

PLANNING

Revision of Circular 12/1996: Planning Agreements

Consultation Paper

December 2008



one
scotland
SCOTTISH GOVERNMENT

Revision of Circular 12/1996: Planning Agreements

Consultation Paper

REVISION OF CIRCULAR 12/1996: PLANNING AGREEMENTS CONSULTATION PAPER

Responding to this consultation paper

We are inviting written responses to this consultation paper by 27 March 2009. Please send your response to:

Stuart.morrison2@scotland.gsi.gov.uk

or

Consultation on Revision of Planning Circular 12/1996: Planning Agreements
Directorate for the Built Environment
Scottish Government
Area 2H (Bridge), Victoria Quay
Edinburgh
EH6 6QQ

If you have any queries on the content of the consultation paper or the consultation process, please contact Stuart Morrison on 0131 244 7060 or at the e-mail address below. Please indicate in your response which questions or parts of the consultation paper you are responding to as this will aid our analysis of the responses received.

In Directorate for the Built Environment we are changing our methods of distribution, with electronic publication for all our publications, subject to only a very small list of exceptions which will also be published in hard copy, such as the National Planning Framework. In addition, we are creating an improved e-newsletter system which will provide an effective way of alerting you to new e-publications, including consultations. To register for electronic newsletters about planning, please register your details at www.scotland.gov.uk/Topics/planning as soon as possible.

The Scottish Government also has an email alert system for all consultations (**SEconsult**: <http://www.scotland.gov.uk/consultations/seconsult.aspx>). This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations. SEconsult complements the new planning e-publications system described above and allows you to register for consultations on specific topic areas across the Government. Please follow the SEconsult link above if you wish to register.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the **Respondent Information Form** which forms part of this consultation paper as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Publishing responses

Where respondents have given permission for their response to be made public (see the attached Respondent Information Form), these will be made available to the public in the Scottish Government Library within 6 weeks of the close of the consultation and on the [SEconsult](#) web pages within 6 weeks of the close of the consultation. Where agreement to publish has been given, we will check all responses for any potentially defamatory material before logging them in the library or placing them on the website. You can make arrangements to view responses by contacting the Scottish Government Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach a decision on the draft regulations or order. Final regulations and orders will require to be laid in Parliament. Further details on the timing of this process will be available through the Modernising Planning page on the Scottish Government's Planning Homepage at www.scotland.gov.uk/Topics/planning .

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to stuart.morrison2@scotland.gsi.gov.uk on 0131 244 7060

RESPONDENT INFORMATION FORM: REVISION OF CIRCULAR 12/1996: PLANNING AGREEMENTS CONSULTATION PAPER.

Please complete the details below and return it with your response. This will help ensure we handle your response appropriately. Thank you for your help.

Name:

Postal Address:

1. Are you responding: (please tick one box)
- (a) As an individual go to Q2a/b and then Q4
- (b) **On behalf of** a group/organisation go to Q3 and then Q4

INDIVIDUALS

- 2a. Do you agree to your response being made available to the public (in Scottish Executive library and/or on the Scottish Executive website)?

Yes (go to 2b below)

No, not at all We will treat your response as confidential

- 2b. **Where confidentiality is not requested**, we will make your response available to the public on the following basis (**please tick one** of the following boxes)

Yes, make my response, name and address all available

Yes, make my response available, but not my name or address

Yes, make my response and name available, but not my address

ON BEHALF OF GROUPS OR ORGANISATIONS:

- 3 The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government website). Are you also content for your **response** to be made available?

Yes

No We will treat your response as confidential

SHARING RESPONSES/FUTURE ENGAGEMENT

- 4 We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Government to contact you again in the future in relation to this consultation response?

Yes

No

Equal Opportunities Questionnaire

This Equal Opportunities Questionnaire is requested in order that the Scottish Government can build an accurate picture of the make-up and diversity of the groups that our planning policies impacts on. This information is **only** used for this purpose.

If you have a disability that requires us to make a reasonable adjustment to enable you to complete this form, please notify use.

Consultation to which you are responding	
Gender	Male <input type="checkbox"/> Female <input type="checkbox"/>

Ethnic origin

How would you describe your ethnic or cultural origin?		
Black British <input type="checkbox"/>	Indian <input type="checkbox"/>	White European/Other <input type="checkbox"/>
Black African <input type="checkbox"/>	Pakistani <input type="checkbox"/>	Chinese/Other Asian <input type="checkbox"/>
Black Caribbean <input type="checkbox"/>	Bangladeshi <input type="checkbox"/>	Mixed Racial Origin <input type="checkbox"/>
Black Other <input type="checkbox"/>	White British <input type="checkbox"/>	Other
Asian British <input type="checkbox"/>	Irish <input type="checkbox"/>	

Age

Under 25 <input type="checkbox"/>	25-40 <input type="checkbox"/>	40 – 55 <input type="checkbox"/>	55- 65 <input type="checkbox"/>	65 + <input type="checkbox"/>
-----------------------------------	--------------------------------	----------------------------------	---------------------------------	-------------------------------

Disability

<p>Do you have a disability as defined by the Disability Discrimination Act 1995 (DDA)? Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>The definition of a disability under the DDA is “a physical or mental impairment which has a substantial and long term adverse effect on a person’s ability to carry out normal day to day activities.”</p>
<p>Please return your completed Equal Opportunities Questionnaire form to the following address:</p> <p>post: email: fax:</p>

THE SCOTTISH GOVERNMENT CONSULTATION PROCESS

Consultation is an essential and important aspect of the Scottish Government's working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. However, in general, Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors and no two exercises are likely to be the same.

Typically Scottish Government consultations involve a consultation paper inviting answers to specific questions or more general views about the material presented. Consultation papers are distributed to organisations and individuals with an interest in the issue, electronically or in hard copy and are placed on the Scottish Government's consultations webpage¹ to allow for participation from a wider audience. Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Government library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4565).

All Scottish Government consultation papers and related publications (e.g. analysis of response documents) can be accessed at: [SEconsult](http://www.scotland.gov.uk/consultations) (<http://www.scotland.gov.uk/consultations>).

The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

¹ <http://www.scotland.gov.uk/consultations>

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

CONTENTS:

Introduction	1
Policy context	1
Annex A: Draft Revised Circular 12/1996: Planning Agreements	3
Annex B: List of Consultation Questions.	15
Annex C: Partial Equalities Impact Assessment (EqIA)	16
Annex D: Partial Regulatory Impact Assessment (RIA)	20

Introduction

1. Following the announcement by the First Minister on 19 August that the planned review of Planning Obligations under the 2006 Act would be postponed in order to avoid additional burdens on the development industry during the current period of economic uncertainty, the Scottish Government made a decision to focus on how best to make the current system of planning agreements - set out in Section 75 of the Town and Country Planning (Scotland) Act 1997 and implemented through Circular 12/1996 - operate more effectively in order that agreements can be taken forward in a more transparent and consistent manner.

2. A draft revised circular has been developed with input from key stakeholders from both the private and public sectors.

3. The draft circular makes a number of changes to the current guidance based on feedback gleaned from the stakeholder group. While the changes do not represent major reform of the planning agreement process, they do place more emphasis on certain aspects of the process. In particular the guidance places more importance on the early identification of requirements for planning agreements in development plans.

