THE LAW SOCIETY AND CITY OF LONDON LAW SOCIETY PLANNING & ENVIRONMENTAL LAW COMMITTES

JOINT RESPONSE TO THE TECHNICAL CONSULTATION ON IMPLEMENTATION OF PLANNING CHANGES

The Law Society of England and Wales ("the Law Society") is the professional body for the solicitors profession in England and Wales, representing over 160,000 registered legal practitioners. The Law Society represents the profession to parliament, government and regulatory bodies and has a public interest in the reform of the law.

The City of London Law Society ("CLLS") represents approximately 15,000 city solicitors 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.

Both the Law Society and CLLS respond to a variety of consultations on issues of importance to its members through their various specialist committees. Exceptionally, and due to the importance of this issue to planning solicitors, the Law Society and the CLLS have decided to submit a joint response to this consultation. The views of both the Law Society and the CLLS Planning & Environmental Law Committees in respect of the Technical Consultation are set out below.

1 CHANGES TO PLANNING APPLICATION FEES

1.1 **Do you agree with our proposal to adjust planning fees in line with inflation, but only in areas where the local planning authority is performing well? If not what alternative would you suggest?**

Yes, given that the last inflationary increase to nationally set fees was 2012.

We feel it may be unhelpful, however, if inflationary increases are not also made available to 'under-performing' authorities. Differential fee levels can be justified but separately to inflation adjustments. It could further be the case that under-performance could be exacerbated by differential fees, particularly at a base level.

1.2 **Do you agree that national fee changes should not apply where a local planning authority is designated as under-performing, or would you propose an alternative means of linking fees to performance? And should there be a delay before any change of this type is applied?**

As indicated in our response to Q1.1, it could have a demonstrably negative impact upon the performance of an 'under-performing' authority if they were unable to receive an inflationary uplift in fees, until such a further increase was introduced, whenever that occurred.

A far more sensible and pragmatic approach, is to allow the suggested 'period of grace' before such a policy applied. This would allow the opportunity for a local planning authority to carefully plan their approach to the level of income to be received and their capacity to deliver acceptable levels of performance. Nationally set fees coupled with the nationally driven approach upon the form of an application through development management procedures, allows for both consistency of approach and some degree of certainty. Under certain circumstances and in certain location, locally set fees could act to inhibit rather than foster a climate for development and growth.

1.3 **Do you agree that additional flexibility over planning application fees should be allowed through deals, in return for higher standards of service or radical proposals for reform?**

Additional flexibility could be introduced over planning application fees. Currently local authorities operate some flexibility (which is also linked to cost), by way of example, in relation to the

processing of Local Land Charge applications and a 'premium' fee could be justified in return for assured higher service standards but also a more expeditious service.

Caution is expressed over reference to such initiatives through devolution 'deals' as there the emphasis is more upon the economic development and regeneration benefits of such deals and although planning is a key driver, there are wider considerations and impacts to consider.

1.4 **Do you have a view on how any fast-track services could best operate, or on other options for radical service improvement?**

A fast-track premium service could have merit (see above) and be useful to high-performing authorities as a source of fee generation to sustain and develop performance. It may also be an incentive to those authorities that aspire to such performance. In addition, the mechanism for such charging has been embedded within local government for some considerable time (Section 93 of the Local Government Act, 2003, power to charge for discretionary services) and could be developed, through service level and other applicable agreements with service users and be reflected in local policies.

1.5 **Do you have any other comments on these proposals, including the impact on business and other users of the system?**

See above.

2 PERMISSION IN PRINCIPLE

2.1 **Do you agree that the following should be qualifying documents capable of granting permission in principle? (a) future local plans; (b) future neighbourhood plans; (c) brownfield registers**.

Yes.

2.2 **Do you agree that permission in principle on application should be available to minor development?**

We consider that the PiP, which is akin to a "bare outline permission", could be practical for minor developments which do not impact on sensitive sites, such as "European sites".

We are less convinced that PiP was likely to be particularly useful for minor developments, however. These would usually be suited to submission of a single, full application.

2.3 **Do you agree that location, uses and amount of residential development should constitute 'in principle matters' that must be included in a permission in principle? Do you think any other matter should be included?**

We are hesitant to suggest greater detail than the government proposes. The purpose of PiP is that demands for information should be modest. We believe that there is one area where more might be made clear, however.

The Consultation document suggests that the PiP is not intended to be exclusive to residential uses and is aimed at "proposals that are housing led". However, the Bill states that regulations may authorise the use of the PiP procedure for any development which is "prescribed" in those regulations. In our experience, developers and funders will wish to have some idea of the nature and scale of the commercial/other uses which support a housing led development, especially for larger proposals.

