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Dear Sirs

DRAFT REVISED CIRCULAR ON PLANNING OBLIGATIONS

Thank you for consulting the House Builders Federation on the above consultation document. The HBF is the principal trade federation for the housebuilding industry representing over 400 members ranging from large multi national companies to small, local developers. It's members account for over 75% of all new housing in England and Wales in any one year.

As you will be aware, HBF was a member of the ministerial advisory group on planning obligations and I hope that we were both constructive and helpful in that process. However, clearly not all of our views have been incorporated into the draft revised circular and thus we wish to make the following representations.

This response addresses all of the sections of the draft revised circular as set out in the proforma for consultation responses. All paragraph references are to Annex B of the consultation draft unless otherwise stated.

1. Retention/Simplification of policy tests

1.1. In general, the encouragement for the use of planning conditions rather than planning obligations in paragraph 3 is welcome. However, an emerging problem is one where there is no arbitration process available to applicants seeking to discharge such a condition.

1.2. For example, a planning permission might contain a condition that requires "a contribution to education facilities". The developer accepts the condition and accepts the obligation to make such a contribution. However, when negotiating with the education authority agreement over the level of contribution cannot be achieved. It is not possible to appeal the original planning condition since there is no disagreement that such a contribution is necessary. Unfortunately there is no appeal system to agree the level of contribution necessary.

1.3. This increasingly common problem might be solved in part through the increased use of standard formulae. Unfortunately, the emerging practice of such formulae is already leading to assessments by local planning authorities not taking into account site viability. This is addressed later in this response. Alternatively the problem should be addressed through amendments to guidance on the use of conditions to ensure that such impasse cannot be reached.

1.4. The HBF agrees with the sentiment set out in paragraph 7 that planning obligations should never be used as a means of securing a share in the profits of development. Such a “betterment levy” cannot sit within the policy tests of paragraph 5 especially the requirement for obligations to be directly related to the proposed development.

1.5. This retention of the so called “necessity test” is vital if this principle is to be maintained.

1.6. It is the planning process itself that seeks to ensure that future development takes place in a mixed and balanced way and that we continue to develop sustainable communities. Thus, people need all sorts of facilities for which planning provides the framework to ensure that providers of those facilities can prioritise their investment and development plans to ensure that community needs can be met.

1.7. In that context, housing is just one of many other community facilities that are needed and development plans ensure that the location and scale of new housing is brought forward in a way which allows service providers to maintain adequate levels of service provision. It is not development itself that raises the need for additional facilities but the people who live in them. Thus, the need for additional educational facilities is a function of increasing pupil numbers, a phenomenon that is purely a function of demographics regardless of whether or not new housing is to be built.

1.8. This consideration is vital if the fourth test of reasonableness is to be maintained. Unfortunately it is the part of the test that is currently most abused. Many local authorities are merely listing all of their public sector statutory responsibilities and, on the spurious logic set out above, linking development to provision of facilities merely on the back of the fact that people will live in the houses and people need facilities.

1.9. The negotiation of a planning obligation should be for facilities that are truly directly related to the proposed development and, without which planning permission should not be granted. Many people happily exist without access to facilities such as swimming pools, libraries and police stations yet all of these types of facility are frequently cited as essential and directly required of development.

1.10. The HBF also agrees with the requirements of paragraph 10 that site viability should remain a consideration for the local planning authority in order that other planning objectives (such as achieving required levels of development)

continue to be met. Viability should be expressed in terms of viability for both the landowner and the developer.

1.11. However, such a test is not the same as a blanket requirement for open book accounting between developer and LPA. The problems of such an approach are extremely complex and detailed, raising issues such as data protection and commercial confidentiality. Viability also varies on a site by site basis for many different reasons. As such the guidance should specifically rule out any requirement for negotiations to be on an open book basis.

