Report to: Strategic Planning Committee

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Planning Obligations Securing Financial Contributions to Health Care

Report summary:

This report seeks to advise Members of discussions officers have been having with representatives of the Royal Devon and Exeter NHS Foundation Trust (RD&E) about securing financial contributions from development to address the impacts of development on services provided by the trust. A robust methodology has been developed in partnership with the trust to enable funding to be collected from major residential developments that officers consider would comply with the relevant legislation.

Is the proposed decision in accordance with:

Budget Yes ☒ No ☐

Policy Framework Yes ☒ No ☐

Recommendation:

That Members of Strategic Planning Committee:

1. **Note the discussions that have taken place between officers and the Royal Devon and Exeter NHS Foundation Trust with regard to developer contributions to health care services.**
2. **Agree that health care contributions calculated based on the methodology set out in this report be sought (where requested) from major new housing developments subject to viability testing where relevant.**

Reason for recommendation:

To ensure that the impacts of development on healthcare services are appropriately mitigated where appropriate in line with case law and in accordance with the requirements of government guidance and the Local Plan.

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Portfolio(s) (check which apply)**:**

☐ Climate Action and Emergencies
☐ Coast, Country and Environment
☐ Council and Corporate Co-ordination
☐ Culture, Tourism, Leisure and Sport
☐ Democracy and Transparency
☐ Economy and Assets
☐ Finance

☒ Strategic Planning
☐ Sustainable Homes and Communities

Equalities impact Low Impact

Climate change Low Impact

Risk: Medium Risk; By adding to the burden of infrastructure contributions required to be met by developers it is likely that the viability of more developments will be put at risk and will need to be tested through an appropriate independently assessed viability appraisal. This could delay applications, create further work for officers and lead to further cases where difficult decisions have to be made about which infrastructure can be funded and which cannot.

Links to background information Wolborough Barton appeal decision: obj.pdf (teignbridge.gov.uk); Ledbury SOS decision: Recovered appeal: land north of Viaduct, adjacent to Orchard Business Park, Ledbury (ref: 3244410 - 15 March 2021) - GOV.UK (www.gov.uk); East Devon Local Housing Needs Assessment: 201020bpitem9afinalhousingneedsineastdevonappendix 1orsaug2020.pdf

Link to Council Plan:

Priorities (check which apply)

☐ Outstanding Place and Environment
☐ Outstanding Homes and Communities
☐ Outstanding Economic Growth, Productivity, and Prosperity
☐ Outstanding Council and Council Services

Background

In 2019 the Royal Devon and Exeter NHS Foundation Trust (RD&E) requested contributions towards the delivery of health care services from a number of large scale residential developments in the district. This included a development of 150 dwellings involved in a proposed land swap arrangement at Exeter Science Park which was considered by the Council's Development Management Committee. The requests for funding were made without prior discussion and were the first such requests received by the authority from the trust. They related to costs incurred by the trust in the delivery of their services that did not result from the provision of infrastructure but from various non-infrastructure costs. These costs range from additional staff costs, medicines, surgical implants, dressings, needles, plasters, food and drink, cleaning supplies, admin supplies etc. The costs incurred are not just through A&E but from surgeries, critical care, outpatient appointments, community nursing etc. The trust was seeking an obligation through a Section 106 agreement to secure funding towards these costs which are incurred due to a lag between when developments are delivered and central funding coming forward that takes account of such developments. The lag time is understood to be up to 1 year during which the trust does not receive funding for the additional demands on their services.

Requests for such funding had not been sought up to that point and were not common elsewhere at that time and so consideration had to be given to the legitimacy of such requests, the robustness of the methodology used and the evidence to support them. This led to Counsel Opinion being sought and the advice can be summarised as follows:

- The provision of the Trust's services is capable of falling outside the term 'infrastructure' for the purposes of the planning Act 2008 and can therefore be requested via a S.106 Agreement;

- The tests under Regulation 122 (2) (b) and (c) do not give rise to any forceful argument to suggest that the contribution does not meet the tests under Regulation 122 (2). The main issue is under Regulation 122 (2) (a) and it is noted that the Trust has a mandatory duty to provide the services irrespective of the contribution. However, the Trust make the point that the relevant service provided over the relevant period, would be inferior in the absence of the contribution. In this respect, necessity could be demonstrated.

