

LONDON BOROUGH OF BRENT

Planning Committee

28th January 2004

REPORT NO 4/04

FROM THE DIRECTOR OF PLANNING

FOR ACTION

NAME OF WARD: ALL

“A NEW APPROACH TO PLANNING OBLIGATIONS” (S 106); ODPM CONSULTATION

1.0 SUMMARY

- 1.1 This Report informs Members of the Government’s proposals to fundamentally reform the Planning Obligations (S 106) system and procedures, including offering developers the opportunity of paying a, tariff-type, ‘Optional Planning Charge’ rather than negotiating a detailed Planning Obligation Agreement (S 106). The Report also provides the response submitted by Officers as the Council’s submission to the Government’s consultation.

2.0 RECOMMENDATION

- 2.1 That your Committee considers the Government’s proposals and their implications for the Borough.
- 2.2 That your Committee approves the Response provided by Officers to the Government’s consultation (attached as Appendices 1 & 2)

3.0 FINANCIAL IMPLICATIONS

- 3.1 There are no direct financial implications arising from this Report.

4.0 STAFFING IMPLICATIONS

- 4.1 The implementation of the proposed Optional Charge system could have significant additional staffing and other resource implications, which cannot be quantified at this early stage.

5.0 ENVIRONMENTAL IMPLICATIONS

- 5.1 It is not possible at present, due to insufficient information as to the detailed implementation of the proposed Optional Planning Charge, to ascertain the extent to which the Government’s proposals could have significantly detrimental implications for the sustainability of development in Brent, together with substantially reduced potential opportunities for enhancing the Borough’s environmental quality.

6.0 LEGAL IMPLICATIONS

- 6.1 Planning legislation establishes the fundamental principles of the land use planning system, whose detailed implementation is the subject of Guidance issued by the Office of the Deputy Prime Minister (ODPM). Local Planning Authority decisions in determining planning applications which do not, without justifiable reason, comply with the Guidance are unlikely to be supported by the Appeal Inspectorate and may even be 'called in' by the Secretary of State.

7.0 DETAIL

Introduction

- 7.1 The Council is currently permitted, to negotiate, legally binding, Planning Obligations Agreements, commonly known as 'S 106 Agreements' (Section 106 of the Town and Country Planning Act 1990), to obtain from a developer an appropriate contribution, either financially or in-kind infrastructural provision etc, to ensure that the proposed development will neither cause any unacceptable detriment to the Borough's environmental quality, or impede the implementation of the Council's land use strategy and planning policies.
- 7.2 Originally used largely to secure essential highways and environmental improvement schemes in the immediate vicinity of the development site, the use of S106 Agreements has been widely extended to ensure a much wider range of community benefits, particularly affordable housing, leading to increased developers complaints about both the additional costs and time incurred.
- 7.3 The Government has sought to control the scope of potential S106 Agreements through the detailed guidance of Circular 1/97 which emphasises the 'Necessity Test', restricting any sought developer contribution to that which is 'necessary and reasonable' (on planning and scale of development grounds) to enable a development which might otherwise have been refused planning permission. However, the Judiciary have proved more sympathetic to local planning authorities' aspirations, to secure the widest possible community benefits from developers, in several court rulings which have effectively extended the remit and use of S 106 Agreements far beyond the confines of Circular 1/97.
- 7.4 The Government's Planning Green Paper (2001) originally considered a much more radical reform of the S106 system which would have effectively replaced the entire process with a mandatory 'tariff' payable by a very wide range of developments. Although many developers welcomed the proposed abolition of the 'time consuming' S106 negotiations, they vehemently objected to the potential scope and scale of the proposed tariff regime, which could have resulted in a single new house incurring an affordable housing obligation .
- 7.5 The Government therefore decided instead to address developers concerns by radically revising the current S106 system. This requires a change to the primary legislation through an amendment of the current Planning and Compulsory Purchase Bill to enable the Government to fundamentally revise the planning

obligations system and processes by means of a Statutory Instrument. The Bill as originally drafted proposed no change to the S106 system.