4. The purpose of this consultation is to seek views on the proposed revised Circular (annex A). The consultation contains a number of specific questions (annex B) on which respondents' views are sought. There is also a more general question inviting comments on the overall proposals as well as associated documentation (the RIA and EqIA). Respondents are asked to bear in mind that the revised Circular is intended to address the process of establishing planning agreements made under the existing legislation (Section 75 of the Town and Country Planning (Scotland) Act 1997. The Scottish Government is aware that the Planning etc (Scotland) Act 2006 will introduce some changes to the process, however these provisions are yet to be implemented and are therefore outwith the scope of the revision. Respondents are welcome to comment on the 2006 Act measures, however, we cannot guarantee that any views expressed on such matters can be fully addressed in the consultation report.

Policy Context

5. Planning agreements have a limited but useful role in the planning system and should be used where it is considered that a condition would not be sufficient and where it would not be appropriate to grant permission without some form of restriction, limitation and/or compensation. Their purpose is to provide a mechanism which would enable certain obstacles to the grant of planning permission to be overcome and development proposals to proceed with potential negative impacts on land use, the environment and infrastructure, reduced, eliminated or compensated for.

6. Circular 12/1996 was intended to provide robust guidance on the use, scope and limitations of planning agreements and to indicate the circumstances under which a planning agreement was required. However, the research findings suggest that conflicts can still often arise between planning authorities and developers during

the negotiation of a planning agreement, particularly where both parties have been unable to agree on the heads of terms to be included in the agreement. Continual delays during the negotiation of planning agreements are likely to lead to further backlogs or delays in development management case work, and additional costs to the development project and/or a potential loss of development projects and hence economic development opportunities.

Annex A

Draft Revised Circular 12/1996: Planning Agreements

INTRODUCTION

1. This Circular sets out Scottish Government policy for the use of agreements made under Section 75 of the Town and Country Planning (Scotland) Act 1997, provides guidance on the circumstances in which such agreements should be used and on how they can be efficiently concluded; these are referred to in the Circular as planning agreements. For clarity, references in the text to 'planning agreements' refer specifically to agreements made under s.75 of the Town and Country Planning (Scotland) Act 1997.

2. The Circular draws on the findings of research reports commissioned by The Scottish Government published in 2004² and 2008³ and a facilitated stakeholder workshop held in November 2008. The Scottish Government, CoSLA and a range of other stakeholders involved in the operation of the planning system signalled their joint commitment to improving the efficiency of Scotland's planning system and ensuring planning is geared towards supporting increased sustainable economic growth⁴. The Scottish Government is concerned that the conclusion of planning agreements can act as a drag on development by slowing up the planning process, delaying the benefits to Scotland's communities of appropriately planned development and adding costs for developers, infrastructure providers and the wider public sector. This Circular is intended to set out the circumstances in which planning agreements should be used and promote greater efficiency.

POLICY AND PRINCIPLES

Legislative background

The Town and Country Planning (Scotland) Act 1997: Section 75 Agreements

3. Section 75(1) of the 1997 Act provides that "a planning authority may enter into an agreement with any person interested in land in their district (in so far as the interest of that person enables him to bind the land) for the purpose of restricting or regulating the development or use of that land, either permanently or during such period as may be prescribed by the agreement".

4. Section 75 (2) provides that "any such agreement may contain such incidental and consequential provisions (including financial ones) as appear to the planning authority to be necessary or expedient for the purposes of the agreement".

5. Section 75 (3) provides that an agreement shall "if the agreement has been recorded in the appropriate Register of Sasines or, as the case may be, registered in the Land Register of Scotland, be enforceable by the planning authority against persons deriving title to the land from the person with whom the agreement was

² <http://www.scotland.gov.uk/Resource/Doc/69582/0017253.pdf>

³ <http://www.scotland.gov.uk/Publications/2008/03/05114332/0>

⁴ Delivering planning reform - <http://www.scotland.gov.uk/Publications/2008/11/05100742/0>

entered into". Such agreements therefore offer advantages over other statutory agreements which are in the nature of personal contracts.

The Planning etc. (Scotland) Act 2006

6. The Planning etc (Scotland) Act 2006 will, when commenced, introduce changes to the development planning process. The terminology in this circular reflects that in the 2006 Act on development planning. The 2006 Act will also introduce some changes into the planning agreement process, most notably introducing provisions regarding unilateral agreements and processes for modifying or discharging agreements (including appeals). **This circular is concerned with the making of planning agreements made under existing section 75 powers.** Further guidance will be prepared to support the introduction of the provisions of the 2006 Act but the Scottish Government's underlying policy and approach to planning agreements will remain largely as set out in this circular.

THE USE OF PLANNING AGREEMENTS: SCOPE AND LIMITATIONS

7. Planning guides the future development and use of land. Planning is about where development should happen, where it should not and how it interacts with its surroundings. This requires promoting and facilitating development, while protecting and enhancing the natural and built environment in which we live, work, and spend our leisure time. The Scottish Government believes that a properly functioning planning system is essential to achieving its central purpose of increasing sustainable economic growth. The Scottish Government is committed to the delivery of these objectives through a plan led system in which local communities are involved positively, and for individual planning applications through a transparent system of decision that is founded on the development plan.

8. Planning authorities must consider each planning application on its merits and reach a decision in accordance with the terms of the development plan, unless material considerations indicate otherwise. The Scottish Government believes that planning agreements have a useful role to play in the development management process where they can be used to overcome obstacles to the grant of planning permission. In this way development can be permitted or enhanced and potentially negative impacts on land use, the environment and infrastructure can be reduced, eliminated or compensated for.

9. Scottish Ministers have noted the concerns raised about the extent of planning agreement usage and the levels and range of contributions sought by planning authorities. The Scottish Government considers that it is not possible to indicate all appropriate circumstances in which for using planning agreements. Planning Authorities should take a decision based on the circumstances of the relevant plan, the proposed development, and the tests set out in this circular. Where a planning agreement is considered necessary, it must have a relevant planning purpose and must always be related and proportionate in scale and kind to the development in question. These principles are central to the guidance that follows.

POLICY TESTS

10. Planning agreements should only be sought where they meet *all* of the following tests:

- **necessary to make the proposed development acceptable in planning terms**
- **serve a planning purpose and be relevant to the published development plan of the authority;**
- **directly relate to the proposed development;**
- **fairly and reasonably relate in scale and kind to the proposed development; and be;**
- **reasonable in all other respects.**

Sequential test of necessity.

11. The Scottish Government considers that there are only limited circumstances in which a planning agreement may be justified. Where a planning permission cannot be granted without some restriction or regulation, and before deciding to seek a planning agreement, the planning authority should with the developer consider the following options in sequence:.

