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Response to Consultation "New Policy Document for Planning Obligations"

Introduction

The City of London Law Society (CLLS) represents over 13,000 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 17 specialist committees. This response to CLG's March 2010 Consultation on a "New Policy Document for Planning Obligations" has been prepared by the CLLS Planning and Environmental Law Committee.

General comments

We welcome the opportunity to respond to this Consultation.

We note that it was formulated under the aegis of the previous Administration with the objective of clarifying the purpose of planning obligations in light of the CIL (the Community Infrastructure Levy).

It remains unclear whether the current Administration will continue the CIL in the form proposed to date or at all.

The following Response pre-supposes the continuance of CIL in its current form and should be read in conjunction with the CLLS consultation response to CLG's July 2009 Consultation on "Detailed Proposals and Draft Regulations for the Introduction of the Community Infrastructure Levy" which also sought views on a number of issues related to planning obligations.

We recommend that further consideration is given to the following:

- Amending the wording in Regulation 122(2) which contains the new requirements to be fulfilled before a planning obligation may constitute a "reason for granting planning permission". In our view, this wording is surely not what the Government intended. Presumably it means the written reason for the grant of planning permission set out in the decision notice. If however a planning obligation is not a reason for granting planning permission does that mean that it is not to be taken into account? Arguably it should not be taken into account. It must however surely still be a material consideration if

it removes/mitigates what would otherwise be a reason for refusal. The wording should have stated that a planning obligation will only be a material consideration in the determination of a planning application if it meets the three tests.

- Paragraph 1.29 of the Consultation Document states that from 6 April 2010 it will be unlawful for a planning obligation to be taken into account when determining a planning application for a development, or any part of a development, that is capable of being charged CIL if the obligation does not meet all of the three tests. This is the Government's interpretation of Regulation 122(2). Their interpretation is wrong. That is not what Regulation 122(2) states. The wording of Regulation 122(2) needs to be amended.

- If the current CIL proposals are to be changed under the new Administration, the continuing appropriateness of Regulations 122 and 123 of the CIL Regulations is called into question.

- The "key principles" referred to in Policy P01. In our view these are unnecessary, overly restrictive and confusing.

- The misconceptions in the Consultation about when and how the "three tests" in Regulation 122 and Policy P02 apply, particularly to affordable housing.

- The meaning and application of the tests "necessary to make the development acceptable in planning terms" and "fairly and reasonably related in scale and kind", particularly in the context of affordable housing and perpetual maintenance payments.

- Clarification of the meaning of Regulation 123 and the pooling of planning obligations.

- Whether it is appropriate for local planning policies expressly to address the content of planning obligations.

- The consultation paper and the policy advice only relates to planning obligations under Section 106 of the 1990 Act (as substituted and amended). It does not impact in any way on the powers contained for example in Section 16 of the Greater London Council (General Powers) Act 1974 which is often cited in Section 106 Agreements by the London Boroughs. The policy advice should be worded so that it relates to covenants under Section 16 of the 1974 Act and other relevant statutes e.g. Section 278 of the Highways Act 1980 and Section 2 of the Local Government Act 2000. Regulation 122(2) would also have to be amended to capture Section 16 otherwise a regime, with covenants which run with the land, given solely under Section 16 will be capable of operating wholly outside the new legal framework.

Consultation questions

We set out below our response to the specific consultation questions:

1. Do you agree with the principles set out in paragraphs P01.1 to P01.5 (key principles)?

No, not entirely.

Paragraph PO1.1 is unnecessary, more restrictive than Section 106/Regulation 122 and should be deleted as it serves only to cause confusion.

We do not agree that affordable housing requirements will always fall within the three tests in Regulation 122(2) and Policy P02 (see further, below). Nor in our view will they always meet the key principles contained in P01.1.

If the paragraph is retained, it would seem sensible to add the examples at Annex B paragraph B3 of Circular 5/05.

We consider that paragraph P01.3 is somewhat incoherent and unconnected with paragraph P01.1. We suggest that it is deleted.

We sound a note of caution about paragraph P01.4. We caution against inadvertently encouraging LPAs to draft and use their own individual standard forms of planning obligation or model clauses rather than more universally applicable wording as this will result in inconsistency between authorities contrary to the objective stated at paragraph 1.7.

2. Do you agree with the principles set out in paragraph P02.1 (the three tests)?

No.

Paragraph 1.3 of the Consultation Document states that the proposed new policy document will only contain relevant policy and not general guidance and guidance on relevant legislation as in Circular 5/05. The matters contained at PO2.1 and the three legal tests are clearly legal matters and accordingly there is a strong argument that paragraph PO2 should be deleted. Interpretation of those legal tests will be a matter for the courts. The following comments are without prejudice to that contention.

In the CLLS response to CLG's July 2009 Consultation "Detailed Proposals and Draft Regulations for the Introduction of the Community Infrastructure Levy", CLLS stated as follows:

- If the CIL is introduced, the scope of planning obligations *must* be scaled back to avoid a double payment for infrastructure through planning obligations and the CIL.

