DCLG consultation: Section 106 Planning Obligations – speeding up negotiations

March 2015

1. This response is submitted by the Local Government Association (LGA).

2. The Local Government Association (LGA) is here to support, promote and improve local government. We will fight local government's corner and support councils through challenging times by making the case for greater devolution, helping councils tackle their challenges and assisting them to deliver better value for money services.

3. The LGA is an organisation that is run by its members. We are a political organisation because it is our elected representatives from all different political parties that direct the organisation through our boards and panels. However, we always strive to agree a common cross-party position on issues and to speak with one voice on behalf of local government.

LGA response

Summary

Councils recognise the importance of timely negotiation and agreement of developer contributions required to make development acceptable. As a starting point, all development should make a reasonable contribution to necessary infrastructure (site-specific and more widely), and also affordable housing. We are concerned therefore about the government's current approach to section 106 contributions and that this will reduce expectations on this score. This may simply lead to an increase land values, rather than helping with viability on anything but marginal sites.

The most important factor in avoiding delays in this process is engagement at early stages of the planning process so that issues are resolved and contributions are agreed before the planning application is considered. This provides certainty to the developer and the local authority and transparency to the community. We therefore welcome the proposals to amend guidance to strengthen the expectations of earlier engagement at the pre-application stage by all parties.

We do not support the proposals for a national dispute resolution process for section 106 agreements. Firstly, Section 106 agreements are a means of meeting policy requirements of the local plan and are central to the assessment of the acceptability of the development proposal as a whole and should not be considered through a separate process. Secondly, it would remove democratic local accountability and undermine public confidence in the planning system. Strengthening requirements for the upfront negotiation of S106 agreements would be a more effective means of avoiding delays than offering an alternative route for resolution. Finally, a dispute resolution process would provide an incentive for developers to "hit and hope" i.e. appeal against any section 106 in the hope of getting something better from arbitration. That would lead to delays in development. Notwithstanding our views on the dispute resolution proposals, this could be mitigated by allowing obligations to be increased from the local authority's proposals, for example where a local authority has already compromised compared to local plan requirements.

Finally, the proposals to exempt student accommodation from contributions to affordable housing are unnecessary and fail to take into account local market conditions. Where there are genuine cases where required contributions could render development unviable this can be addressed through negotiation locally.

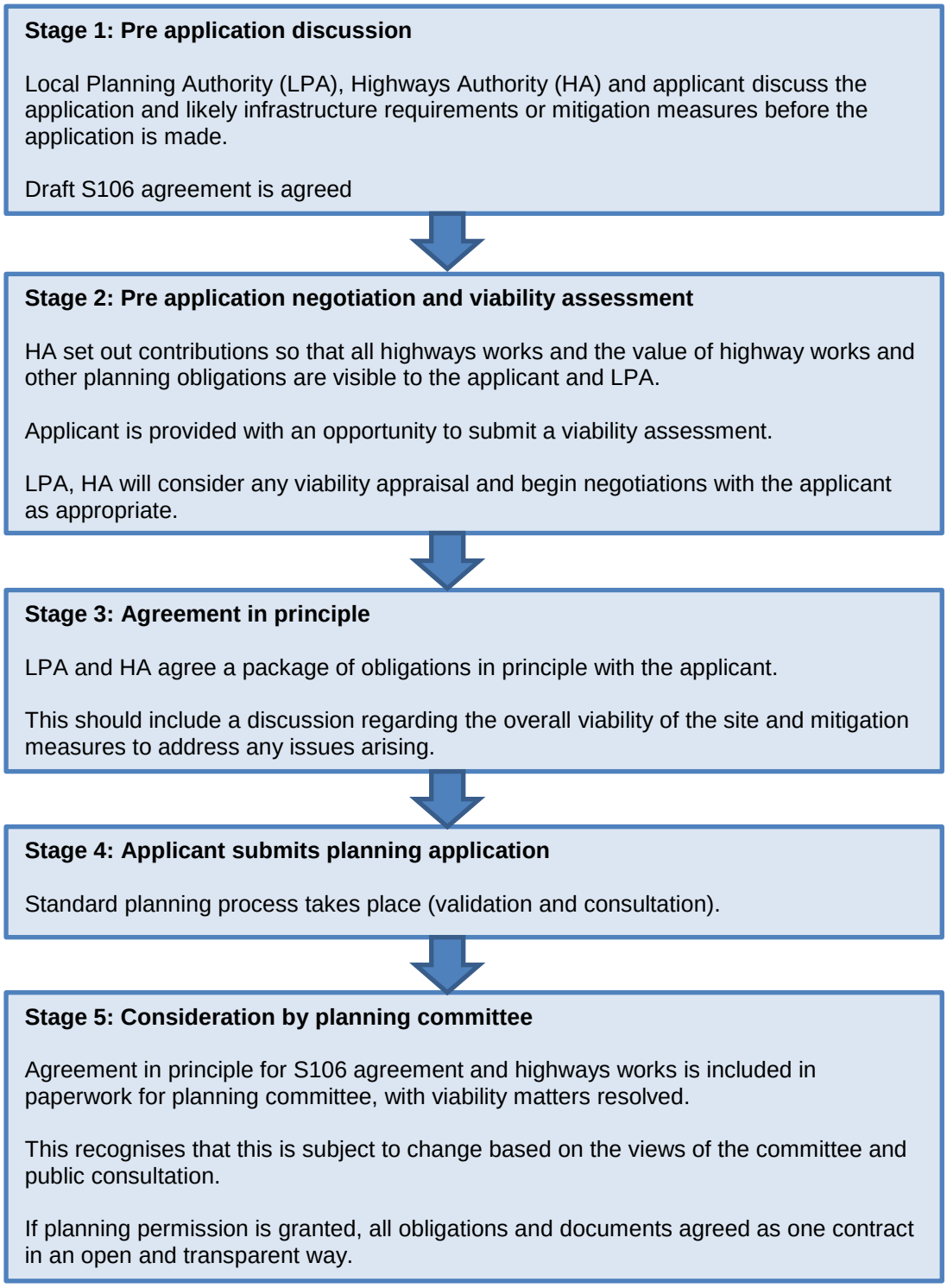
Agreeing planning obligations at early stage of the planning process

