

THE ROYAL TOWN PLANNING INSTITUTE

PLANNING OBLIGATIONS

A response to the Office of the Deputy Prime
Minister on the consultation draft of a
revised Circular

January 2005

2005/01

INTRODUCTION

1. Planning obligations, also known as section 106 agreements, are typically agreements negotiated between local planning authorities (LPAs) and developers, or unilateral undertakings made by developers, in the context of the LPA's grant of planning permission. They provide a means of ensuring that a proposed development contributes to the creation of sustainable communities, particularly by securing contributions towards the provision of the necessary infrastructure and facilities required by local and national planning policies.
2. The consultation paper seeks views on the Government's proposals for reforming and improving the current system of planning obligations in England, in the short to medium term. The Government's aim is to create a system that is faster, more transparent, and more accountable, and which gives greater clarity and certainty to all concerned. The proposals, in the form of a draft that will replace Circular 1/97, can be viewed at www.odpm.gov.uk/stellent/groups/odpm_planning/documents/page/odpm_plan_032594.pdf.
3. The draft Circular sets out possible changes to the current negotiated system of planning obligations. The intention is that these changes will be made in advance of potentially more major reforms to the system to be brought forward in the next 2-3 years, in response to the recommendations in the final report of the *Barker Review of Housing Supply* (March 2004). ODPM's objective is to promote debate and ensure that as wide a range of views as possible is taken into account before a final revised Circular is issued later this year.

GENERAL COMMENTS

4. The Institute welcomes the draft Circular and can support much of its content following the deliberations of the Advisory Group, chaired by Keith Hill MP, Minister for Housing and Planning, the establishment of which was itself an Institute initiative (*paragraph 23*). We are pleased to have been able to have contributed directly to the development of Government thinking on this important issue.
5. The draft Circular addresses many of the problems identified in the 2001 Planning Green Paper – *Planning: Delivering a Fundamental Change*, where the present system of planning obligations was criticised as being “*complex, difficult to agree and (responsible) for delaying the planning process*”. Support has to be qualified, however, to the extent that the present proposals represent only a partial solution. We have to wait until the Chancellor of the Exchequer publishes proposals for a planning gain supplement - as recommended in the

Barker Review of Housing Supply – before the full picture can be seen. In the meantime, we will have a planning obligations regime scaled back to cover direct impact mitigation (and affordable/social housing requirements), but no mechanism for funding wider infrastructure requirements.

6. Nevertheless, we welcome the Government's intention to bring into effect most of the uncontroversial proposals put forward in the Green Paper, for which we have waited for over three years. These include –

- the introduction of the option of mediation;
- the requirement to establish heads of agreement at an early stage;
- the introduction and use of standard terms, where this is practicable;
- the opening of the procedures to greater public scrutiny; and
- the establishment of procedural deadlines at the outset -

and are all major improvements to the system. Collectively, they will make a big difference to the process and largely achieve the modernisation of section 106 agreements that the Government has long been seeking.

7. Since the problems were formally recognised in the Planning Green Paper, Government policy on planning obligations has followed a somewhat tortured path (well described in *paragraphs 10-17* of the consultation paper). The present proposals represent a very welcome about-turn on how best to regularise planning obligations. The Green Paper's proposal for a tariff, and the charge proposed in the consultation paper a year ago, have both been dropped. The "necessity" test, explicitly proposed to be dropped in that earlier consultation paper, has sensibly been reinstated as an underlying principle. This should ensure that planning permissions are not bought or sold, and that planning obligations have transparency and credibility.

8. Although all the current proposals can be achieved through policy, and do not, of themselves require legislation, it is important now, for reasons of transparency, accountability, clarity and certainty - the Government's own words - that these first steps are cemented in place. The Government might reconsider its decision not to put the proposals in the draft Circular on a statutory basis (using sections 46 and 47 of the Planning and Compulsory Purchase Act), as whatever the ultimate decision on a planning gain supplement and a planning charge, optional or otherwise, these will only complement the basic proposals now put forward in the draft Circular.

