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Our reference:
Your reference:
Date: 24 January 2005

Dear Mr Martin,

ODPM consultation on draft revised Circular on planning obligations

Thank you for the opportunity to comment on the draft revised Circular.

The ALG is a statutory joint committee which represents all 32 London boroughs, the Corporation of London, the Metropolitan Police Authority and the London Fire and Emergency Planning Authority. It is in an ideal position to advise on a range of issues relating to London government and other matters of concern to Londoners. It also works closely with the Local Government Association and with many private, voluntary and public sector bodies.

The ALG has consulted London borough planning officers on the issue, and can advise you as follows:

- The ALG notes the provisions in the draft revised Circular on planning obligations. The ALG supports the fact that the focus is on updating and amending the current procedure/circular rather than a total overhaul of the planning obligations system. London local authorities generally do not support total reform of S106 system, but believe it can be improved with minor adjustments.
- Similarly, the ALG welcomes the principle that a decision will be made between the Optional Planning Charge and Barker's Planning Gain Supplement as pursuing both would overburden developers (which will have a detrimental effect on development).
- In February 2004, the ALG commissioned planning consultants Tetlow-King to conduct research into the operation of Planning Obligations/Section 106 procedures in London local authorities. The focus of the research was to highlight examples of good practice, to provide practical advice for authorities to consider and to assess the likely impact of government reforms namely proposals for the optional planning charge. The research provides helpful and practical assistance to developing and improving the Planning Obligations work of London's planning authorities. ALG officers have presented the findings to ODPM officers and to Halcrow for inclusion in the draft Circular and Guidance.

- The ALG welcomes and supports the inclusion of the following broad issues into the draft revised Circular, as it was clear in the ALG research that these are examples of good practice which can assist in streamlining negotiations for planning obligations (outlined in more detail in the bottom table, where the ALG supports the proposals as well as any concerns):
 - Clarification of policy on contributions for affordable housing (See Section D in table for further details);
 - Clarification of guidance on use of maintenance payments (Section F1);
 - Clarification of guidance on pooled contributions (Section F2);
 - Encouragement of use of formulae and standard charges* (Section I);
 - New guidance on use of standard agreements/undertakings* (Section I);
 - New guidance on monitoring of implementation of planning obligations, although there are some concerns over whether there are sufficient resources in the boroughs (Section M).

*The ALG will be conducting research shortly into the use of formulae and standard charges, and standard agreements/undertakings for use by London local authorities.

- More specifically, the ALG would also like to propose the following more detailed changes to the current draft revised Circular:

SUMMARY OF DRAFT REVISED CIRCULAR TOPICS/SECTIONS	ALG DRAFT RESPONSE
A) Stronger emphasis on national, regional & local plan policies	
<ul style="list-style-type: none"> • The Circular does not give a wide range of examples of appropriate uses of planning obligations, as it is not regarded as a matter for national prescription. Rather, the Circular states it is acceptable to require contributions (where not in the application & not met through conditions), where they comply with agreed policies (national, regional & local). This places more emphasis on local, regional & national policies. The Circular requires LPAs to include S106 policies in their Local Development Framework (LDF) documents; and to set out detail on what S106 should deliver in their Supplementary Planning Documents (part of the LDF). This could include matrices for specific sites, sub-plan areas or windfall sites. 	<ul style="list-style-type: none"> • The ALG believes that local planning authorities (LPAs) need the flexibility & authority to be able to deal appropriately with the issue of planning obligations to effectively mitigate the impacts of development. The flexibility of local planning authorities to formulate their own policies & set their own priorities with regard to S106 planning obligations is thus supported.
B) Policy- the broad principles	
<ul style="list-style-type: none"> • S106 should never be used as a means of securing a betterment levy (Annex B no 7). 	<ul style="list-style-type: none"> • Further clarification is needed as exceptions may occur & this needs to be reflected in the Circular.