- The above point raises the issue of whether sufficient evidence exists to demonstrate the Regulation 122 (2) tests are met. The Trust has not yet produced a fully comprehensive justification and the Council has asked for further information regarding particular expenditure and anticipated delivery over the relevant period which has not yet been forthcoming.

- It is open to the Council to find that the contribution does meet all the relevant tests under CIL Regulation 122 (2), provided it is satisfied that sufficient justification is demonstrated.

Unfortunately the trust did not provide sufficient information to satisfy the Council that a contribution on the development of land at Science Park was justified in time to enable a contribution to be sought. The same is true of some other applications where similar requests have been made, however since 2019 officers have been working with representatives of the trust to develop an evidence base and methodology to enable justified contributions to be sought. In the meantime a number of appeal decisions have also been made both by government appointed planning inspectors and the secretary of state that have helped to clarify the position with regard to such requests from health care providers.

Case Law

There are two main appeal decisions that have helped to inform officer's consideration of this issue both of which were made by the secretary of state. There are a number of other decisions that have been referred to us by the Trust but these were made by the Planning Inspectorate and are therefore considered to be less significant. The first secretary of state decision was in Teignbridge and related to Land at Wolborough Barton on the edge of Newton Abbott. The application was for a mixed use development including 1210 dwellings and was the subject of an appeal for non-determination that was heard by a public inquiry. At the appeal the Torbay and South Devon NHS Foundation Trust (NHSFT) are understood to have sought a financial contribution of £1,070,416. In considering the Trusts case the Planning Inspector who considered the appeal helpfully summarised the rather complicated picture of how NHS Trusts are funded commenting in her decision letter as follows:

"323. In simple terms, there are four stages to the NHSFT's argument:

I. The development brings new people into the area;
II. New people present at NHS hospitals seeking treatment, which cannot be denied;
III. Providing that treatment costs the Trust money;
IV. The Trust is not funded for that care until at least 18 months after the population has increased and therefore it should be funded by the developer in order that the general standard of the health service does not suffer as a result of the population increase. Without mitigation, the impact that this development creates has a long-term knock-on effect.

324. There can be no doubt that new people will use NHS services from the moment they occupy the development. The Trust is the principal provider of NHS services and has an obligation to provide the vast majority of the increased services that will be used by the residents of this development. It is a condition of the Trust's licence as a Foundation

Trust to provide a list of mandatory services to all comers and without restriction. The costs of more staffing, drugs and other consumables (i.e. revenue support, not capital) begin as soon as people take up residence.

325. In the longer term, funding to the local health systems will increase as a result of the increasing population. However, in the short term, there is no additional funding to accommodate additional cost. Without such funding, it will provide a lesser or substandard service. The Trust's hospitals are already at full capacity. With unfunded demand for services, waiting times will increase and this will affect the overall health of the population of the development and the existing community which in turn will have a knock-on effect on social, health and wellbeing of the population.

326. The NHSFT is in an invidious position in that the Trust has waiting time targets (e.g. a four hour waiting time target for a person to be seen at A&E). If the Trust fails to meet its targets, it is penalised by withdrawal of its Sustainability and Transformation Fund (now called PSF Provider Sustainability Fund) and it may not receive additional income through the Commissioning for Quality and Innovation payment framework. Such penalties would further affect the standard of care that can be provided. It is noted that the Council has argued that the funding is not necessary because the services would be provided in any event. However, a lesser or substandard service still means that the development will have an unacceptable impact on the health of the population, which would be contrary to the focus on healthy communities in the Framework and in LP policy.

