REPORT TO:	**Environment and Development Committee**	**AGENDA ITEM:**	**7**
DATE OF MEETING:	**6th January 2004**	**CATEGORY: RECOMMENDED**	
REPORT FROM:	**Deputy Chief Executive**	**OPEN**	
MEMBERS' CONTACT POINT:	**John Birkett (5742)**	**DOC:**	
SUBJECT:	**Section 106 Agreements Council's Policy Consultation by ODPM**	**REF:**	
WARD(S) AFFECTED:	**All**	**TERMS OF REFERENCE: ES03**	

1.0 Recommendation

1.1 That the Committee adopts the guidelines in Annex A and responds to the Government in the terms of this report with any alternate/additional views Members think fit

2.0 Purpose of Report

2.1 To reconsider details of the requirements for obligations the Council negotiates from development.

2.2 To express views to the ODPM on the consultation document: " A New Approach to Planning Obligations".

3.0 Executive Summary

3.1 Members have asked for a review of the entry level for negotiating provision, particularly for schools so as to make the system fairer and avoid missing out on Planning Obligations where they could be obtained. The report sets out the considerations that dictate how the requirement is determined, including the current Local Plan policy, the County Council's standard requirements and threshold and the implications of instituting a change. The conclusion is that it would not be appropriate to do so.

3.2 The Government has consulted on proposed revisions to Section 106 to make the process more robust by improving clarity and speed and by introducing an optional planning charge instead of concluding an agreement. The Government's questions are summarised and commented upon. An alternative approach involving a local tax on land sales and development profits is suggested. The conclusion is that the optional charge is unlikely to significantly improve the process which requires a more radical approach if the Government's intentions are to be realised.

4 Detail

School Provision

4.1 The Planning Service has been operating on the basis of a proforma code of requirements for Section 106 Agreements (Attached at Annexe A). This has undergone a limited range of consultation, particularly with parish councils and now requires to be formally adopted, the intention being that it should be published in leaflet form. The Council's position would thus be more transparent and explicable. Periodic updating will be required.

4.2 As a consequence of Councillor's Taylor's question at the last Environmental and Development Services Committee, the position on school provision has been examined again. Negotiations must be based on requirements that genuinely need to be met. Not all parts of the district require additional school provision. The matter is made more complicated by the presence of schools in reasonably close proximity to one another where overall there are surplus places in the area but one school may be oversubscribed because it is more popular. As a whole South Derbyshire has a surplus of slightly over 300 primary places. There is currently no shortage of secondary places.

4.3 The competent authority to arbitrate on these matters is the Education Authority, which has taken the view that it will not seek a contribution from developments of less than 20 dwellings. The South Derbyshire Local Plan 2nd Deposit Draft provides for school places to be funded by development of over 10 dwellings, where there is not sufficient capacity in existing schools. By the County Council's standard ten dwellings would produce a requirement for 3.5 primary school places (20 dwellings are reckoned to produce 1 pupil per school year at primary level). At lower than this threshold, it becomes difficult to correlate the cost of new capital works with the requirement for those places and the amounts of income generated do not fund meaningful schemes. Accounting for expenditure also becomes problematic so that the transparency of the system may be demonstrated. Nevertheless, the County Council is currently reviewing its standard so as to reconcile it with the South Derbyshire Local Plan.

4.4 Another complication arises in seeking contributions from low numbers of dwellings. Despite the use of standard guidelines and documents, Section 106 Agreements remain time consuming to negotiate. This has implications for throughput of applications within the statutory time limit and hence for national performance indicators on which depends receipt of Planning Delivery Grant. It also has knock on implications for the adequacy of planning and legal staff levels to cope with the throughput.

The Future for Section 106 Agreements

4.5 The Government has identified 4 areas where Section 106 Agreements are not working well:

- The time taken to conclude them is too long
- Legal costs can be unnecessarily high
- Case law has thrown up a lack of clarity as to what are legitimate contributions
- Contributions do not necessarily equate with impact.

4.6 Accordingly the Government believes a review is warranted to rectify these concerns so as to deliver high quality, sustainable development that provides social, economic

and environmental benefits to the whole community. The Government's consultation document is available in the Member's room under the title "Contributing to Sustainable Communities: A New Approach to Planning Obligations". It asks a lengthy series of questions of consultees with the expectation of responses by the 8th January 2004. The principle questions are summarised in the paragraphs below together with a response for Members to consider.