- i) The use of a planning condition: The guidance contained in circular 4/98: *The Use of Conditions in Planning Permissions*⁵ should be followed. When deciding to grant planning permission, planning authorities should wherever possible rely on planning conditions. These include, where appropriate, suspensive conditions, rather than using a planning agreement. Planning conditions are usually preferable to a planning or legal agreement saving time and money for all concerned.
- ii) The use of a legal agreement: for example, an agreement made under a different statute, such as the Local Government (Scotland) Act 1973, the Countryside (Scotland) Act 1967, Sewage (Scotland) Act 1986, The Roads (Scotland) Act 1984 etc. A planning agreement is not necessary where the obligations of a landowner or developer may be implemented, for example, by a one-off payment towards the cost of infrastructure provision or the maintenance of open space. Local authorities have a general power to make agreements with developers under Section 69 of the Local Government (Scotland) Act 1973. This gives authorities the power "to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of their functions". This provision would, for example, enable agreements to be made, which would not have to be limited in their purpose to restricting or regulating the development or use of land, but could include the payment of money or the transfer of assets to a local authority.
- iii) The use of a planning agreement under 'Section 75' of the 1997 Town and Country Planning (Scotland) Act. The Planning Authority should be clear when deciding the most appropriate form of agreement that a Section 75 agreement need only be necessary where successors in title must be bound by the required obligation. An example may be where phased contributions

⁵ <http://www.scotland.gov.uk/Publications/1998/02/circular-4-1998/circular-4-1998->

are required. Otherwise consideration of alternative means of securing the required obligation should be considered and, if necessary, options i and ii be revisited.

Planning purpose test

12.Planning authorities should satisfy themselves that an agreement serves a planning purpose which is a purpose related to the use and development of land. This judgement should be rooted primarily in the planning authority's development plan and any associated supplementary guidance. This should enable potential developers and other interests to be aware when designing their proposals of the;

- likelihood of a planning agreement being sought by the planning authority; and, the
- the likely requirements of that planning agreement

Relationship to proposed development test.

13.Planning agreements must relate to the development being proposed. Where a proposed development would create a need for particular facilities, or have a damaging impact on the environment or local amenity that cannot be resolved satisfactorily through the use of planning conditions, a planning agreement could be used provided it would overcome or mitigate those identified barriers to the grant of planning permission. There should be a functional or geographical link between the development and the offer being provided as part of the mitigation offered as part of the developer's contribution.

14.Planning agreements, or other legal agreements, should not be used to extract advantages or benefits or payments, including contributions to Community Trust Funds, from landowners or developers which are not directly related to the proposed development. In reaching decisions on applications for planning permission, planning authorities should not attach any weight to offers made to undertake works, donate monies, or other incentives if these do not meet the test contained in this circular for inclusion within an agreement; nor should planning authorities be influenced by the absence of such offers. **Authorities should bear in mind that their decision may be challenged in the Courts.**

Scale and kind test.

15.Planning agreements should be related in scale and kind to the proposed development. Developers may, for example, reasonably be expected to pay for, or otherwise contribute towards the cost of, infrastructure which would not have been necessary but for the development. The effect of such infrastructure investment may be to confer some wider community benefit but contributions should be proportionate to the scale of the development being proposed. Attempts to extract excessive contributions from developers towards the costs of infrastructure or to obtain extraneous benefits are unacceptable. Planning agreements should not be used just to resolve existing deficiencies in infrastructure provision or to secure contributions to the achievement of wider planning objectives that are not necessary to allow permission to be granted for the particular development.

16.Entering into an agreement can have financial consequences for developers and may be uneconomic where the costs have not been allowed for in the price paid for the land. Cash flow will also be affected where substantial sums of money have to be

paid before the development gets underway or at an early stage in construction. Staged payments in line with the development programme should be an important consideration of the planning authority to help avoid prejudicing the viability and success of a project.

Reasonableness test.

17. Any planning agreement should also be reasonable depending on the circumstances of the particular case so the following questions should be posed:-

- Is an agreement, as opposed to conditions, necessary to enable a development to go ahead? (this question should have regard to the necessity test set out in paragraph 11 above)
- In the case of financial payments, will these contribute to the cost of providing necessary facilities required as a consequence of or in connection with the development in the near future?
- Is the requirement in the agreement so directly related to the regulation of the proposed development that it should not be permitted without it?
- Will the agreement mitigate the loss of, or impact on, any amenity or resource which is present on the site prior to the development?

18. Planning agreements can relate to land, roads, or buildings other than those covered by the planning permission provided there is a direct relationship between the two. In some cases the provision of contributions towards public transport or community facilities may be acceptable provided the requirements are directly related to the development proposal and the need for them arises from its implementation. Agreements should not, however, be used where this connection does not exist or is too remote to be considered reasonable.

PROCESS

19. A key objective of the Scottish Government is to improve the speed, efficiency and transparency of the process of preparing and agreeing planning agreements. This circular places a strong emphasis on:

- achieving a more open and transparent process which provides opportunities for public involvement
- the importance of effective management of the process of developing, negotiating and concluding agreements as part of the planning process
- the role of the SDP or LDP in setting out a clear understanding of infrastructure requirements and, from that, policy on planning agreements
- early identification of expected contributions in Supplementary Guidance
- clear presumption that planning agreements should only be used where they meet the policy tests set out in the circular
- early and appropriate identification of heads of terms
- swifter issuing of planning permission following finalisation of planning agreements
- the importance of monitoring to ensure that agreements are implemented.

Public Involvement

20. The process of setting policy for planning agreements and negotiating planning agreements should be transparent and fair. Information on the terms of a planning agreement should be publicly available.

Effective management of planning agreements

21. Where a planning agreement is being sought, the process of concluding an agreement is integral to the decision making process on the grant of planning permission and should be managed as such across all relevant services in the local authority to minimise delay and additional costs to all parties involved. Planning authorities are encouraged to use a processing agreement, project management methodology, or development of codes of practice in negotiating planning agreements, so as to make clear the level of service a developer can expect and the issues to be agreed at each milestone. This approach should help increase public confidence in the planning agreements process.

22. Planning authorities are also encouraged to identify consistent points of expertise and contact within the authority responsible for liaison and negotiations with developers. It is important that such contacts have an effective understanding both of the requirements of the planning authority set out in the development plan or associated guidance in seeking a planning agreement and of the economics of the development industry that will drive the concerns of the developer in negotiating an agreement.

The SDP or LDP led approach

23. The development plan should be the point at which consideration begins of the potential need for and use of planning agreements. The adoption of formal policies on the use of planning agreements is strongly encouraged. These create an opportunity to include the local community and development industry in the process of determining policy and associated supplementary guidance and clarify early the expected levels of contributions that may be sought from developers.

24. Development plans cannot however anticipate every situation where the need for a planning agreement will arise. Where the potential need for an agreement materialises during the planning application process planning authorities should assess the merits of the individual case justifying these against the guidance in this circular.

Policies and Supplementary Guidance

25. In drafting development plans and associated action programmes planning authorities should work with infrastructure providers and consultees to undertake a clear, costed, assessment of infrastructure requirements and timescales and delivery available funding to support this. From this exercise they can then identify the level and scope of provision that needs to be provided through the use of planning agreements. Broad principles, including the items for which contributions will be sought and the occasions when they will be sought should be set out in the SDP or LDP, and be subject to scrutiny or examination. Methodologies and exact levels of contributions should be included in supplementary guidance. Where standard charges and formulae are applied to individual developments, they should reflect the actual impacts of, and be proportionate to, the development and should comply with

the general tests set out in this circular. Charges and formulae could be set out in matrices to help landowners and developers to predict the size and types of commitments likely to be sought for specific sites or sub-plan areas in advance of submitting a planning application and may also help speed up negotiation.

