average values for the key elements of an appraisal – house prices, construction costs and acceptable developer profit margin. There are several development appraisal toolkits which can be used, however, authorities lacking expertise and experience of using toolkits may find it more appropriate to use external advisors.
- 4.31 Going 'open book' also requires some confidence as the developer may use a different toolkit or make assumptions that are specific to that company. Again, local planning authorities asking for 'open book' are likely to have some experience of development appraisals, and if not, may wish to use external expertise. In terms of information requirements, asking for an 'open book' means that the developer should provide all the details of the original appraisal plus information to demonstrate that prices have fallen and sales slowed compared with what was anticipated. The appraisal can then be undertaken either in-house using the authority's property department or using external advisors.
- 4.32 Some local planning authorities may find it difficult to undertake viability appraisals in-house or to ask for the developer to open the books because they

lack the expertise. This is where using experts from outside the authority such as the District Valuer or a private firm of chartered surveyors can be helpful. In this case the developer must provide whatever information is required by the independent expert who will then do the appraisal and advise the authority. The authority may require the developer to pay the costs of independent advice.

- 4.33 Developers should also indicate what sort of changes to the scheme would be required to make it viable. Again, these can be assessed either in-house or using independent advisors.
- 4.34 In some cases the developer may want to increase the proportion of the scheme that is affordable housing; this could be for dwellings yet to be built or dwellings already completed. If for dwellings not yet built, the agreement of the local authority would be needed and the normal procedures relating to grant and standards would apply. Under SCIF Tranche 1, 2008/11 where (semi) completed market units were purchased by RSLs, there has been flexibility on standards but this SCIF has now been allocated.

#### **Evidence required from developers**

- 4.35 The key pieces of information that are required from the developer will be broadly the same whether it is a new scheme with negotiations just underway or whether a developer is requesting the renegotiation of an existing s106 agreement. A suggested list of information is shown below. The exact content of the information list could vary depending on the approach the authority will take to assessing viability and whether the scheme is in outline or full details are available. It will be good practice for an authority to clearly set out the information they will look for and how outline applications will be treated.
- number and mix of units (i.e. flats, houses, no. of bedrooms, no. of wheelchair units etc.);
  - type and number of affordable housing units;
  - prices currently being achieved/proposed for completed units;
  - sales records over time (to establish how far these have slowed or ceased);
  - assumed receipts for the affordable housing and assumptions about availability of SHG<sup>6</sup>;
  - price paid for land and date at which paid, plus if bought on option full details of the option contract;
  - building costs – including sunk costs (non-recoverable) and work-in-progress and assumed level from the Code for Sustainable Homes ;

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<sup>6</sup> Housing associations operating locally can advise on realistic assumptions about the level of payment that associations can make and how these might relate to the ACG regime. A minimum figure for a payment would be the amount that the association can borrow against the net income it receives from the property.

- other development costs e.g. professional fees, sales and marketing costs;
  - developer and contractor's return assumed;
  - contribution to scheme from any other source;
  - planning obligations sought.
- 4.36 But what is key is that the LPA and the developer need to agree all the factors that will be included in the appraisal and if they cannot, the fall back position should be either
- the use of an independent expert at the developer's expense, or
  - using the agreed toolkit with different assumptions/ input to see what the differences are between the developer's appraisal and the LPA's version.

### **Code for Sustainable Homes**

- 4.37 The introduction of the Code for Sustainable Homes may increase development costs without any compensating increase in value and this will have adverse impact on viability. From September 2009, the Assembly Government expects that applications for five or more dwellings will meet the Code for Sustainable Homes Level 3 and obtain six credits under *Ene1 – Dwelling Emission Rate*. Applications for 1 or more dwellings will be expected to meet the same standards from September 2010. At the time of writing this update, it is unclear whether the above introduction of the Code for Sustainable Homes will have any impact on build costs but information from CLG provides indications of possible cost increases associated with later introduction of Code for Sustainable Homes 4 to 6<sup>7</sup>. However, with time, the industry may be able to deliver higher levels of the Code for Sustainable Homes at lower costs. Planning authorities need to consider the impact of the Code for Sustainable Homes on costs when considering scheme viability but should also recognise that developers have had some time to take them into account in their own viability assessments. Publicly available sources of cost information (e.g. from BCIS) provides a benchmark against which scheme specific costs can be reviewed.

