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## PLANNING AGREEMENTS

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**Scottish Planning Series**

**PLANNING CIRCULAR 1 2010**

**Planning Agreements**

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# CONTENTS

	Paragraph
<b>INTRODUCTION</b>	<b>1</b>
<b>POLICY AND PRINCIPLES</b>	<b>4</b>
Legislative Background	4
The Planning Etc. (Scotland) Act 2006	7
The Use of Planning Agreements: Scope and Limitations	8
<b>POLICY TESTS</b>	<b>11</b>
Necessity Test	12
Planning Purpose Test	15
Relationship to Proposed Development Test	16
Scale and Kind Test	18
Reasonableness Test	21
<b>PROCESS</b>	<b>23</b>
Publicity of Planning Agreement	24
Effective, Efficient Management of Planning Agreements	25
The Plan Led Approach	27
Policies and Supplementary Guidance	29
Development Management Process	33
Registering the Planning Agreement	39
Monitoring of Planning Agreements	41
Variation/Modification of Planning Agreements	43
Resources and Financial Considerations	44
Previous Circulars	45
Further Information	46

CIC.

## INTRODUCTION

1. This circular sets out Scottish Government policy on the use of agreements made under Section 75 of the Town and Country Planning (Scotland) Act 1997 (the 1997 Act); provides guidance on the circumstances in which such agreements should be used; and on how they can be efficiently concluded. References in the text to 'planning agreements' refer specifically to agreements made under Section 75 of the Town and Country Planning (Scotland) Act 1997.
2. This circular draws on the findings of research projects commissioned by the Scottish Government, published in 2004<sup>1</sup> and 2008<sup>2</sup>, as well as a facilitated stakeholder workshop held in November 2008.
3. The Scottish Government, COSLA and a range of other stakeholders involved in the operation of the planning system have signalled their joint commitment to improving the efficiency of Scotland's planning system and ensuring that planning supports increased sustainable economic growth<sup>3</sup>. The process of negotiating and concluding planning agreements should not slow up the planning process, delaying the benefits 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 in their use.

## POLICY AND PRINCIPLES

### LEGISLATIVE BACKGROUND

#### THE TOWN AND COUNTRY PLANNING (SCOTLAND) ACT 1997: SECTION 75 AGREEMENTS

4. 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".

1 Planning Agreements and Positive Planning for Sustainable Communities in Scotland;

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

2 An Assessment of the Value of Planning Agreements in Scotland;

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

3 Delivering Planning Reform; <http://www.scotland.gov.uk/Publications/2008/11/05100742/0>



5. 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”.
6. 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 entered into”. Such agreements may, therefore, offer advantages over other statutory agreements which are not binding on successors in title to the land in question.

### **THE PLANNING ETC. (SCOTLAND) ACT 2006**

7. The Planning etc (Scotland) Act 2006 (the 2006 Act) introduces changes to the planning process. Provisions in the 2006 Act will also introduce some changes into the planning agreement process<sup>4</sup>, most notably introducing provisions regarding unilateral agreements offered by developers and processes for seeking to modify or discharge agreements, including a mechanism for appeals to Scottish Ministers. We intend to implement these changes later in 2010. **This circular is primarily concerned with the making of planning agreements under the existing Section 75 powers.** Additional guidance will be prepared to support the introduction of the provisions of the 2006 Act but the policy and approach to planning agreements will remain as set out in this circular.

### **THE USE OF PLANNING AGREEMENTS: SCOPE AND LIMITATIONS**

8. Planning guides the future development and use of land. 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 planning applications to be determined through a transparent system of decision making that is founded on the development plan.

<sup>4</sup> Section 23 of the Planning etc. (Scotland) Act 2006 will, when implemented, substitute Sections 75, 75A, 75B and 75C in place of existing Section 75 of the Town and Country Planning (Scotland) Act 1997

9. 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. Planning agreements have a limited but useful role to play in the development management process where they can be used to overcome obstacles to the grant of planning permission. An agreement may mean that development can be permitted or enhanced whilst potentially negative impacts on land use; the environment and infrastructure could be reduced, eliminated or compensated for. Planning agreements should, however, always be between willing parties.
10. It is not possible to indicate all appropriate circumstances for using planning agreements. Planning authorities should therefore take decisions based on the circumstances of the relevant development plan, the proposed development, and the tests set out in this circular.