- In such circumstances, it would be appropriate for planning obligations to be limited to mitigating the direct impact of the proposed development without overlapping CIL or duplicating expense for developers.

- It was noted that many LPAs already apply the Circular 05/05 tests as if they were law, although many do not. Flexibility in scheme delivery suggests that it may in some cases be of benefit both to LPAs and developers to permit planning obligations to continue to be used for wider purposes than those expressed in the Circular.

- It was suggested that if planning obligations are scaled back, developers should nevertheless be able to offer and LPAs accept planning obligations based on the pre-Regulation 122 legal tests although LPAs should be prohibited from requiring the same if not agreed by the developer. This ought to maximise flexibility.

Regulation 122 and Policy P02 do not fulfil these purposes.

Furthermore, there appears to be some confusion in the Consultation Questions about when and how the three tests apply. Question 2 states in its preamble (as does paragraph 1.28) that:

> "Regulation 122 will place into law the three tests … which will make it unlawful for a planning obligation concerning a development that is capable of being charged CIL to be taken into account in determining a planning application. The three tests are proposed to remain a material consideration for all other uses of planning obligations".

There are two misconceptions in this.

First, Regulation 122 applies immediately, not only for development that is "capable of being charged CIL" (because presumably a charging schedule has come into force or the transitional date of 6 April 2014 has passed). This is because:

- Regulation 122 applies to "relevant determinations" as that term is defined in that Regulation - all decisions made after 6 April 2010.

- Regulation 123, however, defines the term "relevant determination" differently – by reference to charging schedules in force and the 6 April 2014 date.

There needs to be clearer recognition that the three tests in Regulation 122 are already in effect, they are no longer only material planning considerations in the use of Section 106.

The second misconception lies in the suggestion that it will be unlawful for an LPA to take account of a planning obligation unless the obligation satisfies the three tests. That is not what Regulation 122 says. The Regulation merely prohibits planning obligations forming a reason for granting planning permission unless the three tests are satisfied.

The distinction may appear to be a fine one but we suggest that it is proper if LPAs are not to put themselves at risk of legal challenge for misdirecting themselves about the effect of Regulation 122.

By way of analogy, an emerging LDF policy at very early stages might be treated by the Secretary of State on appeal to lack any weight in his decision making process but it would still be a material consideration. It would be wrong of the Secretary of State to disregard or ignore it simply because it lacked sufficient weight to affect the outcome of his decision.

The same will be true of some planning obligations which fail to meet all of the Regulation 122 tests. It will not be unlawful for LPAs to take them into account when they make their decisions but they must not permit such obligations to constitute a reason for granting planning permission.

Turning to the three tests themselves, we have reservations about how LPAs and the Secretary of State will apply the first test "necessary to make the development acceptable in planning terms".

The word "necessary" implies an objective measure whereas the word "acceptable" is a subjective standard. The latter may be read by some as negating the effect of the former.

In any event, what may be "acceptable" to an LPA will not necessarily be "acceptable" to the Secretary of State or his Inspector. This could result in the test being passed at first instance but failing on appeal or vice versa.

Such an outcome would result in the sort of inconsistency which the Consultation aims to avoid at paragraph 1.7.

In any event, we are unclear why paragraph P02.1(i) now refers to a matter being acceptable in planning terms if "in accordance with published local, regional or national planning policies".

We also have reservations about how LPAs and the Secretary of State will apply the second test "fairly and reasonably related in scale and kind".

Paragraph P02.1(iii) states that:

> "Planning obligations should not be used solely to resolve existing deficiencies in infrastructure provision or to secure contributions to the achievement of wider planning objectives that are not necessary to allow consent to be given for a particular development".

In our view, affordable housing requirements are a good example of the sort of planning obligations which will on many occasions fail to satisfy this test.

3. Do you agree with the principles set out in paragraphs P03.1 to P03.3 (maintenance payments)?

No, not entirely.

In our view, the three tests cannot be satisfied for maintenance payments of any type where these are required or offered in perpetuity.

The concept or a perpetual payment is quite simply inconsistent with the three tests in Regulation 122. That is so whether the payments relate to facilities which benefit users of the associated development or otherwise. The longest duration for a maintenance payment should be the lifetime of the development.

We suggest that the practice which has grown up over the last 20 years of requiring maintenance payments in perpetuity is re-considered in light of Regulation 122.

We note that practice among LPAs varies in how they approach all other types of maintenance payment ie those which are time limited. We suggest that LPAs may benefit from practice guidance or case studies on this subject in light of the three tests and current market conditions which have brought to the fore arguments relating to scheme viability.

4. Do you agree with the principles set out in paragraphs P04.1 to P04.2 (relationship with conditions)?

Yes.

However, we recommend that the paragraphs cross-refer to and clarify the outcome of the issue referred to at paragraph C018 of CLG's 2009 Consultation "Improving the use and discharge of planning conditions", namely whether and when it should be appropriate for a planning permission to be granted subject to a condition requiring the subsequent completion of a planning obligation (for example, because the site is in multiple ownership and not all signatories can be secured at the time when planning permission is granted).