Third party developers and funders will also benefit from this information in terms of the investment decisions they make elsewhere. LPAs will need to identify the non-residential component in order to make decisions as to whether, for example, EIA or Appropriate Assessment (AA) is required at the PiP stage. They will need this information when consulting stakeholders such as the

Environment Agency or English Heritage over the suitability for inclusion of candidate brownfield sites.

While we agree that the level of detail required should be kept to a modest level , we consider that the "in principle matters" should also include the amount of non-residential development proposed. The various uses might be described by means of a broad or flexible categorisation, such as "XXXX sqm of Class A uses", with each use stated to have a site-wide maximum building height.

2.4 **Do you have views on how best to ensure that the parameters of the technical details that need to be agreed are described at the permission in principle stage?**

See our response to question 2.3.

2.5 **Do you have views on our suggested approach to a) Environmental Impact Assessment, b) Habitats Directive or c) other sensitive sites?**

The PiP represents a challenge in terms of addressing European requirements, especially if the "in principle matters" are kept to a minimum so that the nature of the development and its potential impacts cannot be fully identified. The challenge is greater if, as the Consultation says, LPAs are required to take a "positive and proactive approach" and only reject candidate sites if there is "no realistic prospect" of them being suitable for new housing.

Case law indicates that SEA, EIA and Habitats requirements may all be potentially engaged at the PiP stage, applying the precautionary approach and earliest stage of assessment requirement. The PiP is likely to be regarded as the first of two "development consents" in a multi-stage consenting procedure. Although we agree that the case law suggests that a procedure for co-ordinating SEA and EIA requirements is technically possible, in our view the likelihood of this working in practice is low given that for the majority of relevant developments there will be a gap in time between plan/register preparation and technical details application.

In terms of EIA and AA, we expect that LPAs will often be working from minimal environmental information when compiling their brownfield registers/making PiP allocations in plans. We therefore expect there to be many cases where the European requirements technically need to be addressed both at PiP and then again at technical details approval stage. If so, any EIA or AA work undertaken by the LPA may have little or no benefit since the developer will need to re-address EIA and AA in light of its specific proposals and the circumstances prevalent at the time of its details application.

The proposals at paragraph 2.30 of the Consultation appear to impose a requirement on LPAs to "guestimate" the environmental impacts from a development project whose nature and scale are largely unknown some time in advance of the proposal actually coming forward. We do not consider that a PiP granted in such cases will provide the market with the certainty and predictability it requires.

We suggest instead that development which the LPA considers is likely to give rise to significant environmental effects for the purposes of the EIA and/or Habitats Directives is excluded from the scope of PiP, in the same way as for permitted development rights, unless the LPA is satisfied that it has sufficient information to screen the development and determine that EIA and/or AA are not required. This is more consistent with the commentary at paragraph 3.5 of the consultation.

In terms of SEA, we note that European case law does not permit LPAs to dispense with the requirement to undertake SEA simply because an EIA has been carried out. We recommend that this is made clear in the final guidance.

2.6 **Do you agree with our proposals for community and other involvement?**

No. The Aarhus Convention and Directives and Regulations safeguard the public's right to participate in the planning process and access justice in appropriate cases. We consider that the consultation arrangements for brownfield registers should mirror those for local plans and that the consultation arrangements for technical details approval should mirror those for planning applications. We do not consider this to be unnecessary repetition, especially in those cases where the nature and scale of the development are largely unknown at PiP stage and/or there is a material time gap between PiP and technical details application. Full consultation will be particularly relevant where EIA and/or AA requirements are engaged.

2.7 **Do you agree with our proposals for information requirements?**

We are not clear that the information referred to in paragraph 2.37 will typically provide a sufficiently sound basis for grant of PiP, and that - with reference to our comments on question 2.5 - where additional work is undertaken, whether this would be a worthwhile use of limited planning authority resources.

With reference to the details suggested at paragraph 2.40, we are concerned that the impacts cited do not identify impact on surrounding social and economic infrastructure, e.g. schools, highways. It is unclear at whether, and at which stage - in principle or technical details - the Government proposes that these important issues should be addressed.

2.8 **Do you have any views about the fee that should be set for a) a permission in principle application and b) a technical details consent application?**

No.

2.9 **Do you agree with our proposals for the expiry of permission in principle on allocation and application? Do you have any views about whether we should allow for local variation to the duration of permission in principle?**

We consider that allowance should be made to permit local variation to both the duration and expiry of PiPs *and* technical details approvals. Both PiP and details approval form the planning permission to be implemented so existing provisions should apply to both.

2.10 **Do you agree with our proposals for the maximum determination periods for a) permission in principle minor applications, and b) technical details consent for minor and major sites?**

Where complex issues are raised, such as European requirements, we consider that LPAs will require more time to determine PiP and technical details applications.

