

S106 CONSULTATION: RESPONSE BY HIGHBURY GROUP ON HOUSING DELIVERY

We do not consider that Government encouragement to Local Authorities to renegotiate agreements entered into voluntarily by developers is appropriate unless there are very clear controls over the use of the process. In our view best practice for large scale developments involving development timescales over 3 years should already include formal mechanisms for review by scheme face to reflect both changes in market demand, costs, value, availability of public funding and other external factors. This in accordance with the ATLAS best practice guide on Cascade agreements, previously endorsed by CLG and the guidance set out in the Mayor of London's Housing SPG (2005).

The purpose of revised financial appraisals is to inform a renegotiation of a s106 agreement to reflect changes in the development economics of a scheme. Where a developer has entered into an s106 agreement without a mechanism for review to reflect changes in circumstances, including potential fall in anticipated sales values, this may reflect poor decision making, and it should not be assumed that the local planning authority should automatically reduce the developer's obligations to reflect the changed circumstances. It is wrong to assume that a review will necessarily demonstrate a weakening of viability from the developer's perspective and a reduction in viability. In some circumstances, an increase in value may be greater than an increase in costs, and may therefore justify an increase in the planning obligation in relation to that previously agreed and this may include an increase in the quantity, quality and/or affordability of affordable housing provision either within a scheme or as a contribution to off site development. In some cases subsidy to the development may be available that was not guaranteed at the time of the initial appraisal and planning consent.

It should be noted that from the perspective of the local planning authority, the purpose of a development viability assessment is not just to assess whether there is a viability based justification for non-compliance with the policy of the LPA, but also to test whether the provision of public subsidy, either in terms of grant or discounted land cost is justified in terms of additionality principles – ie whether policy compliance could be achieved without subsidy. A viability assessment can therefore demonstrate what additional affordable housing outputs could be achieved by increased subsidy. This approach was accepted by the HCA and its predecessor body, the Housing Corporation.

We also consider inappropriate the separate announcement by Ministers that developers should have the right to refer s106 agreements which they have signed to the planning inspectorate, who would then have the power to

impose revisions to the agreement on the local planning authority. This is not an appropriate function for the planning inspectorate. While a LPA and developer in dispute should be able to agree to appoint an arbiter, this should not be a unilateral process initiated by a single party.

It should be noted that while development viability is a factor which should be taken into account in determining a planning application it is not the primary consideration. As s106 obligations need to be justifiable in terms of being necessary to make a development proposal policy compliant, it follows that waiving a planning obligation freely entered into would make a development proposal less acceptable to the local planning authority. It should be noted that the variation of a planning consent and planning obligation on the grounds of reduced viability, may be of such significance as to make a development proposal unacceptable to the local planning authority. LPAs should have the right to reach such a judgement and it is not appropriate for the planning inspectorate to impose revisions to a scheme on the local planning authority.

We recognise, however, that not all S.106 Agreements will have been drafted in line with the best practice outlined in this response. Accepting that circumstances have changed in many cases through circumstances beyond the control of either party, we consider that a more appropriate response from Government would be to issue a Chief Planner's letter, or some best practice guidance, to highlight good practice in the voluntary renegotiation of agreements where the interests of both contracting parties have been protected. If the proposed approach is pursued then the Group believes that:

- (a) it should only apply where a developer is able to demonstrate, to the satisfaction of the planning authority, that the development will proceed if the obligation is waived or relaxed;
- (b) the application process should be supported by information that shows that the development will proceed and by a viability analysis (or other material) that provides a clear and compelling reason for relaxing the planning obligation. All of this material should be open for public review, scrutiny and challenge;
- (c) if an obligation is relaxed then the amended agreement should contain "catch up" provisions that allow affordable housing levels to be reviewed again if the developer fails to start/is materially delayed or if the viability analysis turns out to have been wrong.