

LONDON BOROUGH OF HAVERING – RESPONSE TO CONSENTS AND AGREEMENTS POSITION STATEMENT SUBMITTED BY THE APPLICANT AT DEADLINE 6 (REP6-14)

1. Introduction

- 1.1 At Deadline 6 the Applicant submitted an updated “Consents and Agreements Position Statement v6.0 (REP6-014). That document states, on page 9:

Section 106 agreements

4.2.6 The Applicant is actively negotiating section 106 agreements with the host local authorities to agree matters that may be required to make the proposal acceptable in planning terms.

4.2.7 At the time of the DCO application submission, draft Heads of Terms were set out [APP-505] and have been subject to further discussion with the local authorities. An updated draft Heads of Terms was submitted at Deadline 4 [REP4-144].

4.2.8 The first draft section 106 agreements were issued to the applicable local authorities for review and comment on 29 September 2023 with the expectation that agreements will be finalised by Deadline 9 in line with the Examination timetable.

4.2.9 Further updates on the status of each section 106 agreement can be found in Appendix B.

- 1.2 Appendix B of the document purports to set out the position in respect of the s.106 agreements under discussion with the various local authorities.
- 1.3 Appendix B does not accurately or fully reflect the position as at Deadline 6 with regard to the s.106 in respect of the London Borough of Havering (LBH). This note therefore updates the Examining Authority as to the position so that some context is provided for the draft s.106 agreement that, in accordance with the Examination timetable, the Applicant is due to submit at D7.

2. Position as at Deadline 6

- 2.1 As set out in the above extract from REP6-014, LBH received a draft s.106 agreement on 29 September 2023. The draft received included three obligations relating to:
- compliance with the Skills Education & Employment Strategy (SEE Strategy), which is appended to the Section 106 Agreements Heads of Terms (REP4-144);
 - payment of a Community Fund; and
 - payment of contributions to officer time.
- 2.2 LBH’s lawyer subsequently raised concerns regarding the compliance of the draft agreement with s.106 (1) and explained those concerns at a meeting on 11 October 2023. At the Applicant’s request those concerns were also set out in a note provided by LBH to the Applicant on 12 October 2023. That note is contained in **Appendix 1** to this document.
- 2.3 Subsequent to that note the Applicant indicated on 20 October that, to address the points raised in the note, it intended to deal with the SEE Strategy and the Community Fund by moving those obligations to the Stakeholders Actions and Commitments Register (SAC-R), thus leaving only the contribution to officers’ time remaining in the LBH s.106 agreement. The Applicant also advised that there would be a consequential amendment to Article 61.
- 2.4 Notwithstanding the above, no reference is made to the SEE Strategy or the Community Fund in the updated SAC-R submitted to the Examination on 31 October,

at Deadline 6 (**REP6-051**). Nor is there any amendment proposed to Article 61 within the revised dDCO submitted at Deadline 6.

2.5 This means that it will not be until Deadline 7 that LBH will know how it is intended to deal with the SEE Strategy and the Community Fund within the context of Article 61. At a meeting on 3 November 2023 LBH was advised that it would receive some drafting, however as at the time of writing no such drafting has been received.

2.6 It is of great concern that, due to the late production of a draft s.106 and failure to appreciate the scope of s.106, the ability of LBH, and other authorities to engage with the revised approach is shoehorned in towards the end of the Examination.

3. **Current Position**

3.1 LBH sets out below the current position by reference to the headings in Appendix B of **REP6-14**. It is the same position as that which pertained at Deadline 6, which is not reflected in the update provided by the Applicant in the Appendix B submitted at D6.

	Applicant's text - App B - REP6-014	Current Position - LBH
Skills, Education and Employment	The Applicant has set the strategic objectives and the minimum targets have been fixed. The Applicant is working to secure a mechanism in which to regularly engage with Local Authorities and Regional Partners throughout the delivery of the scheme	The Applicant advised LBH on 20 October that, in response to the note in Appendix 1, it will no longer propose to include the SEE Strategy in the s.106. Discussions on the SEE Strategy between LBH and the Applicant, when it was included in the dDCO, did not make much progress with LBH being concerned about the soft, aspirational nature of the measures in the SEE Strategy which were not easily translated into hard, enforceable, measures. In addition, there are issues in relation to the Applicant not wishing to accept direct responsibility for compliance. The Applicant has advised it will be including the SEE Strategy in the SAC-R and will be amending Article 61. LBH will comment on these when available.
Community Funds	Engagement on the value, distribution and the high level eligibility criteria of the Fund is complete.	The Applicant advised LBH on 20 October that, in response to the note in Appendix 1, it will no longer

		<p>propose to include the Community Fund in the s.106 agreement. Discussions on the Community Fund between LBH and the Applicant when it was included in the dDCO indicated that there are ongoing issues with regard to the quantum and the role of LBH in determining distribution of funds within its area.</p> <p>The Applicant has advised it will be including the Community Fund in the SAC-R and will be amending Article 61. LBH will comment on these when available.</p>
Officer Support Contributions	<p>The Applicant has reviewed the additional resources burden that will impact London Borough of Havering during the delivery of the Project over and above their statutory duties and has made an appropriate proposal for a financial contribution.</p>	<p>LBH indicated in its first response on the draft s.106 agreement on 12 October that the sums proposed by the Applicant were inadequate. LBH put forward the figures it considers appropriate on 31 October which are currently under consideration by the Applicant.</p>
Other	<p>The Applicant has reviewed the s106 requests from Havering against the tests set out in Paragraph 4.10 of the National Policy Statement for National Networks (NSPNN). The Applicant considers there are no further additions to the s.106 scope.</p>	<p>LBH is disappointed that the Applicant has not responded positively to its requests for additional obligations, as referred to in Table 19 on page 139 of the LBH Local Impact Report (REP1-249).</p>

