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CLLS PLANNING & ENVIRONMENTAL LAW COMMITTEE RESPONSE TO CLG CONSULTATION "PLANNING PERFORMANCE AND THE PLANNING GUARANTEE"

The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response in respect of the consultation paper titled "Planning Performance and the Planning Guarantee" issued by the CLG in November 2012 has been prepared by the CLLS Planning & Environmental Law Committee.

CLLS welcomes this further initiative to speed up planning procedures in an attempt to secure the delivery of much needed development and growth.

CLLS has the following comments in relation to the consultation paper:

1. Paragraph 9: The proposal to refund an applicant's planning application fee should an application remain undetermined after 26 weeks is a welcome initiative. The consultation paper makes it clear that this can be "contracted out" if a PPA is in place. However, we consider that there is still a risk of "bad behaviour" on the part of planning authorities in that they may refuse a planning application just before the 26 weeks expires in order to avoid having to pay the refund. This concern is addressed in part at paragraph 78 where it is stated that if an authority does refuse an application just to avoid the penalty, such behaviour would be taken into account by an inspector in considering whether to award costs in any subsequent appeal proceedings. That approach does, however, presuppose that the applicant will pursue an appeal. There may be a good reason why an applicant does not wish to pursue an appeal, notwithstanding the refusal. We consider that CLG

should consider further options in terms of penalties to be enforced against a LPA which does refuse a planning application simply to avoid having to pay the refund.

2. Paragraph 31: In relation to extensions to the timescale for the determination of a planning application, sometimes these timescales are extended in order to protect the right of appeal and not necessarily because the applicant agrees that the LPA should have more time to determine the planning application. In other words, an agreed extension to the timescales for determination could still reflect poor performance on the part of the LPA. We consider that this potential should be recognised and there should be an explicit acknowledgement that an agreement to an extended timescale does not necessarily indicate that a LPA is not poorly performing.

3. Paragraph 31, question 4: In relation to planning performance agreements, our experience is that LPAs generally adopt a sensible approach regarding the form and content of PPAs, even on very large applications. However, we agree that encouragement should be given to a general approach to PPAs which is proportionate in terms of the form and content of PPAs.

4. Paragraphs 62 and 63: CLLS's most significant comments on the consultation paper relate to paragraphs 62 and 63. We consider that CLG is adopting a very simplistic approach on these issues in cases where planning applications are made direct to the Secretary of State. We certainly do not agree with the final sentence of paragraph 62 and the proposed presumption that applications should be examined principally by means of written representations with the option only of a short hearing to allow the key parties to briefly put their points in person. This would reflect an approach which is geared solely towards a speedy determination of a planning application without proper consideration of all of the issues. An application made direct to the Secretary of State would mean that there was no consideration of the application at a LPA committee meeting. If the application is to be determined principally by means of written representations with only the option of a short hearing, there would be no requirement for a proper consideration of the planning application in a public forum. That is not in the interests of the applicant, the LPA or third parties and could lead to more judicial reviews, challenge being the only option available to an aggrieved party. Proper consideration should be given on a case by case basis as to whether an inquiry is appropriate and, if it is not, whether a hearing should take place.

5. Similarly, in relation to paragraph 63, CLLS does not consider that the full implications of the new procedures have been addressed. Paragraph 63 states that the Planning Inspectorate would not enter into discussions with the applicant about the nature and

scope of any Section 106 Agreement as these are best determined locally by the applicant and the planning authority. This raises the question as to how, in circumstances where the application is being made direct to the Secretary of State, that discussion process is to take place. There is a clear distinction with the discussions which do take place between an applicant and LPA in relation to a Section 106 Agreement in the context of an appeal to the Secretary of State. In those circumstances, the application has been dealt with initially by the LPA and there is a process and forum for a discussion on the terms of the Section 106 Agreement. Those discussions continue in the context of the appeal. In circumstances where a LPA has been designated as "poorly performing" and the applicant has chosen to apply for planning permission direct to the Secretary of State there is a real risk that a LPA will refuse to engage in Section 106 discussions. There will also be no "consultation" process during which the LPA can obtain views on the contents of the Section 106 Agreement from affected parties. Accordingly, we consider that the Planning Inspectorate will have to play some role in relation to the Section 106 Agreement in circumstances where an application is being made direct to the Secretary of State.