26. Supplementary planning guidance should not be applied to development proposals until it has been agreed formally by the authority following consideration of representations on the draft version. Planning Authorities drafting supplementary guidance (including masterplans, development briefs and action plans etc), should highlight constraints and indicate the planning, design and environmental considerations they aspire to. Supplementary guidance should be derived from the plan and should clarify the likely need for a planning agreement and its scope and content in order to assist developers.

27. Where planning authorities propose to rely on standard charges and formulae, planning authorities should include these in Supplementary Guidance in advance. The publication of information about standard charges should include, where applicable, information on any charges to be applied for the preparation and completion of the planning agreement itself.

28. Where a planning application is not granted because of a failure to conclude a planning agreement any appeal should consider, amongst all other relevant matters, whether or not the planning authority has highlighted potential development constraints in the relevant development briefs.

Planning agreements and development management

29. The negotiation of planning agreements should not delay the development project or the development management process unnecessarily. All parties should proceed as quickly as possible towards the resolution of heads of terms to be contained in an agreement. This should occur during pre-application discussion or, at the latest, in parallel with the planning application so that, should an appeal be lodged, the heads of terms are already a matter of record. The aim should be to proceed in a spirit of co-operation and early warning with prior agreed deadlines and working practices. This will facilitate an early decision on the necessity for a planning agreement, in accordance with the policy tests set out previously in paragraphs 10-18 and the particular circumstances of the proposal.

30. Having decided on the need for a planning agreement, negotiation on proposed heads of terms for an agreement should proceed quickly taking account of the infrastructure requirements identified in the development plan or associated supplementary guidance and the particular circumstances of the proposal (paragraphs 23-28).

31. Applicants must be advised as soon as possible that the planning authority is minded to grant planning permission subject to both parties concluding a planning agreement. The applicant's views should then be sought on whether, in principle, they would enter into such an agreement to resolve outstanding matters and the likely content of the agreement.

32. The heads of terms, should contain as much detail as possible and should make reference to local policies and other material (such as standard charges and formulae) contained in the development plan and supporting material. To speed up the process planning authorities should use model agreements or clauses and publish these in supplementary guidance. Planning authorities are encouraged to confirm the agreement of relevant consultees to the heads of terms before entering final negotiation and concluding an agreement. They should also justify requirements in Heads of Terms in accordance with the development plan and this circular. The aim should be that heads of terms, once agreed by both parties and by the relevant committee, should not be revised or renegotiated.

33. The developer has the opportunity to conclude the planning agreement before the planning permission is issued. Where the developer wishes to avoid any risk associated with this approach then Heads of Terms should be agreed prior to planning permission being granted.

Negotiating and completing a planning agreement

34. Advice on negotiating and completing a planning agreement is set out in Annex 1.

Concluding planning agreements

35. Planning agreements should contain only those matters that are justified when considered against the tests at paragraphs 10-18 and agreements should be restricted to specific purposes. It is not appropriate to include other matters such as all the conditions attached to the associated planning permission.

Registering the planning agreement

36. Only where planning authorities wish the provisions of an agreement to be enforced against successors in title do agreements made under Section 75 of the Town and Country Planning (Scotland) Act 1997 have to be recorded in the Register of Sasines or registered in the Land Register of Scotland.

37. If it is not a requirement to bind successors in title (or phased contributions are not required) only in particular circumstances should a planning agreement be sought by the planning authority. If the intention is to conclude a Section 75 agreement that does not bind successors in title the alternative options outlined in paragraph 11 above should be considered fully.

38. Concern has been expressed about the delay, which can be several weeks, between finalising an agreement and the issue of planning permission whilst the agreement is recorded. This period is generally occupied by sending the agreement for recording. While there are risks for planning authorities in issuing a planning permission prior to an acknowledgement of receipt of the agreement from the Keeper of the Registers of Scotland (Sasines and Land Registers) they should consider issuing permission immediately on receipt of the acknowledgement. This is because the provisions of the agreement run from the date on which the Keeper acknowledges receipt and, while there is a small risk that an agreement might be returned because of a technical defect; there are situations where the timeous issue of planning permission can be crucial to the development process.

Monitoring of planning agreements

39. Planning authorities should have in place mechanisms and procedures for confirming that the infrastructure to be provided under a planning agreement is delivered. Planning authorities should consider designating a responsible officer for this role.

40. When infrastructure is put into place as a result of planning agreements account should be taken of the provision in the process of revising development plans and local policies standard charges and formulae should be similarly reviewed.

Variation/modification of planning agreements

41. Once concluded a planning agreement forms a legal contract between the planning authority and the developer. As such it may be modified only by mutual agreement.

Manpower and financial considerations

42. The guidance in this Circular clarifies existing processes and as such is not expected to have additional expenditure or manpower implications for local authorities.

Annex 1

Negotiating and completing a planning agreement.

1. It is important for all parties to the negotiation of a planning agreement to recognise that the early sharing of relevant information on potential requirements and limitations will be helpful in streamlining the process of reaching an agreement. In addition where agreement becomes difficult to achieve it may be worthwhile for the parties to consider using some alternative dispute resolution techniques such as mediation⁶.

General legal aspects

2. Although the interpretation of statute remains a matter for the Courts, the following points should be borne in mind when preparing planning agreements:-

- it is believed that generally only a person whose name appears on the Register of Sasines or the Land Register of Scotland as the owner or lessee under a recorded lease may enter into a planning agreement. A person whose only interest is that of a developer or prospective purchaser may not enter into such agreements, although they may be joined as a third party;
- planning agreements do not have to be associated with a specific grant of planning permission but they may, in appropriate cases, modify the conditions or limitations in an existing permission;
- the wording of Section 75(1) indicates that agreements are "for the purposes of restricting or regulating the development or use of the land". While these words have a negative connotation the Scottish Ministers' view is that an agreement should incorporate positive obligations provided the overall purpose of the agreement is to restrict or regulate the development. For example, an obligation to provide car parking or open space/landscaping could be regarded as an integral part of a development. Incidental or consequential provisions, including those of a financial nature, which are required in connection with a development, may also be included on this basis.

Advice to solicitors on drafting agreements

3. Where it is being recommended to the planning committee that permission should be granted subject to completion of a planning agreement, delegated authority to conclude the agreement should be sought rather than having it referred back to the committee. The local authority planning and legal officer should immediately be notified of the committee's decision. If the legal officer has not already done so, the applicant's solicitor should be notified of the need for and general content of an agreement and a request made to examine title deeds.