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<sup>7</sup> Communities and Local Government, Cost Analysis of the Code for Sustainable Homes, Full Report, (2008)

## 5 EMERGING PLANNING MECHANISMS

### Introduction

- 5.1 With the change in market conditions, scheme viability may be so reduced that development cannot proceed (or will proceed at a very slow pace). Planning authorities have recognised this issue and there are a growing number of examples of planning ‘mechanisms’ which are emerging to address this situation. These mechanisms aim to enhance scheme viability and therefore maintain the momentum of development while guarding against the developer/landowner ‘pocketing’ an advantageous planning permission, which they implement when the market picks up. The main examples of good practice available to date are set out in this section of the update. But it is important to stress that new examples of good practice are still emerging and authorities need to keep abreast of this fast-changing aspect of land use planning.

### Negotiation and re-negotiation

- 5.2 Planning mechanisms that respond to the credit crunch will apply equally to the negotiation of new applications as they will to the re-negotiation of an existing planning permission and its associated s106 agreement. In the latter case, the situation will be clear cut and will involve some sort of change in the permission and/or s106 agreement. In the former case, planning authorities will need to consider which of the planning obligations are essential to allow the development to proceed and those which they are prepared to forego (in whole or in part) – this may include a reduced percentage and/or different mix of affordable housing.
- 5.3 But in both situations, there are a number of good practice principles emerging as new mechanisms are developed.
- 5.4 Local planning authorities should be flexible in the way they treat developer/landowner requests for a ‘review’ of scheme viability. There may be situations where it will be appropriate for an authority to refuse to agree to a reduction in obligations, but it should clearly spell out the reasons for this. If the only schemes to be considered for reduced obligations are those which contribute to the strategic needs of the area (e.g. to its housing and/or economic regeneration) then this needs to be explained and their definition set out.
- 5.5 Local planning authorities and developers need to have a shared understanding of a scheme’s viability so that the local authority is assured that any reduction in planning obligations (including affordable housing) is the minimum required to achieve a viable scheme that can proceed in the short term.
- 5.6 The planning obligations imposed on a scheme must be capable of effective implementation and accord with Circular 13/97, Planning Obligations.
- 5.7 Reducing or otherwise altering planning obligations (including affordable housing requirements) should not be agreed without mechanisms in place, (such as a reduced time limited permission) to encourage early development of the scheme and to guard against an advantageous permission being ‘pocketed’ and not developed until market conditions improve. Nor should there be any obstacle to

the immediate development of such sites, such as the need for major infrastructure provision (although the need for infrastructure may be one reason that scheme viability is compromised and a reduced planning obligation is justified).

- 5.8 Local authorities will need to consider how they can make best use of the initiatives provided by the Welsh Assembly Government (see section 3 for a review of current position) and keep up to date with new initiatives.
- 5.9 The remainder of this section sets out the key planning mechanisms that have been identified to date. Again it is noted that new initiatives continue to emerge. The Assembly Government will disseminate new mechanisms to local planning authorities.
- 5.10 Not all the options outlined in this section involve a reduction/delay in planning obligations and the first option (described below) actually increases the early delivery of affordable housing.

### **Bringing forward / redesigning development of affordable housing**

- 5.11 In some circumstances, developers will prefer to bring forward development of the affordable housing in a scheme and/or to switch (part) completed market units to affordable housing. To date, this option has usually been associated with developments which have already started and has been seen as a short-term measure to maintain a basic level of development activity on a site or to round off development already in hand (with further development of the scheme held back until market conditions improve). However, any revisions to a previously approved scheme should not reduce the standard of design.
- 5.12 In considering this type of option, the planning authority may want to take into account the following:
  - Is there adequate funding for the affordable housing and a known RSL(s) prepared to purchase and manage the units (finding the units to be of an acceptable standard)?
  - Does development of the affordable housing as proposed jeopardise longer-term development of the site in any way?
  - Can a good scheme design be found which ensures the scheme contributes to mixed and sustainable community objectives in the short term (while the affordable housing is the only development on the site) and in the longer term, when the remaining market units are built out?
  - Will affordable housing occupants have access to appropriate facilities or will they have to wait until the rest of the scheme is developed?
  - If this option is followed, is there still a risk that the rest of the scheme will not be built out for many years, and if so how does this need to be managed?

