

**Open Report on behalf of Andy Gutherson, Executive Director - Place**

Report to:	<b>CLlr R Davies, Executive Councillor for Highways Transport and IT</b>
Date:	<b>14 - 18 March 2022</b>
Subject:	<b>Adoption and Implementation of the Advanced Payment Code Exemptions Policy</b>
Decision Reference:	<b>I025506</b>
Key decision?	<b>No</b>

**Summary:**

The report seeks to secure the Executive Councillor's approval to adopt and implement an Advanced Payment Code Exemptions Policy where a development site meets specified criteria.

**Recommendation(s):**

That the Executive Councillor for Highways, Transport, and IT: -

- (1)** Approves adoption of the policy by Lincolnshire County Council of excepting certain new developments from the Advanced Payment Code process if a development site meets criteria specified in Appendix A to this Report;
- (2)** Delegates to the Executive Director Place authority to agree a form of guidance to be issued to the public explaining the Advanced Payment Code process and detailing Lincolnshire County Council's policy with regard to it.

**Alternatives Considered:**

To continue applying the Advanced Payments Code (APC) in accordance with the process prescribed by statute and without adopting a policy of excepting certain developments from the requirement to serve APC Notice.

**Reasons for Recommendation:**

Lincolnshire County Council have applied exemptions to the APC code for a number of years. However, we have been unable to locate the policy documents to support this stance.

This recommendation will ensure that the relevant policies are in place to support future enforcement of the APC code in Lincolnshire. It will also ensure that the policy is in line with statutory responsibilities in respect of highways and flood risk.

**1. Background**

- 1.1 When new residential developments are constructed, they include new roads and footways. At the time of the construction the developer has the option to offer them for adoption as publicly maintainable highway or they can choose to keep the road as a private road.
- 1.2 In cases where roads are to be adopted, the developer usually enters into a legal agreement with the County Council, under S38 of the Highways Act 1980, and will pay a security to the County Council until the road is adopted, after which the security is returned to the developer.
- 1.3 In cases where the roads are to remain private, the developer will set up a Management Company and the residents will pay contributions to the company to maintain the roads and associated infrastructure. The decision to keep roads private are often market driven, it may be dictated by site specific circumstances, or the standard of materials used are of a higher specification than the County Council can accept, due to the higher cost of the long-term maintenance of the products used.
- 1.4 If a developer has not entered into a S38 agreement, the legislation through the Advanced Payment Code (APC) provides a legal mechanism for the County Council to request the landowner to deposit security equivalent to the construction costs of the roads. The security has to be deposited before any construction work can begin on the erection of any new buildings. This is to ensure that roads serving the developments are constructed and completed to a suitable standard in the event that the developer defaults. In addition, it will protect any purchaser of a new building as without any security being paid under the APC the purchaser may be liable to pay the construction costs of the road if the developer fails to complete the road, goes into administration or liquidation, and is wound up.
- 1.5 Evidence suggests that there have been cases where the County Council has been required to call in a bond and complete a road because a developer has failed to do so or has gone into administration. In addition, there have been instances, where the developers have not completed the highway works required on developments and the local residents were not protected by either a S38 agreement or a payment

made under the APC, as result of which the residents had to fund and complete the works. It is anticipated that there will be an increase or additional schemes brought forward for planning permission for residential developments and consequently an increase in requests for the roads to be adopted.

- 1.6 Under the APC process, the County Council has a short timescale in which to determine if to serve an APC notice or not. As an APC Notice must be served within 6 weeks of the Initial Notice, under either the Building Act 1984 or the Building Regulations 2000, being deposited with the Local Planning Authority. When notification is received the County Council will follow the procedure for the serving of notices.
- 1.7 The APC Notice sets out the amount of security a landowner must pay to the County Council before the commencement of the construction of building.
- 1.8 Developers and landowners must satisfy the APC Notice prior to carrying out any works to construct a dwelling by either; -
  - Providing security by either making a cash deposit or to provide a bond;
  - Completion of a S38 agreement (Note that an intention to enter into a S38 agreement is not sufficient. Either a cash deposit, or bond must be provided, or building work is not commenced until the S38 agreement is completed).
- 1.9 Once an APC Notice has been served the County Council register this on the local land charges register so as to inform potential purchasers as to the status of the roads.
- 1.10 However, on the rare occasion a developer proceeds to construct the development without providing an APC security or a S38 agreement being in place is a contravention of the Highways Act. The County Council will commence court proceedings.
- 1.11 To cancel an APC Notice, the developer must either; -
  - Enter into a section 38 agreement.
  - Complete all highway works to an acceptable adoptable standard for the County Council to progress adopt, under S228 of the Highways Act 1980. On adoption the APC Notice will be cancelled, and any security paid will be returned.
  - Complete all highway works to an adoptable standard where it is intended that the highway works will remain private. In which case following completion of the works the County Council will release the security and the highway will remain privately maintained.
- 1.12 The legislation does allow discretion in the serving of APC Notices and the County Council could choose to exempt all sites. Simply doing this would not provide the

clarity required or ensure that residents were properly informed or protected and it would be preferable to have a proactive policy on all residential developments.