2. Typology for use of planning obligations

2.1. The prescribing of the nature of development to achieve planning objectives is, essentially, at the very heart of the planning system. However, it is not at the heart of planning obligations. Where development requires a specific piece of infrastructure in order to proceed the permission can be conditioned to require such provision to be made in conjunction with the proposed development.

2.2. Thus, if it is necessary to ensure that a development contains a choice of housing types and tenures this should be a matter of negotiation between the LPA and the developer and planning permission should be granted conditionally on the basis of the outcome of those negotiations.

2.3. For example, in order to make a development acceptable in planning terms a new development might have to provide a pedestrian link between two existing areas in order to achieve the best planning outcome for the development. Thus, the permission would be conditioned to ensure that such a link was provided.

2.4. A scheme for residential development might require a mix of dwellings to allow for greater choice in the housing market and to meet the needs of a range of households. Once again the mix of households should be negotiated between the LPA and the developer and a condition should be imposed on the planning permission.

2.5. The prescription of the nature of development does not require the cumbersome process of a planning obligation. This is particularly the case in respect of the provision of an element of affordable housing that can more than adequately be controlled through planning conditions.

2.6. There appears to be little difference between the concept of compensating for loss or damage caused by a development and the mitigation of the impact of a development as set down in paragraphs 15 and 16. The first is merely a subset of the second.

2.7. It is vital that the typology for the use of planning obligations does not contradict the requirements of the policy tests set out in paragraph 5. Care should be taken that any examples given in the text are consistent with the requirements of the tests.

3. Contributions for affordable housing

3.1. As suggested above, the prescription of the nature of development can adequately be controlled through planning conditions rather than planning obligations.

3.2. The need for affordable housing arises out of the planning system itself since this imposes spatial control over where and how many houses are built. Residential development does not, in itself, generate a demand for affordable housing.

3.3. However, commercial development, including public sector commercial development such as hospitals and schools, particularly in areas of existing low unemployment, will bring new jobs to an area resulting in new workers being attracted to that area. Since some of these workers will require affordable housing of some sort a planning obligation towards the provision of such housing would be appropriate under the requirement of mitigation of the impact of a development.

3.4. Of considerable concern is the suggestion in paragraph 14 of the draft that presumes that the affordable housing element of residential development will be provided “in kind”. There is no definition of what this phrase means nor is there any recognition of the impact this requirement may have on the overall viability of development proposals.

3.5. As will no doubt be detailed in the good practice guidance, current practice by LPAs for affordable housing contributions is moving towards such “in-kind” provision of completed housing at zero cost to the local authority or RSL. This level of subsidy often means either that the amount of affordable housing provision will be limited or, if the LPA insists on meeting inflexible proportions of affordable housing on all sites, may render the development financially unviable. This issue is better addressed in specific guidance on affordable housing provision (ie: revisions to PPG3) and thus, the reference to “in-kind and on-site” should be removed from this circular.

3.6. A further concern to the HBF is the suggestion in paragraph 14 of the introduction to the draft that the funding of affordable housing out of the uplift in land value has been agreed in principle by the Chancellor. While this may well be a fact, it is made in the context of considering reform of the planning system to include a “community tax” or planning gain supplement, not in the context of the existing policy regarding planning obligations which includes the necessity for a direct link between the proposed development and the planning obligation being sought.

3.7. The draft document is adamant that it does not change policy, merely provides greater clarity of existing policy. If this is, indeed, the case, this new suggestion of capturing increases in land value cannot be applied out of the context of a wholesale review of policy regarding planning obligations.

4. Maintenance payments

4.1. HBF agrees with the rule that maintenance of assets for wider public use should be borne by the body or authority in which the asset is to be vested.

4.2. However, it is difficult to reconcile the idea that an obligation should be required to provide such infrastructure in the first place if the fourth policy test of reasonableness is to be maintained with regard to the advice in the last sentence of paragraph 9; that planning obligations should not be used solely to resolve existing deficiencies.