### **Re-phasing planning obligations**

- 5.13 Usually appropriate for larger schemes, developed over a number of years, and with a variety of planning obligations to be met, scheme viability can be considerably improved simply by re-phasing the 'payment' of obligations - be they a developer provided facility (e.g. building a new school) or a cash payment.
- 5.14 Scheme specific negotiations will be needed to identify the extent of re-phasing required to provide a viable scheme. The authority will have to carefully weigh the economic impact of delaying payment of obligations against the need for the facility to be provided. The timing of some obligations may be critical (e.g. delivery of a school when X dwellings are completed) but other obligations may be less time sensitive.
- 5.15 The authority may also need to consider mechanisms to fund the delivery of infrastructure whilst waiting for payments from a development.
- 5.16 The (re-negotiated) s106 agreement must include effective mechanisms to ensure that rescheduled obligations are met on time (authorities should consider carefully how performance should be phased within the development programme) or identify how further rescheduling is to be agreed, if viability remains a concern.

### **Reduced obligations requirement associated with a time limited permission**

- 5.17 A relatively simple mechanism that can be applied to a wide variety of site types is to ally a reduced requirement for planning obligations (especially affordable housing) with a time limited planning permission e.g. a two year permission. At the end of the specified period, the local authority has to be assured that substantial progress in the development of the scheme has been achieved or the permission will lapse (but see below for further comment on achieving this).
- 5.18 This mechanism has the advantages of simplicity but there are a number of issues of implementation that the planning authority will need to take into account if this mechanism is being used. They include:
- Identifying the minimum level of reduction in planning obligations/requirement to ensure the scheme is viable (and that it is appropriate for the authority to accept in return for the planning benefits of early development);
  - Being assured that the scheme is development-ready and will proceed once viability issues have been addressed (which will tend to mean that the mechanism is not suitable for schemes with outline permission);
  - Having a very clear and binding definition of what amount of development needs to have been undertaken for the requirements of the permission to have been met. This could be achieved through a s106 agreement that set out the minimum percentage of the approved scheme which would need to be completed or there is an unconditional building contract;

- Identifying what is to happen if the requirements of the permission/s106 agreement are not met (e.g. that the original requirements bounce back, or there is a formula for recalculation according to progress made).
- 5.19 One of the earliest short-life permissions was granted by the London Borough of Southwark (and is illustrated in the box below) but short-life permissions, as a mechanism to guard against abuse of any concessions of obligations, are being taken up by other councils (e.g. Plymouth City Council).

#### **London Borough of Southwark**

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 (with a small increase in social rented units but a greater decrease in intermediate affordable homes).

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.

#### **Temporary Measures to Stimulate Development Market Recovery – Plymouth City Council**

Initiative associated with a Supplementary Planning Document (SPD) based on the introduction of policies in the Adopted Core Strategy which increased the affordable housing target (from 25% to 30%) and introduced a tariff arrangement for planning obligations. The authority was concerned that the introduction of the new requirements during the down turn in the market, might 'choke off' development.

The temporary measure associated with the SPD which was approved by the Council on 1<sup>st</sup> December 2008 introduces time limited concessions for developers who can negotiate a reduced tariff payment (depending on the type of development) and/or a reduction in the level of affordable housing in the scheme. In return, developers must agree to make a substantial start on the development within the two years of grant of permission and planning permissions are limited to two years. These measures are part of the 10-point Market Recovery Action Plan.

The concessions are available for applications submitted during 2009, and will be reviewed during the first year of operation

Guidance on how the Council is operating the scheme and its priorities for spending to take account of any reduction in the tariff payments it receives are clearly set out on the Council's website <http://www.plymouth.gov.uk/ldfplanningobligations>

- 5.20 Where concessions against planning obligations may be considered, the authority has the option of setting out how it will prioritise the obligations it collects (including affordable housing delivery).

### **Reviewing obligations through the life of a permission**

- 5.21 A variant on the 'short-life' permission (but which is only really relevant to larger sites) is to review the level of obligations at defined stages in the scheme's development. The implication of this approach is that obligations (again, including affordable housing) can be reduced for different 'phases' of the scheme, throughout its life but that the full contributions will be sought when scheme economics allow.
- 5.22 This approach could be based on, for example:
- Pre-determined development 'milestones' (e.g. after Area 1 has been completed or after X dwellings have been occupied) at which obligations for the next phase of development would be reviewed,
  - Market change triggering a review (e.g. house prices rising or falling by a certain percentage using an agreed price index);
  - Time (e.g. on the basis of an annual review).
- 5.23 Reviewing obligations over the life of a large-scale development to reflect changing market conditions (and changing availability of public subsidy) should ensure that the development remains viable. However, on its own, changing the level of obligations for each phase will not necessarily mean that the scheme will get built out quickly. Other mechanisms, e.g. short-life planning permissions will be needed to encourage speedy development of the phased development (where concessions against the normal level of planning obligations are allowed).