327. At a national level, funding is allocated to the Department of Health through a process of negotiation with Her Majesty's Treasury. There is no direct reflection of population movement – funding is more related to affordability, delivery of national standards, and politically determined cost drivers such as pay awards.

328. The allocation for any given financial year (1st April to 31st March) is calculated as follows:

- Baseline from the previous year; plus
- Growth – incremental allocation reflecting the overall increase in funding agreed with HMT; plus, or minus. 'Growth' does not mean population growth. 'Growth' is essentially politically driven e.g. an announcement that the NHS will be given £x more in the Budget,
- Adjustment to growth depending on whether the resultant allocation is above or below a target allocation.

329. In 2019/20 the allocation to South Devon Trust Clinical Commissioning Group (CCG) was uplifted on the previous year by 5.48% being 'average growth'. That growth allocation is broadly intended to uplift funding to accommodate the increasing costs of delivering healthcare, including inflation, growth in demand for certain medical technologies etc. The target allocation is calculated with reference to population, age and the needs of a local area informed by indicators such as deprivation indices. As above, at present, the target and actual allocations for Devon are within normal tolerance, so average levels of growth are received.

330. Where population changes outside of 'normal demographics', such as a development of this nature, additional funds flow to a CCG as follows:

- Registered GP population increases as people take up residence;
- That increase in population drives a higher target allocation;
- With target allocation then becoming higher than the actual (previous year plus standard uplift) an additional allocation may be made.

331. This process typically takes up to 3 years to affect a change in allocation:

- Year 1 – Housing development leads to population growth
- Year 2 – Census count at GP practice level, feeds into target allocation model
- Year 3 – Funding flow as additional growth allocation

332. However, cost-flows to NHS organisations begin from Year 1, as people with needs access services from their uptake of residency. There is therefore up to a 2 year 'mismatch' between local NHS organisations incurring cost and the allocation of additional funding that might be expected to accommodate a growing population. This is the basis for the shortfall of (conservatively) 12 months identified by the Trust.

333. The NHSFT has a five-year funding settlement with the CCG overlaid with the NHS National Contract each year. No additional funding is allocated in any given year as a direct result of additional activities being undertaken. The Trust receives no additional income to cover changes in population from a significant development such as this until the CCG funding catches up, significant changes in population not being reflected for up to three years. Nor are the Trust able to bill for additional services. The Trust is left bearing the cost of actions to mitigate increased demand until such times as the CCG funding allocation catches up and feeds through into contract values.

334. The question to justify a S106 contribution must be does the impact of the proposed development result in a funding deficit to the NHS Trust leading to adverse impacts on health in the area? The answer to that question must be yes as set out above.

335. The contribution is necessary to make the development acceptable in planning terms because, without it, the population increase will be accessing NHS Trust services without any corresponding funding for (at least) one year which will adversely affect the standard of service that can be provided leading to an adverse impact on the health and wellbeing of the population of the Trust's area at large. The S106 contribution would be used to fund running costs which is established in law and previous appeal decisions.

336. Without the requested contribution, the access to adequate health services is rendered more vulnerable thereby undermining the sustainability credentials of the proposed development due to conflict with the Framework and Local Development Plan policies.

While having a great deal of sympathy for the NHS Trust and the impact of development on their services the Inspector also had to consider the appellants case which argued that the Trust were not in themselves legally obliged to provide health care services as they are commissioned by the local CCG who hold that responsibility and therefore the Trust were the wrong people to be making the request. The appellants other key arguments related to growth in population arising from the development was known and should be accounted for in funding since population increases are estimated well in advance and the development was planned for since it forms an allocation in the Teignbridge Local Plan and so funding for the growth arising from it should have been planned for in advance. Ultimately the Inspector concluded that since the development was "known" it could not be justified for the developer to plug a gap in funding. The appeal was called in and finally determined by the secretary of state in June 2020. In his letter he concluded on this issue stating:

