

# OFFICE OF THE DEPUTY PRIME MINISTER

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ODPM Circular 05/2005  
Office of the Deputy Prime Minister  
Eland House, Bressenden Place, London SW1E 5DU

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18 July 2005

## PLANNING OBLIGATIONS

### INTRODUCTION

1. The purpose of this Circular is to provide revised guidance to local authorities in England on the use of planning obligations under section 106 of the Town and Country Planning Act 1990 as substituted by the Planning and Compensation Act 1991. Sections 46 and 47 of the Planning and Compulsory Purchase Act 2004 give the Secretary of State the power to make regulations to replace s106, but the Secretary of State has not yet taken these powers, and so the Circular does not concern these sections.
2. This Circular replaces Department of the Environment Circular 1/97, which is hereby cancelled. This Circular clarifies the basis on which planning obligations should be assessed for their acceptability in *policy* terms and gives further guidance on the *process* of securing obligations.
3. While the Secretary of State sets out the policy tests for planning obligations (detailed in Annex B), the question of whether or not an obligation is valid and material in a particular case is ultimately a matter for the Courts. On a number of occasions, the Courts have held that planning obligations that go beyond the policy tests nevertheless meet the statutory requirements of the 1990 Act and are therefore still valid and material.
4. This Circular sets out some of the reforms to the planning obligations system proposed in the consultation paper *Contributing to sustainable communities: a new approach to planning obligations*, published on 6 November 2003. The changes in this Circular concern only the negotiation of planning obligations and do not introduce an optional planning charge as proposed in the Government's November 2003 consultation paper. This is in line with the Minister for Housing and Planning's statement to Parliament of 17 June 2004 (Hansard 44WS). A decision on the introduction of an optional planning charge will be made in the context of the Government's response to the Barker Review of Housing Supply, *Delivering stability: Securing our future housing needs* (17 March 2004). The Review's final report recommended the introduction of a Planning-gain Supplement (recommendation 26) accompanied by a "scaled-back" system of planning obligations – both of which would require legislation. This Circular therefore concerns the improvements to the current system which the Government would like to make in the interim period before further reforms are brought forward.

5. This Circular is structured as follows:

**Annex A** which sets out the statutory framework for planning obligations, including the arrangements for the discharge or modification of planning obligations; and

**Annex B** which explains the policies of the Secretary of State and provides guidance on the use of planning obligations. These are the policies to which the Secretary of State will have regard in determining applications or appeals and which local planning authorities should also take into account when determining applications and drafting plan policies.

6. Further, more detailed information on the application of this Circular will be given in forthcoming good practice guidance on planning obligations to be published by the Office of the Deputy Prime Minister later in 2005.

**MRS J M BAILEY,**

Head of Planning Policies Division, Office of the Deputy Prime Minister

Addressed to:

The Chief Executives of:

County Councils in England  
District Councils in England  
Unitary Authorities in England  
London Borough Councils  
Greater London Authority  
Regional Planning Bodies  
Regional Development Agencies  
Council of the Isles of Scilly

The Town Clerk, City of London

The National Park Officer, National Park Authorities in England

The Chief Planning Officer, The Broads Authority

# ANNEX A

## STATUTORY FRAMEWORK FOR PLANNING OBLIGATIONS

### PLANNING AND COMPENSATION ACT 1991

#### PLANNING OBLIGATIONS

- A1. Section 12(1) of the 1991 Act** substituted sections 106, 106A and 106B for section 106 of the Town and Country Planning Act 1990. Section 106 introduced the concept of planning obligations, which comprises both planning agreements and unilateral undertakings. It enables a planning obligation to be entered into by means of a unilateral undertaking by a developer as well as by agreement between a developer and a local planning authority. Details of the sections substituted are set out below.
- A2. Section 106(1)** provides that anyone with an interest in land may enter into a planning obligation enforceable by the local planning authority identified in the instrument creating the obligation. Such an obligation may be created by agreement or by the person with the interest making an undertaking. The use of the term "planning obligation" reflects the fact that obligations may be created other than by agreement between the parties (that is, by the developer making an undertaking). Such obligations may restrict development or use of the land; require operations or activities to be carried out in, on, under or over the land; require the land to be used in any specified way; or require payments to be made to the authority either in a single sum or periodically.
- A3. The obligations created run with the land** (as do planning agreements made under old section 106 of the 1990 Act) so they may be enforced against both the original covenantor and against anyone acquiring an interest in the land from him/her unless the agreement makes specific to the contrary. The obligations can be positive (requiring the covenantor or his/her successors in title to do a specified thing in, on, under or over the land) or negative (restricting the covenantor or his/her successors from developing or using the land in a specified way).
- A4. Section 106(2)** provides that a planning obligation may:
- i. be unconditional or subject to conditions;
  - ii. impose any restriction or requirement in 106(1) (a) to (c) for an indefinite or specified period (thus enabling, for instance, an obligation to end when a planning permission expires);