### **A deferred payment arrangement**

- 5.24 Reduced planning obligations can be linked to a deferred payment arrangement. This incorporates the important principle that the developer knows their maximum liability at the start of development (through the s106 agreement) but may pay less if market conditions (and scheme viability) do not facilitate payment of the full set of obligations.
- 5.25 By using deferred payments, the local authority sets out the base s106 agreement in accordance with its policies but then allows for variation from this requirement (if the planning circumstances of the development justify this and viability issues are proven) with defined trigger mechanisms to review the

payment – ‘under-age’. The following are examples from the London Thames Gateway Development Corporation (LTGDC) and Ashford Borough Council.

### **Use of deferred charge – London Thames Gateway Development Corporation**

Where LTGDC grants planning permission for a development, the development will normally be required to make financial and in kind contributions towards infrastructure and community facilities. These contributions will be secured through a section 106 agreement. The level of financial and in kind contributions sought will be in accordance with the guidance in the Planning Obligations Community Benefit Strategy.

**Standard Charge:** this is the charge per dwelling that is justified as a contribution towards the significant infrastructure needs of the area. Currently this is £22,600 in the Lower Lea Valley and £28,800 in London Riverside

**Discounted standard charge:** The strategy recognises that the standard charge, in most cases was not viable and seeking to levy a charge at that level would inhibit regeneration. Therefore a ‘discounted standard charge’ of £10,000 per unit in the Lower Lea Valley and £6,000 per unit in London Riverside was set.

**Deferred Standard Charge / Recapturing the Discount:** This is a mechanism to ensure that the discount or part of the discount (i.e. £22,600 minus £10,000 in the Lower Lea Valley and £28,800 minus £6,000 in London Riverside) is recaptured if the viability assumptions justifying the original discount prove unwarranted. This mechanism is necessary in particular on large developments where build out takes some time and circumstances change as time elapses after planning permission is granted. No deferred charge is required from developments of less than 100 units or units completed within three years of the grant of planning permission. There are also three options for calculating the deferred charge set out in the Strategy (all developers have chosen to include Option 1 in their legal agreements).

**Option 1:** Matrix of average sales values and deferred charges: If sales values increase from those anticipated when legal agreement signed, a deferred charge would be payable in steps in line with values up to the standard charge.

**Option 2:** The Discounted Standard Charge applicable at the time the contribution was payable.

**Option 3:** The Fixed Deferred Charge: level and timing of deferred charge fixed and set out in legal agreement. Envisaged later contributions would be considerably above the discounted standard charge applicable at signing of the agreement and index linked.

<http://www.ltgdc.org.uk/pdf/Adopted%20Planning%20Obligations%20Community%20Benefit%20Strategy%20for%20web.pdf>

A standard legal agreement is found at:

<http://www.ltgdc.org.uk/PDF/LTGDC%20-%20Standard%20Legal%20Agreement.pdf>

### **Mechanism for varying level of planning obligations - Ashford Borough Council**

Ashford Borough Council has set out the principles to be used in dealing with the situation where a development cannot afford to pay all the necessary infrastructure contributions, in line with the adopted core strategy and the need to deliver housing outweighs the impact of the possible loss of contributions to important infrastructure. Ashford Council is unlikely to use it for small sites which do not have a significant impact on their housing trajectory.

Where the Council accepts that a development would not be financially viable if the full package of contributions normally required were paid up front, the Council will consider deferring some of the contributions. Assessment of the viability evidence produced by the developer will normally be undertaken by a consultant instructed by the Council and paid for by the developer.

The 'total contribution' fixed for a development is a ceiling on the amount of contributions expected of the development (in line with policy). The developer is asked to pay an initial contribution and the balance is the 'deferred contribution' which is divided by the number of sale dwellings to give a 'Deferred per open market dwelling contribution'. This is paid on a per dwelling basis as market dwellings are sold. The amount of the deferred contribution paid depends on the increase in value between the date of the development viability appraisal and the actual sale price achieved.

