Consultation questions – response form

We are seeking your views to the following questions on the proposals to allow earlier renegotiation of section 106 obligations agreed prior to April 2010.

How to respond:

The closing date for responses is 8 October 2012

Responses should be sent preferably by email:

Email response to **cil@communities.gsi.gov.uk**

Written response to:

William Richardson
Communities and Local Government
CIL Team
Zone 1/E2 Eland House
Bressenden Place
London SW1E 5DU

About you

i) Your details:

Name:	Joshua Risso-Gill
Position:	Member
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ii) Are the views expressed on this consultation an official response from the organisation you represent or your own personal views?

Organisational response	X☐
Personal views	☐

iii) Please tick the box which best describes you or your organisation:

District Council	☐
Metropolitan district council	☐
London borough council	☐
Unitary authority/county council/county borough council	☐
Parish council	☐
Community council	☐
Non-Departmental Public Body (NDPB)	☐
Planner	☐
Professional trade association	☐
Land owner	☐
Private developer/house builder	☐
Developer association	☐
Voluntary sector/charity	☐
Other	☐

(please comment):	**Professional Body (City of London Law Society)**

iv) What is your main area of expertise or interest in this work (please tick one box)?

Chief Executive ☐

Planner ☐

Developer ☐

Surveyor ☐

Member of professional or trade association ☐

Councillor ☐

Planning policy/implementation ☐

Environmental protection

Other ☐

(please comment):	Planning Lawyer

Would you be happy for us to contact you again in relation to this questionnaire?

Yes X☐ No ☐

ii) Questions

Please refer to the relevant parts of the consultation document for narrative relating to each question.

Question 1 – is the Government's objective to encourage formal reconsideration of Section 106s on stalled development supported by the shortened relevant period given in the draft regulation?

No

Comments

Changes to market conditions and the decrease in viability of schemes is undoubtedly preventing development coming forward. This is particularly the case for housing schemes which are subject to planning obligations for the provision of affordable housing on-site, or for a substantial affordable housing contribution payment. Whilst normally

negotiated down, some local planning policies have a default affordable housing contribution of 50% which, in the current economic climate, renders residential development, particularly larger schemes, unviable.

As stated in the consultation document, DCLG wrote to local planning authorities ("LPAs") in March 2011, encouraging them to consider whether to voluntarily renegotiate planning obligations. Where LPAs have felt compelled to renegotiate planning obligations over the past 18 months, they have already done so.

Section 106A and Section 106B of the Town and Country Planning Act 1990 ("TCPA") provide that a planning obligation may only be modified or discharged by agreement, after receipt by the LPA of a formal request, or on appeal. If, on a formal request for modification or discharge of a planning obligation, the LPA determines the planning obligation shall continue to have effect without modification, then the LPA faces incurring time and expense if the applicant decides to appeal against that determination.

This risk of appeal, therefore, is the incentive for the LPA to renegotiate planning obligations after receipt of a formal request. As this right of appeal is not available until after an applicant has made the formal request, there is no incentive on the LPA to renegotiate planning obligations voluntarily in the interim. Until five years after the date the obligation was entered into, without an incentive for the LPA to renegotiate, developments which are unviable or only have marginal viability due to planning obligations will remain unimplemented.

The proposed timeframe, however, fails to take into account the time limits attached to planning permissions. In particular, a cut-off date of 6 April 2010 will be of little help to developers with outline planning permissions, which require submission of reserved matters within 3 years from the date of the outline planning permission. Further commentary on the proposed timeframe is set out in the response to Question 2 below.

The principle of changing the timeframe within which formal requests for renegotiating planning obligations, therefore, is welcome and will, in theory, help developers to make schemes viable. The proposed timeframe, however, severely restricts any potential benefit to stalled development this principle may otherwise generate.

Question 2 – does 6 April 2010 represent a reasonable cut off for the proposed change?

No

Comments

Time Limits for planning permissions and outline planning permissions

The time limit imposed on a planning permission within which it must be implemented before it lapses is at the discretion of the LPA. Depending on the nature, size and location of the development, the LPA may impose a shorter or longer time limit for implementation than the default three years under section 91(1)(a) TCPA.

LPAs have this same discretion in imposing the time within which applications for reserved matters must be submitted under section 92(4) TCPA. The default time limit for submission of reserved matters is three years from the date of the grant of the outline planning permission.