4. Solicitors may wish to bear in mind the following general points when drafting an agreement:

- the parties: the agreement should be with the landowner determined from an examination of the title deeds or exceptionally with any party who is in a position to complete title and is prepared to do so prior to becoming a party to the agreement. Otherwise, a decision will need to be made whether he should

⁶ Refer to forthcoming Scottish Government guidance on mediation

be joined as a party. Lessees under a lease which is not recorded may also be joined in the agreement. In appropriate cases, a heritable creditor, the superior, or the person having the benefit of a servitude may need to be joined to consent to the terms of the agreement. In some cases, parties such as Scottish Natural Heritage (in the case of agreements relating to the conservation, management or monitoring the effects of development on the natural heritage) may need to be joined;

- taking effect: the planning authority will wish to ensure that the agreement takes effect no later than the date on which planning permission is to be granted. The agreement can, however, be drafted in such a way that obligations imposed on the developer would not be enforceable unless the planning permission is to be implemented;
- arbitration: provisions for arbitration in respect of disputes over the meaning of the content of the agreement and over compliance with its terms should be considered;
- interpretation: with complex agreements it may be helpful to incorporate an interpretation clause defining key words or terms used. In addition, it may be important to establish clear boundaries on the land to which the agreements relates;
- review of variation: consideration should be given to including a provision for review and variation of the agreement in defined circumstances;
- subdivision: if future subdivision of the subject land or property seems likely it may be appropriate to incorporate a provision dealing with the allocation of obligations;
- enforcement: an action of interdict would be available to any of the parties in the event of one of the other parties carrying out some action which was in breach of the agreement. It is not necessary to mention this in the agreement. Consideration should be given to specific provisions which would apply in the event of any of the parties being in breach of the terms of the agreement and also in respect of entry and inspection of the land which is subject to the agreement, for direct action to implement obligations in the agreement in the event of default and for the recovery of costs;
- completion and discharge: where appropriate, agreement should be reached with the applicant's solicitors on the manner in which satisfactory completion of obligations in the agreement is to be acknowledged by the planning authority. Provision should be made for the discharge, in whole or in part, of the agreement in specified circumstances, for example, the satisfactory completion of all obligations in the agreement or the discontinuance of the use which is the subject of the related planning permission;
- sale on: the planning authority may wish to include a provision prohibiting the disposal of the subjects prior to recording or registration of the agreement.

5. With complex proposals the legal officer may need to discuss the wording of the draft agreement with the planning officer and, where appropriate, external consultees and other specialist advisers. The draft should then be forwarded to the applicant's solicitor.

Finalising the agreement

6. The legal officer should arrange for the appropriate search to ascertain that there has been no transmission of an interest in the land to be included in the

agreement from the last infert proprietor disclosed in the title deeds with whom it is intended that the planning authority enter into the planning agreement.

7. Upon receipt of the revised draft from the applicant's solicitor, it may be necessary to discuss any proposed changes with the planning officer. Revisions and adjustments may then need to be the subject of further correspondence with the applicant's solicitor.

Once the terms of the draft are settled, the agreement should be finalised by the legal officer and sent to the applicant's solicitor (and to solicitors acting for any other parties) for signature.

8. On receipt of the duly executed agreement, arrangements should be made for it to be signed on behalf of the planning authority.

9. If the planning agreement is to be recorded or registered it should immediately be forwarded for entry in the Register of Sasines or in the Land Register for Scotland as appropriate. Copies should be sent to the applicant's solicitors and to the planning authority for retention by them.

10. On receipt of an acknowledgement from the Keeper, the decision notice on the planning application (which will have been prepared in advance) should immediately be dated and issued. In particularly urgent cases, the planning authority may consider issuing the planning consent on receipt of the executed agreement from the applicant's solicitor. There is a risk in such cases that the land will be sold on prior to the recording or registration of the agreement and the purchaser could acquire title free from the burden of the agreement. The extent of this risk will be a matter for the judgement of the authority.

Annex B

Consultation Questions

- 1. Does the revised Circular help users to identify clearly the various implementation stages of the Planning Agreements process and does the Circular follow a logical and transparent process?**
- 2. Will the revised circular help streamline the process of negotiating and concluding planning agreements?**
- 3. Does the revised Circular set out clear guidance on how to determine when a planning agreement, as opposed to a condition or other legal agreement is required?**
- 4. To what extent do you consider the policy tests in the revised Circular sufficiently explicit to ensure enable consistent interpretation by all who use the Circular?**
- 5. To what extent do you consider that planning agreements may be negotiated at pre-application stage in order to reduce unnecessary delay and cost?**
- 6. Does the revised Circular offer adequate guidance on access to Planning Agreements by the public?**
- 7. Are there other changes the system of mitigating impacts of development that would be effective in supporting sustainable economic growth in Scotland? If so what are these and how would they function?**
- 8. The Planning etc (Scotland) Act 2006 when commenced makes new provisions on the use of unilateral obligations and variation of planning agreements. Do you consider that these will alter the process of negotiating and concluding a planning agreement as set out in this circular?**
- 9. Are there particular costs or benefits not addressed in the partial RIA? What are they?**
- 10. Will particular groups not identified by the partial RIA be affected by the revised Circular?**
- 11. How might the revised Circular impact positively or negatively on equalities groups?**
- 12. Will any groups not identified already in the partial EqlA be affected by the revised Circular?**

Comments on any other part of the consultative draft are welcomed.

Annex C

Partial Equalities Impact Assessment

1. Define the aims of the policy

Policy Title	Revision of Planning Circular 12/1996: Planning Agreements
Strategic Outcome	Wealthier & Fairer
Directorate or Agency	DIRECTOR-GENERAL ECONOMY and Chief Economic Adviser
Group	Directorate for the Built Environment
Division	Planning Modernisation and Co-ordination
Branch	Planning Infrastructure and Enforcement

What is the purpose of the proposed policy (or authority and a developer or landowner in order to make a changes to be made to development acceptable in planning terms. Under the the policy)?

Planning agreements are made between a planning authority and a developer or landowner in order to make a changes to be made to development acceptable in planning terms. Under the terms of a planning agreement the planning authority restricts and regulates the development or use of the land and/or the developer undertakes to make a contribution towards (either by paying for or providing) additional infrastructure or other amenity in proportion to the impact of the development.

Who is affected by the policy or who is intended to benefit from the proposed policy and through the developer providing improved infrastructure how?

A planning agreement is intended to benefit the local community either by; - controlling the nature and/or intensity of a development to minimise it's impact, - the proposed policy and through the developer providing improved infrastructure (for example, by contributing to upgrading local roads or building a school), or - both of the above.

How have you, or will you, put the policy into practice, and who is or will be delivering it?

The legal framework for such agreements is set out under section 75 of the Town and Country Planning (Scotland) Act 1997. The Scottish Government will provide guidance on the implementation of the policy through the revised circular. Planning authorities will be responsible for determining whether an agreement is required and for agreeing the terms of any agreement with developers or landowners on a case by case basis.

How does the policy fit into our wider or related policy initiatives?

Supports the Scottish Government aims for a fairer Scotland

Have the resources for your policy been allocated?

No

2. Has consideration been given to the diverse needs and/or experiences of your target audience?

Age	Yes
Evidence	Where a planning agreement provides for improvements to local infrastructure there is potential that this will have a

positive impact upon older people and youngsters. Provision that could have such an impact could, for example, include improved access to public transport, improved school facilities, parks, affordable housing, etc. Obviously the impact will depend on the nature of the support provided. As agreements are intended to improve or provide additional infrastructure, it is unlikely that any provision would have a negative effect on communities.