3 BROWNFIELD REGISTER

3.1 **Do you agree with our proposals for identifying potential sites? Are there other sources of information that we should highlight?**

Yes, although see our earlier comments regarding the desirability of identifying non-residential components at PiP stage and the need to comply with European legislative requirements.

3.2 **Do you agree with our proposed criteria for assessing suitable sites? Are there other factors which you think should be considered?**

Yes, although see our earlier comments regarding the desirability of identifying non-residential components at PiP stage and the need to comply with European legislative requirements. Consideration might usefully be given to clarifying the meaning of "previously developed land" in light of the Court's recent judgment in *Dartford Borough Council v SSCLG* (January 2016).

3.3 **Do you have any views on our suggested approach for addressing the requirements of Environmental Impact Assessment and Habitats Directives?**

See comments above in respect of Q2.5.

3.4 **Do you agree with our views on the application of the Strategic Environment Assessment Directive? Could the Department provide assistance in order to make any applicable requirements easier to meet?**

Yes. In relation to the proposal that LPAs might use an assessment previously undertaken during local plan preparation, we draw your attention to Recital (4) and Article 4 of the SEA Directive. See also our comments above in respect of Q2.5.

3.5 **Do you agree with our proposals on publicity and consultation requirements?**

See comments above in respect of Q2.6.

3.6 **Do you agree with the specific information we are proposing to require for each site?**

Yes.

3.7 **Do you have any suggestions about how the data could be standardised and published in a transparent manner?**

No.

3.8 **Do you agree with our proposed approach for keeping data up-to-date?**

Yes. Hosting the register on-line means that updates can be made as and when they become known, i.e. almost in real-time - although an annual review remains appropriate.

3.9 **Do our proposals to drive progress provide a strong enough incentive to ensure the most effective use of local brownfield registers and permission in principle?**

The proposal to apply the presumption in favour of sustainable development will act as a strong incentive on LPAs. We cannot comment on whether this will result in the most effective use of brownfield registers and PiP.

3.10 **Are there further specific measures we should consider where local authorities fail to make sufficient progress, both in advance of 2020 and thereafter?**

No comment.

4 SMALL SITES REGISTER

4.1 **Do you agree that for the small sites register, small sites should be between one and four plots in size?**

The recent "Consultation on proposed changes to National Planning Policy" set out the Government's proposal to define a "small site" as a site of less than 10 units. For the sake of consistency and on the basis that the proposed supportive national policy to small sites will apply to sites of less than 10 units we would suggest that the same definition should be applied for the small sites register.

4.2 **Do you agree that sites should just be entered on the small sites register when a local authority is aware of them without any need for a suitability assessment?**

The intended purpose of the small sites register needs to be clearly defined. The Consultation document suggests that the overall objective is simply to increase awareness of the location of small sites.

If the register is not intended to provide an indication of the acceptability of any given small site for development then we agree that no suitability assessment is necessary.

However, consideration should be given to the benefit of such a register. The recent "Consultation on proposed changes to National Planning Policy" confirms that in the year to June 2015 over 52,000 planning decisions were made by local planning authorities concerning residential development on sites of less than 10 units. The owners of small sites and local developers are likely to be well aware of the development potential of such small sites.

In these circumstances it is unclear whether any real benefit will be derived from the creation of a separate small sites register which provides no indication of the acceptability of a site for redevelopment.

Any minor benefit to be derived from the creation of a new separate register needs to be balanced against the considerable administrative burden that will be placed on local authorities to publish and maintain the register.

The Housing and Planning Bill will impose a requirement on local authorities to maintain a register of brownfield land. This register will cover small sites. If a separate register of small sites is to be maintained it would seem sensible (and practically less onerous from a local authority perspective) for this to form a sub-component of the wider brownfield land register – given that the majority of small sites are likely to be on brownfield land. Such small sites would then be readily identifiable by prospective developers.

4.3 **Are there any categories of land which we should automatically exclude from the register? If so what are they?**

If the intention is that the register will provide no indication of the acceptability of the site for redevelopment then no categories of land should be excluded.

If the register is to perform a more specific function (whether as part of the brownfield register or otherwise) then it would be helpful to mirror the approach proposed to be taken to the proposed small sites planning policy - including brownfield sites, other sites within existing settlement boundaries or immediately adjacent to settlement boundaries but excluding open or green belt sites or rear garden land.

4.4 **Do you agree that location size and contact details will be sufficient to make the small sites register useful? If not what additional information should be required?**

Only if the register is purely intended to identify small redevelopment sites with no indication of their acceptability for redevelopment would we agree that no further details are required other than location size and contact details.

5 NEIGHBOURHOOD PLANNING

5.1 **Do you support our proposals for the circumstances in which a local planning authority must designate all of the neighbourhood area applied for?**

We disagree with the reduction of local planning authorities' discretion. Designation of neighbourhood areas can raise major local issues and disputes, including between neighbouring parishes and communities. Such disputes can be particularly difficult in mixed urban-rural fringe communities.

