PLANNING COMMITTEE – 25 SEPTEMBER 2012

REPORT TITLE: CONSULTATION: RENEGOITATION OF SECTION 106 PLANNING OBLIGATIONS

REPORT OF HEAD OF PLANNING

WARDS AFFECTED: ALL WARDS

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1. PURPOSE OF REPORT

1.1 To advise Members of, and to seek Members agreement on the consultation response on proposed changes to the time period during which the local planning authority can be formally requested to renegotiate the terms of signed Section 106 agreements.

2. RECOMMENDATION

2.1 That Members:

(i) note the content of the report; and

(ii) agree the responses to the questions raised as detailed within this report.

3. BACKGROUND TO THE REPORT

3.1 Section 106 of the Town and Country Planning Act 1990 allows a local planning authority to enter into a legally-binding agreement or planning obligation with a landowner, or persons who intend to develop that land, in association with the granting of planning permission. These planning obligations are intended to deliver or address matters that are necessary to make a development acceptable in planning terms. The Borough Council uses such provisions to secure necessary developer contributions in respect of play and open space, affordable housing, education etc.

3.2 The Government's Housing Strategy "Laying the Foundations: A Housing Strategy for England" published on 21 November 2011 set out a number of proposals to help unlock stalled development. There are currently around 1400 housing schemes of over 10 housing units with planning permission that are stalled. 62% of stalled units predate April 2010.

3.3 The Government is concerned about the high number of stalled schemes and the lost economic benefit they represent. Some planning obligations negotiated in different economic conditions now make sites economically unfeasible – resulting in no development, no regeneration or community benefits.

3.4 The Government want to ensure that effective renegotiation of planning obligations can be achieved to make them more reflective of the current market and help unlock stalled development, whilst continuing to ensure through the use of obligations that development is acceptable to communities and local authorities in line with local plans. Wherever possible, such renegotiation should be agreed on a voluntary basis. It is important to note that HBBC has, when requested, reconsidered the terms of planning obligations to ensure development is delivered.

3.5 The intent of the change is to assist in bringing forward stalled development. It will not mean that obligations should be reduced arbitrarily or the terms altered automatically. Nor should it be a reason to permit unsustainable development. It remains that there must be a strong justification for any change, and the resultant

obligation must still be sufficient to make the development acceptable in planning terms. The principles for modifying planning obligations are given in section 106A of the Town and Country Planning Act 1990. This requires that an obligation must "*no longer serve a useful purpose*" or that it "*continues to serve a useful purpose…equally well*" if it is to be modified. These principles will be important considerations during negotiations.

3.6 **The Proposed Changes**

3.7 Section 106A of the Town and Country Planning Act 1990 allows voluntary renegotiation of a planning obligation at any time. Where voluntary agreement cannot be reached there may be a formal request to reconsider an obligation when that obligation is 5 years old. The local authority must take a decision on such a request. If the local authority decision is not to renegotiate terms then there is a right to appeal to the Planning Inspectorate.

3.8 In March 2011 the Government wrote to all authorities encouraging them to consider carefully whether voluntary renegotiation of planning obligations was appropriate in order to stimulate development. It is clear that this has happened in some cases. However, it is now proposed to take this further by ensuring that there is greater opportunity to require reconsideration of planning obligations where there is clear justification for doing so.

3.9 It is now proposed that for all planning obligations agreed on or prior to the 6 April 2010, the relevant local planning authority can be asked to formally renegotiate the terms one month after the introduction of new regulations. For all planning obligations agreed after 6 April 2010, the period will remain at 5 years. There will be no change to the ability to renegotiate obligations voluntarily at any time.

3.10 The Government considers that 6 April 2010 is an appropriate cut–off date for this change. New statutory tests (the CIL tests) were introduced for most planning obligations on 6 April 2010 which ensure that obligations agreed after that date must only cover what is necessary to make the development acceptable, must be directly related to the development and reasonable in scale and kind. It is also clear that a high proportion of stalled developments are dated prior to April 2010 when market conditions were different.

3.11 The current proposal will require a new regulation to allow the change for obligations agreed prior to April 2010.

3.12 Planning Inspectors, when hearing appeals, will also have to apply these principles in reaching their decisions. They will also need to have regard to the requirements of section 38(6) of the Planning and Compulsory Purchase Act 2004 and thus consider the evidence for modifying the obligation in light of the local plan policy position and any other relevant material considerations.