"……the Secretary of State agrees with the Inspector that in the circumstances of a 'known' development within an adopted Development Plan document which had been the subject of consultation with relevant health providers at the time of production, it cannot be justified to require a developer to plug a gap in funding essentially to pay staff wages, which is brought to the appeal at the eleventh hour, even though that may, in part, be due to some element of new population which may move into the Newton Abbot area as a result of the building of the new homes (IR361). For this reason he considers that the provision obligation fails to meet the tests of Regulation 122 of the Community Infrastructure Levy Regulations 2010 (as amended) and is not therefore enforceable, in line with clause 4.2 of the Unilateral Undertaking to Teignbridge District."

It is considered that this decision forms a clear basis in case law for seeking contributions towards the health care services provided by the RD&E Trust, however only on "windfall" sites that were not allocated through a development plan document such as the Local Plan. On the basis of this decision officers had continued to work with representatives of the trust to develop a suitable methodology and evidence base to seek contributions in these circumstances. A further Secretary of State decision has however reached a different conclusion on this issue.

The second case relates to Land north of Viaduct, adjacent to Orchard Business Park, Ledbury, Herefordshire. In this case a mixed use development including 625 new homes was proposed. The site was a "known" development forming part of a strategic site within the Herefordshire Core Strategy. In this case the Inspector considered the issue of health care contributions stating in their decision letter that:

> "15.13 The Wye Valley NHS Trust seeks a contribution toward Hereford Hospital. It submitted details of the additional interventions required based on the projected population of the proposed development. The contribution sought would assist with providing capacity for the Trust to maintain service delivery during the first year of occupation of each unit of the accommodation on/in the development. This is necessary since the Trust will not receive the full funding required to meet the healthcare demand due to the baseline rules on emergency funding and there is no mechanism for the Trust to recover these costs retrospectively in subsequent years.
>
> 15.14 I am satisfied that the contribution is necessary to make the development acceptable in planning terms. In the absence of the contribution there would be inadequate healthcare services available to support the population increase arising from the proposed development and it would also adversely impact on the delivery of healthcare not only for the development but for others in the Trust's area. The contribution is directly related to the development and is fair and reasonable in terms of scale and kind……."
>
> 15.26 If the Secretary of State is minded granting planning permission for the development I am satisfied that the financial contributions requested are necessary to render the proposal acceptable in planning terms and they are directly related to the development. Having regard to the costings set out in the justification statement I am also satisfied that they are fairly and reasonably related in scale and kind to the development proposed.
>
> 15.27 Overall, I conclude that the obligations in the s106 agreement meet the tests in CIL regulation 122 and the same policy tests in the Framework and I would recommend that they be taken into account in assessing the application"

As with the Wolborough Barton decision this appeal was also called in by the Secretary of State and the response to the inspector's conclusion on this issue was:

> "34. Having had regard to the Inspector's analysis at IR15.1-15.25, the planning obligation dated 2 October 2020, paragraph 56 of the Framework, the Guidance and the Community Infrastructure Levy Regulations 2010, as amended, the Secretary of State agrees with the Inspector's conclusion for the reasons given in IR15.26-15.27 that the obligation complies with Regulation 122 of the CIL Regulations and the tests at paragraph 56 of the Framework."

It is considered that this case provides a Secretary of State decision that indicates that such health care contributions can be justified where the development is both a windfall site and also where it is “known” development which is allocated in a development plan document. It is however clear that in the Herefordshire case the contributions were not challenged to the extent that they were in the Wolborough decision and there is clearly a risk that the inconsistency in these decisions was not identified by the secretary of state. There is therefore clearly a risk that at some point in the future a different decision may be reached again. Notwithstanding this it is considered appropriate to move forward with a methodology for contributions based on the position as currently understood through these cases.