- iii. provide for payments of money to be made, either of a specific amount or by reference to a formula, and require periodical payments to be paid indefinitely or for a specified period.
- A5. **Section 106(3)** provides that, as previously with agreements, planning obligations shall be enforceable against the original covenantor and his/her successors in title.
- A6. **Section 106(4)** enables the instrument which creates the planning obligation to limit the liability of covenantors to the period before they cease to have an interest in the land. This enables someone entering into a planning obligation to cease to be bound by its terms once he/she has disposed of his/her interest in the land concerned.
- A7. **Sections 106(5), (6), (7) and (8)** contain provisions for enforcing planning obligations. Section 106(5) provides for restrictions or requirements imposed under a planning obligation to be enforced by injunction. Section 106(6) provides that, in addition to 106(5), if the developer is in breach of a requirement to carry out works on the land, the authority may enter the land and do so itself and recover its reasonable expenses. Section 106(7) provides that the authority, before exercising its powers to enter the land, shall give not less than 21 days' notice of its intention to do so to any person against whom the obligation is enforceable. Section 106(8) provides that any person who wilfully obstructs the authority if it enters the land under subsection (6)(a) shall be guilty of an offence and be liable to a fine of up to level 3 on the standard scale (currently £1000).
- A8. **Section 106(9)** requires that a planning obligation may only be entered into by a deed which: states that the obligation created is a planning obligation; identifies the land concerned; identifies the person entering into the obligation and states his/her interest; and identifies the authority by whom the obligation may be enforced. **Section 106(10)** requires a copy of the deed to be given to the local planning authority by whom it is enforceable.
- A9. **Section 106(11)** provides that a planning obligation is a local land charge for the purposes of the Local Land Charges Act 1975. If a local land charge is not registered, it remains binding against a purchaser of the land, but the purchaser is entitled to compensation for non-registration. Under section 8 of the 1975 Act any member of the public has a right of access to the local land charges register, which is maintained by every London borough and district council. The register contains a description of the charge, including a reference to the relevant statutory provision, and says where relevant documents may be inspected.
- A10. **Section 106(12)** enables the Secretary of State to make regulations specifying that money to be paid or expenses recoverable under a planning obligation shall be a charge on the land. This would assist a local planning authority in proceedings to recover such sums.
- A11. **Section 106(13)** defines the terms "land" and "specified" used in section 106.
- A12. **Section 296(2)** provides that the local planning authority may not enforce a planning obligation against Crown land, either by injunction or by entering the land, without the consent of the "appropriate authority" (i.e. the Crown body responsible for the land concerned).
- A13. **Section 299A** also relates to Crown land. **Section 299A(1)** provides that the appropriate authority may enter into a planning obligation in relation to any Crown or

Duchy interest in land. The obligation is enforceable to the extent mentioned in new section 299A(3). **Section 299A(2)** provides that a planning obligation under section 299A may only be entered into by an instrument executed as a deed which: states that the obligation concerned is a planning obligation; identifies the land concerned; identifies the appropriate authority and states the Crown or Duchy interest; and identifies the local planning authority by whom the obligation may be enforced. **Section 299A(3)** provides that a planning obligation under this section may be enforced against any person with a private interest derived from a Crown or Duchy interest. **Section 299A(4)** applies most of the provisions of sections 106, 106A and 106B to obligations entered into under section 299A. **Section 299A(5)** requires the consent of the appropriate authority to be obtained before a planning obligation in respect of Crown or Duchy land is enforced.

### **Consequential Amendments**

**A14. Section 83 of the 1991 Act**, which applies to England and Wales, Scotland and Northern Ireland, amends section 91A of the Income and Corporation Taxes Act 1988, consequential upon section 12. Section 91A of the 1988 Act provides that, where a person makes a site restoration payment in the course of carrying on a trade, the payment shall be allowable as a deduction against profits or gains for the relevant tax period.

## MODIFICATION AND DISCHARGE OF PLANNING

### OBLIGATIONS

**A15. Section 106A(1)** provides that a planning obligation may not be modified or discharged except by agreement between the authority and the person or persons against whom it is enforceable, or in accordance with sections 106A(1) and 106B. The Secretary of State considers that the variation of obligations by agreement between the parties is to be preferred to the formal application and appeal procedures.

**A16. Section 106A(2)** provides that any agreement between the parties to modify or discharge a planning obligation shall be by deed.

**A17. Section 106A(3)** provides that anyone against whom a planning obligation is enforceable may, at any time after the "relevant period" expires, apply to the local planning authority concerned for the obligation to be modified as specified in his/her application or for it to be discharged.

**A18. Section 106A(4)** defines "relevant period" as such period as may be prescribed by the Secretary of State in regulations, failing which the period is to be five years from the date the obligation is entered into. The Secretary of State has decided not to prescribe a relevant period. It would not be reasonable to allow an obligation to be reviewed very soon after it had been entered into. This would give no certainty to a local planning authority which had granted planning permission on the understanding that a developer would meet certain requirements. Other affected parties might also be disadvantaged by allowing obligations to be swiftly brought to an end. On the other hand, where over a period of time the overall planning circumstances of an area have altered it may not be reasonable for a landowner to be bound by an obligation indefinitely. Allowing the five year period to stand appropriately reconciles these various considerations.