There are various arrangements about how deferred contributions are calculated and secured and then about how they are pooled and spent on different types of infrastructure.

Minimum provision of affordable housing on-site needs to be fixed at the start of the agreement. This may mean a reduced percentage of affordable housing against policy. However, the deferred payment mechanism can be used to receive cash from the developer (in lieu of additional on-site provision) at a later date.

The Council's approach is set out at <https://secure.ashford.gov.uk/cgi-bin/committee/index.cfm?fuseaction=DocTrack.getPlanningDoc&PlanningID=842>

- 5.26 One of the issues with deferred payment arrangements that needs to be considered is the provision of affordable housing on-site. While the authority can identify the full amount of on-site affordable housing it wishes to see on a scheme (and consistent with policy), if it agrees to a reduced amount of affordable housing at Day 1, there are difficulties in increasing the level of on-site provision at a later stage (if/when other deferred payments are increased). One option for the authority is to accept a minimum on-site amount of affordable housing as part of the s106 agreement at Day 1, and to include a cash

contribution towards affordable housing provision elsewhere, as part of its overall approach to the collection of deferred payments later.

### **Inappropriate profit sharing arrangements**

- 5.27 The use of deferred charges as described above is an acceptable planning mechanism. It avoids the situation of an authority retrospectively increasing the planning obligations sought when market conditions improve, without agreement at the start about the maximum level of obligations which are applicable – ‘over-age’.
- 5.28 It is not good practice for an authority simply to seek to ‘share’ in an increase in market value (although where the authority is also able to act in a land-owning capacity, the use of joint venture – described in Section 7, provides a structured and acceptable way of local authority and developer sharing risk and reward provided that proper separation of authority functions is achieved).

### **Summary**

- There are a number of mechanisms that have emerged which local authorities can use to assist housing developments get underway in the current market conditions. An important principle is that the mechanism used does not gift an advantageous permission to a developer for use at a later date. The main ‘checks’ available are either to limit the life of the permission and/or ensure that the payment of planning obligations is deferred rather than removed.
- The main mechanisms identified in this section are:
- Scheme re-design to bring forward the affordable housing provision (as a short term measure to maintain development activity);
- Granting of short life permissions that include a reduced level of planning obligations (including affordable housing);
- Reviewing obligations over different ‘phases’ of a scheme’s development (but with mechanisms to avoid the abuse of any concessions granted);
- A deferred payment mechanism.

These are all relatively new ideas as a response to the current market difficulties and other mechanisms may emerge in the future.

## 6 PROCEDURES TO DEAL WITH MARKET UNCERTAINTIES

### Dealing with the credit crunch

- 6.1 In dealing with market uncertainties, it will be important for local authorities to be clear about the approaches they are taking in responding to the impact of the credit crunch on development. This section of the guidance update, builds on the approaches set out in the 2008 Practice Guidance in *Step 5: Developing an Effective Negotiating Process*.
- 6.2 An effective local authority during the credit crunch will be one that:
- Has a general understanding of the viability issues that result from the market down-turn;
  - Is approachable and prepared to discuss with developers/landowners the impact of the market down-turn on individual schemes;
  - Has a consistent and clear approach to (re)negotiation of schemes which is understood by the development industry in its area;
  - Maintains a long term view of housing delivery and planning policies, as the context for dealing with the current market uncertainties.
- 6.3 In achieving all of these, it is recognised that there is not a single model of good practice that will suit every authority. But it is good practice that authorities actively review how they are dealing with housing schemes during the period of market uncertainty and that their approach is shaped by discussion with the development industry.

### Characteristics of a flexible approach

#### Overview

- 6.4 A positive and flexible approach by authorities, in responding to a request from developers/landowners to (re)consider the planning obligations (including affordable housing) for a scheme will be important. This is the same whether a developer/landowner wishes to renegotiate an existing permission or is applying for permission for a new scheme which would be contrary to policy<sup>8</sup>.
- 6.5 This does not mean that authorities should automatically agree with the approach the developer/land owner wishes to adopt. But it means that authorities should have a clear process for dealing with such requests and have a corporate understanding of its 'sticking points' – the policy requirements which are of such strategic importance that it will not normally be prepared to review them.
- 6.6 There is a small number of published approaches by local authorities in England to deal with the market down turn<sup>9</sup> and to which the guidance update refers to elsewhere e.g. Slough Borough Council, Norwich City Council, Ashford Borough

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<sup>8</sup> The same principles apply when a prospective planning applicant intends to submit a new application for a site where there is already planning permission.