Lead-in times and expenditure for implementation and reserved matters submissions

Before a planning permission can be implemented, particularly in the case of large development schemes, a developer will most likely have to discharge pre-commencement conditions attached to the planning permission. These pre-commencement conditions range from remediation requirements, to carrying out surveys to providing access points and highway improvements.

The discharge of these pre-commencement conditions takes a significant amount of time, and requires a big financial commitment on the part of the developer. Unless the developer is certain the development will proceed and is viable, the developer is unlikely to willingly invest time and resources in discharging the pre-commencement conditions.

The same principle applies to outline planning permissions. These require the submission of reserved matters, and often the discharge of pre-commencement conditions as well. The reserved matter submissions require further investigation, survey and design work beyond that carried out for the original outline planning application.

Undertaking this work also carries a vast time and financial commitment. The developer will not be willing to engage with formulating reserved matters submissions until it is certain that the scheme is viable, and that work can commence before the expiration of the outline planning permission.

Timeframe for modifying or discharging planning obligations

If a scheme has currently stalled due to its associated planning obligations rendering it unviable, a developer will be unwilling to incur the time and expense in discharging pre-commencement conditions or formulating reserved matter submissions until such a time as the developer is certain the planning obligations are modified or discharged to make the scheme more viable.

Even if the formal request procedure for modification or discharge of planning obligations is made available for planning obligations entered into on or before 6 April 2010, it will still take a substantial period of time to reach a stage where those obligations are modified or discharged. By the time the developer is certain that the obligations are modified or discharged, there may not be sufficient time to discharge pre-commencement conditions and/or formulate reserved matter submissions.

Example of timeframe for modifying or discharging planning obligations

Set out below is a practical scenario of a planning obligation entered into on 6 April 2010, with an outline planning permission granted on the same date with a time limit for the submission of reserved matters within three years of the date of the outline planning permission.

The consultation document states developers will have the opportunity to formally request the modification or discharge of planning obligations from one month after the regulations come into force. After full consideration of the consultation responses, DCLG expects the regulations to come into force this year. As an estimate, the regulations may come into force around the beginning of December 2012.

Therefore, the time from which developers may make their formal request would start from January 2013. The developer will need time to consider and prepare the grounds for the re-negotiation of obligations, although the developer has the opportunity to start this process once the obligations come into force.

Before making the formal request, the developer must comply with notice requirements 21 days before date of the application, as set out in Regulation 4 of the Town and Country Planning (Modification and Discharge of Planning Obligations) Regulations 1992. Even if the regulations come into force in December 2012, it is questionable whether an applicant can comply with the notification requirements set out in Regulation 4 before it is capable of making its application, one month after the new regulations come into force. In any event, the developer is likely to use December to consider whether it has a compelling case to satisfy the requirements for modifying or discharging the planning obligations, and will not wish to submit or publish notices until such a time as it is certain to proceed with the application.

The earliest the applicant is likely to submit its application for the modification or discharge of the planning obligations is towards the end of January 2013. The LPA then has eight weeks to determine the application.

On the basis that the LPA has not been willing to voluntarily renegotiate the planning obligations previously, one can presume the LPA is not in favour of the renegotiation of the planning obligations. Other developers in the area may also submit their applications to the LPA at the same time, meaning the LPA does not have the resources to quickly process the applications.

This shows there is potential for the LPA to take the full eight weeks, and then to determine the planning obligations shall continue to have effect without modification. This means the applicant has to wait until the end of March 2013 before being able to appeal.

The applicant may then submit an appeal to the Planning Inspectorate ("PINS"). As indicated in the consultation documents, PINS have indicated they aim to consider the majority of written representation appeal cases within 14 weeks. PINS may take longer than the 14 weeks in some cases, and not all appeals will be carried out by written representations; decisions on appeals dealt with by hearing may take more than 14 weeks.

Taking PINS' 14 weeks time frame for a decision, this takes the applicant up to the end of June/beginning of July 2013.

Even if the applicant is successful at appeal, there is no certainty as to the viability of its scheme until after the deadline for submission of

reserved matters (6 April 2013). The same applies for the LPA determining the application in favour of the applicant towards the end of March 2013; the applicant will not have sufficient time to prepare reserved matters submissions before the end of the three year time limit.

In conclusion, even taking an outline planning permission granted on 6 April 2010, which provides the maximum amount of time before the expiry of the time limit for submission of reserved matters, the proposed cut-off date of 6 April will not help stalled development come forward. Planning permissions which require discharge of pre-commencement conditions, and outline planning permissions which require submission of reserved matters details, within three years of the date of the permission will not benefit from the proposals.