Pre application discussions and early engagement can identify potential issues with proposed development before an application is submitted and provide a route to agree in principle planning obligations and highways contributions associated with the development.

The process of agreeing section 106 contributions would be faster and more transparent if applicants were required to identify at pre-application stage whether their submission would include agreement to the local plan requirements and if not, what it does agree alongside robust evidence on why it cannot achieve the other requirements.

All relevant Section 106 requirements, CIL tariffs and Section 278 highway works should be agreed as a package early in the planning process, so that when planning is agreed by the planning committee the whole 'contract' is fully understood by all parties.

A proposed good practice process is included below:



Response to Section 106 consultation questions

Question 1: Do you agree that Section 106 negotiations represent a significant source of delay within the planning application process?

Section 106 is a mechanism to achieve some of the requirements of the development plan that cannot be fulfilled by other means and is therefore a necessary part of the planning process without which many applications would have to be refused.

By their very nature these can be complex negotiations which seek to balance the different interests of communities and developers and therefore do require time for careful consideration.

We would question the evidence that section 106 negotiations represent a 'significant' source of delay across the board within the planning application process. Our Planning Positively through Partnership publication[1] has a number of examples of how early engagement and agreement on section 106 contributions can ensure that development is brought forward in a timely manner. There should also be recognition that timely agreement depends on the quality and timeliness of information submitted by developers as much as action from Local Authorities. .

However, we would agree that there are cases where delays can arise where section 106 obligations are required and where agreements are not submitted with the planning application.

As outlined above, delays can be avoided where section 106 drafting starts at pre-application stage and the there is broad agreement to the section 106 before an application is submitted.

This already happens in many councils, with support from developers, and should be adopted as common practice. It may be that this could be achieved through strengthening guidance.

The introduction of locally-set planning fees would also help further with resourcing section 106 processes.

Question 2: Do you agree that failure to agree or complete Section 106 agreements are common reasons for seeking extra time to determine a planning application?

Failure to agree or complete Section 106 agreements can be one of a number of reasons for seeking extra time to determine a planning application, from both councils and developers. The most effective way to make the application assessment and determination more efficient is for all relevant information and evidence should be provided at the beginning of the process, at pre-application stage.

Question 3: Do you agree that the current legal framework does not provide effective mechanisms for resolving Section 106 delays and disputes in a timely manner?

No. Securing affordable housing, policy matters and mitigation measures through Section 106 is a fundamental part of the planning application process and should be seen as such. Development proposals will be assessed in relation to the local plan and where that plan requires mitigation or the provision of affordable housing or other actions the developer should provide these, unless the developer can provide robust evidence to show that this will render development on an individual site unviable.