- 1.13 There is a need for clarity for all those involved in the process to have a positive system where the issue of adoption or non-adoption are identified at the earliest possible stage. Therefore, it is recommended that the APC procedure allows sites to be exempted where the site falls within one of the categories detailed in Appendix A.
- 1.14 The proposed approach will provide clarity and set out what the County Council's role is where developments are to remain private. Individuals moving into private developments need to satisfy themselves that the roads and future maintenance of them are secure in an acceptable way.
- 1.15 If a policy exception applies, the developers will be informed at the earliest opportunity and no further action will be taken, no APC Notice will be served. Lincolnshire County Council (LCC) adopting a policy of exempting certain specified categories of development is entirely without prejudice to the circumstances prescribed by statute as being exempt from APC. The statutory provisions regulating the APC are contained in the Highways Act 1980 (the Act). Nothing by way of LCC policy has the power to override the Act. The policy is intended to add clarity as to instances in which LCC will, as a matter of discretion, additionally not apply APC.
- 1.16 Nothing will prevent developers from offering the roads that they are constructing for adoption as public highway through a S38 agreement in the usual way.

## **2. Legal Issues:**

### Equality Act 2010

Under section 149 of the Equality Act 2010, the Council must, in the exercise of its functions, have due regard to the need to:

Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act.

Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.

Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The relevant protected characteristics are age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

Having due regard to the need to advance equality of opportunity involves having due regard, in particular, to the need to:

- Remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic.
- Take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it.
- Encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to tackle prejudice, and promote understanding.

Compliance with the duties in section 149 may involve treating some persons more favourably than others.

The duty cannot be delegated and must be discharged by the decision-maker. To discharge the statutory duty the decision-maker must analyse all the relevant material with the specific statutory obligations in mind. If a risk of adverse impact is identified consideration must be given to measures to avoid that impact as part of the decision making process.

It is considered that the proposal will have a neutral impact on groups with protected characteristics, as the proposed change is at a policy/procedural level, relating to how the County Council and the development industry interact, at high level only. There is no immediate impact upon service users.

#### Joint Strategic Needs Analysis (JSNA) and the Joint Health and Wellbeing Strategy (JHWS)

The Council must have regard to the Joint Strategic Needs Assessment (JSNA) and the Joint Health & Wellbeing Strategy (JHWS) in coming to a decision.

It is not considered there is a risk of there being an adverse impact under the JSNA and the JHWS.

#### Crime and Disorder

Under section 17 of the Crime and Disorder Act 1998, the Council must exercise its various functions with due regard to the likely effect of the exercise of those functions on, and the

need to do all that it reasonably can to prevent crime and disorder in its area (including anti-social and other behaviour adversely affecting the local environment), the misuse of drugs, alcohol and other substances in its area and re-offending in its area.

Consideration has been given to section 17 of the Crime and Disorder Act 1998 and the policy is not considered to have any direct effect on crime and disorder.

### **3. Conclusion**

The purpose of this report is to seek approval to adopt and implement an Advanced Payments Code Exemptions Policy where a development site meets specified criteria.

### **4. Legal Comments:**

The Council has the power to make the decision sought by the recommendations.

Provided the matter is in accordance with the budget the decision is consistent with the Policy Framework and within the remit of the Executive Member for Highways Transport and IT.

### **5. Resource Comments:**

Approval of the recommendation formalises the policy framework for the Council's current APC exceptions practice and as such does not have any resource implications. However, adoption of the proposed policy will provide greater clarity and support enforcement of the APC code.

### **6. Consultation**

#### **a) Has Local Member Been Consulted?**

N/A

#### **b) Has Executive Councillor Been Consulted?**

N/A

#### **c) Scrutiny Comments**

The decision will be considered by the Highways and Transport Scrutiny Committee at its meeting on 7 March 2022 and the comments of the Committee will be reported to

the Executive Councillor for Highways, Transport and IT.

**d) Risks and Impact Analysis**

N/A

**7. Appendices**

These are listed below and attached at the back of the report	
Appendix A	Advanced Payments Code (APC) Exemptions Policy

**8. Background Papers**

No background papers within Section 100D of the Local Government Act 1972 were used in the preparation of this report.

This report was written by Liz Burnley, County Manager for Development, who can be contacted on 077173 03774 or [Liz.Burnley@lincolnshire.gov.uk](mailto:Liz.Burnley@lincolnshire.gov.uk).

This page is intentionally left blank