<p>clarifies the first policy test* for acceptable S106, by placing greater emphasis on the requirement for obligations to be necessary in order to make the development acceptable in planning terms. The draft revised Circular is therefore proposing that S106 agreements should continue to be “impact mitigation” or “positive planning” measures linked to planning necessity and that it should not be used for tax-like purposes, such as the capture of land value increases for purposes not directly necessary for development to proceed.</p> <p>* Circular 1/97 (para 7) sets out the so-called Necessity Test which requires planning obligations to be: (i) necessary; (ii) relevant to planning; (iii) directly related to the proposed development; (iv) fairly & reasonable related in scale & kind to the proposed development; & (v) reasonable in all other respects.</p>	<p>importance to the ALG are highlighted in more detail in the sections below.</p>
<ul style="list-style-type: none"> • 8: Obligations must be directly related to proposed developments. For example, there should be a functional or geographical link between the development and the item being provided as part of the contribution. 	<ul style="list-style-type: none"> • In the last sentence, “for example” should be changed to “i.e.” as obligations must be related to proposed developments.
<ul style="list-style-type: none"> • 10: It may not be feasible for proposed developments to meet all the requirements set out in policy frameworks and still be economically viable. In such cases it is for the LPA and public sector parties to decide what is to be the balance of contributions made by developers and by public sector infrastructure providers in its area supported. Decisions on the level of contributions should be based on negotiation with developers over the level of contribution that can be demonstrated as reasonably being made, whilst still allowing development to take place. 	<ul style="list-style-type: none"> • There is a potential problem with the last sentence in cases where developers refuse to make information. • Financial appraisal: It must be noted that viability of development is a critical issue in the consideration of the scope of S106 and in determining the level of contributions to be provided by individual developments. The Circular should therefore give explicit policy support for testing the viability of schemes, & explicit guidance on financial appraisal.
<p>D) Affordable housing</p>	
<ul style="list-style-type: none"> • 12-14: In the consultation process the issue of a policy basis for affordable housing was controversial, as many stakeholders have found it difficult to relate requests for affordable housing to the general policy basis for obligations set out in Circular 1/97. The draft revised Circular separates affordable housing from the general policy basis for obligations. 	<ul style="list-style-type: none"> • The ALG favours on-site presumption for the provision of affordable housing, as off-site provision could detract from the objectives of mixed and balanced communities. Off-site provision should therefore only be supported where it could lead to more appropriate provision for the intended client group & where it is not possible to provide the required amount of affordable housing on-site.

mitigation & affordable housing.	<ul style="list-style-type: none"> • More prominent policy support in the revised Circular should be made for affordable housing contributions from commercial development (on which some London local authorities already have policies with set proportions); & on how to secure affordable housing contributions from mixed-use development.
E) Examples of use of planning obligations	
E1) Prescribing nature of development to achieve planning objectives	
<ul style="list-style-type: none"> • 14: The circumstances in which affordable housing cannot be provided on-site should be prescribed in LDF. 	<ul style="list-style-type: none"> • It is not realistic to specify all possible circumstances. • Clarification is needed on this. • There is concern that the clause may be too prescriptive.
E1) Mitigating impact of development	
<ul style="list-style-type: none"> • 16: If proposed development would give rise to a need for additional community infrastructure, e.g. a new school classroom, contributions might be sought towards this. 	<ul style="list-style-type: none"> • The ALG welcomes the inclusion of education, which was not included previously.
F) Types of contribution	
F1) Maintenance payments	
<ul style="list-style-type: none"> • 18: The Circular allows LPAs to require contributions for maintenance from developers for a limited period, in cases where new infrastructure is primarily for development or where it cannot immediately be supported by mainstream public funding. This is on condition that contributions should be “time-limited” and that LPAs & developers should agree in advance how payments will be made. Where an asset is intended for wider public use, the costs of maintenance should be borne by the body/ authority that will be responsible for it. 	<ul style="list-style-type: none"> • The inclusion of maintenance payment issue is welcomed and supported as it will support the work of LPAs. • However, the final Circular needs to be clear that, where it can be shown that mainstream public sector funding is not available for the running of necessary facilities, it is appropriate for S106 to fund it. In the absence of such support, the necessary infrastructure for the development would not be provided and the local planning authority would need to consider whether that fact was significant enough to direct the authority to refuse the application. • Also, time-limiting maintenance payments could deter authorities from seeking infrastructure improvements.
F2) Pooled contributions	
<ul style="list-style-type: none"> • 19: The Circular sets out guidance on the use of pooled contributions from a number of developers where they are linked to specific infrastructure (i.e. they must not be tax-like), where they can support development and to 	<ul style="list-style-type: none"> • The inclusion of the principle of pooled contributions is welcomed to assist LPAs in securing adequate contributions for necessary infrastructure. • However, it should be noted that it is often