You are referred to the CLLS's representations on this issue dated 19 March 2010 which are attached.

We also recommend that LPAs should be discouraged from using Grampian style conditions for infrastructure which is capable of being funded by the CIL.

5. Do you agree with the principles set out in paragraphs P05.1 to P05.6 (pooled contributions and standard charges)?

No, not entirely.

We note that the policy expressed at paragraphs P05.2 and P05.3 is more stringent than the legal tests in Regulation 123. In our view, this may result in confusion.

We disagree that the "only" circumstances in which an LPA can seek pooled contributions are those set out in paragraph P05.3. This fails to take account of the transitional period to 6 April 2014 but speaks instead of "exceptional" circumstances. It is not clear what is meant by exceptional circumstances in this context. These paragraphs appear inconsistent with paragraph 1.37.

We suggest that the paragraphs should instead clarify the meaning of the term "planning obligation" in Regulation 123.

Is the term used in the Regulation to mean each separate deed made under Section 106 of the 1990 Act (regardless of how many covenantors may be promising payments under each deed) or does it mean each separate covenant (even if there are say 10 different covenanting parties in one Section 106 deed)? In our view, Regulation 123(3) suggests the former but the point could be usefully clarified.

We also suggest that further guidance would be useful on the practical application of Regulation 123. We note for example that many historic Section 106 obligations require contributions towards infrastructure which is defined in the loosest of terms. Where LPAs have completed such planning obligations, it will be easy but not necessarily appropriate to argue that 5 or more separate planning obligations exist so as to prevent pooling.

6. Do you agree with the principles set out in paragraphs P06.1 to P06.4 (planning framework)?

No.

The trend towards formulating local planning policies directly on the content of planning obligations is a recent one.

On the one hand, it smacks of much of the top down planning and over finessing so evident in the planning system over the last 17 years. Now that Regulation 122 brings the three tests into law, there appears even less reason than before to draft policy explicitly for planning obligations.

On the other hand, DPDs may usefully provide LPAs with the evidence base they need to justify their decisions based on Regulation 122 and the three tests.

If that is the intention, we suggest that it is made clearer in these paragraphs. If not, we see no useful purpose for them. We question in any event the suggested use of SPD. If local policy is drafted on planning obligations, it should be rigorously tested in DPDs not SPDs.

7. Do you agree with the principles set out in paragraphs P07.1 to P07.4 (transparency and accountability)?

Yes, with reservations.

A policy of localism favours early public access to emerging planning obligations. However, the downside can involve immense pressure on LPA officers especially in areas where local residents are articulate and knowledgeable. It can result in negative resource implications if LPAs feel it necessary to be seen to be inclusive to the public when negotiating planning obligations.

If so and with a multiplicity of parties involved – many of whom have no direct interest other than to slow down the grant of planning permission – there is significant potential for planning permissions to be delayed and business to lose confidence in the planning system.

It will be remembered that this and fears about reduced inward investment were the rationale behind the previous Administration's original reforms to the planning system (following the Barker Review).

8. Do you agree with the principles set out in paragraph P08.1 (appeals, modification and discharge)?

Yes.

9. Do you agree that new guidance on the use of planning obligations should be provided?

Yes, see above and our response in the same terms to CLG's July 2009 Consultation on "Detailed Proposals and Draft Regulations for the Introduction of the Community Infrastructure Levy".

We suggest that this guidance is prepared in parallel with the new policy for planning obligations and the emerging new guidance on CIL and planning conditions so that all of the relevant documents inform each other.

10. Any other comments

a. Paragraph 2.5 of the draft policy annex states that planning obligations may only be "imposed" using the statutory powers available. This statement is somewhat draconian. It would be better to state that planning obligations may only be entered into using the statutory powers available. This would for example address the use of unilateral planning obligations.

b. We suggest that the new guidance on planning obligations would usefully address the relationship between the new policy and Planning Inspectorate Guidance Note 16/2010.

c. There is a need for guidance in relation to the use of unilateral undertakings in relation to appeals. A local planning authority cannot enter into covenants in a unilateral undertaking by the very nature of the document. There will however usually be a need for such covenants e.g. to control how the local planning authority can spend a contribution. Provisions can be included within the undertaking making the developer's covenants conditional on the local planning authority first entering into a cross undertaking eg to control how the local planning authority expend a contribution. This is a useful provision. There is no uniformity of approach however and whilst some planning inspectors are comfortable with the use of cross undertakings others have expressed concern. Any new guidance should confirm that this is an acceptable practice.

Conclusion

We are keen to maintain a dialogue with CLG as the detailed proposals to implement the CIL and the policy on planning obligations evolve. We hope that CLG will keep us informed of progress and feel able to seek our assistance where this would be helpful.

In the meantime, if there are any particular aspects of the above that you would like to discuss further, please do not hesitate to contact Robert Leeder (Policy & Committees Coordinator, CLLS) at mail@citysolicitors.org.uk or 020 7329 2173.

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