- A19. Section 106A(5)** prevents any applicant for modification of a planning obligation from specifying a modification which imposes an obligation on some other person against whom the original obligation is enforceable. Thus it would not be possible, for example, for an original covenantor who had since leased part of the land to a third party to apply for a modification that would transfer the whole obligation to the part of the land which had been leased.
- A20. Section 106A(6)** provides that an authority which receives an application for modification or discharge of a planning obligation may determine it by refusing it; or, if the obligation no longer serves any useful purpose, by discharging it; or, if the obligation would serve a useful purpose equally well with the modifications specified by the applicant, by consenting to the modifications sought. The Secretary of State considers that the expression "no longer serves any useful purpose" should be understood in land-use planning terms.
- A21. Section 106A(7)** provides that the authority shall notify the applicant of its decision within a period prescribed by the Secretary of State.
- A22. Section 106A(8)** provides that, where the authority determines that a planning obligation shall have effect subject to modification, the modified obligation shall be enforceable from the date on which the applicant is sent a notice of determination.
- A23. Section 106A(9)** empowers the Secretary of State to make regulations with respect to the form and content of applications, the publication of notices of such applications, procedures for considering any representations on the applications and the notices to be given to applicants of the authority's determination.
- A24. Section 106A(10)** provides that section 84 of the Law of Property Act 1925 shall not apply to planning obligations. Section 84 empowers the Lands Tribunal to modify or discharge restrictive covenants, including those contained in a planning obligation. It is considered to be of limited application in the planning context, because the test of obsolescence which it imposes is stringent, and it does not cover positive covenants. The section has been disapplied to prevent any overlapping of the 1925 and 1990 jurisdictions.
- A25. Section 106B(1)** provides that where a local planning authority fails to give notice of its determination of an application for modification or discharge of a planning obligation within the period prescribed under section 106A(7), or to refuse such an application (see 106A(6)(a)), the applicant may appeal to the Secretary of State.
- A26. Section 106B(2)** provides that an appeal against an authority's failure to give notice of its determination of an application shall be treated in the same way as an appeal against refusal of an application.
- A27. Section 106B(3)** enables the Secretary of State to make regulations prescribing the period within which notice of such appeals shall be given and the manner in which they shall be made.
- A28. Section 106B(4)** applies 106A(6) to (9) in relation to appeals to the Secretary of State as they apply in relation to applications to authorities. The Secretary of State does not intend to make regulations prescribing a period within which appeals must be

determined. The time taken to determine such appeals will, however, be compatible with the published targets for determining appeals under section 78 of the 1990 Act.

- A29. Section 106B(5)** gives either party to an appeal the right to a hearing. When an appeal is made, the appellant and the local planning authority will be asked to state whether they wish to be heard before an Inspector, or whether they are content for the appeal to be determined by exchanges of written representations. If neither party asks to be heard, and if the Secretary of State does not consider a local inquiry necessary, the appeal will be dealt with by written representations, following, with any variations as necessary, the spirit of the Town and Country Planning (Appeals) (Written Representations Procedure) Regulations 2000 (SI 2000/1628).
- A30.** If either principal party exercises his/her right to be heard, the Secretary of State will consider whether to hold a local inquiry or to offer them the option of a less formal hearing, following the procedure in the Town and Country Planning (Hearings Procedure) (England) Rules 2000 (SI 2000/1626). Where there is a local inquiry the spirit of the Town and Country Planning (Inquiries Procedure) Rules 2000 (SI 2000/1624) or of the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) Rules 2000 (SI 2000/1625) will be applied. In the light of experience it will be considered whether the Rules should be formally adapted to such appeals or whether a separate set of Rules should be produced.
- A31. Section 106B(6)** provides that the determination of an appeal to the Secretary of State under this section shall be final.
- A32. Section 106B(7)** applies schedule 6 to the 1990 Act (Determination of Certain Appeals by Person Appointed by Secretary of State), allowing appeals to be determined by an Inspector appointed by the Secretary of State.

**The Town And Country Planning (Modification And Discharge Of Planning Obligations) Regulations 1992 (SI 1992/2832)**

- A33. The Town and Country Planning (Modification and Discharge of Planning Obligations) Regulations 1992 (SI 1992/2832) came into force on 10 December 1992.** The regulations enable applications to be made to the enforcing local planning authority for the modification and discharge of planning obligations, and for appeals to be made to the Secretary of State where such applications are refused or not determined. The procedures in these regulations apply only to planning obligations entered into under section 106 or section 299A of the Town and Country Planning Act 1990, as substituted and inserted by section 12 of the Planning and Compensation Act 1991. They do not apply to agreements entered into under other powers, including section 106 as originally enacted.
- A34. Regulation 3** of the 1992 Regulations provides that an application for modification or discharge of a planning obligation shall be on a form provided by the local planning authority and sets out which information such a form shall require. An application is required to include the information specified by the form, a map identifying the land to which the obligation relates and any other information which the applicant considers relevant to determine the application.

- A35. Regulation 4** provides for the notification of applications for modification or discharge to persons (other than the applicant) against whom the obligation is enforceable. The relevant forms and certificates are set out in the schedule to the Regulations.
- A36. Regulation 5** makes provision for the local planning authority to publicise applications in accordance with the form set out in Part 3 of the schedule, and to invite representations to be made. Authorities are also required to make a copy of the application and the relevant part of the instrument which created the obligation available for inspection during the 21-day period available for representations.
- A37. Regulation 6** prevents authorities from determining applications until the 21-day period for representations has expired, and requires them to give written notice of their decision within 8 weeks of receipt of the application, or such other period as they and the applicant may agree in writing. Decision notices must state the authority's reasons clearly and precisely, and set out the applicant's right of appeal.
- A38. Regulation 7** provides that any appeal to the Secretary of State shall be made within 6 months of the date of the authority's decision notice refusing the application, or in the case of non-determination within 6 months of the expiry of the period specified in Regulation 6(2). The relevant appeal forms may be obtained from the Planning Inspectorate.
- A39. Regulation 8** enables all classes of appeal to be determined by Planning Inspectors. The Secretary of State may decide to recover individual appeals for his own determination in line with the published criteria for planning appeals.



