Gloucester City Council

Meeting:	**Planning Policy Sub Committee Date: 26 March 2015**
Subject:	**Response to CLG Consultation: Section 106 Planning Obligations: Speeding Up Negotiations - Consultation**
Report Of:	**Cabinet Member for Regeneration and Culture**
Wards Affected:	**All**
Key Decision:	**No Budget/Policy Framework: No**
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Appendices:	**1. Response to CLG Consultation Questions**

1.0 Purpose of Report

1.1 To seek Planning Policy Sub-Committee's approval of the proposed response to the Department of Communities and Local Governments Consultation (DCLG) on speeding up Section 106 Negotiations.

2.0 Recommendations

2.1 Planning Policy Sub-Committee is asked to **RECOMMEND** that it endorses Appendix 1 as the Council's response to the DCLG consultation.

3.0 Background and Key Issues

3.1 The Government has set out a number of proposals to improve what it sees as unnecessary delays in the finalisation of S106 Agreements.

3.2 The key issue is how speedier negotiations may impact upon the Council achieving planning gains from development and/or contributions that mitigate the impact of the development.

3.3 Currently developers can renegotiate affordable housing contributions on S106 agreements on the basis of viability and are therefore already in a strong negotiating position with regard to contributions. Officers take the view that anything that weakens the Council's negotiating position (which is exercised in a

reasonable manner) is likely to be detrimental to the contributions the Council receives and as a result lead to a risk of reductions in affordable housing provision.

4.0 Reasons for Recommendations

4.1 The response is framed to consider what action might be taken to improve performance in the speed of S106 negotiations, as all parties wish to see sustainable and appropriate development approved as quickly as possible, whilst seeking to protect the interests of the Local Planning Authority and secure the wider objectives of the Council.

4.2 It is the officer's view that local decision making would be undermined by the imposition of a statutory timescale and other proposals set out within the consultation document.

5.0 Future Work and Conclusions

5.1 DCLG has been provided with a copy of the consultation response and have been advised that approval is still to be given to it as a Council approved document. Should Committee decide to amend the response DCLG will be notified of the change within 7 days of the committee meeting.

6.0 Financial Implications

6.1 There are no financial implications arising from the consultation document itself, but if future revisions to the negotiation of S106 agreements resulted in reduced contributions, this would limit the level of the capital programme which the Council could support with S106 money.

7.0 Legal Implications

7.1 Legal Services have provided comments in relation to the officer's response, supporting their view, and recommending that it is best that the Planning Inspectorate is not involved in any arbitration They advise that the dispute resolution process is a reasonable proposal.

7.2 They suggest that the independent arbitrator must comprise a panel of persons who together have the essential skills to understand the subject matter under dispute. Given that housing issues may have to be considered, one member of the panel must include a person with knowledge in this field.

7.3 Legal Services also identify that delays and disputes are generated by technical property problems. For example, developers may not hold a sound title or may be involved in a boundary dispute with an adjoining owner. It therefore follows that the panel should also include a property solicitor.

8.0 Risk & Opportunity Management Implications

9.1 The main risk is that should Committee not endorse a response that DCLG will not be able to consider that issue from a Local Planning Authorities perspective.

10.0 People Impact Assessment (PIA):

10.1 N/A

11.0 Other Corporate Implications

Community Safety

11.1 N/A

Sustainability

11.2 N/A

Staffing & Trade Union

11.3 N/A

Appendix 1

Gloucester City Council

Response to Communities and Local Government Consultation: Section 106 Planning Obligations – Speeding up Negotiations Student Accommodation and Affordable Housing Contributions Consultation

This document reflects a draft response. Given the timescales of the consultation and the Council's Governance Structures it has not been possible to get the response to Planning Policy Sub-committee (PPSC) in advance of the DCLG deadline. It is anticipated the document will go before PPSC on 26 March and be approved. This Council's approved position will then be confirmed.

Overall, the consultation document makes some sensible comments regarding the need for use of standardised clauses and focusing on efficient processes. However, the tone of the document suggests that the Government may favour certain approaches; there is a lack of a sound evidence base upon which to base the consultation questions.

The Council's draft responses to the consultation questions are as follows:

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

No.

The key word here is significant**.** The process of negotiation and completion of a legal agreement is a necessary and legitimate part of the planning process which ensures that:

- Both LPA and Developer are clear about the obligations required to be met
- The mechanisms are in place to meet them.

The process can become more protracted either because:

- The Affordable Housing has not met target and there is some time extension linked to the consent rather than refuse application, this approach may reflect a Council's policy position and/or developers are not happy with Local Planning Authority's (LPA) attempt to tie into key obligations and there is much too-ing and fro-ing.
- There are technical issue over land ownership to be resolved.

Delays are only significant in a minority of cases. Local authorities have finite resources which impact on speed of the process, this does not reflect on the nature of the work rather the resources that case be brought to bear in relation to it. It is questionable whether seeking to penalise LPAs because they do not have resources will lead to better planning outcomes.

There is no doubt that standardised clauses and definitions help speed up drafting but cannot remove the issue around disagreement over inclusion of clauses and this reflects the nature of the process. Assistance from national bodies over clauses and drafting would be of assistance for example, the Council for Mortgage Lenders worked with

Chartered Institute of Housing and National Housing Federation to provide guidance on Mortgagee in Possession Clauses.