The reason for the selection of 6 April 2010 as the cut-off date

The consultation impact assessment indicates a reason for selecting 6 April 2010 as the cut-off date for the proposed changes is because this was the date from which new statutory tests were introduced for most planning obligations. This is referring to the tests set out in Regulation 122 of the Community Infrastructure Levy Regulations 2010, which states that a planning obligation may only constitute a reason for granting planning permission for the development if the obligation is:

(a) necessary to make the development acceptable in planning terms;

(b) directly related to the development; and

(c) fairly and reasonably related in scale and kind to the development.

The selection of the cut-off date on this basis is flawed for two reasons:

1. **These criteria from Regulation 122 existed for some time prior to Regulation 122. Tests broadly in the same form as those in Regulation 122 were set out in Circular 05/05 (now withdrawn by the NPPF) and, whilst they did not have legislative force, they were still to be taken into account by LPAs determining planning applications. To select the cut-off date on the basis of the date the CIL Regulations came into force implies that planning obligations since that date will be significantly more compliant with these criteria than those planning obligations entered into before 6 April 2010, which is not necessarily the case.**

2. **The third criteria laid down in Regulation 122 requires the obligation to be fairly and reasonably related in scale and kind to the development. If the development has now stalled because the planning obligation renders the development unviable, the planning obligation can no longer be deemed to be fairly and reasonably related in scale and kind to the development. The purpose of planning obligations is to off-set potentially negative impacts of the development, and to make the proposed development acceptable in planning terms. If the economic climate has changed, then equally what is 'necessary' to make the development acceptable in planning terms may have changed. Therefore, just because a planning obligation satisfied the tests under Regulation 122 at the time of the LPA's determination to grant planning permission should not mean that those obligations are not also capable of being subject to a formal request for their renegotiation.**

The basis for modification or discharge

The consultation impact assessment suggests having a lower prescribed period on all future consents could imply that there is more flex in the system than there actually is, encouraging frivolous appeals from developers, and unnecessarily threatening the certainty provided by current arrangements.

The test for whether a planning obligation is capable of modification or discharge under Section 106A is whether the obligation no longer serves a useful planning purpose, or whether it continues to serve a useful purpose equally well if it had effect subject to the modifications specified in the application.

Where LPAs determine that these requirements are not met, they may determine that the planning obligation continues to have effect without modification. Equally, for appeals, Inspectors will consider whether these tests are met and have regard to the local plan policy position and other relevant material considerations.

There is, therefore, no automatic right to modification or discharge of planning obligations merely from the fact a developer may make a formal request for the modification or discharge of that planning obligation. Unless the relevant tests are met, the planning obligation will not be modified or discharged.

To alleviate any concerns about "frivolous appeals", this can be

controlled by an award of costs against developers who bring appeals without any sound basis for doing so.

Conclusion

The proposed cut-off date of 6 April 2010 means stalled planning permissions and outline planning permissions with a 3 year time limit for implementation or submission of reserved matters respectively are already timed-out from benefitting from the proposed legislative changes.

There is no reasonable justification for the selection of 6 April 2010 as the relevant cut-off date. In addition, controls already exist within the formal request and appeal process to ensure only certain obligations are modified or discharged, where the original planning purpose no longer exists or can be served equally as well.

Therefore, the cut-off date should be removed, and developers should be able to make formal requests for the discharge or modification of all planning obligations, regardless of when they were entered into.

This will result in an administrative cost and burden for both LPAs and PINS. Considering the current cut-off date will have minimal affect on currently stalled developments, and removing this time limit allows LPAs to receive the benefits of continuing or modified planning obligations that would otherwise never become available due to the development not being built out, this administrative cost is a small price to pay compared to the long-term benefits of new development and planning obligations.

Question 3 – what approaches could be taken to secure acceptable affordable housing delivery through revised obligations?

Comments

The general approach should be for local planning authorities to be much more flexible and creative when considering ways to allow development to proceed on revised terms.

Example: planning application for increasing height of a building block in North London to create additional floors of residential development; policy objection to increase in height; scheme unviable unless increase

in number of flats. Local authority should be able to balance the benefit of new housing and override the height objection to grant permission. The development can then proceed and generate affordable housing provision off-site.

Example: Brent Cross. S106 provides for a re-assessment of viability before each housing phase is built, to re-calibrate the affordable housing provision to take account of up-to-date market and other viability factors.