9. We found the format of the consultation paper less than user-friendly from the point of view of a consultee. The separation of the discussion of the reform proposals (in *Chapter 4*) from the proposals themselves (in *Annex B* of the draft Circular) and the duplication of paragraph numbers (because, unlike in *Annex A*, the paragraph numbers in *Annex B* have no prefix) have made it difficult to structure this response. The detailed comments that follow are set out under the paragraph references in *Annex B* of the draft Circular.

DETAILED COMMENTS

DRAFT CIRCULAR – ANNEX B

Policy – the broad principles

10. *Paragraphs 2-3:* There is an inconsistency between these two paragraphs in the description of the trigger point that might justify the negotiation of planning obligations. In *paragraph 2*, the reference is to “development proposals which might otherwise be unacceptable”, in *paragraph 3* it is “which would otherwise be unacceptable”.
11. *Paragraph 5:* The Institute strongly supports the Secretary of State’s policy tests, and particularly welcomes restoration of the status of the “necessity” test. Depending on whether *paragraphs 2/3* mean “might” or “would”, it may be appropriate to add “more” before “acceptable” in *5(i)*.
12. *Paragraph 7:* While we fully support the sentiments expressed here – we believe that taxation and the planning process should be kept firmly apart – the draft Circular’s proposals for formulae and standard charges (*paragraphs 29-31*) come very close to crossing this line, and will make monitoring difficult.

The Secretary of State’s policy tests

13. *Paragraph 8:* This appears to widen the scope of the “necessity” test – “to bring a development in line with relevant local, regional or national planning policies” – and so increases the profile of development plan policies.
14. *Paragraphs 9-10:* In considering the proportionality of obligations – “reasonably related in scale and kind to the proposed development” - the draft Circular does not appear to acknowledge the common situation where overloaded infrastructure needs upgrading before a new development can proceed, and where the development is the only potential source of funding within the plan period. Is proportionality to be applied in these circumstances, even if the development is sufficiently viable to meet the full cost, and the developer willing to do so? The alternative is for planning permission to be granted with a “proportionate” contribution that has no chance of being supplemented from public funds, leaving the infrastructure improvements unimplemented at the end of the plan period, and the cheque returned to the developer.

Examples of the use of planning obligations

Prescribing the nature of the development to achieve planning objectives

15. *Paragraphs 12-14:* We are pleased to note that the draft Circular establishes beyond doubt the reasonableness of using planning obligations to ensure provision of a proportion of affordable housing in market housing schemes where there is a need for this provision. To increase utility, and regularise intervention on house type and tenure, the following might usefully be added –
 - (to the end of *paragraph 12*) – “Planning obligations can also be used to ensure provision of the specific housing type and tenure required by planning policy”; and/or
 - (after the first sentence of *paragraph 13*) – “The specification of affordable housing may include the house type and tenure required to implement these policies”.

Compensating for loss or damage caused by a development

16. *Paragraph 15:* Given that most development will be irreversible, it may be appropriate to suggest, in the final sentence, that restoration of “*facilities, resources and amenities...*” may be acceptable on alternative sites.

Types of contribution

Maintenance payments

17. *Paragraph 18:* The proposal to fix time limits and payment amounts in advance is supported. It is assumed that these arrangements would make it possible to seek payment of a lump sum to cover the early years’ maintenance, as initial establishment and maintenance is often the most critical.

A fast, predictable, transparent and accountable system

18. *Paragraphs 22-23:* The principles of good practice described here are welcomed and supported.

Local planning obligations policies

19. *Paragraphs 24-25:* The Institute strongly supports the principle that the local benefits to be delivered through planning agreements should generally be established in advance through the development plan system. The requirements might be expressed more strongly in the Circular – by reference to the need for transparency about the actual sums involved at the stage of reporting on a planning application, for example - but the present wording does signal a move away from support for ad hoc proposals from a developer that might appear to the local community to be a straightforward attempt to bribe the LPA. The reference to “*high level policies*” in *paragraph 24* should relate specifically to the Core Strategy DPD.
20. This will not work, in practice, if the development plan is not kept very up to date. The Institute can appreciate a reluctance on the part of ODPM to contemplate this, for fear it becomes a self-fulfilling prophesy, but the Circular does need to provide a basis for determining planning applications where there are legitimate new requirements that have arisen since adoption of the DPD or SPD, as a result, for example, of market fluctuations.

