



Article by Brian Hurwitz and Richard Braun

CAMBRIDGESHIRE ADVANCES
ON INFRASTRUCTURE FUNDING

Among the new freedoms and flexibilities for local authorities set out in the Local Government Act 2003 are borrowing powers to invest in capital works and assets. Councils have been using “prudential borrowing” for the past three years.

The cost of borrowing must be affordable and in line with principles set out in a professional prudential code endorsed by the Chartered Institute of Public Finance and Accountancy. However, as the Local Government Association notes, wide variations have emerged between authorities in the amounts invested and the purpose to they are put.

Cambridgeshire County Council has recently secured developer contributions under planning agreements which include provision for reimbursing the council’s costs in using its powers to provide major infrastructure necessitated by the developments concerned (Planning, 23 October, p5). Prudential borrowing has eased cash-flow problems for the developers and added an extra incentive to start development by smoothing significant upfront infrastructure costs.

The council’s in house lawyers and finance officers and staff from the County Council’s new communities service worked with Sharpe Pritchard to build provisions into several recent section 106 agreements. The funding will still be provided by the developer, but in the short term the county council has stepped in to help. The developers will repay interest costs incurred by the council in funding particular items of transport and education infrastructure.

Agreements were completed in November 2009 on a major residential development at Trumpington Meadows and a major commercial and biomedical development adjacent to the Addenbrooke’s Hospital campus. Two further agreements relating to major residential developments at Glebe Farm and Clay Farm, Trumpington, were completed subject to the outcome of an appeal. Another agreement is in the pipeline for housing on part of a language school site.

The 2003 Act allows local authorities to borrow money provided that it is intended for any purpose related to their statutory functions or for the prudent management of their financial affairs. This in turn is subject to various other controls and duties, which are expanded upon in the prudential code. The mechanism for dealing with this arrangement in section 106 agreements is relatively simple.

The relevant prudential borrowing costs contribution is defined as a sum necessary to reimburse the council for its costs incurred in borrowing the sums concerned. The definition also makes it clear that this covers works carried out by the council which comply with the guidance set out in the code. The definition lists specific items of infrastructure works covered by the prudential borrowing. These correspond with highways and education works, such as a contribution towards a secondary school.

The definition allows for an increase in payments in order to take account of the prudential borrowing costs contribution. In turn, this is linked to interest which the council will have incurred from the date that the borrowing commenced until the relevant payment is made. The beauty of this arrangement is that it allows the council to specify an earlier date than that in the section 106 agreement from which the money was first borrowed, as long as the infrastructure does relate to the proposed development.

The agreements contain separate clauses dealing with financial provisions. Those payments which include a prudential borrowing costs contribution are excluded from indexation provisions that apply to other payments. A schedule to the agreement sets out the obligations on the owners to make the various payments. Its terms include a requirement to pay the relevant prudential borrowing costs contribution at the same time as making payment of the final instalment of transport and education contributions secured under the agreements and linked to the prudential borrowing costs contribution.

Quite uniquely, the section 106 agreement appends an example set out in tabular form to show the extent of the borrowing required and how this relates to the anticipated dates for payments of the relevant contributions. This provides clarity and transparency about the use of the funds and its relationship to the proposed development.

This mechanism sets a clear commitment and programme towards delivery, allowing the council to work in co operation with the developer but also giving it both flexibility and project management input. This is leading to more advanced delivery of the necessary infrastructure for development.

This article was written by Brian Hurwitz jointly with Richard Braun, manager of the property legal team at Cambridgeshire County Council. It was published in “Planning” magazine on 27 November 2009. Brian Hurwitz is a partner at Sharpe Pritchard Solicitors.

**This note is intended to provide a brief overview of the legal principles under discussion.
It is not intended to be a comprehensive guide or to constitute legal advice.**