5.2 **Do you agree with the proposed time periods for a local planning authority to designate a neighbourhood forum?**

We disagree. Authorities have limited resources to deal with the designation of plans and local discretion should be retained.

5.3 **Do you agree with the proposed time period for the local planning authority to decide whether to send a plan or Order to referendum?**

Agreed - this provides certainty.

5.4 **Do you agree with the suggested persons to be notified and invited to make representations when a local planning authority's proposed decision differs from the recommendation of the examiner?**

Agreed - this provides certainty.

5.5 **Do you agree with the proposed time periods where a local planning authority seeks further representations and makes a final decision?**

We agree with the idea of fixed time periods but would prefer six weeks to five for final decisions

5.6 **Do you agree with the proposed time period within which a referendum must be held?**

We do not agree with these time periods and believe that the authority should have greater discretion.

5.7 **Do you agree with the time period by which a neighbourhood plan or Order should be made following a successful referendum?**

We think that retaining the requirement for the authority to make the plan or Order as soon as is reasonably practicable, while allowing discretion, remains appropriate.

5.8 **What other measures could speed up or simplify the neighbourhood planning process?**

We agree with the introduction of some time limits, but recommend the retention of much local planning authority discretion.

6 LOCAL PLANS

6.1 **Do you agree with our proposed criteria for prioritising intervention in local plans?**

We agree with the premise that local authorities should have up-to-date local plan in place.

As a corollary, we are bound to support the principle of intervention and the establishment of criteria so that a local authority will not be surprised (para 6.6) if it is considered that intervention is required. We thus agree that the use of data on local development schemes and that published by the Planning Inspectorate are appropriate mechanisms through which to assess local plan performance.

We would be reluctant, however, to see further additional administrative burdens placed upon local authorities.

In addition, whilst accepting that housing demand and delivery are key considerations when taking decisions about prioritising intervention, we would caution against placing so much emphasis on the five-year housing supply that attention is diverted from other equally important factors such as the need to identify a sufficient supply of employment land and related infrastructure.

6.2 **Do you agree that decisions on prioritising intervention to arrange for a local plan to be written should take into consideration: a) collaborative and strategic plan-making; and b) neighbourhood planning?**

We believe that collaborative and strategic plan-making is a critical element of the local plan process. Unfortunately, sight of which is often lost - in part due to political pressures at the local level, as well as the frequent absence of a regional planning policy-making authority (and where those do exist, the reluctance of some district councils to work with the strategic body - and vice versa). The Local Plans Expert Group have identified many of the problems in this area.

We would suggest that proof of positive collaborative and strategic plan-making should constitute an important element in the reporting process and must be taken into account as part of the intervention prioritisation process.

Neighbourhood plans should not be delayed by the failure of a local authority to bring forward its local plan - such a position would be totally contrary to the underlying ethos of neighbourhood planning. That said, if local communities begin to promote neighbourhood plan policies that are patently contradictory of the policies likely to be promoted by the emerging, albeit, delayed local plan - then the community will be faced with a recipe of policy chaos. To avoid such a position we suspect that intervention may well be required.

6.3 **Are there any other factors that you think the government should take into consideration?**

We are very conscious of local authorities' resource pressures and therefore would caution against an inflexible application of the intervention process. We welcome and fully support the recognition of “exceptional circumstances” as noted in 6.4 below.

We reiterate our concern that excessive focus on the need for a five year housing supply could lead to the neglect of other elements of the plan. There is reason to believe that such over-concentration could lead to some local authorities following a two stage parallel local plan process - one stage dealing just with housing supply (to avoid the submission of residential planning applications on unallocated sites), the other dealing with the other elements of the plan, employment, environment, infrastructure etc. An such division would be detrimental to comprehensive and consistent plan-making.

6.4 **Do you agree that the Secretary of State should take exceptional circumstances submitted by local planning authorities into account when considering intervention?**

Definitely. Each case should be assessed on its own merits. We recognise, however, that there is a balancing exercise to be undertaken and the mere existence of "exceptional circumstances” must be balanced against the overall need for a local plan. In some cases, it could also be the ‘exceptional circumstance’ increases the case for intervention.

6.5 **Is there any other information you think we should publish alongside what is stated above?**

For reasons already stated and developed in our answer to Question 6.6, we do believe that care must be taken not create an imposition which of itself adds to the delay in plan-making.

6.6 **Do you agree that the proposed information should be published on a six monthly basis?**

We are not convinced that the six month reporting period is strictly necessary. However, we agree that most local plans will need to undergo a formal process of updating every five years.

Provided all parties are in possession of the principal milestones (as set out in your para. 6.15), a twelve month “minimum” publication target would probably be sufficient to understand progress. Local authorities should be required to explain any slippage in the previously reported timetable. Annual reporting would also release time to be better employed on progressing the plan.