# ANNEX B

## PLANNING OBLIGATIONS

### POLICY: THE BROAD PRINCIPLES

- B1.** The principal objective of the planning system is to deliver sustainable development, through which key Government social, environmental and economic objectives are achieved. The delivery of these goals is provided for in a framework of development documents, in which local communities are positively involved, and through a transparent system of decision-making on individual applications.
- B2.** In dealing with planning applications, local planning authorities consider each on its merits and reach a decision based on whether the application accords with the relevant development plan, unless material considerations indicate otherwise. Where applications do not meet these requirements, they may be refused. However, in some instances, it may be possible to make acceptable development proposals which might otherwise be unacceptable, through the use of **planning conditions** (see Department of the Environment Circular 11/95) or, where this is not possible, through **planning obligations**. (Where there is a choice between imposing conditions and entering into a planning obligation, the imposition of a condition is preferable (see paragraph B51).)
- B3.** **Planning obligations** (or "s106 agreements") are private agreements negotiated, usually in the context of planning applications<sup>1</sup>, between local planning authorities and persons with an interest in a piece of land (or "developers"), and **intended to make acceptable development which would otherwise be unacceptable in planning terms**. Obligations can also be secured through unilateral undertakings by developers. For example, planning obligations might be used to **prescribe** the nature of a development (e.g. by requiring that a given proportion of housing is affordable); or to secure a contribution from a developer to **compensate** for loss or damage created by a development (e.g. loss of open space); or to **mitigate** a development's impact (e.g. through increased public transport provision). The outcome of all three of these uses of planning obligations should be that the proposed development concerned is made to accord with published local, regional or national planning policies.
- B4.** Planning obligations are unlikely to be required for all developments but should be used whenever appropriate according to the Secretary of State's policy set out in this Circular. There are no hard and fast rules about the size or type of development that should attract obligations.
- B5.** The Secretary of State's policy requires, amongst other factors, that planning obligations are only sought where they meet *all* of the following tests. The rest of the guidance in this Circular should be read in the context of these tests, which must be met by all local planning authorities in seeking planning obligations.

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<sup>1</sup> They can also be used in relation to Local Development Orders (*Note: once the relevant provisions in the Planning and Compulsory Purchase Act 2004 have been commenced*).

A planning obligation must be:

- (i) relevant to planning;
- (ii) necessary to make the proposed development acceptable in planning terms;
- (iii) directly related to the proposed development;
- (iv) fairly and reasonably related in scale and kind to the proposed development; and
- (v) reasonable in all other respects.

**B6.** The use of planning obligations must be governed by the fundamental principle that **planning permission may not be bought or sold**. It is therefore not legitimate for unacceptable development to be permitted because of benefits or inducements offered by a developer which are not necessary to make the development acceptable in planning terms (see B5(ii)).

**B7.** Similarly, planning obligations should never be used purely as a means of securing for the local community a share in the profits of development, i.e. as a means of securing a "betterment levy".

## THE SECRETARY OF STATE'S POLICY TESTS

**B8.** As summarised above, it will in general be reasonable to seek, or take account of, a planning obligation if what is sought or offered is **necessary** from a **planning** point of view, i.e. in order to bring a development in line with the objectives of sustainable development as articulated through the relevant local, regional or national planning policies. Development plan policies are therefore a crucial pre-determinant in justifying the seeking of any planning obligations since they set out the matters which, following consultation with potential developers, the public and other bodies, are agreed to be essential in order for development to proceed. Obligations must also be so **directly related to proposed developments** that the development ought not to be permitted without them – for example, there should be a functional or geographical link between the development and the item being provided as part of the developer's contribution.

**B9.** Within these categories of acceptable obligations, what is sought must also be **fairly and reasonably related in scale and kind to the proposed development** and **reasonable in all other respects**. For example, developers may reasonably be expected to pay for or contribute to the cost of all, or that part of, additional infrastructure provision which would not have been necessary but for their development. The effect of the infrastructure investment may be to confer some wider benefit on the community but payments should be directly related in scale to the impact which the proposed development will make. Planning obligations should not be used solely to resolve existing deficiencies in infrastructure provision or to secure contributions to the achievement of wider planning objectives that are not necessary to allow consent to be given for a particular development.

**B10.** In some instances, perhaps arising from different regional or site-specific circumstances, it may not be feasible for the proposed development to meet all the requirements set out

in local, regional and national planning policies and still be economically viable. In such cases, and where the development is needed to meet the aims of the development plan, it is for the local authority and other public sector agencies to decide what is to be the balance of contributions made by developers and by the public sector infrastructure providers in its area supported, for example, by local or central taxation. If, for example, a local authority wishes to encourage development, it may wish to provide the necessary infrastructure itself, in order to enable development to be acceptable in planning terms and therefore proceed, thereby contributing to the sustainability of the local area. In such cases, decisions on the level of contributions should be based on negotiation with developers over the level of contribution that can be demonstrated as reasonable to be made whilst still allowing development to take place.