Formulae and standard charges

21. *Paragraphs 29-31:* The Institute regrets that there remains an element of revenue-raising in the proposals here, where it appears that the Government is trying to go beyond regularising current practice. Although *paragraph 30* states that “*LPAs may choose to provide standard charges for one or more specific matters, but there is no requirement to address any or all matters through standard charges and formulae*”, it is, at best, ambiguous in its intent, especially when read with *paragraph 4 of Annex B* – “*Planning obligations are unlikely to be required for all developments, but their use should be encouraged wherever appropriate according to the Secretary of State’s policy set out in this Circular*”. This is a reversal of current policy (in *Circular 1/97*), which discourages the use of planning obligations unless they are really necessary.
22. The change of emphasis to encouraging planning obligations, but not in all cases, indicates a significant move towards their greater use with planning permissions. Apart from anything else, this suggests that the “necessity” test is not to be applied with the fervour that it should be. The range of “benefits” that LPAs are asking developers to fund through planning agreements gets ever more extensive and needs to be reined back – an issue that the revised Circular is designed to address. (One of the more bizarre charges of which the Institute is

aware is a charge of £3.50 per new house for “poop scoop” services!)

23. We firmly believe that taxation should be completely separated from the planning process and strongly recommend that this issue be reconsidered. There are a number of adverse consequences in the drift towards a charging culture –
- it gets in the way of a betterment tax regime. These kinds of charges will have to be dropped if the Treasury decides to proceed with a tax;
 - it charges only new developments for services, when most of the benefits should be funded by all users, moving towards the inequality of new infrastructure largely being paid for by new development, despite the policy that only additional infrastructure needs should be so funded;
 - it confuses planning with revenue-raising once again, creating perverse incentives to grant planning permission;
 - it is inequitable in that wealthier locations, with high land values, can raise and retain far more money than can poorer areas, reinforcing pre-existing differentials in environmental quality and other attributes; and
 - it will promote a new activity amongst LPAs in establishing and approving charging regimes. This will divert planners from their priority roles, create more to argue about, and further delay plan-making.

Use of independent third parties

24. *Paragraph 33:* The use of independent third parties to help the negotiation process is strongly supported.

Public involvement

25. *Paragraph 37:* Although there is a register requirement for section 106 agreements, the Institute is not aware of there being any statutory notification procedure by which the general public might be made aware of the existence of agreements. Is this something that might be considered?

Persons interested in land

26. *Paragraph 45:* In view of the distinction between the status of parties to a planning obligation and those able to submit a planning application, it would be helpful if the Circular defined what it means by an “interest” in land.

b) Changes to appeal time limits

27. *Paragraphs 42-46:* It is assumed that this proposal will not be pursued following Keith Hill’s announcement, on 16 December 2004, that the time allowed to lodge section 78 appeals will revert to 6 months.

OUTLINE OF GOOD PRACTICE GUIDANCE

A fast, predictable, transparent and accountable system

28. *Page 34:* The good practice guidance might include advice to LPA planning staff on briefing their legal colleagues (or consultants) adequately on the aims of particular obligations, with all necessary contact details. Delays can occur, at the outset, if these issues are not adequately addressed.
29. There might also be reference to the mechanisms, within LPAs, for determining applications that are subject to section 106 agreements. Some planning officers may need to refer to committee specifically to seek authorisation to enter into the agreement. Others will be able to take a speedier route through the use of delegated powers.

Public involvement

30. *Page 36: 2nd bullet:* This is often not known until well through the processing time of a planning application. A second round of public consultation is likely to impact greatly on the timescale of determination. Is the draft Circular clear enough on this? Is it a requirement, or simply advice?

Implementation of planning obligations

31. *Page 37:* The creation of a section 106 database is to be welcomed. It is unclear from the outline in the consultation paper on what scale – national or local – it is proposed that this should operate. The Institute would like to see a national monitoring system, available on the ODPM website.