Developer's solicitors will routinely amend and change S106 through the negotiations and this causes delays, in particular when clauses are changed without prior notice, tracking changes becomes an issue. Again, this can be dealt with by improved processes within the Local Authority, e.g.; providing the agreement in a format that they cannot amend and that comments need to come back from developer for the LPA to agree and insert. The current consultation gives the impression that the delays are primarily caused by the LPA.

A key question is what does one think a reasonable time is to conclude a S106 agreement? This will very much premise on the stakeholders' perspective.

The current Government view as expressed in numerous consultation and amendments to the planning system is that it is best to remove as many barriers to development coming forward and that will no doubt think that negotiations should be concluded in rapidly with minimal constraints on the developer whereas from a Local Authority perspective an LPA would want to take more time to ensure their interests are protected.

The consultation calls for evidence and then seeks to consult on solutions without a clear understanding of the scale of the issue or the key drivers behind it.

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?

No. The Council does not have experience of this occurrence.

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.

Currently a developer can appeal on the basis of no determination if S106 negotiations are taking too long. On the basis that most S106 in Gloucester are negotiated with developers operating at a national level would indicate that such a remedy is adequate. Often redrafts will sit with developer's solicitors for long periods. The drive for developers on S106 links to the build programmes and or sale of land and is very market driven, if the developer thinks market is going up, it may well be happy to left negotiations drift on the basis that it will receive an uplift in site value.

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. Clear guidance, good practice examples and the provision of model agreements led by national bodies would provide a framework for improved performance and also a performance framework could be developed so that objective evidence base for performance. Resources at LPA level is a key factor in performance. Whilst the idea that

front loading negotiations is to be welcomed, the local experience is that many councils have limited resources to respond as quickly as they might to pre-application enquiries. Developers will operate to exacerbate this by agreeing a position at an early stage and then back tracking or putting a different position closer to planning committee on the basis that this gives officers less time to respond with obvious pressure on officers to ensure a consent is approved. The use of national bodies such as the Planning Advisory Service to identify best practice and provide model processes would help address performance issues without undermining the LPAs negotiating position. The provision on model S106 agreements with reasonable clauses would mean that developers would make applications in the knowledge of the fundamental elements of the legal agreement. Any delays would then be down to:

1. The model agreement being unrealistic – again this could be dealt with through good practice guidance.
2. The developer seeking to change the model.

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

Arbitration clauses in existing legal agreements allow for such a mechanism and so it is not unreasonable to consider its use in terms of the initial drafting of the agreement. The key issues are

1. What are reasonable timescales for drafting a s106, should they be statutory of should they be agreed?
2. How arbitration is paid for.

It is unfortunate that the consultation does not ask a question regarding the preference for industry standards with flexibility built in at a local level as opposed to a statutory standard.

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

Yes. The idea of an agreement akin to a unilateral being submitted and approved once time limits are assessed is unworkable, the reason set out in the consultation document all being valid. Unilateral Undertakings submitted on appeals often case many problems because they are drafted without considering all the relevant factors.

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?

No. It is suggested that the developer would need to put forward an argument as to why the S106 in its current draft form is not adequate and make recommendations as to how it should be completed. The suggested approach is a carte blanche for a complete rewriting that could undermine the LPA position and makes both parties' previous work and negotiations redundant, which seems unhelpful.

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

This would appear to be standard operating practice, there could be risks involved if such a process was not binding. There could perhaps be a caveat to this, i.e., in the unlikely but possible eventuality that a decision is deemed unlawful or obviously at odds with National Planning Policy Framework or Guidance.

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

As section 106 agreements may still deal with a range of issues is important that the body or individual needs to have an awareness and competency to deal with these issues and not just the planning element. It is felt that on this basis the Planning Inspectorate would not be a suitable body to arbitrate on such issues.

It is the Council's view that an Arbitration Panel would be the best approach, the panel possibly including a planner, District Valuer Office, National Housing Federation and Developer representatives. This may work and would give greater confidence that all aspects have been considered.

Question 10: How long should the process take?

This is very much dependent on the process, what would it entail, submission of draft agreement and both sides arguments, time for consideration, time for decision?

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 consultation states:

"A further consideration is what types of application should have access to a Section 106 dispute resolution mechanism. Restricting it to certain types of application, such as those for major development, may reduce the overall burden on the body appointed to provide the service. We are interested in the views of respondents on this point, including whether Section 106 delays are an issue for small-scale as well as major developments".

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

It would seem sensible to take a holistic approach, although difficulty with smaller developers is their understanding of issue and process and may lead to arbitration where it is not really needed. A definition of 'smaller 'developments is key, with smaller developments unlikely to require Affordable Housing Contribution unless they are in rural locations

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

No. Such a proposal is not in the spirit of localism and subsidiarity, for the reason that it takes away the decision on whether the application is in principle sound away from the LPA, the dispute mechanism should focus on S106. The issue is what areas are in dispute or is it just a question of delay?

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 comment.

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?

The Council does not seek S106 contributions to student accommodation. The question perhaps is, how student accommodation affects the overall viability of a site and then the ability to provide affordable housing. If the LPA requires both student and AH contribution this might affect developers appetite to bring forward developments. The key question here is where is the evidence around this? Another question that is equally valid is how much does the land value reflect the expected impact of contributions.