## EXAMPLES OF THE USE OF PLANNING OBLIGATIONS

**B11.** The following paragraphs give a general indication of what might reasonably be achieved through the use of planning obligations. They are not intended to be exhaustive and establishing the relationship between a particular planning benefit and an individual development must be a matter of planning judgement, exercised in the light of local circumstances, rather than an issue for detailed national prescription.

### **Prescribing the nature of the Development to achieve Planning Objectives**

**B12.** Planning obligations can be used to secure the implementation of a planning policy in order to make acceptable a development proposal that would otherwise be unacceptable in planning terms. For example, where not possible through a planning condition, planning obligations can be used to secure the inclusion of an element of affordable housing in a residential or mixed-use development where there is a residential component.

**B13.** A requirement through a planning obligation for the provision of an element of **affordable housing** in residential or mixed-use developments with a residential component should be in line with Local Development Framework policies on the creation of mixed communities. As per the guidance in Planning Policy Guidance Note 3 (Housing) (PPG3), Local Development Frameworks should identify the need for affordable housing and should set site-size thresholds above which the provision of a specified proportion of affordable housing would be expected.

**B14.** The presumption is that the affordable housing elements of residential or mixed-use developments with a residential component required by local policies on mixed communities and provided through planning obligations should be provided in-kind and on-site. However, there may be certain circumstances, which should be specified in the Local Development Framework, where it may not be necessary for provision to be on-site, and where provision on another site or a financial contribution may represent a more appropriate option. These are set out in PPG3.

### **Mitigating the Impact of a Development**

**B15.** Where a proposed development would, if implemented, create a need for a particular facility that is relevant to planning but cannot be required through the use of planning conditions (see paragraph B51), it will usually be reasonable for planning obligations to

be secured to meet this need. For example, where a proposed development is not acceptable in planning terms due to inadequate access or public transport provision, planning obligations might be used to secure contributions towards a new access road or provision of a bus service, perhaps co-ordinated through a Travel Plan. Similarly, if a proposed development would give rise to the need for additional or expanded community infrastructure, for example, a new school classroom, which is necessary in planning terms and not provided for in an application, it might be acceptable for contributions to be sought towards this additional provision through a planning obligation.

### **Compensating for Loss or Damage caused by a Development**

**B16.** Planning obligations might be used, when appropriate, to offset through substitution, replacement or regeneration the loss of, or damage to, a feature or resource present or nearby, for example, a landscape feature of biodiversity value, open space or right of way. It may not be necessary to provide an exact substitute of the item lost, but there should be some relationship between what is lost and what is to be offered. A reasonable obligation will seek to restore facilities, resources and amenities to a quality equivalent to that existing before the development.

## TYPES OF CONTRIBUTION

**B17.** Contributions may either be in kind or in the form of a financial contribution. In the case of financial contributions, payments can be made in the form of a lump sum or an endowment, or, if beneficial to all parties and not unduly complex, as phased payments over a period of time, related to defined dates, events and triggers. Policies on types of payment, including pooling and maintenance payments, should be set out in Local Development Frameworks. The local authority's generic policies on payment types should be contained in Development Plan Documents, and the details of their application in Supplementary Planning Documents.

### **Maintenance Payments**

**B18.** Where contributions are secured through planning obligations towards the provision of facilities which are predominantly for the benefit of the users of the associated development, it may be appropriate for the developer to make provision for subsequent maintenance (i.e. physical upkeep). Such provision may be required in perpetuity.

**B19.** As a general rule, however, where an asset is intended for wider public use, the costs of subsequent maintenance and other recurrent expenditure associated with the developer's contributions should normally be borne by the body or authority in which the asset is to be vested. Where contributions to the initial support ("pump priming") of new facilities are necessary, these should reflect the time lag between the provision of the new facility and its inclusion in public sector funding streams, or its ability to recover its own costs in the case of privately-run bus services, for example. Pump priming maintenance payments should be time-limited and not be required in perpetuity by planning obligations.

**B20.** For all maintenance payments, local authorities and developers should agree the type of payments to be made, e.g. regular payments, or commuted sums, all with a clear audit trail.

## **Pooled Contributions**

- B21.** Where the combined impact of a number of developments creates the need for infrastructure, it may be reasonable for the associated developers' contributions to be pooled, in order to allow the infrastructure to be secured in a fair and equitable way. Pooling can take place both between developments and between local authorities where there is a cross-authority impact. Local authorities should set out in advance the need for this joint supporting infrastructure and the likelihood of a contribution being required, demonstrating both the direct relationship between the development and the infrastructure and the fair and reasonable scale of the contribution being sought. There should be a clear audit trail between the contribution made and the infrastructure provided.
- B22.** In some cases, individual developments will have some impact but not sufficient to justify the need for a discrete piece of infrastructure. In these instances, local planning authorities may wish to consider whether it is appropriate to seek contributions to specific future provision (in line with the requirements for demonstrating need as set out above). In these cases, spare capacity in existing infrastructure provision should not be credited to earlier developers.
- B23.** In cases where an item of infrastructure necessitated by the cumulative impact of a series of developments is provided by a local authority or other body before all the developments have come forward, the later developers may still be required to contribute the relevant proportion of the costs. This practice can still meet the requirements of the Secretary of State's policy tests if the need for the infrastructure and the proportionate contributions to be sought is set out in advance.
- B24.** In the event that contributions are made towards specific infrastructure provision but the infrastructure is not provided within an agreed timeframe, arrangements should be made for contributions to be returned to developers.