<sup>9</sup> No examples of these have been identified amongst Welsh authorities.

Council and Plymouth City Council (with a 10 Point Market Recovery Action Plan). This section of the guidance update therefore has very limited established good practice to learn from. The ideas set out here about protocols make use of these examples and also draw from approaches and protocols used in negotiating affordable housing and planning contributions generally (and which were described in the July 2008 Guidance).

- 6.7 New protocols and procedures to deal with the market down-turn are likely to emerge over time and authorities will need to keep up to date and share good practice wherever possible. In England, the Homes and Communities Agency published a good practice note in July 2009 which LPAs may find useful. The good practice note is called "Investment and Planning Obligations: Responding to the downturn." and can be found at [www.homesandcommunities.co.uk/good-practice-notes](http://www.homesandcommunities.co.uk/good-practice-notes)

*Being clear about circumstances for (re) negotiation*

- 6.8 A positive approach can include the authority making clear the situations in which it is (and is not) prepared to discuss the (re) negotiation of a scheme. The following is an example of how this can work and how the council's approach is made public through its adoption as council policy.

**Slough Borough Council**

**S106 Agreements and the Economic Downturn**

2. By exception requests to renegotiate existing S.106 agreements may be considered where all of the following circumstances apply:
  - where schemes are left half-built and subject to Administration.
  - where lack of progress is hindering regeneration objectives;
  - where lack of progress is leading to damaging "eyesores"
3. In all other cases existing agreements should be left in place to await the upturn or suitable alternative development packages considered, unless it is considered key regeneration objectives are threatened.

Extract from Cabinet Meeting Agenda – January 2009

*Identified officers*

- 6.9 It may be helpful to identify a small team of named (housing and planning) officers that become specialist in dealing with scheme (re)negotiations. The team will need to be experienced in developer/land owner negotiations, have an understanding of development economics and have access to specialist legal and property advice (in-house or from external advisers). Some authorities already have a dedicated s106 officer and they could be pivotal in such an approach.

*Being proactive*

- 6.10 An authority may conclude that it cannot wait for developers to approach the authority when they have identified a problem and that keeping up the momentum of development requires a more pro-active approach to identify schemes which are stalling and work with developers/landowners to find mechanisms to encourage development to proceed.
- 6.11 There are various ways of identifying stalled schemes and starting dialogue with developers:
- Regular liaison with the development industry and housing associations through established fora;
  - Establishing a 'development industry credit crunch forum' specifically to discuss issues and review possible initiatives;
  - Monitoring progress with schemes that already have planning permission and are important to the authority's planning strategy. When schemes appear to be 'stalling', contact with the developer is triggered to begin discussions about the options open to overcome difficulties and accelerate development. The case study from Plymouth City Council offers an example of this.

**A proactive approach – Plymouth City Council**

The Council has in place a Market Recovery Action Plan. The Action Plan is overseen at a senior level and the Assistant Director of Development has overall responsibility for its implementation.

The City Council also maintains a regular dialogue with developers and landowners through The Plymouth Regeneration Forum which has been focussing on the City's regeneration efforts.

The Council through a Delivery Database carefully monitors progress with development on sites with planning permission. Where this looks like this is slipping, council officers will contact the developer to discuss whether there are any blockages to development and how that developer could take advantage of the options for renegotiating the s106 that the council has in place.

**Setting out the information needed from developers**

- 6.12 Section 4 of this update guidance sets out a possible list of information that local authorities may ask developers to provide to inform the (re) negotiation of a planning permission/s106 agreement. It is good practice that these information requirements are set out by the authority so that developers know what is needed of them.
- 6.13 This is really no different from the position when a developer is discussing scheme economics with a local authority in support of any planning application

where scheme viability may be an issue. The example from Norwich City Council (see case study below) illustrates one way in which this can be done.