<p>between LPA's.</p>	<p>possible" caters for this uncertainty.</p> <ul style="list-style-type: none"> • It is also important that the government's obligation to supply infrastructure is not understated. • In areas of high cost/low value development, notably contaminated sites in some parts of Thames Gateway, it is unlikely that planning obligation can provide the necessary infrastructure for a sustainable community to be created, because the resulting land value of such sites would be insufficient. The circular should be clear what should happen in such circumstances. • The circular should be clear what other mechanisms should operate to provide the infrastructure in such circumstances. It is important that the Government's responsibility in such cases is made explicit.
<ul style="list-style-type: none"> • 20 & 21: LPAs should set out in advance the need for infrastructure and the likelihood of a contribution being sought. 	<ul style="list-style-type: none"> • It is unclear about how realistic this is. What should happen currently and also in circumstances where no further development will take place?
<p>G) Fast, predictable, transparent & accountable system</p>	
<ul style="list-style-type: none"> • 23: LPAs may wish to consider the development of codes of practice in negotiating S106s, so as to make clear the level of service a developer can expect & to increase public confidence in the system. 	<ul style="list-style-type: none"> • The clause is welcomed & supported and would serve to increase confidence in the system.
<p>H) Joining up across all public sector infrastructure providers</p>	
<ul style="list-style-type: none"> • 28: The Circular calls for the involvement of all sectors & tiers of government/public agencies responsible for physical/community infrastructure in setting S106 policies, and formulating site-specific obligations. 	<ul style="list-style-type: none"> • It is important that public sector bodies work together in the determination of priorities for S106 planning obligations. However, local authorities should have the flexibility to set their own priorities as they have the knowledge of what the needs are in their areas.
<p>I) Standard agreements/undertakings</p>	
<ul style="list-style-type: none"> • The Circular encourages LPA's to use formulae/ standard charges & use of standard legal agreements. These should be published in advance to indicate likely size/type of contributions. According to the Circular, formulae/standard charges can make considerable contribution to promoting certainty/predictability & increasing speed in 	<ul style="list-style-type: none"> • The ALG agrees that standard formulae and charges will speed up the application. However, clarification is needed over whether these will be locally agreed standards or national standards. The ALG feels that locally agreed standards would best serve local needs.