4.7 *Do you agree that the problems set out in para 3.5 above the most significant or are there others? Do you agree with the Government's new approach?*
The problem of attributing the public costs of development appropriately is one of the oldest in the Planning regime. All the above criticisms of the above system are real. They are also more intractable than is admitted in the consultation document. In the first instance the law provides for an agreement to be entered into. The Local Authority has considerable influence in this but not absolute control. The circumstances and persuasiveness of developers is a significant factor. Often they are at arms length from owners of the land and unable adequately to control the land price and other circumstances of concern to the Council. On that turns the whole ability to make the necessary concessions to secure all that may be required in the community interest, whilst maintaining overall profitability. The outcome will inevitably be arbitrary.

4.8 The case of Tesco Stores Ltd v. the S of S for the Environment (1995) threw into question two of the five main tenets in Government policy (Circular 1/97); namely that any obligation should be directly related to proposed development itself and that it should be fairly and reasonably related in scale to it. The case allowed a broader interpretation, requiring only a connection between an obligation and a development that is greater than *de minimis*. This has left a legacy of confusion as to what is genuinely legitimate. A further inertia has been built into the system. Negotiating agreements is one of the most challenging and therefore potentially fulfilling aspects of Development Control. Councillors and professional planners (Local Authority and private consultants) alike are reluctant to forego the satisfaction that may be derived from the outcome of negotiations. Each side attempts to push the negotiation in the direction of its own maximum advantage. Inevitable delay results. The way to close the gap between the Tesco case and Circular 1/97 is for the law to be clarified as to what may legitimately be sought. Equity should dictate that there should be a direct correlation between the development and the obligations provided. Anything more would smack of selling planning permissions to the discredit of the system.

4.9 Changing the system in favour of the more obvious tax based system, based on profit from land sales and development would have a, hitherto insuperable, disadvantage. The Treasury wishes to remain firmly in control of the tax system and its distribution and must account for the overall proportion of GDP absorbed into public expenditure. Nevertheless the following suggestion is put forward as a means of making the whole system more comprehensive, transparent and efficient.

4.10 A New Alternative Approach to Planning Obligations

1. Rescind Section 106
2. Tax profits from all land sales at standard rates nationwide or at rates that reflect development costs in different parts of the country. Each land transfer would incur tax on any uplift in value since last sale.
3. Tax profits from developments. Developers to keep separate accounts for each project for tax purposes.

4. Make these taxes payable directly to the Local Authority in whose area the land falls
5. Hypothecate receipts to Local Strategic Partnerships for the area where the development takes place
6. Local Strategic Partnerships allocate funding to projects on the basis of their own negotiated formulae for impacts on particular services/infrastructure.

4.11 **Benefits**

1. Strengthen Local Strategic Partnerships by improving funding base, joint responsibility and accountability.
2. Improve capability of public sector to meet public needs and improve transparency in delivery of benefits.
3. Speed up decision making and improve Development Control performance by removing necessity to negotiate agreements without removing responsibility to identify impacts/needs for services and infrastructure. These would continue to come out of consultation/determination of applications and would feed into consideration of improvements decided on by the LSP.
4. Make the receipts for planning obligations relate more directly to the value of the development as determined by the market and ensure greater equity between one case and another automatically.
5. Apply the cost and the benefits to all cases irrespective of scale.
6. Facilitate better planning of infrastructure and facilities on basis of budgeted capital receipts/expenditure.
7. Improve the credibility/visibility of local democracy.
8. Make the taxation base for central/local expenditure more focussed on the actual delivery of sustainable public services and decrease Local Authorities' dependence on Central Government for tax revenues.

4.12 **Disadvantages**

1. Requires complicated fiscal/reporting arrangement between H M Treasury and Local Strategic Partnerships, Local Authorities, NHS Trusts, Environment Agency, etc.
2. Revised assessments of central/local funding would not necessarily improve Local Government's (or other public sector partners') ability to deliver services overall, despite raised expectations.
3. Requires greater accountability on part of landowners and developers to prevent tax evasion and thus mechanisms and responsibility for policing it.
4. The cost of land and ultimately housing would tend to rise yet further as sales would reflect the desire to pass on the tax burden to puchasers.

4.11 *Should Planning Obligations seek contributions to the range of impacts implied in case law?*
The list quoted includes Green travel plans, education, health services, flood defences and affordable housing. Clearly the answer is "Yes".