Methodology

In discussion with representatives of the trust officers have sought to better understand the need for the contributions being sought and to develop a robust methodology for calculating contributions. This has involved looking at activity data held by the trust and migration data both of which are explored in more detail below:

Activity data

The trust hold a lot of data about demands for their services which is held by postcode. Even attendees at Accident and Emergency (A&E) are required to give a postcode and so those demands are recorded. Initially the trust were looking to use this data to calculate a per dwelling charge that is common across the district but officers raised concerns that demands on their service will vary greatly across the district depending on the demographic profile of the residents of those areas. The demands on their services from postcodes within Sidmouth are very different from those from postcodes in Cranbrook because of the different age profile of residents. It is also important to take account of the fact that those living in the east of the district may in an emergency find it more convenient and quicker to travel to an A&E department outside of the RD&E Trust area as they are entitled to do. As a result the trust have drilled down into their data and are now proposing to calculate contributions based on the likely costs for the location within the district where the proposed development would take place based on the demands and costs to their service from existing development in that locality. Through this we can ensure that the costs are calculated as accurately as possible and reflect the likely demands from the development.

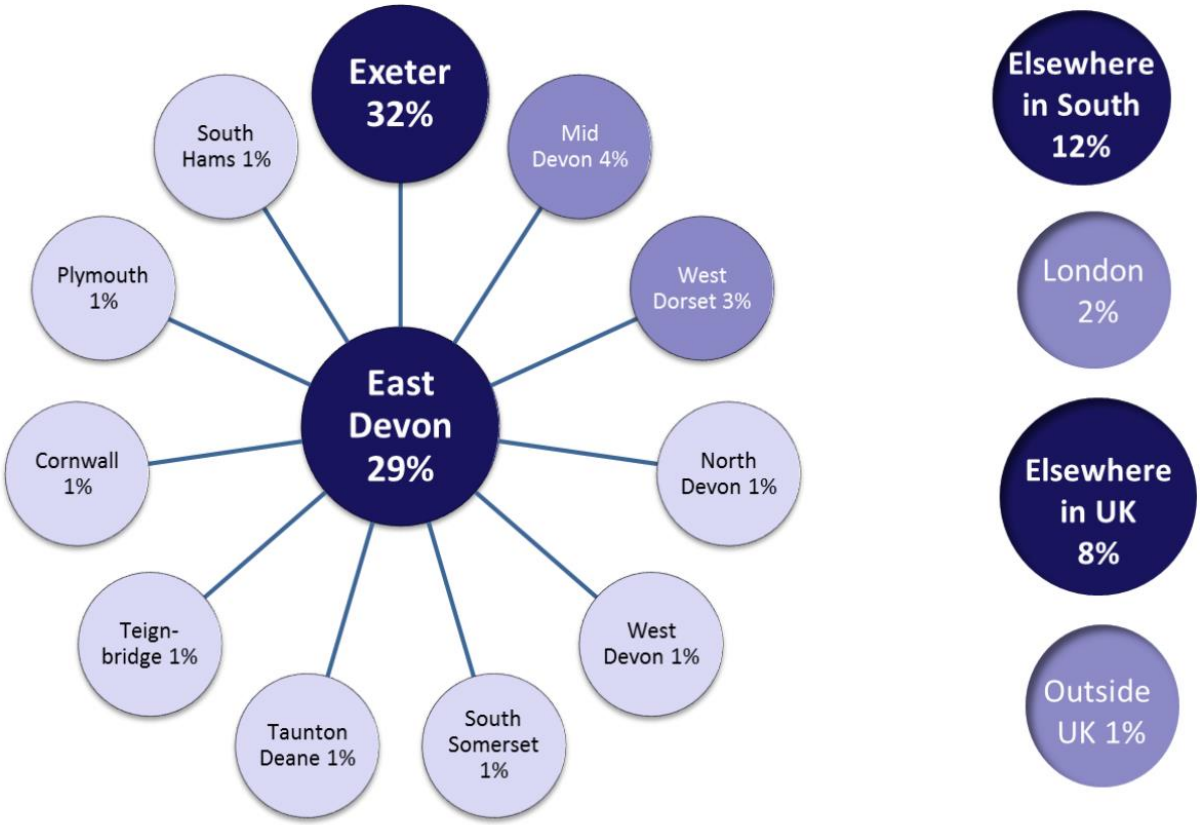
Migration levels

Another area of concern raised by officers was that the RD&E trust covers a large area encompassing Exeter, Mid-Devon and East Devon. New properties built in East Devon will only directly create additional demand for the Trusts services where the occupants are not already resident in the trusts area. Even then they could be new household formations from residents already resident in the area. As a result it is considered that it would not be true to say that developers should pay a full contribution for every new dwelling and that some form of discounting is needed to take account of the proportion that would be occupied by existing residents of the area. It is acknowledged that there will be knock-on impacts from second hand homes being made vacant from residents moving into new build homes and those being occupied by those who are not currently resident in the area. It is however difficult to see how this could be calculated and questionable as to whether it would be reasonable to expect developers to contribute for these knock on impacts as contributions can only be sought for the direct impacts of development.

The Housing Needs study carried out by ONS and reported to Members in October 2020 included a postal survey of occupants of new build properties in the district. In total 2,125 recently built properties were written to with 530 being completed and returned. 20% of the responses were from residents of Cranbrook with the rest coming from other new developments elsewhere in the

district. One of the questions asked was where residents had moved from. Responses are summarised in the diagram on the next page:

Figure 74: Location of previous address