7 EXPANDING THE APPROACH TO PLANNING PERFORMANCE

7.1 **Do you agree that the threshold for designations involving applications for non-major development should be set initially at between 60-70% of decisions made on time, and between 10-20% of decisions overturned at appeal? If so what specific thresholds would you suggest?**

Our objection is not to the specific threshold values but to the perverse incentives that they can offer planning authorities seeking to achieve targets. For example, speed of determination targets can encourage premature refusal.

In some cases, planning authorities invite applicants to withdraw good applications before a likely refusal. This allows the authority to meet speed targets but actually slows down the planning process for developers.

While many such refused cases would have good prospects at appeal, applicants are often reluctant to challenge the decision on delay or cost grounds.

Conversely, a welcome introduction to the mix is that the speed of decision-making is judged against the statutory timescale but with allowance for extensions agreed with the applicant (either *ad hoc* or in a PPA) – see para 12(b) of the accompanying Criteria document.

Applicants seeing good progress being made but who can also see that a decision within the unextended period is unlikely should be allowed to agree extensions as a means of avoiding premature refusals.

7.2 **Do you agree that the threshold for designations based on the quality of decisions on applications for major development should be reduced to 10% of decisions overturned at appeal?**

No comment.

7.3 **Do you agree with our proposed approach to designation and de-designation, and in particular**

(a) **that the general approach should be the same for applications involving major and non-major development?**

(b) **performance in handling applications for major and non-major development should be assessed separately?**

(c) **in considering exceptional circumstances, we should take into account the extent to which any appeals involve decisions which authorities considered to be in line with an up-to-date plan, prior to confirming any designations based on the quality of decisions?**

7.4 **Do you agree that the option to apply directly to the Secretary of State should not apply to applications for householder developments?**

No comment.

8 TESTING COMPETITION IN THE PROCESSING OF PLANNING APPLICATIONS

8.1 **Who should be able to compete for the processing of planning applications and which applications could they compete for?**

Planning consultancies and legal advisers who are able to demonstrate sufficient expertise and experience in this area should be able to compete for the processing of minor planning applications. However it is important to recognise that applications for major development are not readily compartmentalised into the separate steps of 'processing' and 'determination' and in our view are not considered suitable to be dealt with in this way. Major applications often relate to significant or sensitive proposals where an understanding of what is proposed in the context of other development proposals or pre-application discussions and other activity is relevant to any judgments being made.

We would question how realistic/workable is a scenario where the LPA will be presented with a report and a recommendation from a third party on a significant or sensitive application without the 3rd party necessarily having the knowledge of other planning discussions or proposals and therefore making a planning assessment without the full picture. This potentially raises confidence/credibility issues from the LPA/Members/public etc. and/or could result in duplication of

effort and possibly different judgments by the LPA further down the line which would increase the timescales and reduce certainty in the process.

8.2 **How should fee setting in competition test areas operate?**

Planning application fees should be set within a range. The fee should continue to be paid to the local planning authority. The authority should decide, with a figure falling somewhere within the range, whether to pass some or all of the fee to the external provider.

8.3 **What should applicants, approved providers and local planning authorities in test areas be able to do?**

We do not consider that applicants should have the ability to select who they want to process their planning applications. There needs to be care here in relation to probity issues and the potential for conflicts, or at least the perception of conflict. An example is where a developer may have a very good relationship with a particular planning consultancy - there needs to be transparency in the process to ensure that there is not the perception that the developer's application is being "rushed through" or otherwise favourably treated by that consultancy.

We consider that the potential for conflicts can be managed by the applicant being required to submit the application to the local planning authority. The authority, rather than the applicant, should have the ability to decide who is going to process the application. The authority may decide that the application will be handled by itself or by one of their approved external providers on a panel set up by the authority. The authority could, therefore, manage any risk for conflict in its choice of external provider. This is akin to the process whereby authorities outsource legal services to external law firms.

With regard to paragraph 8.14 of the consultation, we consider it is unrealistic for the authority to take a decision within a short specified period ("perhaps a week or two"). In many cases, there may be objections which would necessitate the planning application to be referred to the authority's planning committee. In such cases a one/two week timeframe is unlikely to be practical.

8.4 **Do you have a view on how we could maintain appropriate high standards and performance during the testing of competition?**

See above in relation to conflicts/probity issues.

8.5 **What information would need to be shared between approved providers and local planning authorities, and what safeguards are needed to protect information?**

If the application is submitted direct to the local planning authority, the authority should validate it and register it on its website. It then should be passed to the provider for further processing. This would, therefore, cut down on the amount of information needed to be passed to the provider, i.e. there would be no need for summary details to be passed to the planning authority (paragraph 8.17).