4.3. The suggestion that such maintenance payments should reflect the timelag between provision of facilities and their inclusion in public sector funding streams needs further guidance, possibly through specific examples of appropriate timescales. This matter might be adequately covered in the good practice guide.

5. Pooled contributions

5.1. The pooling of contributions from planning obligations is the first step away from the tests set out in paragraph 5 towards a betterment levy or development land tax.

5.2. There are some examples of where pooling contributions can be directly related to development proposals, for example, in the new growth areas where a clear plan for provision of infrastructure and development is set out in a discrete geographic area in a known timeframe.

5.3. However, major infrastructure projects (such as major new public transport systems), from which a number of developments may benefit in the future, cannot be considered to be directly related to all development, thus requiring a contribution on a formulaic basis. Such an approach is merely a development tax and thus beyond the scope of the current draft proposals.

5.4. Similarly, contributions towards an undefined pot of money, for spending in an undefined timeframe cannot be consistent with the requirements of paragraph 5.

5.5. Indeed, this fact is acknowledged in paragraph 21, which states that contributions unused within a defined period should be returned to the contributor.

5.6. While such a safeguard is to be welcomed it begs the question as to why the proposed infrastructure was necessary in the first place in order for the development to be acceptable in planning terms given that the development would now exist without the “vital” infrastructure. The safeguard in itself encourages the abuse of the system of planning obligations, suggesting that the system is more about seeking financial contributions from development to offset public spending rather than about mitigating the impact of development. The onus of detailing how contributions are being spent should be placed on

the LPA rather than relying on the developer chasing (or not, in many case,) for this important public information of how the contributions have been spent.

6. Local planning obligations policies

6.1. In a development plan led system it is important that local authority policies regarding the use of planning obligations are clearly set out in development plan documents and that they are tested through the independent examination procedures.

6.2. It is, therefore, curious as to why, in paragraph 25, the government is encouraging local authorities to introduce new policies through the production of supplementary planning documents. Given that this draft revision does not change government policy regarding planning obligations any new policies by LPAs should be introduced through the proper channels of LDF production.

7. Joining up across public sector

7.1. It is important that local authorities are able to deliver all agencies required in the negotiation of planning obligations. It is unacceptable for new requirements to be tabled late in the development process and clear policies in development plans should eradicate this frustrating and unnecessary practice.

8. Formulae and standard charges

8.1. The reference in paragraph 29 to the fact that standard charges and formulae must operate within the current tests of reasonableness and are distinct from the previously proposed optional planning charge must be stressed. A move towards such a charge has major implications for the entire process and standard charges and formulae should not be used as a back door entry into such a system without the safeguards of the necessary changes to the rest of the planning obligations system.

8.2. However, where planning obligations are being negotiated it is helpful to have a clear baseline from which to work if assessments of site viability are to be discussed. Similarly, in viability appraisals before sites are contracted it is useful to be able to assess the possible impact of an obligation when it is agreed that such an obligation would be appropriate.

9. Standard agreements/undertakings

9.1. The requirement for LPAs to draw up and publish standard heads of terms and model clauses is considered to be of considerable assistance to the speeding up of the planning obligations procedures.

9.2. However, such agreements should be closely monitored to assess whether or not the standard wording is acceptable to applicants or whether they are frequently being amended in a similar way, which would indicate the necessity to modify the wording for future agreements. Similarly, it should be stressed

that standard agreements must remain lawful and be within the tests of reasonableness set out in the guidance.

9.3. It might be a positive step for ODPM to suggest model clauses in support of this guidance, in a similar way to the model conditions contained within Circular 11/95.

10. Use of independent third parties

10.1. While the use of independent mediation within the process of planning obligations is initially attractive it removes a considerable amount of transparency from the planning process.

10.2. The concept of “open book accounting” is, theoretically, simple yet in practice it has problems of considerable complexity and of issues such as commercial confidentiality.

