

Southend-on-Sea City Council

Report of the Executive Director for Growth and Housing

to

Cabinet

On

12th January 2023

Report prepared by: (1) Kevin Waters, Director of Planning and

(2) Giles Gilbert, Director of Legal Services

Use of Section 106 Contributions

Place Scrutiny Committee

Cabinet Member: Councillor Carole Mulroney

Part 1 (Public Agenda Item)

1. Purpose of Report

The purpose of this report is to consider the motion of the Opposition Councillors (“Opposition Business”) and its legality and wider implications, as moved at the meeting of Council on the 15th December 2022. The Opposition Motion is appended to this report (Appendix 1). The Amendment to this motion is appended at Appendix 2

2. Recommendation

- 2.1 That the Council acknowledges that it cannot become involved in relation to decisions relating to individual planning applications presented to Development Control through conflict of roles and that the Development Control Committee is a quasi-judicial function, not a political function.
- 2.2 That the Council continues to support the provision of public art through the long established, policy and legal framework, of, where appropriate, seeking contributions to funding public art through Section 106 Agreements, and that

where a planning application is required in relation to public art this is progressed through the Development Control process in accordance with the procedures in the Council's Constitution.

- 2.3 That a review of the policy framework for securing contributions to public art be considered as part of preparing the new Local Plan, when all Councillors, residents and other stakeholders can have input into any changes.

3. Background

- 3.1 On the 14th December 2022 Councillors Cox and Davidson submitted an Opposition motion to be debated at Council on the 15th December 2022.

- 3.2 The motion read as follows:

This Council resolves that it should:

- 1. Never seek to use Development & Control as a means of implementing Council policy.*
- 2. As the applicant of the above planning applications, withdraw these planning applications*
- 3. Consult with members of this Council to reprovise spending on these art commissions to vital infrastructure projects.*

- 3.3 In response Councillors Mulronev and George proposed:

The Council continues to support the provision of public art through the established, policy and legal framework and the development control process. The policy framework for securing contributions to public art will be considered as part of preparing the new Local Plan when all members and residents will be able to have input.

- 3.4 In considering the merits and legalities of the Opposition motion:

- 3.5 *Never seek to use Development & Control as a means of implementing Council policy.*

- 3.5.1 Policies for obtaining planning obligations should be set out in a Council's Development Plan documents and are expected to be clear about what is required. Councils should then consider whether otherwise unacceptable development could be made acceptable using planning obligations.

- 3.5.2 Planning obligations, often referred to as Section 106 Contributions, are legal obligations entered into to mitigate the impacts of a development proposal. They can, where appropriate, be used to require the payment of financial contributions for a range of purposes, secure the direct delivery of mitigation and to control development in a variety of ways, for example to manage the phasing of large-scale complex schemes.

- 3.5.3 Southend's current Development Plan, in Policy KP3 of the Core Strategy (adopted in 2007), sets out that the Council will enter into planning obligations with developers to ensure the delivery of a range of potential contributions,

including, where appropriate, the provision of public art. Many councils have such policies in their Development Plans.

3.5.4 The Council therefore has a long standing adopted policy of, where appropriate, seeking contributions to public art through the use of Section 106 Agreements and the Council's approach to adopting this policy is consistent with national guidance.

3.5.5 Where the delivery of a piece of public art results in an application for planning permission needing to be submitted to the Council it may, under the terms of the Council's Constitution, be required to be determined at the Council's Development Control Committee. That is therefore the forum in which it must receive a decision.

3.6 *As the applicant of the above planning applications, withdraw these planning applications*

3.6.1 Planning permissions have now been granted for all three applications submitted by Focal Point Gallery. In accordance with the procedures set out in the Council's Constitution two of the applications, with reference numbers 22/01511/BC3 and 22/01976/BC3, were determined respectively by the Council's Development Control Committee on the 2nd and 30th November 2022. The third application, with reference 22/01512/BC3, received no objections and was determined under delegated powers in October 2022. The decision notices for these applications are attached at Appendix 3.