9 INFORMATION ABOUT FINANCIAL BENEFITS

9.1 **Do you agree with these proposals for the range of benefits to be listed in planning reports?**

No. We consider that the requirement to state financial benefits will be unworkable in relation to large sites which are granted outline planning permission. At that stage, the number of residential units and floorspace within the development will not be fixed. Therefore, it will not be possible to calculate CIL, council tax revenue, business rate revenue, etc. Furthermore, in relation to many developments, the actual quantum of S106 contributions is not ascertained before the development goes to committee.

For the above reasons we therefore think this obligation, which would place a further burden on local authorities, would be likely to result in a bland and meaningless generalised statement to be added to committee reports. However, if detailed financial information was provided and proved to be inaccurate, this would be likely to be another ground for challengers to oppose the development by judicial review.

More importantly, we also query the need for this proposal. LPAs should make decisions by considering the planning benefits of the scheme. A full account of monies coming to the Council should not be a relevant consideration for the planning committee. We are concerned that members of planning committees are liable to be swayed by the financial benefits list, or at least liable to delve into areas they should not be considering. This could lead to more planning permissions being challenged in the courts.

We are not convinced that the results of the British Social Attitudes survey quoted[1] - based on a hypothetical question - can be transposed to many real-life situations, and note also that the same percentage (47%) of respondents already supported the development of more homes in their area in any case.

9.2 **Do you agree with these proposals for the information to be recorded, and are there any other matters that we should consider when preparing regulations to implement this measure?**

Please see our response to question 9.1. We also caution against elevating the status of direct payments to communities, particularly where this may be seen as 'buying off' opposition.

10 SECTION 106 DISPUTE RESOLUTION

10.1 **Do you agree that the dispute resolution procedure should be able to apply to any planning application?**

Yes. The consultation document proposes that the dispute resolution mechanism will be available for any planning application where the Secretary of State considers that the local planning authority would be likely to grant planning permission if satisfactory section 106 obligations are agreed. However, it is important that the Regulations provide clarity about what this means.

The dispute resolution procedure could be a helpful tool for applicants in the context of the tests that planning obligations have to comply with contained in Regulation 122 of the Community Infrastructure Levy Regulations 2010. In our experience, planning authorities do not always interpret the Regulation 122 tests appropriately and seek to insist on planning obligations that do not meet the tests. This creates a judicial review risk and can have an impact on scheme viability.

10.2 **Do you agree with the proposals about when a request for dispute resolution can be made?**

The planning committee must, when determining an application, be provided with details of the s.106 obligations that officers recommend should be required to make the development acceptable in planning terms.

Paragraph 10.15 of the consultation document provides that the range of decisions that an authority can take, following the conclusion of a dispute resolution process, is limited and, significantly, that a local planning authority cannot proceed to refuse on a ground which relates to the 'appropriateness' of a section 106 agreement (reflecting paragraph 5(3) of Schedule 13 to the Housing and Planning Bill 2015).

[1] https://www.gov.uk/government/publications/british-social-attitudes-survey-2013-attitudes-to-new-house-building

This raises questions about the timing of the dispute resolution process and the issues that the appointed person can consider.

If the dispute resolution process is concluded before the decision on the application is made, it could inform the planning committee's decision. Certainly where an authority is seeking obligations that in the applicant's view infringe the Regulation 122 tests, this would be helpful. However, we question whether it would be appropriate for an appointed person to interfere with the planning authority's exercise of its planning judgement and paragraph 10.15 appears to acknowledge that. Consideration also needs to be given to how a conclusion can be drawn that an authority would be likely to grant permission before the committee resolution has been passed; an authority would be fettering its discretion if officers provided a "minded to grant" notice before the committee had made its decision. This suggests that a pre-committee dispute resolution process would not be appropriate.

If the dispute resolution process is carried out after the committee resolution to grant permission, the obvious question is what discretion can be afforded to the appointed person. The appointed person should not be able to interfere with the planning committee's judgement on the planning balance and a dispute between the applicant and the planning authority would have to be framed in narrow and precise terms that reflected the discretion provided to officers to negotiate obligations set by the planning committee.

We also consider that the only persons who should be entitled to initiate the dispute resolution procedure should be the applicant, the interested LPA and any other person who is required to be a party to the planning obligation in order to give it legal effect (such as the substantive landowner if different from the applicant). Given that the appointed person's report will be a material consideration on any appeal, if "another person" is permitted to initiate dispute resolution, this would be akin to introducing third party rights of appeal by the back door. Such rights would permit those persons to delay, manipulate and ultimately frustrate the planning process. Third party appeal rights have long been resisted to avoid these outcomes and to ensure the effective and expeditious working of the planning system.