Consultation	
Disability	Yes
Evidence	There is potential that where a planning agreement provides for additional infrastructure this may benefit those with disabilities. Specific examples would include improved access to public transport, improved disabled access to public buildings, affordable housing or housing designed for disabled access, etc. As with Age, the benefits of any particular agreement would be dependent on the terms of that particular agreement.
Consultation	
Gender	Yes
Evidence	We do not believe that planning agreements will have different applications dependent on gender.
Consultation	
Lesbian, Gay, Bisexual & Transgender	Yes
Evidence	We do not believe that planning agreements will have any particular implications for LGBT
Consultation	
Race	Yes
Evidence	We do not believe that there will be different implications arising from planning agreements for people of different races.
Consultation	
Religion & Belief	Yes
Evidence	We do not believe that planning agreements will apply differently to people of particular religions or beliefs.
Consultation	

3. What else do you need to know to help you understand the diverse needs and/or experiences of your target audience?

Age	We will consider this further in light of any comments received to consultation
Evidence	
Disability	We will consider this further in light of any comments received to consultation
Evidence	

Gender	We will consider this further in light of any comments received to consultation
Evidence	
Lesbian, Gay, Bisexual & Transgender	We will consider this further in light of any comments received to consultation
Evidence	
Race	We will consider this further in light of any comments received to consultation
Evidence	
Religion & Belief	We will consider this further in light of any comments received to consultation
Evidence	

4. What does the information you have tell you about how this policy might impact positively or negatively on the different groups within the target audience?

Age	We will consider this further in light of any comments received to consultation. There are potential benefits in regard to access to local amenities or services, however the nature of the benefits will depend on the provisions of individual agreements.
Disability	We will consider this further in light of any comments received to consultation. There are potential benefits in regard to access to local amenities or services, however the nature of the benefits will depend on the provisions of individual agreements
Gender	We will consider this further in light of any comments received to consultation
Lesbian, Gay, Bisexual & Transgender	We will consider this further in light of any comments received to consultation
Race	We will consider this further in light of any comments received to consultation. There are potential benefits in regard to access to local amenities or services, however the nature of the benefits will depend on the provisions of individual agreements
Religion & Belief	We will consider this further in light of any comments received to consultation. There are potential benefits in regard to access to local amenities or services, however the nature of the benefits will depend on the provisions of individual agreements

5. Will you be making any changes to your policy?

Age	We have no plans to change the policy at this stage, however we will review this following the consultation.
-----	--

Disability	We have no plans to change the policy at this stage, however we will review this following the consultation
Gender	We have no plans to change the policy at this stage, however we will review this following the consultation
Lesbian, Gay, Bisexual & Transgender	We have no plans to change the policy at this stage, however we will review this following the consultation
Race	We have no plans to change the policy at this stage, however we will review this following the consultation
Religion & Belief	We have no plans to change the policy at this stage, however we will review this following the consultation
Comments	We have no plans to change the policy at this stage, however we will review this following the consultation

6. Does your policy provide the opportunity to promote equality of opportunity or good relations?

Age	No specific opportunities have been identified.
Evidence	
Disability	No specific opportunities have been identified.
Evidence	
Gender	No specific opportunities have been identified.
Evidence	
Lesbian, Gay, Bisexual & Transgender	No specific opportunities have been identified.
Evidence	
Race	No specific opportunities have been identified.
Evidence	
Religion & Belief	No specific opportunities have been identified.
Evidence	

7. Based on the work you have done – rate the level of relevance of your policy

Age	Unknown
Disability	Unknown
Gender	Unknown
Lesbian, Gay, Bisexual & Transgender	Unknown
Race	Unknown
Religion & Belief	Unknown

Annex D

Partial Regulatory Impact Assessment

PARTIAL REGULATORY IMPACT ASSESSMENT FOR REVISION OF CIRCULAR 12/1996: PLANNING AGREEMENTS

1. Title of Proposal

1.1 Revision of Circular 12/1996 Planning Agreements

2. Purpose and Intended Effect

Objectives

2.1 This Regulatory Impact Assessment (RIA) examines the Government's revised approach to planning agreements (Section 75 Agreements) in Scotland. The revision of Circular 12/1996 is intended to address existing shortcomings in the Circular and to create a more efficient, transparent, predictable and streamlined means of developing, concluding, registering and monitoring planning agreements. The revised Circular seeks to achieve the following aims and objectives:

- To clarify the scope, use and limitations of planning agreements under S75 of the Town and Country Planning (Scotland) Act 1997
- To set out clearer guidance for relevant stakeholders on policy implementation and monitoring of planning agreements
- To help improve the efficiency and the speed at which planning agreements are processed and aid the delivery of development and regeneration projects.
- To ensure that the views of relevant stakeholders are considered throughout the review process in order to gain support for the finalised revised Circular.

2.2 The review of Circular 12/1996 will examine particular core principles, including:

- The use, scope and limitations of planning agreements
- The speed at which planning agreements are processed
- Openness and access to planning agreements by the public
- Mechanisms for arbitration during negotiation of planning agreements
- Financial viability of development proposals
- Accountability over the long term use of financial contributions

Background

2.3 The Scottish Government has been reviewing planning agreements policy and practice since 2001. Research undertaken by the Scottish Executive in 2001 concluded that during the period dating from the publication of Circular 12/1996 in September 1996 to September 1999, there was an increase of 77% in the use of planning agreements. The majority of these agreements related to residential developments with 26% of agreements linked to developments of less than 10 dwellings. It also concluded that there was a wide variation across the country in the extent to which agreements were used. For example over the survey period

September 1996 -March 2000, Aberdeenshire Council and Aberdeen City Council alone accounted for 30% of all agreements concluded.

2.4 In 2004 and 2008 the Scottish Government carried out an assessment of the value and effectiveness of planning agreements. The first of the studies, '*Planning Agreements and Positive Planning for Sustainable Communities in Scotland*', involved a substantial degree of research and consultation amongst a broad range of stakeholder representatives, including all 32 Scottish Planning Authorities, Scottish Government Departments, 2 National Parks Authorities, the Royal Town Planning Institute, the Royal Institute of Chartered Surveyors, CoSLA, representatives from the development industry, academic institutions, the Law Society of Scotland and private sector planning law representatives.

2.5 Further research undertaken in 2008, '*An Assessment of the Value of Planning Agreements in Scotland*', involved consultation amongst all 34 Scottish Planning Authorities. It concluded that the number of s75 planning agreements entered into annually is increasing as are the values being secured. It also concluded that there has been significant growth in the use of agreements under s69 of the Local Government (Scotland) Act 1973.

2.6 Both the 2004 and 2008 studies concluded that there was a long agenda of issues to be addressed in developing an effective system for processing planning agreements and developer contributions in Scotland. These are summarised in 2.11 below.

2.7 On the 1 August 2008 the First Minister announced that the planned review of Planning Obligations/Developer Contributions under the Planning etc. (Scotland) Act 2006 would be postponed in order to avoid additional burdens on the development industry during the current period of economic uncertainty. As an alternative, the Scottish Government considered it appropriate to focus on how best to make the current system of planning agreements, set out in Section 75 of the Town and Country Planning (Scotland) Act 1997 and implemented through Circular 12/1996, operate more effectively in order that planning agreements could be taken forward in a more transparent and consistent manner. This would involve a review of Circular 12/1996, its subsequent withdrawal and replacement with a revised Circular containing robust policy and best practice guidance.