- 6.14 It is also important that authorities explain how they will examine viability issues raised by developers and any preferences they have for the type of modelling/assessments to be used e.g. use of 'open book' (and what this means), use of evaluation models e.g. the Development Appraisal Toolkit<sup>10</sup> or the model developed for the Homes and Communities Agency.
- 6.15 Authorities may choose to bring in expert help from outside to assist them in assessing the evidence provided by the developer and/or in working out an amended/new s106 agreement. Expert advice costs money and the authority needs either to identify a realistic budget for this from within its own resources and/or seek a reasonable contribution from developers for the costs incurred. Either way, it is important that developers know from the start of any discussions how expert advisors are to be paid for and that the contribution they are expected to make is proportionate.

*Options that can be considered*

- 6.16 A transparent protocol for dealing with (re)negotiation of s106 agreements needs to illustrate the mechanisms that the authority will consider to improve scheme viability and to secure scheme delivery. Section 5 illustrated the key mechanisms that have emerged to date and which authorities may want to adopt.
- 6.17 But it is also important that there is flexibility and new and innovative options are not excluded although an authority may want to set out those mechanisms that fit least well with its priorities and approach.

*Action plans*

- 6.18 There is a small but growing number of authorities that have set out their 'action plan' to deal with the market down turn. This can cover a wide range of local government activities with housing delivery through s106 agreements as just one (albeit important) element.
- 6.19 There is no single format for action plans and they take different forms (e.g. a council committee paper) and have different approaches. Example of action plans are from Plymouth City Council, and Slough Borough Council.
- 6.20 Action plans offer a good practice approach, bringing together in one place the approach adopted by the authority and that makes clear to developers i) what they will need to do to demonstrate a genuine viability issue ii) how the authority will respond when there is a proven viability concern.

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<sup>10</sup> A excel based model developed for a consortium of local authorities in Wales by Three Dragons

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

Norwich City Council recognised that, in exceptional circumstances, it may need to reduce the level of planning obligations (including affordable housing) on individual schemes to ensure that scheme viability was maintained. In May 2009 the Council agreed a framework for prioritising the planning obligations it sought (where viability is a proven difficulty) so that the Council operates a co-ordinated corporate approach and developers know what to expect.

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

An independent ‘open book’ appraisal based on current values and using known assumptions about developer returns. The developer is to meet the costs of the appraisal;

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;

Report to planning committee to explain the exceptional circumstances and the reduced s106 requirement – 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.

Details of the Council’s approach are found at :

[http://www.norwich.gov.uk/intranet\\_docs/corporate/public/committee/reports/2009/Executive/REP\\_Executive\\_Response\\_to\\_consultation\\_on\\_Planning\\_Obligations\\_A\\_Framework\\_for\\_Prioritisation\\_2009\\_05\\_27.pdf](http://www.norwich.gov.uk/intranet_docs/corporate/public/committee/reports/2009/Executive/REP_Executive_Response_to_consultation_on_Planning_Obligations_A_Framework_for_Prioritisation_2009_05_27.pdf)

The new approach will be implemented chiefly via the Council’s established development team approach.

### **Summary**

Local authorities need the right procedures to deal with the market downturn and consequent impacts on scheme economics. A first step is to establish a protocol or other action plan that guides how (re)negotiations with developers will be managed. This should:

- re-emphasise the policy requirements and the importance of scheme viability in setting policy and subsequent scheme negotiations;
- state the circumstances where the authority is prepared to be flexible;
- list the information required from developers to demonstrate viability concerns;
- involve the development industry (including housing associations) in establishing the process for scheme (re)negotiations;

- describe the approach to viability that will be taken (e.g. 'open book', use outside experts);
- set out the kind of options the authority will consider in a (re) negotiated agreement.

## 7 OTHER OPTIONS OPEN TO LOCAL AUTHORITIES

### A wider approach

- 7.1 Maintaining a housing delivery programme in a downturn is not solely the responsibility of the planning system. Local authorities should consider adopting a wider and more pro-active approach to facilitate development, making use of wider funding powers, their own landholdings and their ability to attract private finance.
- 7.2 This will require commitment at senior officer and member level drawing on the skills of strategic housing, finance, legal and estates colleagues as well as on those of local authority planners.
- 7.3 The three key mechanisms which are available are:
- Releasing the local authority's own land for housing schemes with a high percentage of affordable housing (and working with other public sector landowners to do the same, including the Welsh Assembly Government);
  - Provision of up-front public sector finance to enable commencement of stalled sites, potentially through some form of Joint Venture;
  - Provision of mortgage funding to low cost home owners and first time buyers.