10.3 **Do you agree with the proposals about what should be contained in a request?**

We consider that the appointed person should also be sent a copy of any relevant committee papers (reports and minutes) for the application and a copy of any planning obligation which may have been completed previously for the same or substantially the same development as proposed in the application. In this way the appointed person will have a full understanding of how the LPA has addressed the matters in dispute for the application in question and any prior relevant application.

10.4 **Do you consider that another party to the section 106 agreement should be able to refer the matter for dispute resolution? If yes, should this be with the agreement of both the main parties?**

See comments above in respect of Q10.2.

In the case of two tier authority areas, the rights of upper tier authorities to refer s106 matters for dispute resolution should be limited to those matters for which they have direct responsibility (e.g. highways).

10.5 **Do you agree that two weeks would be sufficient for the cooling off period?**

No. We suggest that four weeks will be required to enable discussions to take place between the parties in dispute, to allow officers time to engage elected members (where appropriate) and to guard against periods when relevant personnel are absent from the office (for example, holiday periods).

10.6 **What qualifications and experience do you consider the appointed person should have to enable them to be credible?**

The appointed person should have extensive (perhaps ten years) experience of drafting and negotiating planning obligations which are of a comparable nature and complexity to the planning obligation in dispute. The appointed person should have a sound understanding of the nuances of the Community Infrastructure Levy (CIL) Regulations (in particular rr.122 and 123) and the ability to understand how the planning obligation in dispute relates to the application proposals which it supports. The appointed person should be empowered to call upon the assistance of further specialists in the subject areas in dispute, should he feel this is required. See further, Q10.8 below.

10.7 **Do you agree with the proposals for sharing fees? If not, what alternative arrangement would you support?**

Yes, although we suggest that the normal rule should be that costs are shared evenly between the parties unless they agree otherwise.

It would be unfortunate if, by initiating the dispute resolution process to facilitate the speedy resolution of a planning obligation, the resulting costs liability led the LPA to "sit back" on the process in the knowledge that the applicant will be put to considerably greater expense in pursuing a Section 78 appeal. Similarly, it would be unfortunate if there were to be no mechanism to avoid spurious or "tactical" referrals made by developers in the knowledge that the relevant LPA is costs averse. We therefore welcome the acknowledgement in paragraph 10.10 of the consultation that the appointed person will be empowered to award costs if a party has acted unreasonably.

10.8 **Do you have any comments on how long the appointed person should have to produce their report?**

We consider that for planning obligations of any substance, four weeks should be a sufficient time for the appointed person to produce their report.

10.9 **What matters do you think should and should not be taken into account by the appointed person?**

The appointed person will need to understand section 106 of the Town and Country Planning Act 1990 and related case law and comply with the legal requirements contained in the CIL Regulations.

10.10 **Do you agree that the appointed person's report should be published on the local authority's website? Do you agree that there should be a mechanism for errors in the appointed person's report to be corrected by request?**

Yes. There should be the opportunity for limited redaction of commercially-sensitive information, however.

10.11 **Do you have any comments about how long there should be following the dispute resolution process for a) completing any section 106 obligations and b) determining the planning application?**

If the procedures suggested above at Q10.8 are adopted, we agree that four weeks from publication of the report should be sufficient time for the parties to execute and complete the planning obligation recommended by the appointed person or an alternative agreement of their choosing.

10.12 **Are there any cases or circumstances where the consequences of the report, as set out in the Bill, should not apply?**

In our view, the consequences of the appointed person's report set out in the Bill raise a critical weakness in the new procedure. They mean that the proposed dispute resolution process is toothless and therefore ineffective.

If, notwithstanding the appointed person's report, the LPA decides that it does not wish to complete the planning obligation, it may choose not to do so without seemingly even any costs liability. If in those circumstances, the applicant takes on the burden of lodging a Section 78 appeal, the appeal inspector need do no more than "have regard" to the suggested obligation. It is not binding or binding in the absence of materially new circumstances etc on the inspector.

This is a poor outcome for applicants and significantly erodes the value of the new procedure.

Applicants may well choose to ignore dispute resolution and move straight to an appeal in order to avoid what they perceive to be a potential waste of time. Alternatively, the cost and delay in bringing an appeal may cause applicants to give up entirely on their proposals at this point so that a development which has already been approved in principle is frustrated.

We appreciate that the problem underlying this issue lies in the fact that jurisdiction remains with the LPA at this stage of the process rather than with the Secretary of State, as it would on an appeal.

We therefore suggest that if dispute resolution is to be at all useful, the government should consider legislating to permit the Secretary of State to recover the planning obligation (only) in those cases where the obligation remains in issue following the appointed person's report so that the planning process is not frustrated by intransigence. We further suggest that if an LPA refuses to complete the requisite planning obligation following the appointed person's recommendations, the LPA should be automatically liable for the applicant's full costs not only in pursuing the dispute resolution procedure but also in pursuing any procedure following recovery of jurisdiction by the Secretary of State.