2.8 The review of Circular 12/1996 has been welcomed by stakeholder representatives from the development industry, local authorities and by infrastructure providers.

Rationale for Government Intervention

2.9 Planning agreements have a limited but useful role in the planning system and should only be used where it is considered that a condition would not be sufficient and where it would not be appropriate to grant permission without some form of restriction, limitation and/or compensation. Their purpose is to provide a mechanism which would enable certain obstacles to the grant of planning permission to be overcome and development proposals allowed to proceed with potential negative impacts on land use, the environment and infrastructure reduced, eliminated or compensated for.

2.10 Circular 12/1996 was intended to provide robust guidance on the use, scope and limitations of planning agreements and to indicate the circumstances under which a planning agreement was required. However, the research findings suggest that conflicts can still often arise between planning authorities and developers during the negotiation of a planning agreement, particularly where both parties have been unable to agree on the heads of terms to be included in the agreement. This illustrates that Circular 12/1996 is not sufficiently achieving its intended purpose. Continual delays during the negotiation of planning agreements is likely to lead to further backlogs in development management case work, and additional costs to the development project and/or a potential loss of development projects and hence economic development opportunities.

2.11 The research undertaken in 2004: *'Planning Agreements and Positive Planning for Sustainable Communities in Scotland'* called for the need to establish the scope, use and limitations of planning agreements and to set the parameters of necessity, proportionality and reasonableness in a revised Circular. It also highlighted a number of criticisms which have been levelled at planning agreements process as set out in Circular 12/1996:

- Uncertainty regarding the legitimate use and scope of agreements
- Delays in development management often caused by the identification of the need for a planning agreement very late on in the planning process
- Unnecessary use of planning agreements where planning conditions would suffice
- Lack of openness and access to planning agreements by the public
- Lack of mechanisms for arbitration during the negotiations of a planning agreement

2.12 The research undertaken in 2008: *'An Assessment of the Value of Planning Agreements in Scotland'* identified wide disparities between Planning Authorities in Scotland in the practice and methodology used to secure developer contributions through planning agreements. The study concluded that:

- The number of planning agreements entered into annually is increasing as are the values being secured.
- There has been significant growth in the use of s69 agreements under the Local Government (Scotland) Act 1973 and some authorities now appear to favour the use of these over s75 agreements. The s69 agreement process is perceived to be quicker, less cumbersome and less protracted than the s75 agreement process enabling planning authorities to process applications and issue decision notices more quickly.
- Only 6 authorities indicated that they have a dedicated Developer Contribution Officer or Team. Authorities with such staff secured almost five times as many contributions as those without and also for a wider range of purposes. However, there is no evidence that the total value of contributions secured by those authorities was greater than those authorities without such staff.

- One third of authorities had formula-based developer contribution policies for calculating contributions and were able to secure on average £2m per annum more than those authorities without such policies, regardless of whether or not they had dedicated Developer Contributions staff. This suggests that formula-based contributions policies are more likely to increase the value of developer contributions than appointing dedicated staff.
- Generally, authorities appear to be poor at monitoring and reporting on contributions that have already been secured. However, post agreement monitoring tends to be better in authorities which have dedicated Developer Contributions staff.

2.13 It is clear from the 2004 research findings that there is widespread discontent with the current planning agreements process. Similarly, the 2008 research illustrates inconsistencies in the practice and application of planning agreements, with some authorities using planning agreements more intensively than others. The revised Circular should significantly help to address criticisms outlined in both research studies by improving efficiency, transparency, predictable and accountable system.

3. Consultation

3.1 The draft Circular we are consulting on has been developed with input provided by key stakeholders. Primarily this was achieved through a two day workshop held in September.

Initial consultation

3.2 The following Scottish Government Directorates were invited to the two day workshop and to contribute to the consultation process including: Built Environment Directorate and Change and Corporate Services Directorate . The following Scottish Government Agencies were also invited to the two day workshop and to contribute to the consultation process: Transport Scotland and Communities Scotland.

3.3 The Scottish Property Federation, Homes for Scotland, Dundas Wilson Solicitors, Anderson Strathearn Solicitors and MacRoberts Solicitors, were invited to the workshop to participate on behalf of the development industry and CoSLA, Aberdeenshire Council, Fife Council, North Lanarkshire Council, City of Edinburgh Council and Glasgow City Council, invited to participate on behalf of Scottish Local Authorities.

Public consultation

3.4 The revised circular is currently subject to public consultation.

Summary of Consultations

3.5 An analysis of the responses to the public consultation will be published. Responses received will be made available on the Scottish Government website, except where respondents have requested anonymity.

4. Options

In developing this set of proposals, the Scottish Government has considered three alternative policy options – A, B and C

(A) Do nothing

4.1 The intention of Circular 12/1996 was to set out a clear process under which planning agreements could be negotiated and implemented in a transparent and consistent manner and obstacles to the grant of planning permission, which could not be overcome by a condition, could be resolved through a Section 75 Agreement to enable development proposals to proceed. However, the research conducted in 2004 indicates that there is much discontent with the current planning agreements process as it is set out in Circular 12/1996, suggesting that the stated objectives of Circular 12/1996 are not being achieved. Similarly, the research undertaken in 2008 on the value of planning agreements in Scotland demonstrates widespread inconsistencies amongst local authorities in the application and use of planning agreements. Without revision to Circular 12/1996, the situation would remain as it is, with delays in finalising planning agreements continuing to hold-up planning decisions and development projects.

(B) Amend Circular to Extend Guidance on Developer Contributions

4.2 Findings from the 2008 research and consultation revealed that while only 6 Planning Authorities in Scotland have a dedicated Developer Contribution Officer or Team, there is no evidence to suggest that the total value of in-kind and financial contributions secured by those authorities was greater than those authorities without such staff. Conversely, the one third of authorities who have in place formula-based developer contribution policies secured on average £2m per annum more than those authorities without such policies. This suggests that there is a need for an agreed and consistent methodology for calculating developer contributions. The research also concluded that authorities appear to be poor at monitoring and reporting on contributions that have already been secured. As a result of the research findings, there is a need to:

- identify the most common modes of contribution and establish consistent conventions for processing them
- consistently record and monitor key data concerning the use of developer contributions secured through a planning agreement
- ensure that planning authorities have effective systems for monitoring and accounting for due payments under agreements and for the co-ordination of their use in the implementation of relevant projects
- ensure an effective exchange of practice among planning authorities in the negotiation of developer contributions.

4.3 There is some scope therefore, to amend the Circular to extend guidance on the use of developer contributions within planning agreements. This would require planning authorities to have in place robust and consistent methodology for calculating, processing and monitoring contributions and accounting for due payments and for the co-ordination of their use in the implementation of relevant projects.

4.4 There is substantial evidence to suggest that Circular 12/1996 is not having the intended effect and is no longer fit for purpose. It is unlikely however, that enhanced guidance on developer contributions alone would reverse the position as it would not resolve more fundamental issues such as the need to establish the use, scope and limitations of planning agreements and the need to set the parameters of necessity, proportionality and reasonableness.