## **A PLAN-LED SYSTEM**

- B25.** In order to allow developers to predict as accurately as possible the likely contributions they will be asked to make through planning obligations and therefore anticipate the financial implications for development projects, local authorities should seek to include as much information as possible in their published documents in the Local Development Framework. In line with previous advice in Circular 1/97, local planning authorities should include in their new-style Development Plan Documents general policies about the principles and use of planning obligations – i.e. matters to be covered by planning obligations and factors to be taken into account when considering the scale and form of contributions or level of affordable housing provision – if these are not already covered in their “saved” policies under schedule 8 to the Planning and Compulsory Purchase Act 2004. These generic policies should cross-refer to the relevant topic-specific Development Plan Document policies which will be used in determining the planning obligations to be sought by local planning authorities.
- B26.** More detailed policies applying the principles set out in the Development Plan Document (e.g. application to specific localities and likely quantum of contributions) ought then to be included in Supplementary Planning Documents. These more detailed policies might include matrices for predicting the size and types of obligations likely to be sought for specific sites; sub-plan areas; or windfall sites.

- B27.** Where local authorities do not have existing high level policies specifically relating to planning obligations in their adopted local plan or Unitary Development Plan, they should set out the implications for planning obligations of the relevant topic-based Development Plan Document policies (e.g. transport or open space) in a Supplementary Planning Document, based on the policies in this Circular. This practice should only be followed in the transitional period before policies are in place in the relevant Development Plan Document, as set out above (and for that transitional period this practice is considered to accord with Planning Policy Statement 12 paragraph 4.40).
- B28.** All local planning obligations policies should be in line with the guidance given in this document and should cover both allocated and windfall sites as well as setting out principles for general application. Where mitigation or compensation measures are required, planning obligations policies should be based on a clear and up to date assessment of the impacts likely to be created by development (including any disproportionate impacts on different sectors, groups or areas) and the nature and scale of the measures needed to address these impacts.
- B29.** Where there are issues of strategic or regional importance that need to be addressed through planning obligations (for example, the need for pooled contributions towards major infrastructure in Growth Areas), it may be appropriate for these to be referred to in Regional Spatial Strategies, which will set a strategic framework to be interpreted at the local level through the Local Development Framework.
- B30.** Local planning authorities take the lead in negotiating planning obligations with developers. However, it is important that all sectors and tiers of government or other public agencies with legitimate land-use planning interests are involved at an appropriate level and in a focused way in providing an evidence base and setting planning obligations policies. They should also be involved, where appropriate, in formulating site-specific planning obligations requirements. An integrated approach such as this will also ensure a coherent approach to the need for infrastructure created by a number of developments.

## A FAST, PREDICTABLE, TRANSPARENT AND ACCOUNTABLE SYSTEM

- B31.** It is important that the negotiation of planning obligations does not unnecessarily delay the planning process, thereby holding up development. It is therefore essential that all parties proceed as quickly as possible towards the resolution of obligations in parallel to planning applications (including through pre-application discussions where appropriate) and in a spirit of early warning and co-operation, with deadlines and working practices agreed in advance as far as possible. The forthcoming good practice guidance will give examples of a number of ways in which the planning obligations process can be streamlined and made more predictable and transparent, but the following practices (in paragraphs B33-50 below) are especially encouraged within local authorities.
- B32.** Local authorities may wish to consider the development of codes of practice in negotiating planning obligations, so as to make clear the level of service a developer can expect, and in order to increase public confidence in the planning obligations system.

## **Formulae and Standard Charges**

- B33.** Formulae and standard charges are quantitative indications of the level of contribution likely to be sought by a local planning authority, through a planning obligation, towards the provision of infrastructure that is necessitated by a new development. Local authorities are encouraged to employ formulae and standard charges where appropriate, as part of their framework for negotiating and securing planning obligations. These can help speed up negotiations, and ensure predictability, by indicating the likely size and type of some contributions in advance. They can also promote transparency by making indicative figures public and assist in accountability in the spending of monies. Such charges operate under the current system of legislation (i.e. site-specific negotiation) and as such are distinct from the optional planning charge proposed by the Government in November 2003.
- B34.** It is for local planning authorities to decide which matters, if any, to address through standard charges and formulae. However, where they propose to rely on standard charges and formulae local planning authorities should publish their levels in advance in a public document (see paragraph B26). The publication of information about standard charges should include information about any charges to be applied for preparing and completing the planning obligation agreement itself.
- B35.** Standard charges and formulae applied to each development should reflect the actual impacts of the development or a proportionate contribution to an affordable housing element and should comply with the general tests in this Circular on the scope of obligations. Their main purpose is to give greater certainty to developers and increase the speed of negotiations. Standard charges and formulae should not be applied in blanket form regardless of actual impacts, but there needs to be a consistent approach to their application. Whether local authorities seek a standard charge will depend upon the nature of the proposed development.

## **Standard Agreements / Undertakings**

- B36.** Local planning authorities are encouraged to use and publish standard heads of terms, agreements / undertakings or model clauses wherever possible in the interest of speed. A standard agreement, which local planning authorities are encouraged to use, will be included alongside the forthcoming good practice guidance. There will be specific circumstances which will require particular changes in the drafting of the agreement. It is intended that any difficult clauses or terms in the standard document should be raised by developers in the course of pre-application discussion or negotiation with the local planning authority.