10.3. Many examples of current practice regarding the use of such third parties has led towards LPAs seeking to extract as much “value” from the proposed development as possible rather than focussing on the actual issue of what is strictly necessary to enable the development to be acceptable in planning terms.

10.4. There is, however, a role for arbitration in cases where planning conditions require a contribution to be made to a specific project yet agreement cannot be reached as to the level of that contribution as exampled above. Greater guidance should be given on who would be seen as an appropriate “independent third party” and how the costs of such mediation should be met.

11. Cost recovery

11.1. The delivery of a planning service is a public service, taking away rights from landowners to do what they wish with their land in order that development can be managed in the light of the wider public interest. Thus the public has a responsibility to meet the costs of such a service. If the proper planning of an area requires a legal agreement the costs should be borne by all sides of the process.

11.2. The proposals to increase the fees for planning applications are, in part, as a result of the rising costs of greater involvement of legal staff in order to draw up planning obligations. Thus, any requirement to pay separately for such work is double charging.

11.3. The greater use of conditions on planning permissions would reduce costs to local authorities and this should be used as an incentive for their greater use. If costs of producing legal agreements are always passed on to the applicant there is no such incentive for authorities to consider the advantages of conditions over obligation agreements.

12. Use of unilateral undertakings

12.1. The ability for applicants to submit unilateral undertakings where agreement cannot be reached with the LPA is an essential part of the planning process, particularly in a process that is one of negotiation.

12.2. The proposed retention is, therefore, welcomed.

13. Monitoring and implementation of obligations

13.1. Obviously the monitoring of the implementation of planning obligations is an important part of the process. This monitoring should be as transparent as possible in order that all interested parties can clearly see how development has mitigated its impact and how effective such mitigation has been.

14. Time limit for modification and discharge of planning obligations

14.1. In the light of the recent decision to extend the time limit for appeals under S78 (and other related sections) of the T&CPA to 6 months it would be consistent to allow 6 months for the appeal of a refusal to modify or discharge a planning obligation.

15. General

15.1. Current guidance regarding planning obligations stresses that the consideration of planning applications should be in accordance with the development plan and other material considerations. Planning obligations are currently negotiated through agreement between the LPA and the applicant and should be sought rather than required as a pre-requisite to planning permission in all cases.

15.2. This important part of the necessity test should remain within the guidance and should be more clearly articulated within the policy document.

16. Good Practice Guidance

16.1. Unfortunately the good practice guidance appears to have been based on the current practice of local authorities. Much of this practice goes beyond the existing tests of reasonableness and thus remains beyond the scope of this limited policy clarification of the existing system of planning obligations.

16.2. Indeed, the fact that the good practice guidance has been produced without the feedback of the consultation exercise in respect of the draft policy suggests that the project was one of research of current practice rather than specifically aimed at establishing good practice.

16.3. ODPM should, therefore, be quite clear that the contents of the good practice guide are consistent with the policy guidance and do not include established abuses of the system which go beyond those policy guidelines. This process may be assisted through the incorporation of a simple flowchart asking such questions as “Can this obligation be secured via a planning conditions? If yes,

then do so, if no, why not?" The HBF would be happy to work with ODPM to produce such a practical tool to assist the process.

16.4. Similarly, all examples of current practice should be assessed against the tests of reasonableness and not against what some developers have contributed towards in the past. Developers are frequently faced with little alternative to pay for the facilities requested by the LPA simply because of the lengthy appeal process leading to increased costs in any event.

Conclusions

The system of planning obligations is one of increasing complexity yet the original tests of necessity remain. It is, therefore, necessary to ensure that policy does not creep towards legitimising abuse of the system but that those abuses are stamped out through the implementation of effective and clear policy.

Obviously HBF is keen to continue the debate around how policy statements can be made clear, concise and consistent and is happy to continue to play an active part in the implementation of this ever increasingly complex practice.

Yours faithfully

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