<p>possible in the interest of speeding up planning applications.</p> <ul style="list-style-type: none"> • Guidance on drafting is given in the good practice guidance, with onus of proof being on those parties who wish to depart from this guidance. 	<p>sentence. If LPAs have to prove why they are departing from standard formulae, then it would indicate that they must use these standard formulae.</p> <ul style="list-style-type: none"> • The first sentence is supported, but not the second sentence. Local planning authorities should not be required to follow ODPM's standard agreements (only if they do not have their own) but should be able to formulate their own agreements.
K) Use of independent third parties	
<ul style="list-style-type: none"> • 33: The Circular addresses the use of involving expert third parties, in the form of mediation, validation or expert advice. LPA's may in terms of Circular wish to employ mediation to help in negotiations; to resolve a dispute which is delaying negotiations; or to employ a third party to validate factual information; or in drawing up S106 policies. 	<ul style="list-style-type: none"> • This clause is considered impractical & unrealistic. • Clarification is needed on this clause & evidence should be provided to show this could be done in practice. • The implications of the clause are uncertain. With mediation, parties commit themselves to accepting the outcome. This may have implications for planning committees in that it may 'bind' them and thus interfere with the democratic process.
<ul style="list-style-type: none"> • 34: There may be circumstances in which factual information needs to be validated before negotiations can continue. In these cases parties may wish to agree to involve an independent third party to help progress the negotiation. In cases where a dispute relates to the viability of a proposal, the independent third party might have access to financial information provided by the developer on a confidential basis. • 35: May also be appropriate for third party expert advice to be used in drawing up planning obligation policies, & in consideration of individual applications. 	<ul style="list-style-type: none"> • The ALG welcome the inclusion of Sections 34 and 35, which will assist in the determination of planning applications. • There is concern, however, on whether the confidentiality issue is legally sound. • It is unclear what powers local planning authorities have in cases where developers refuse to make information available. The ODPM needs to clarify this. • Concern over fairness to subject some development to this while not others. More clarification on where this should be used is necessary.
L) Cost recovery	
<ul style="list-style-type: none"> • 36: The Circular gives guidance on recovering negotiating costs through contributions, towards funding of LPA officers, legal fees, monitoring & implementation- where it can be demonstrated that contributions make a significant contribution to speed & efficiency of negotiating, & where the rate/level of contributions is specified in advance. 	<ul style="list-style-type: none"> • The introduction of this is welcomed as it will assist LAs in recovery of costs. However, this may cause disputes between planners & developers relating to the definition of 'speed & efficiency'. Should be further clarified & defined in the circular.
M) Implementation & monitoring of planning	


<p>systematic & transparent way to ensure contributions are spent on their intended purpose, to ensure development contributes to sustainability & has a positive effect.</p>	<p>funding to set up IT systems etc. This could have substantial financial implications.</p>
<p>N) Time limit for appeals against refusal to modify /discharge planning obligations</p>	
<ul style="list-style-type: none"> • The Circular also seeks views on whether to reduce from 6 months to 3 months the time limit for appealing against an LPA's failure to modify or discharge an obligation. Reducing the time limit from 6 to 3 months would bring it into line with the time limit for other appeals, revised under PCPA 2004. 	<ul style="list-style-type: none"> • The ALG believe that the time limit for appeals should be reduced to 3 months in line with other appeals, as this will avoid unnecessary delays on the finalisation of planning decisions.
<p>O) General ALG overall comments on the draft circular</p>	
<ul style="list-style-type: none"> • The Government is encouraging the use of S106 in a wider variety of circumstances & a larger number of applications, including smaller applications. This is likely to impact on the overall speed of decisions. Developers are often content to get an 'in-principle' approval and then to "move slowly" on the S106 agreement. Further clarification is required on the circumstances in which local planning authorities can issue a refusal in such cases. • There may be circumstances in which prospective developers seeking planning permission may be unable to enter into a S106 due to the fact that they do not have ownership of the land at the time. These circumstances are not addressed in the draft Circular. • As the Government has not as yet made a decision on whether or when the optional planning charge or planning gain supplement is introduced, it is inappropriate to take these into consideration in the current reform process. • Finally, it is not clear how the Government approach in this consultation addresses how infrastructure in growth areas & areas of low value should be funded. 	

London local authorities have considerable knowledge and experience in effectively dealing with planning obligations and their views should maximize the effectiveness of a revised Circular and also the wider government reforms on the issue. The ALG would therefore like to request you to positively consider the abovementioned proposals and amend the draft revised Circular to reflect these changes.

Please note that this letter represents an ALG officer's response and that a final ALG response endorsed by the ALG Leader's Committee will be send to you on 9 February 2005, after this officer's response has been considered by them at their meeting on 8 February 2005. Permission for this late submission has been granted to the ALG by your Ms Liz Grierson and Mr Kenneth Cameron in December 2004.

The ALG would be happy to discuss any details outlined in the response further, please do not hesitate to contact me.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'E. van Heyningen', followed by a long horizontal line extending to the right.

Emille van Heyningen
Principal Planning Policy Officer