[1] Planning Positively through Partnership

In making a decision on the proposal the local planning authority will then need to weigh this up against other material planning considerations to consider whether the proposal as a whole is acceptable. If it is not, then an application will be refused.

Developers already have existing provisions for dealing with planning application disputes via the planning appeal process. This applies equally to disputes over required contributions, as to any other material consideration for which a planning application has been refused.

Question 4: Do you agree that legislative change is required to bring about a significant reduction in the delays associated with negotiating Section 106 agreements?

No, there is already a framework in place for assessing the acceptability of development – the local plan and process for dealing with disputes – the planning appeal process.

The focus should be on strengthening existing guidance and supporting culture change in both councils and the development sector, to encourage pre application discussions and early engagement on likely contributions required.

Question 5: Do you agree that any future dispute resolution mechanism should be available where Section 106 negotiations breach statutory or agreed timescales?

No. A secondary mechanism that takes the decision away from the formal democratic planning process, breaking up the whole consideration into two different grades of consideration would complicate the process, be less transparent to the community and will erode public confidence in the planning process.

We would also question the likely uptake of such a dispute resolution mechanism, given the low uptake by developers of the section 106 appeals process for renegotiating affordable housing contributions.

Question 6: Do you agree that a solution involving an automatic or deemed agreement after set timescales would be unworkable in practice?

Yes, for the reasons set out in the consultation paper.

Question 7: Could submission of a draft Section 106 agreement or unilateral agreement during the negotiation process be a requirement of being able to seek dispute resolution where statutory or agreed timescales are breached?

Yes. A requirement to submit a draft or unilateral undertaking (or a section 106 statement clearly setting out what is proposed), with details of how it meets the policy requirements and where it doesn't, with evidence of why not, at the pre-application stage, would make the process more efficient, more effective, and improve transparency and confidence in the process. Evidence that negotiation has already taken place between the local authority and applicant should also be provided.

Question 8: Do you agree any dispute resolution mechanism would need to be binding on the parties involved?

It is not clear how this would work in practice or how it would be consistent with local democracy and accountability of decision making.

The outcome of a decision on a section 106 contribution could have implications for the decision on the planning application as a whole and the local authority should still be able to refuse the planning application if it would not deliver the mitigation/policy requirements of the local plan.

Question 9: Which bodies or appointed persons would be suitable to provide the dispute resolution service?

Notwithstanding our view that a dispute resolution service for section 106 will divide the planning considerations and take the decision away from local decision making, if government take forward this proposal the body should be independent and not a representative of the development industry, landowners or other sector-related organisations.

Question 10: How long should the process take?

No comment

Question 11: Do you agree that the body offering Section 106 dispute resolution should be able to charge a fee to cover the cost of providing the service?

Yes, the service should be fully funded as part of the costs of the development application and should be paid by the applicant.

Question 12: Should all types of planning application have recourse to Section 106 dispute resolution?

This new process will have significant resource implications for local authorities and the development industry so it is unlikely to be proportionate for many types of application.

Question 13: Do you consider that any dispute mechanism would need to also involve the determination of the related planning application?

No. The section 106 issues should not be divided from the other planning considerations when assessing the acceptability of development. But it would be even more unacceptable to remove the determination of all planning applications with section 106s that cannot be agreed away from the democratic decision making process. This would undermine the local plan-led process and would further alienate local communities that will have to accommodate the development.

Question 14: Are there any ways in which this could be done where only the Section 106 agreement is the subject of the resolution mechanism?

No. The section 106 is an integral part of the planning application assessment against the policies of the local plan as a whole.

Question 15: To what extent do you consider that the requirement to provide affordable housing contributions acts as a barrier to development providing dedicated student accommodation

We do not agree that section 106 affordable housing contributions act as a barrier to provision of dedicated student accommodation. There has been a boom in student accommodation across the country over the last few years and in many areas it is one of the most valuable types of development. In addition, student accommodation also benefits from tax relief which includes both VAT and capital allowances.

Where there are genuine cases where required contributions could render development unviable, councils are open to discussion and entering negotiations.

There is a risk that removing requirements for affordable housing contributions for student housing, will, in some areas, for example Oxford, put that tenure at a massive advantage compared to market housing. This will introduce a market distortion that leads to over-provision of student housing, with potential for it then to be moved to residential, in full or in part, at a later date.

As we have outlined in previous consultation submissions we strongly object to national exemptions for section 106 affordable housing contributions. Blanket national exemptions do not take into account local circumstance and local market conditions and undermine provision of affordable housing.