3.6.2 The three planning applications concerned are no longer under consideration by the Council, as Local Planning Authority, and have all received a decision granting planning permission. They are therefore not able to be withdrawn by the Council or the applicant. In each case the applications were determined on the basis of the relevant material planning considerations alone, as required by national planning policy and legislation, and there were no valid planning grounds to justify a refusal of planning permission.

3.7 *Consult with members of this Council to re-provision spending on these art commissions to vital infrastructure projects.*

3.7.1 Where planning applications have received a decision already and the associated planning obligations have secured the delivery of financial contributions to public art, the obligations require the sums provided to be spent on public art only. If the contribution is not to be spent on public art it must be returned to the applicant. It cannot be spent on any other purpose.

3.7.2 This situation is not specific to public art contributions and all sums paid to the Council through planning obligations are for clearly specified purposes and only those purposes. The Council is not legally able to secure financial contributions for generic purposes using planning obligations.

3.7.3 When planning applications are determined, either under delegated powers or at Development Control Committee, they must receive a decision only on the basis of policies in the development plan and other material planning considerations. This can include a wide range of factors such as design, character, amenity and safety matters. However, it is difficult to envisage circumstances where the funding arrangements for a piece of public art could be seen as a material planning consideration, when the funding is from an entirely separate application determined some time previous to the application to deliver the public art itself.

4. Reasons for Recommendations

4.1 The recommendations ensure that planning applications continue to be determined in accordance with the requirements of national legislation and policy and the Council's own Constitution and adopted policy framework. It also makes certain that contributions to public art which have already been received are not returned to the developer, that new contributions continue to be sought for public art in accordance with our adopted policy framework and that any change to that framework goes through the appropriate route, allowing all relevant stakeholders to input into the process.

5. Other Options.

5.1 The Council could decide to no longer seek planning obligations requiring contributions to public art from developers. However, it does, through policy KP3 in the Core Strategy, have a development plan policy basis to do so in certain circumstances. This is why such sums have been collected previously.

6. Corporate Implications

6.1 Contribution to Southend 2050.

6.1.1 The delivery of public art through the securing of funds using Section 106 Agreements contributes to meeting a number of Southend 2050 outcomes, particularly those under the themes of pride and joy and active and involved. It is unclear what other sources of funding would be available for delivering public art in the absence of those delivered through the use of Section 106 Agreements.

6.2 Financial Implications –

6.2.1 The Executive should not be trespassing into matters for Development Control Committee, which are matters for the Council's quasi judicial role in appropriately dealing with planning applications. So long as Section 106 funds are secured and spent lawfully and as specified in the agreement then this is a matter dealt with through that process.

6.2.2 Where Section 106 Agreements have identified sums for public art they are required to be spent as such and cannot be spent on other matters. The alternative is to return the funds to the developer. Should the council decide to stop seeking

contributions to delivering public art from development, it is unclear what other sources of funding might become available for such work.

6.3 Legal Implications – as contained in this report and:

6.3.1 Section 316 of the Town and Country Planning Act 1990 refers to planning authorities considering applications made by themselves (there are also regulations made under that section) – the provisions clearly envisage that a planning authority can consider and determine an application made by itself. The usual procedures apply, including requirements to advertise and consult on the application, and an application must be decided in accordance with the development plan and planning policies unless material considerations indicate differently. Central government considers that these requirements contain sufficient safeguards to protect against potential misuse of the system.

6.4 People Implications – None

6.5 Property Implications – None

6.6 Consultation – None required

6.7 Equalities and Diversity Implications – To be considered in relation to each individual planning application.

6.8 Risk Assessment – Not required

6.9 Value for Money – Section 106 funds identified for public art are required to be spent as such and cannot be spent on other projects as explained in this report. The alternative is to return the funds to the developer.

6.10 Community Safety Implications – None

6.11 Environmental Impact – The benefits of public art to the built environment are well recognised and there is support for its delivery in the Council's adopted planning policies. It is unclear what other sources of funding could be utilised to deliver public art in absence of sums secured through Section 106 Agreements.

7. Background Papers

8. Appendices

Appendix 1 Opposition Business Motion of the 14th December 2022

Appendix 2 Administration Amendment of the 15th December 2022

Appendix 3 Planning Decision Notices 22/01976/BC3; 22/01511/BC3 and 22/01512/BC3.