### Use of public sector land for housing

- 7.4 Land ownership gives much greater control over the pace and type of development than is possible through the planning system. Local authorities with land holdings which are suitable for development need to consider whether development of these sites in the current market could provide a valuable source of new housing at a time when other sites are not readily coming forward.
- 7.5 Whilst local authorities have a responsibility to secure best consideration for land, this will include an assessment of the contribution disposal of these assets may make to the achievement of strategic policy priorities and objectives. Where delivery of affordable housing is a priority this should be taken into account when considering the options for disposal of public sector land.

### Joint ventures

- 7.6 Local authorities will wish to ensure that they do not dispose of land on terms which provide a windfall gain on a site sold to a third party. For this reason it may be appropriate to consider entering into a joint venture with a developer or RSL who is handling a former public sector site. Joint Ventures help share risk and reward, usually in proportion to the relative input of the venture partners. They are particularly useful in a volatile or falling market.
- 7.7 Joint Ventures enable the public and private partners to determine who bears upfront costs, which can help facilitate major development schemes. This approach is particularly important where early infrastructure funding is required.

Here the public sector could play a part as a “patient investor”, a role formerly taken by the Welsh Development Agency.

- 7.8 In England the Homes and Communities Agency is increasingly insisting that it wishes to take an equity share in schemes and to have a say in how those schemes are structured and developed. This approach is built into the recent Kickstart Initiative.

### **Local authority mortgages or mortgage guarantees**

- 7.9 There is ample evidence that the shortage of mortgages for first time buyers and low cost home owners is contributing to the current slowdown in the housing market
- 7.10 Local authorities have the power under section 435 of the Housing Act to lend mortgages of up to 100% of value. In England and Wales there is a specified national rate of 3.93%. Lending can be across the board or to specified categories of borrower such as first time buyers or low cost home owners. In the 1980s local authorities had 1/5 of the total mortgage market with a particular focus on people buying their first home.
- 7.11 Local authority mortgages have historically been publicly funded but given the anticipated shortfall of public funding, mechanisms to attract private finance are also being canvassed.
- 7.12 In some instances it may be appropriate for the local authority to provide a mortgage guarantee rather than directly funding the mortgage.

### **Securing private finance for affordable housing**

- 7.13 Various local authorities in England have been exploring how to bring additional private finance into housing and infrastructure provision. The following initiatives are worth noting:
- 7.14 Essex County Council has used its powers to support local industry to set up a bank in partnership with Santander. The Bank has a fund of £50m and will lend primarily to small businesses.
- 7.15 The Yorkshire Regional Development Agency, together with the Charity Bank has established a Yorkshire Deposit Bond which focuses on investment in local charitable causes:  
[http://www.charitybank.org/Saving/Charity Bank Saving Accounts/The Yorkshire Deposit Bond.aspx](http://www.charitybank.org/Saving/Charity%20Bank%20Saving%20Accounts/The%20Yorkshire%20Deposit%20Bond.aspx).
- 7.16 Eighty-two areas in England have submitted bids to pilot Accelerated Development Zones (ADZs). The Chancellor announced in April's Budget that the Treasury would look at the possibility of using ADZs in the UK to help boost the construction of vital infrastructure through the recession.
- 7.17 ADZs are based on the Tax Increment Financing scheme, used in the US, which enables councils to fund infrastructure by borrowing against the future revenues raised by having that infrastructure. Although the ADZ model is premised on an

increase in Business Rate to pay for upfront infrastructure costs, it is intended to bring forward sustainable mixed use developments as in the proposed Leeds Aire Valley scheme which includes 29,000 new jobs and 7,000 new homes on a 400 hectare site which requires £250m upfront infrastructure spending. ([http://www.corecities.com/dev07/Publications/Unlocking\\_City\\_Growth\\_web.pdf](http://www.corecities.com/dev07/Publications/Unlocking_City_Growth_web.pdf))

## **Summary**

- Local authorities need to take a corporate approach to the delivery of affordable housing. This will require commitment at senior level;
- They should give consideration to all possible mechanisms in their power including disposal of public sector land, entry into Joint Ventures with RSLs or developers and provision of mortgages to first time buyers and low cost home owners;
- Expectations of limited public funding in the future have encouraged development of a range of new initiatives to attract private finance into formerly publicly funded projects and local authorities should monitor emerging new initiatives to see which ones could be used or adapted to facilitate provision of housing.

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