4.5 The costs and benefits identified in Section 5 therefore focus on a comparison between Option A 'Do Nothing' and Option C 'Complete Revision'.

(C) Complete Revision of Circular 12/1996

4.6 Combined data from the 2004 and 2008 research suggests a full-scale revision of Circular 12/1996. The proposed full-scale revision of Circular 12/1996 would ensure the provision of comprehensive guidance on matters that are not sufficiently addressed in the current Circular. These relating to:

- the use, scope and limitations of planning agreements
- the speed at which planning agreements are processed
- developer contributions and financial viability of development proposals
- access to planning agreements by the public
- mechanisms for arbitration during negotiation of planning agreements
- monitoring of planning agreements and developer contributions
- accountability relating to the long term use of financial contributions

4.7 The revision of Circular 12/1996 will take account of stakeholder consultation and the conclusions of 2004 and 2008 research. The revised Circular will follow a logical and transparent process, and will provide clarity on the various procedures and policy tests that Planning Authorities and Developers should follow will when negotiating and finalising a planning agreement.

5. Costs and Benefits

Sectors and Groups Affected

5.1 The revised Circular will have a direct impact on local authorities, infrastructure providers, land owners, the development industry and those who promote development, including professional advisors, and on local communities where the development promoted results in local impacts.

5.2. While the revised Circular will offer guidance on the use of formula based policies in respect of "*incidental and consequential provisions (including financial ones)*" (s75 (2) of The Town and Country and Planning (Scotland) Act 1997), its primary intention is to clarify the use, scope and limitations of planning agreements and to increase the speed at which planning agreements are processed, rather than

to bring about a major change in the approach taken to secure financial contributions through planning agreements.

5.3 It is difficult to accurately quantify the proportionate impact (costs and benefits) on the individual sectors listed in 5.1 above. However, the 2008 research, '*An Assessment of the Value of Planning Agreements in Scotland*', concluded that the annual value of reported financial contributions obtained through planning agreements rose from £14.4m in 2004/05 to £52.7m in 2006/07. The research also reported that the total value of all 'incidental and consequential provisions' (direct financial and in-kind contributions) secured over the study period from 2004 to 2007, reached over £159.1m. The research also concluded that Planning Authorities whose development plans contained formula based policies, secured on average £2m more per annum than Planning Authorities without such policies. The clear upward trend in the overall amount of financial contributions secured through planning agreements is in part therefore, attributed to the increase in the use of formula based policies by Planning Authorities.

5.4. The 2008 research reported that in terms of direct financial contributions, the largest sum secured was for new road infrastructure. Second to this was the sum secured towards recreation and education. There was also a reported upward trend in the sums secured towards off site provision of affordable housing, open space contributions and contributions towards public transport schemes. With regard to the total value of incidental and consequential contributions (in-kind contributions), over 80% were accounted for by affordable housing contributions, largely by virtue of land contributions. The value of in-kind contributions towards roads infrastructure and recreation also appeared to have grown annually.

Economic Costs and Benefits

5.5 The purpose of the revised Circular is to increase the speed at which planning agreements are processed by providing clearer policy guidance. This will reduce the risk of uncertainty regarding the use, scope and limitations of planning agreements and the incidence of protracted disputes during the negotiation of planning agreements.

5.6 The revised Circular advises Planning Authorities to set out planning agreement policies and requirements in Local Development Plans and their supporting documents (development briefs and master plans etc) and, where practicable, formula based policies and standard charges. This will lead to increased certainty and early identification of the need for a planning agreement and will enable Planning Authorities, Landowners and Developers to conclude agreements more quickly, resulting in savings to the development project and to staff costs.

5.7 Faster negotiations will reduce the overall time between the planning stages of development and its disposal, which could significantly reduce the costs of holding land at pre-planning stage. Equally, greater flexibility in the payment profile and phasing of financial contributions should bring financial contributions more in line with the development project programme; enabling the project implementation phase to proceed more quickly.

5.8 The Development Plan Led approach outlined in the revised Circular will benefit local authorities, infrastructure providers, developers and the community by facilitating the delivery of strategic and large scale regeneration projects and their

associated economic and infrastructure requirements. While the costs of the infrastructure may in part, be borne by the developer, the costs will relate purely to the impact generated by the development project. A plan led and quantitative approach to the delivery of infrastructure and development will help determine the test of necessity for an agreement and will overcome co-ordination failures, delivery failures and issues relating to proportionality.

5.9 In most instances, financial and in kind contributions are likely to remain at a similar scale locally. However, as demonstrated in the research undertaken in 2008, an increase in the use of formula based policies relating to financial contributions is likely to lead to an overall increase in the national annual value of financial contributions. The revised Circular may therefore lead to an increase in the use of planning agreements with a consequent increase in overall financial contributions from developers.

5.10 The Development Plan Led Approach and the increased use of formula based policies will however, enable developers to predict more accurately the full costs of their development projects early on. It will also enable developers to factor into the price paid for the land, any necessary (development impact related) contributions towards infrastructure, which may lead to reduced residual land values

Environmental Costs and Benefits

5.11 The revised Circular will help to indicate the circumstances under which a planning agreement, in preference to a condition, should be used. This will lead to more effective use of planning agreements and will likely to extend the scope for environmental benefits across a wider range of development projects.

Social Costs and Benefits

5.12 Early engagement with infrastructure providers during the drafting of the Development Plan will provide more certainty over the delivery of infrastructure projects. This will enable Planning Authorities and infrastructure providers to plan for growth in those areas where there is sufficient infrastructure and/or where new infrastructure projects are planned. This, combined with increased environmental benefits through more effective use of planning agreements, will lessen the impacts of development projects making them more acceptable to the community.

5.13 Voluntary pooling of financial contributions among Planning Authorities will assist funding of services and infrastructure shared by more than one community and is likely to broaden the range of infrastructure that may be provided.

6. Small/Micro Firms Impact Test

6.1 Respondent views on potential impacts for small/micro firms will be sought as part of the public consultation.

7. Legal Aid Impact Test

7.1 The revision of Circular 12/1996 will have no effect on Legal Aid.

8. "Test Run" of Business Forms

8.1 The revision of Circular 12/1996 will not require the creation and use of business forms.

9. Competition Assessment

9.1 Will follow in the final RIA.

10. Enforcement, Sanctions and Monitoring

10.1 The revision of Circular 12/1996 will create clearer policy guidance. However, this guidance is not enforceable and no sanctions will be put in place. The Directorate for the Built Environment will, however, monitor the application of the revised circular through regular dialogue with those charged with its delivery.

11. Implementation and Delivery Plan

11.1 Will follow in the final RIA

12. Post- implementation Review

12.1 Will follow in the final RIA

13. Summary and Recommendation

13.1 Will follow in the final RIA

14. Declaration and Publication

14.1 Will follow in the final RIA

Q1. Are there particular costs or benefits not addressed in the partial RIA? What are they?

Q2. Will particular groups not identified by the partial RIA be affected by the revised Circular?



The Scottish
Government

December 2008

© Crown Copyright

ISBN 978 0 7559 7370 5



RR Donnelley B58875 12-08