From this it is clear that over 60% of residents of new build properties in the district had moved from elsewhere within the RD&E Trust area and therefore would not directly impact on service delivery. Clearly some of these will have been new household formations that may lead to new births that would impact on service delivery, however since the trust is only seeking to meet a 1 year funding shortfall due to the lag time before government funding addresses the uplift in population it is not possible to account for how many would be new household formations that lead to an increase in population in the first year. It is therefore considered that any contribution should be discounted by 65% to take account of relocations within the trusts area that do not actually directly lead to additional demand.

It should be noted that while the trust accept the data and the need for a discount to ensure a robust methodology they wish to look at this issue in further detail and consider the knock on impacts of freed up capacity within the existing housing stock and resulting inward migration from outside of the trusts area. This may lead to a revised methodology in time.

Calculation of contributions

The trust have calculated the appropriate contribution based on the discussed methodology for a number of sites based on an occupancy level of 2.24 persons per dwelling to reflect latest data. The costs are then calculated for each activity based on the activity level for that locality and then the migration discount applied and the cost divided by the number of dwellings. Due to the different activity levels the costs can vary quite significantly across the district with costs likely to be in the order of between £600 to £1000 per dwelling in most cases.

The trust has been clear that they are only likely to make requests from major developments in the district comprising of 10 or more dwellings.

Conclusions

It is hoped that this work now shows that through case law and counsel advice there is a sound legal basis for securing non-infrastructure contributions for health care services provided by the RD&E Trust. Discussions with officers of the trust have developed a robust methodology for calculating the contributions that could be defended at appeal if necessary and that these contributions reflect as accurately as possible the true cost of the impact of each new home on the trusts costs.

A by-product of this work has been the building of relationships between council officers and those of the trust which will hopefully continue and help the trust to engage with the development of the new Local Plan such that the impacts of growth on healthcare providers can be better understood and taken into account as the plan is developed.

Financial implications:

It is envisaged that EDDC will act as billing authority and therefore intermediary between the NHS trust and developers for these contributions. From a financial controls perspective it is important that these amounts are segregated from other section 106 contributions i.e. they are invoiced separately from a segregated cost code and a methodology is agreed to ensure these amounts are passed on to the trust in a timely fashion.

Legal implications:

Local Plan policies and national planning policy are supportive of contributions towards non infrastructure services being required to mitigate development impacts where they meet the Regulation 122 tests. The proposed NHS contribution methodology flows from recent case law as set out within the report. A robust methodology will support the Council's position should any challenge be made at appeal.