4.12 *Further questions address issues like:*

- *Should Local Plans set out how Local Authorities will use negotiated Planning Obligations to secure contributions?*
- *Should formulae be used to explain the scale of contributions sought?*
- *Should Planning Obligations policies be examined as part of the development plan process?*
- *Should ongoing obligations be allowable (agreed triggers and dates)?*
- *Should contributions be pooled between Local Planning Authorities?*
- *Should standard heads of terms and clauses be used?*

The answer to these questions should again be yes but the plan making process is too long winded to respond to changing circumstances and too inflexible to foresee all opportunities that may be exploited. However, the Local Planning Authority should have published guidelines for Section 106 Agreements that should be consulted upon and subjected to scrutiny in the Community Strategy making process. Annex A is an example of what should be statutorily required. Standard agreements, heads of terms, etc. should be common, best practice and publicised as such.

4.13 *Should Local Planning Authorities bring in additional resources to speed up the process, charging the cost to the developer and should expert mediators be employed to resolve disputes?*
The Council has often asked developers to draw up agreements at their expense and currently ask developers to meet our legal costs in doing so. There could be circumstances where planning consultants might assist. Some consultants advertise their expertise in obtaining a better outcome for Local Planning Authorities. Whether this should be required practice at the cost of the developer is an open question. Additional costs would in theory limit the amount of public benefit to be negotiated.

4.14 The nub of the consultation document is a proposal to establish a new optional planning charge as a change in the law to provide an alternative to negotiated Planning Obligations. This is intended to reduce delays and increase certainty for developers. The same range of contributions would be covered. The document poses the following questions:
Do you agree that the optional planning charge should be used to secure the same range of contributions as negotiated Planning Obligations?
Should Local Planning Authorities set out the basis for the charge in development plans?
Should there be different levels of charge for different types of land or development?
Will Local Planning Authorities be able to set charges that take account of all likely impacts of sites allocated in the plan?
Should the charge apply only to identified sites in the plan or to windfalls or sites outside the plan as well?
Should affordable housing be secured via a financial contribution or by works in kind or by a combination of both?
Should Local Planning Authorities have the flexibility to decide which option to choose?
Should the charge vary according to the size of the development and how should it be calculated?

4.15 The core difficulty of the proposal is the setting of appropriate levels of charge. This is likely to be variable between Local Planning Authorities not simply because of differing conditions but different approaches to negotiation/approach to the problem of service provision and rigour of actual performance. Developers will have a wide experience of different regimes and will continue to complain to Government of

discrimination. Guidance from the ODPM would assist but could not be expected to produce other than a one size fits all approach. This might not equate to actual needs or particular circumstances.

4.16 The system would become as close to a local tax as makes no matter, other than to avoid accounting for it as public expenditure, which it undoubtedly in effect would be. There is likely to be great difficulty in making the system work either more quickly or fairly than the present system. Indecision as to which route to take in any particular case itself would be a source of delay. Nevertheless, the greater the flexibility for both sides of the public/private divide the better for making progress in arriving at workable solutions.

4.17 A number of areas of current concern are not addressed by the consultation. A principle issue is the setting up of a robust accounting system that is transparent and avoids the possibility of fairly small funds for different elements of planning charge from being:

- overlooked,
- inappropriately applied
- lost through claw-back at the expiry of negotiated time periods for its use or because the body that need to carry out the works is not the Council and not geared up to deliver the outcomes required expeditiously.

This is an issue that the Service is currently seeking to tackle under the existing system. The planning charge system is likely to exacerbate the difficulties. Best practice guidance would assist in this.

5.0 Financial Implications

5.1 Section 106 Agreements produce income that must be devoted to works associated with/necessary to development.

6.0 Corporate and Community Implications

6.1 This issue is key to successful implementation of a Community Strategy.

7.0 Conclusions

7.1 There is no basis for a revision of the policy with regard to schools at present because the Local Plan has recently been published and is still undergoing its public local inquiry and because there is no support from the LEA to whom the funding is payable.

7.2 The consultation asks questions that do not strike at the heart of the difficulties it identifies. A more radical approach will be required if the problems are to be solved and the law should be clarified. A potential solution is put forward in para 4.10 above.

7.3 The optional charge will provide one more means of tackling the issues but will itself raise problems of identifying robust and transparent means equating impact with outcomes in public provision. These are likely to throw yet further doubt on the effectiveness of the system.