## **Use of Independent Third Parties**

- B37.** Local planning authorities and developers may wish to consider using independent expert mediators to help in the process of negotiating the detail of planning obligations for complex or major applications, or to help to facilitate in dispute resolution where disputes are unduly delaying negotiations. Use of mediation can reduce the cost and length of the planning process.
- B38.** In addition there may be circumstances in which factual information needs to be validated before negotiations can continue. In these cases the parties may wish to agree to involve an independent third party with relevant expertise (e.g. valuation) 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 strictly confidential basis.

- B39.** In some instances it may also be appropriate for third party expert advice, for example, needs and cost assessments commissioned from consultants, to be used in the drawing up of planning obligations policies, as well as in the consideration of individual applications.
- B40.** The role of independent third parties is to facilitate or contribute to the negotiation process, not to arbitrate. Responsibility for agreeing the outcome of a planning obligation negotiation remains with the parties involved, and responsibility for the final determination of the application remains with the local planning authority.

### **Public Involvement**

- B41.** The process of setting planning obligations policies and negotiating planning obligations should be conducted as openly, fairly and reasonably as possible and members of the public should be given every reasonable assistance in locating and examining proposed and agreed planning obligations which are of interest to them.
- B42.** The Town and Country Planning (General Development Procedure) (Amendment) (England) Order 2002 (Statutory Instrument 2002 no. 828), which came into effect on 1 July 2002, requires details of planning obligations to be recorded in both Parts I and II of the local planning authority's planning register:
- Part I must include details of any planning obligation (including unilateral undertakings) entered into or proposed in respect of an application for planning permission or application for the approval of reserved matters, and of any other relevant planning obligation or agreement in respect of the land which is the subject of the application.
  - Part II must include details of any planning obligation (including unilateral undertakings) entered into in connection with a planning decision by a local planning authority or the Secretary of State, and of any other planning obligation or agreement taken into account when making the decision, together with particulars of any modification or discharge of any such obligation or agreement.
- B43.** With respect to the requirement to include details of planning obligations in Part I of the register, it is recognised that the terms and content of agreements can change frequently during negotiations and that having to update the register every time there is a change could be unduly onerous for authorities. Individual authorities are best placed to judge when to update the register, bearing in mind its purpose in ensuring the transparency of the process, but as a guide, local planning authorities should expect to record agreed heads of terms at the start of the process, followed by any significant changes to draft agreements.
- B44.** Where applications involving planning obligations are considered by a planning committee, agreed heads of terms for obligations should be included in committee papers and open to public inspection.



B45. Planning obligations must also be registered as local land charges.

### **Unilateral Undertakings**

B46. In most cases, it is expected that local planning authorities and developers will finalise planning obligations by *agreement*. However, where there is difficulty reaching a negotiated agreement, a developer may offer unilaterally to enter into a planning obligation.

B47. Further, there may be circumstances where local planning authorities may wish to encourage developers to submit unilateral undertakings with their planning application (if possible based on a standard document) in the interest of speed. These circumstances may arise where: a) only the developer needs to be bound by the agreement with no reciprocal commitments by the local planning authority (so long as the authority by whom the obligation is enforceable is identified within the deed); and b) it is possible to ascertain the likely requirements in advance, due to the presence of detailed policies, particularly those based on formulae and standard charges or following pre-application discussions.

B48. Unilateral undertakings, like other planning obligations, are usually drafted so that they come into effect at a time when planning permission is granted and provide that, unless the developer implements the permission (by carrying out a material operation as defined in section 56(4) of the 1990 Act), he is under no obligation to comply with the relevant obligations.

B49. Unilateral undertakings are commonly used at planning appeals or call-ins where there are planning objections that only a planning obligation can resolve. Where a unilateral undertaking is offered, it will be referred to the local planning authority to seek their views. Undertakings should be consistent with the policies set out in this Circular and when completed should be submitted with the appeal or call-in.

### **Implementation of Planning Obligations**

B50. Once planning obligations have been agreed, it is important that they are implemented or enforced in an efficient and transparent way, in order to ensure that contributions are spent on their intended purpose and that the associated development contributes to the sustainability of the area. This will require monitoring by local planning authorities, which in turn may involve joint-working by different parts of the authority. The use of standardised systems is recommended, for example, IT databases, in order to ensure that information on the implementation of planning obligations is readily available to the local authority, developer and members of the public.

## **OTHER MATTERS**

### **Conditions Vs. Obligations**

B51. It is important to recognise that, if there is a choice between imposing conditions and entering into a planning obligation, the imposition of a condition which satisfies the policy tests of Department of the Environment Circular 11/95 is preferable because it enables a developer to appeal to the Secretary of State regarding the imposition of the condition. The right of appeal where an obligation is concerned, on the other hand, is only relevant where an application has been refused due to the developer not agreeing to the inclusion

of an obligation, or where a request to modify an obligation is refused (see paragraph B59 below). The enforcement of conditions is also more straightforward since it generally involves the use of the planning enforcement system, as opposed to private contractual action in the Courts. The terms of conditions imposed on a planning permission should not be re-stated in a planning obligation; that is to say, an obligation should not be entered into which requires compliance with the conditions imposed on a planning permission. Such obligations entail unnecessary duplication and could frustrate a developer's right of appeal. Further, as per the guidance in Department of the Environment Circular 11/95, permission cannot be granted subject to a condition that the developer enters into a planning obligation under section 106 of the Act or an agreement under other powers.