10.13 **What limitations do you consider appropriate, following the publication of the appointed person's report, to restrict the use of other obligations?**

The parties should remain at liberty after the report to complete an alternative obligation to that recommended by the appointed person provided that the obligation meets the appropriate legal requirements, i.e. it sits within the framework of the relevant committee/delegated officer decision subject to any material change in considerations which may have arisen during the intervening period.

10.14 **Are there any other steps that you consider that parties should be required to take in connection with the appointed person's report and are there any other matters that we should consider when preparing regulations to implement the dispute resolution process?**

A longstanding problem associated with the timely implementation of planning permissions is the need for developers to complete additional legal agreements following the grant of permission but prior to commencement of works. The most common examples are highway agreements made under Sections 38 and 278 of the Highways Act 1980 and sewerage agreements made under Section 104 of the Water Industry Act 1991.

In many cases, it is appropriate (and sometimes necessary) for such agreements to be completed separately and some time after the planning obligation has been signed and planning permission issued. We do not recommend that this flexibility is taken away but we do believe that a dispute resolution procedure akin to that proposed for planning obligations would greatly assist in resolving such agreements quickly (subject always to the caveat we make at Q10.12 about overcoming the

authority's reluctance to complete the relevant agreement even after the dispute resolution process has run its course).

11 PERMITTED DEVELOPMENT RIGHTS FOR STATE-FUNDED SCHOOLS

11.1 **Do you have any views on our proposals to extend permitted development rights for state-funded schools, or whether other changes should be made? For example, should changes be made to the thresholds within which school buildings can be extended?**

We support the proposals to extend the existing temporary right to two academic years. One academic year is often too short a time to enable more permanent provision to come forward.

We support the proposals to increase the threshold for extensions - but any larger or further extension should be subject to full planning considerations.

We do not support the proposal concerning temporary buildings. We are concerned that the proposals introduce a use right - together with operational development, albeit temporary - based on the prior use of a building that has been lost due to demolition. This is a departure from the long-held legal position that a use right related to a building disappears when that building has been demolished. We are not convinced of the case to create a precedent for departure from this principle.

11.2 **Do you consider that the existing prior approval provisions are adequate? Do you consider that other local impacts arise which should be considered in designing the right?**

The prior approval process should continue to be operated. We do not see any other impacts which need to be considered as part of the process.

12 CHANGES TO STATUTORY CONSULTATION ON PLANNING APPLICATIONS

12.1 **What are the benefits and/or risks of setting a maximum period that a statutory consultee can request when seeking an extension of time to respond with comments to a planning application?**

A balance needs to be struck between the need to provide a realistic time for statutory consultees to respond to development proposals and the prospect of a lack of a response delaying development decisions. A maximum period will provide greater certainty in terms of the speed of local planning authorities being able to make determinations. To the extent that there is any risk associated with a maximum period, we suggest that there will only be a risk if the implications of the proposed development are sufficiently significant that the statutory consultee can demonstrate that additional time is required to enable them to respond (see below).

12.2 **Where an extension of time to respond is requested by a statutory consultee, what do you consider should be the maximum additional time allowed? Please provide details.**

This should depend on the scale and complexity of the development proposals. A limit of an additional two weeks should be imposed for anything other than large scale development (as defined under the criteria for applications of potential strategic importance currently adopted by the Mayor of London under Part 1 of the Schedule to the Town and Country Planning (Mayor of London) Order 2008), this would include:

- development which comprises or includes the provision of more than 150 houses, flats, or houses and flats (Category 1A)
- development (other than development which only comprises the provision of houses, flats, or houses and flats) which comprises or includes the erection of a building or buildings with a total

floor space of more than: 100,000 sq. m in the City of London; 20,000 sq. m in Central London (other than the City of London); or 15,000 sq. m outside Central London (Category 1B); or

- development which comprises or includes the erection of a building which is more than: 25 metres high and is adjacent to the River Thames; 150 metres high and is in the City of London; or 30 metres high and is outside the City of London (Category 1C).

For large scale development proposals, the extension should reflect the issues raised and the time required by the statutory consultee to provide the necessary response.

13 PUBLIC SECTOR EQUALITY DUTY

13.1 **Do you have any views about the implications of our proposed changes on people with protected characteristics as defined in the Equalities Act 2010? What evidence do you have on this matter? Is there anything that could be done to mitigate any impact identified?**

We note the consultation's assertion that no adverse equalities impacts have been identified but would point out that section 149 of the Equalities Act[2] requires that public authorities must have due regard to the need to:

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

This would suggest that the equality duty extends beyond simply identifying no bad effects to the duty to actively promote good.

13.2 **Do you have any other suggestions or comments on the proposals set out in this consultation document?**

No.

[2] www.legislation.gov.uk/ukpga/2010/15/section/149