Proposed Reforms

- 7.6 The haste with which the Government has devised its outline proposals to enable their inclusion in the Planning and Compulsory Purchase Bill at its House of Lords stage is clearly visible both from the lack of detail in its document, *Contributing To Sustainable Communities – A New Approach To Planning Obligations*, and the very truncated consultation period (6th November 2003 – 8th January 2004).
- 7.7 Although the proposals are intended to cover a very wide range of developments, the importance to which the Government considers they will deliver its housing strategy (as set out in *Sustainable Communities, 2003*) is clearly visible in Ministerial statements and particularly the commitment to consider the recommendations of the Barker Review (Treasury commissioned housing market study) before the details of the new strategy are finalised. And also the finalisation of the recent proposed revision of Planning Policy Guidance Note 3 Housing whose own consultation, unfortunately, preceded, this essentially complementary reform of the S106 system (see Report to Planning Committee, 29/10/2003).
- 7.8 The Government's proposals seek to make the current S106 process more 'transparent and accountable' by requiring local planning authorities to include a specific policy in their development plans setting out the circumstances in which they will seek planning obligations and the level of the sought contribution. The Government hopes that this requirement will both afford developers and land owners the capacity to challenge the 'reasonableness' of the proposed contributions remit and cost levels through the plan making process and also afford a greater degree of 'certainty'.
- 7.9 Although many authorities, including Brent, already have development plan policies detailing the type of development likely to incur a planning obligation, the proposed requirement to effectively provide a 'tariff calculation formula' would introduce a radically new level of complexity that, paradoxically, the Government has, until now, resolutely maintained would represent an inappropriate level of detail in the local development plan.
- 7.10 This proposed 'formula' would enable developers, if they so wish, to bypass the, proposed revised, S106 negotiating process, by simply offering to pay an appropriate 'charge' either in cash or in-kind. The Government is considering making it a mandatory requirement for the developer to indicate at a very early stage their preference for the Optional Charge or S106 negotiating routes and to prevent any subsequent change of mind on the part of the developer or attempts by the authority to seek 'residual negotiations'.
- 7.11 The Government's current outline proposals, and discussions with ODPM civil servants, would seem to infer that the local planning authority will be afforded considerable 'autonomy' in deciding both the scope of the 'chargeable areas' (i.e.) specifying those types of developments, such as affordable housing, which might be reserved to S106 negotiations and the charge cost level. However, this ignores

the reality that this apparent 'flexibility' will be dependent on the local authority being able to persuade the, Government appointed, Development Plan Inquiry Inspector of its justification. And is further countered by the Government's clear determination to afford the widest possible scope to expedite development, particularly new housing, by maximising the types of development amenable to charging rather than negotiations.

- 7.12 Most of the detailed implementation processes of the current outline proposals are either unspecified or extremely ambiguous and may, hence, be open to further discussion and consideration. These include the status of the key 'charge and S106' policy, whether it should be a Local Development Framework (LDF) 'core policy' (the LDF system will replace the current UDP process) and hence only amenable to review every few years, or a lower status Local Development Document (LDD) subject to regular review. This issue alone could determine the timetable for the introduction of the new charge system as LDF core policies are not likely to be ready for adoption for three years.
- 7.13 The proposals also embody elements which appear to contradict other key Government strategies and guidance, for example, the current charge proposals would appear to favour an affordable housing commuted payment which would be directly contrary to the revised PPG 3 requirement for 'on-site affordable housing provision'. Conversely, whereas the PPG proposals would normally restrict an affordable housing proposal to developments of 15 or more dwellings, the ODPM have indicated that the charge could require an affordable housing commuted payment in respect of much smaller schemes, possibly as low as one dwelling, which would seem to contradict PPG3's emphasis on 'viability' and encouragement of the use of site specific cost evaluation models.
- 7.13 The Government has indicated that these potential contradictions and inconsistencies should be resolved in the Draft PPG3 Practice Guide which they propose to complement the Draft S106 Circular they hope to publish in March. Members will be advised of these further proposals following their publication.
- 7.14 It is not, however, known whether the Government will address the concerns expressed by the Housing Corporation that the proposed charge would reduce the current level of affordable housing provision by housing associations, as it would preclude the current 'grant stretch' obtained by requiring developers to enter into partnership with housing associations through the present S106 negotiations process. Housing Associations have expressed their own concerns that the charge system could result in developers providing in-kind affordable housing that does not meet their particular design, construction and management needs. It has been estimated that the implementation of the proposed Optional Planning Charge could reduce London's affordable housing provision by one third.
- 7.15 The current proposals are also conspicuously silent on the potential relationship between the proposed London boroughs charge policies and the need for them to be statutorily in conformity with the Mayor's Spatial Development Strategy (London Plan). Although the proposals would enable adjacent boroughs to 'pool' charges or S106 receipts for a more strategic use, they are unlikely to directly enable the Mayor to strategically control such potential 'pooling' arrangements.

7.16 The Government requested comments on the above proposals by 8th January after a consultation period of only eight weeks (including the Christmas/New year holiday period) instead of the customary twelve weeks. This very truncated timetable precluded the submission of a draft response for consideration by Members. Officers therefore found it necessary to prepare and send the response clearly identified as an 'officers response', subject to further consideration by Members (attached as Appendices 1 & 2). The ODPM, as is customary, provided a proforma response questionnaire (attached as Appendix 2) but officers considered that its parameters were too limited to properly raise key Borough concerns and therefore drafted a complementary letter (attached as Appendix 1).

8. Conclusions

8.1 The proposed radical reform of the S106 legislation, guidance and procedures, particularly the proposed optional planning charge, bears all the hallmarks of a hastily produced and badly thought set of proposals which actually contradict other Government guidance. They have been comprehensively criticised by all sectors of the development industry, from local authority planners to estate agents and developers. They will undoubtedly have significant implications for sustainable development in Brent and these are likely to be more negative than positive on the basis of the current proposals. It is hoped it will be possible to provide a better assessment of these potential problems in a subsequent report following the Government's proposed elaborated proposals later this year

9.0 BACKGROUND INFORMATION

Details of Documents:

9.1 Consultation Paper.

8.2 Any person wishing to inspect the above papers should contact Michael Maguire, The Planning Service, Brent House, 349 High Road, Wembley, Middlesex HA9 6BZ, Tel: 0208 937 5310

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APPENDIX 1 LETTER TO ODPM