### **Other Legislation**

**B52.** This guidance is not concerned directly with matters arising from other legislation, e.g. the requisitioning of the provision of a water supply or of a public sewer from a water company under the Water Industry Act 1991<sup>2</sup> or previous legislation; or agreements made under the Public Health Act 1936; or agreements about development in the vicinity of roads under section 278 of the Highways Act 1980 (as substituted by the New Roads and Street Works Act 1991) on which Department for Transport, Local Government and the Regions Circular 4/2001 gives advice. However, there is of course merit in ensuring a joined-up approach is taken to the planning of the provision of all infrastructure and services relating to a site.

### **Mineral Developments**

**B53.** While the same guiding principles apply, it should be noted in connection with mineral developments that special considerations apply to the use of planning obligations and to the imposition of conditions. These are set out in Minerals Planning Guidance Note 2 (Applications, Permissions and Conditions: July 1998) and Minerals Planning Guidance Note 7 (The Reclamation of Mineral Workings: November 1996).

### **Persons Interested in Land**

**B54.** Attention is drawn to the statutory requirement that a developer must be a person interested in land in the area of a local planning authority before he/she can enter into a planning obligation. This differs from the requirements for planning permission more generally where a developer does not need to have an interest in a piece of land in order to gain planning consent. Before accepting that a planning obligation resolves planning objections to a proposed development, local planning authorities should take care to ensure as early as possible in the process that all those who might need to be directly involved in complying with its provisions (e.g. all those interested in the land (where "interested" has a legal meaning), including the freeholder, any lessees, tenants and mortgagees and also guarantors etc.) have entered into it. The purchaser of the development site may also have an "interest", for example where he/she is a party to a contract conditional upon obtaining planning permission for the land, or has a right under an option to purchase the land. At an appeal, the Inspector may seek evidence of title if it has not been demonstrated that the developer has the requisite interest.

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<sup>2</sup> The use of s106 of the 1990 Act in order to secure the provision of infrastructure for water supply, sewerage or sewage disposal should not be necessary because it will already be the developer's responsibility to requisition the provision of a water supply by the water company under section 41 of the Water Industry Act 1991 and/or the provision of sewers under section 98, and the provision of associated infrastructure by the water company is financed by infrastructure charges levied by companies under section 146 of the 1991 Act for any new connection.

Where a trunk road is involved, the developer will also need the agreement of the relevant highway authorities and any necessary highway orders.

- B55.** Local authorities may wish to require signatories of s106 agreements to give immediate written notice of any change in ownership of the interests in the site to which a s106 agreement applies before all the obligations have been discharged so that authorities can trace successors in title. Written notice should give details of the transferee's name and address, together with details of the site or unit to which his/her interest applies.

### **Appeals and Call-ins**

- B56.** The Secretary of State will deal with each appeal or call-in which comes before him on its merits, but he is unlikely to attach weight to demands by a local planning authority or offers by a developer which go beyond this guidance. If a local planning authority seeks unreasonable planning obligations in connection with a grant of planning permission, it is open to the applicant to refuse to enter into them; he/she has the right of appeal to the Secretary of State against a refusal of permission or the imposition of a condition or the failure to determine the application. Such appeals will be considered in accordance with the advice given in this Circular. As with unilateral undertakings (paragraphs B46-49), it is important that planning obligations are entered into prior to the consideration of the appeal or call-in by the appointed Inspector and not left until the latter stages.

- B57.** Where an appeal has arisen because of what seems to the Secretary of State to be an unreasonable requirement on the part of the local planning authority, and a public local inquiry or hearing has been held, he will consider sympathetically any application which may be made to him for an award of costs. Similarly, where an appellant has refused to meet a reasonable requirement by the local planning authority, applications for an award of costs against the former will also be sympathetically considered.

- B58.** The Secretary of State expects local planning authorities and developers to adhere to the guidance set out in this Circular. They are reminded that the Courts have held that Government policies are themselves material considerations to be taken into account when planning decisions are made. They will also wish to bear in mind that the Secretary of State has the power to intervene in the operation of the planning system (i.e. to call in or to direct the modification of development plans, to call in planning applications for his own decision, to revoke or modify planning permissions, or to discontinue land uses). The Secretary of State will give consideration as to whether it is appropriate to exercise such powers where it appears that the guidance contained in this Circular is being ignored or misapplied.

### **Appeals against refusals to Modify or Discharge a Planning Obligation**

- B59.** Planning obligations can only be modified or discharged by agreement between the applicant and the local planning authority or following an application to the local planning authority five years after the obligation has been entered into. Where an application is made for modification or discharge and the authority decides that the planning obligation shall continue to have effect without modification (or fails to determine an application), the applicant has the right of appeal to the Secretary of State within 6 months. (See Annex A to this Circular for further details.) The Secretary of State will have regard to the policies explained in this Circular when determining such appeals.

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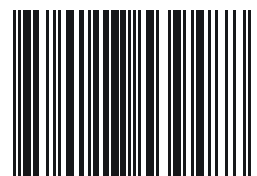
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