With specific reference to the questions:-

Question 1: Do you agree that local planning authority performance should be assessed on the basis of the speed and quality of decisions on planning applications?

Whilst we agree the principle, we have some concern as to the subjective element that will have to be introduced if planning authority performance is to be judged on the "quality" of its decisions.

Question 2: Do you agree that speed should be assessed on the extent to which applications for major development are determined within the statutory time limits, over a two year period?

We agree that speed does provide an objective indicator but with the caveat already sounded above that on occasion, time periods will have been extended by mutual agreement and a simply objective criterion may not be appropriate.

Question 3: Do you agree that extensions to timescales, made with the written consent of the applicant following submission, should be treated as a form of planning performance agreement (and therefore excluded from the data on which performance will be assessed)?

As noted above, we have some concern that this approach could in practice become over simplistic. We are not convinced that it would be correct simply to treat post-application

agreements *per se* in the same manner as planning performance agreements in that the rationale for such agreements can be very different. This concern underlines a general concern as to the practicality of moving forward on this aspect of the initiative.

Question 4: Do you agree that there is scope for a more proportionate approach to the form and content of planning performance agreements?

Agreed, albeit with the caveat, as noted in paragraph 31 that such agreements must set out a clear and agreed timescale for determining the application as an absolute minimum.

Question 5: Do you agree that quality should be assessed on the proportion of major decisions that are overturned at appeal, over a two year period?

We agree with the statement that where "an authority has a sustained track record of losing significantly more appeals than the average, it is likely to reflect the quality of its initial decisions." Our concern is that this will not be the case in all instances and it should therefore be understood that such a test should only be viewed as an initial indicator.

Question 6: Do you agree with the proposed approach to ensuring that sufficient information is available to implement the policy?

This is absolutely essential.

Question 7: Do you agree that the threshold for designations should be set initially at 30% or fewer of major decisions made on time or more than 20% of major decisions overturned at appeal?

It is difficult to "set the bar" at this stage. We suspect that the 30% and 20% tests are a fair starting point but would suggest that those thresholds should be reviewed following the first 12 months of operation.

Question 8: Do you agree that the threshold for designation on the basis of processing speeds should be raised over time? And, if so, by how much should they increase after the first year?

We do not necessarily agree that there should be an automatic increase of thresholds. Our preference would be to review the position after the first 12 months and see how the process is operating.

Question 9: Do you agree that designations should be made once a year, solely on the basis of the published statistics, as a way to ensure fairness and transparency?

Yes.

Question 10: Do you agree that the option to apply directly to the Secretary of State should be limited to applications for major development?

On grounds of practicality, this is probably inevitable, but the ideal should be that any local planning authority that is failing to perform and does not meet the standards required should be treated as a poor performer. In reality there should be no differentiation between a major development and, for example, a small proposed extension to a residential building. Again, we suggest that this is an issue that should be reviewed following the first 12 months of operation.

Question 11: Do you agree with the proposed approaches to pre-application engagement and the determination of applications submitted directly to the Secretary of State?

Yes.

Question 12: Do you agree with the proposed approach to supporting and assessing improvements in designated authorities? Are there specific criteria or thresholds that you would propose?

We certainly agree with a regular review and we do have some concern as to the practicality of assessments being undertaken by the Department for Communities and Local Government simply on the basis that we are not convinced that the Department actually has the time and resources to undertake such additional duties. In an ideal world, we would welcome the opportunity to comment on the responses submitted to this consultation paper by the local planning authorities themselves.

Question 13: Do you agree with the proposed scope of the planning guarantee?

Yes.

Question 14: Do you agree that the planning application fee should be refunded if no decision has been made within 26 weeks?

Yes.

The individuals (and their respective firms) who were involved in preparing this response are as follows:

- Michael Gallimore, Hogan Lovells International LLP

- Brian Greenwood, Osborne Clarke (Hon. Secretary, CLLS Planning & Environmental Law Committee)

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