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

3.14 **Answer 1** - yes. It will allow a formal mechanism for the reconsideration which should, in turn, improve development completion and economic stimulus.

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

3.16 **Answer 2 –** yes. Whilst the economic position and development costs will continue to fluctuate, most stalled development was subject to planning obligations secured way before April 2010 and therefore within a very different economic climate. Whilst other dates could be equally justified as a turning point, it is important that the date coincides with the introduction of the CIL Regulations and the legal requirement that obligations will only be lawful if all three tests in the CIL Regulations of April 2010 are met.

3.17 **The Specific Impact on Affordable Housing**

3.18 It is the Government`s opinion that planning obligation contributions towards affordable housing represent the largest proportion of all obligations. *However, it is the Government`s view* that some obligations agreed prior to April 2010 which include a high level of affordable housing, may now be so unviable that development may not occur at all under the current terms. Those applications will therefore not deliver any affordable housing, and therefore the policy change will help bring forward more affordable housing than would otherwise happen.

3.18 As with all other areas of obligations, renegotiation does not mean that affordable housing contributions should automatically be reduced or lost. It means that obligations should be tested against local plan policies to see if a revised obligation serves its purpose equally well. It may be possible for authorities and developers to agree a similar level of provision, but in different ways or to change the phasing in which delivery is expected.

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

3.20 **Answer 3 –** Viability-led phasing of the provision is the most appropriate way of securing delivery of affordable housing. This economically-informed approach will ensure that the developer's commitments are deliverable and defined to the local planning authority.

3.21 **Procedural and Operational Issues**

3.22 In renegotiating any planning obligation the economic viability of a development must be considered. This is something that Members will be aware has been considered over the past few years but is becoming a frequent consideration in the determination of planning applications.

3.23 The Borough Council does not have an internal resource for considering the economic viability of developments and as such has to outsource this work. It is important to note that economic viability is a relatively new material planning consideration and as such is a specialist area that overlaps the remit of planners, quantity surveyors and economists. The Borough Councils current outsourced arrangement is with Coventry City Council; however the Borough Council asks that the applicant pays Coventry City Council's costs and an administration fee to HBBC for managing the assessment. In light of the proposed regulatory changes subject of this consultation paper this arrangement would need to be maintained and the applicant meet the costs of any such assessment.

3.24 It is important to note that any development costs (including professional fees such as the viability assessment) can be included within any viability consideration.

4. <u>FINANCIAL IMPLICATIONS [PE]</u>

4.1 The financial implications of such renegotiations could be significant to the Borough Council, particularly in respect of Play & Open Space contributions which are

typically spent by the Council itself. Any loss in income would need to be considered alongside the importance of delivering the development. It is a consideration of the Borough Council as the local planning authority in deciding if a development is delivered with a reduced contribution. The risk to the Councils Play & Open Space income is likely.

5. LEGAL IMPLICATIONS [MR]

5.1 There is a requirement for legal input in the completion of or modification of any agreement under S106 and with this is a cost. Under normal working arrangements this cost is paid by the applicant upon completion of the agreement and should these proposed changes come into force the Council's legal costs should be met by the applicant.

5.2 The report summarises the legal implications from the proposed changes

6. CORPORATE PLAN IMPLICATIONS

6.1 None.

7. CONSULTATION

7.1 None. This is a consultation by DCLG.

8. RISK IMPLICATIONS

8.1 It is the Council's policy to proactively identify and manage significant risks which may prevent delivery of business objectives.

8.2 It is not possible to eliminate or manage all risks all of the time and risks will remain which have not been identified. However, it is the officer's opinion based on the information available, that the significant risks associated with this decision / project have been identified, assessed and that controls are in place to manage them effectively.

8.3 The following significant risks associated with this report / decisions were identified from this assessment:

Management of significant (Net Red) Risks		
Risk Description	Mitigating actions	Owner
None		

9. **KNOWING YOUR COMMUNITY – EQUALITY AND RURAL IMPLICATIONS**

9.1 The issues arising through this consultation are legislative provisions relating to the Town and Country Planning Act 1990 (as amended) and would apply on a national basis. Therefore any arising impacts with be applicable to all and no definitive impacts upon equality and rural matters will apply.

10. **CORPORATE IMPLICATIONS**

10.1 None.

Background papers: Renegotiation of Section 106 Planning Obligations – CONSULTATION.
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