END

APPENDIX 1

LONDON BOROUGH OF HAVERING (LBH) – INITIAL COMMENTS ON DRAFT S.106 AGREEMENT SUPPLIED BY NATIONAL HIGHWAYS ON 29 SEPTEMBER 2023 – SPECIFICALLY OBSERVATIONS ON LEGAL BASIS FOR S106 OBLIGATIONS AND THEIR ENFORCEMENT

1. It is not clear what the rationale is for the agreement being said to be pursuant to s.106 of the T&CP Act 1990. The obligations do not appear to comply with s106 (1). These are legal requirements distinct from the CIL regulations and tests in the guidance regarding the acceptability of s.106 obligations.
2. In order to be planning obligations (and therefore development consent obligations) the obligations need to come within the terms of the following subsections of s.106(1) which provides:
 1. *Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation*
 - (a) *restricting the development or use of the land in any specified way;*
 - (b) *requiring specified operations or activities to be carried out in, on, under or over the land;*
 - (c) *requiring the land to be used in any specified way;*
 - (d) *or requiring a sum or sums to be paid to the authority on specified date or dates periodically.*
3. The land referred to in (a) to (c) is the land proposed to be bound – in this case the area of land covered by title number EX957898.¹
4. The obligations in Sch 2 (SEE), Sch 3 (Community Fund) and Sch 5 (Officer Support Contributions) do not restrict the development or use of the land or require it to be used in any specified way. Whilst the Community Fund is a payment of monies which could come within (d), as drafted by NH, it does not come within the terms of that sub paragraph because the payment is not to the authority but to another body.
5. The Officer Support Contribution obligation does appear to come within (d). It is the only obligation in the agreement which complies with s.106 (1).
6. The consequence of not complying with s.106(1) is that there is only reliance upon s.111 of the LGA 1972 and the obligations in Sch 2 and 3, are contractual only and do not bind successors in title.
7. Even though the Officer Contributions would run with the land, the land identified in Sch1 is a very small part of the overall scheme. Were NH to dispose of it to another body it is unknown as to the status of that body, its relationship to the overall scheme and its ability to

¹ Although title has not yet been provided

meet the obligations to pay the monies. There is no security for the payment of the officer contributions.

8. The obligations need to bind NH and any subsequent undertaker who has the benefit of the Order. The agreement does not achieve this because:
 - a. all the obligations with the sole exception of the officer payments do not comply with s.106 (1) and therefore do not bind the land; and
 - b. in any event, ownership of the land concerned, being such a small part of the overall scheme does not ensure that the owner of the land would have any connection to the scheme and be in a position to comply with the obligations.
9. The intention must surely be to ensure that the undertaker (being both NH and whoever may have the benefit of the Order in the future) is required to comply with all the obligations.
10. At a discussion held on 11 October, between NH and LBH legal representatives, no answer was provided by NH to the above points and it was agreed that LBH would proceed to amend the agreement as it felt fit and submit it to NH with an accompanying note. This is that note.
11. The agreement of itself is not capable of remedying the problems outlined above given that the obligations appear incapable of being brought within s.106 and since it cannot bind successors in title under s.111. In any event, binding successors title to the small parcel of land referred to in Sch 1 does not provide security for performance.
12. As a solution it is suggested that the DCO should include a provision which imposes the liability to perform/observe all the obligations on the undertaker – being NH or anyone to whom the benefit of the Order is transferred under Article 7. It then would not matter whether or not they comply with s.106.
13. There is precedence for this. When Sizewell C got into similar difficulties it resolved it by, not seeking to bring the obligations within s.106, but by entering into an agreement with the local authorities under s.111 and s.1 of the Localism Act 2011 and then ensuring that drafting in the DCO required that any party to whom the benefit of the Order was transferred was also required to comply with the obligations with similar enforcement power being given to the local authorities as those applying to s.106 obligations.²
14. Although clause 5.3 of the draft agreement prevents NH transferring the benefit of the Order without the transferee entering into a deed of covenant with the Council on terms equivalent to this deed that does not overcome the s.106 compliance difficulties. In any event it is preferable that such a pre-condition to transfer of the benefit of the Order should be on the face of the Order.
15. NH is asked to grapple with the issues raised above and advise as to why the concerns are misguided or, if it accepts them, how it would wish to resolve them. The draft

² See Articles 8(3), 9(7), 9(8) and 10 of The Sizewell C (Nuclear Generating Station) Order 2022 and Sizewell C Deed of Obligation REP10 - 074 – 085, Explanatory Memorandum of Deed of Obligation REP10-086

agreement returned to NH with this note generally assumes a Sizewell C approach which will also require appropriate additional wording to be included in the draft DCO.

END