## POLICY TESTS

11. Planning agreements should only be sought where they meet ***all*** of the following tests:
  - **necessary to make the proposed development acceptable in planning terms (paragraphs 12-14);**
  - **serve a planning purpose (paragraph 15) and, where it is possible to identify infrastructure provision requirements in advance, should be relevant to development plans;**
  - **relate to the proposed development either as a direct consequence of the development or arising from the cumulative impact of development in the area (paragraphs 16-17);**
  - **fairly and reasonably relate in scale and kind to the proposed development (paragraphs 18-20) and be;**
  - **reasonable in all other respects (paragraphs 21 & 22).**



### NECESSITY TEST

12. There are only limited circumstances in which a planning agreement may be justified. A planning agreement under Section 75 is not necessary where the obligations of a landowner or developer may be implemented by a one-off payment and there is no need to bind successors in title to the agreement.
13. Where a planning permission cannot be granted without some restriction or regulation the planning authority should firstly consider whether the restriction or regulation can be achieved by the use of a planning condition. Planning conditions are preferable to a planning or other legal agreement, as they are simpler and can potentially save time and money. The guidance contained in Planning Circular 4/1998: *The Use of Conditions in Planning Permissions* should be followed.
14. The planning authority should be clear when deciding to use a planning agreement that it is necessary because successors in title must be bound by the required obligation, for example where phased contributions to infrastructure are required. It should be noted that in some cases where no binding of successor in title is required an agreement made under a different statute may be more appropriate, quicker and easier to agree. This could include the Local Government (Scotland) Act 1973, the Countryside (Scotland) Act 1967, Sewerage (Scotland) Act 1986, The Roads (Scotland) Act 1984 etc.

### PLANNING PURPOSE TEST

15. Planning authorities should satisfy themselves that a Section 75 agreement serves a planning purpose related to the use and development of land. This judgement should be based primarily on the development plan<sup>5</sup> and any associated supplementary guidance<sup>6</sup>. This should enable potential developers and other interests to be aware when formulating their proposals of the likelihood of a planning agreement being sought and the likely requirements of that planning agreement.

5 Scottish Planning Policy.

6 Paragraph 96, Planning Circular 1/2009: Development Planning.

<http://www.scotland.gov.uk/Publications/2009/02/13153723/9>.

**RELATIONSHIP TO PROPOSED DEVELOPMENT TEST**

16. Planning agreements must relate to the development being proposed. Where a proposed development would create a direct need for particular facilities, place additional requirements on infrastructure (cumulative impact) or have a negative 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 clearly overcome or mitigate those identified barriers to the grant of planning permission. There should be a link between the development and any mitigation offered as part of the developer's contribution. In addition, when determining whether a planning agreement is required planning authorities should take account of the existence of any other agreements or conditions relating to infrastructure provision that apply to the development.
17. Planning agreements should not be used to extract advantages, benefits or payments 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, including contributions to community trust funds, if these do not meet the tests contained in this circular for inclusion within an agreement. Equally, planning authorities should not be influenced by the absence of such offers.

**SCALE AND KIND TEST**

18. Planning agreements must be related in scale and kind to the proposed development. In assessing any contributions planning authorities may take into account the cumulative impact of development over time. The effect of such infrastructure investment may be to confer some wider community benefit but contributions should always be proportionate to the scale of the proposed development. Attempts to extract excessive contributions from developers towards the costs of infrastructure or to obtain extraneous benefits are unacceptable.
19. Planning agreements should not be used to resolve existing deficiencies in infrastructure provision or to secure contributions to the achievement of wider planning objectives which are not strictly necessary to allow permission to be granted for the particular development. Situations may arise where an infrastructure problem exists prior to the submission of an application for planning permission. Where the need to improve, upgrade or replace that infrastructure does not arise directly from the proposed development then planning authorities should not, generally, seek to address this through a planning agreement. It is generally inappropriate to grant planning permission for a development which would demonstrably exacerbate a situation which was clearly already unsatisfactory.



20. It is essential that planning authorities understand the implications of a planning agreement on the viability of a development. Entering into an agreement is likely to have financial consequences. Cash flow can also be affected where substantial sums of money have to be paid before a development proceeds or at an early stage in construction. Where a planning agreement requires financial contributions, staged payments in line with the construction programme can help avoid prejudicing the overall viability of a project.

### **REASONABLENESS TEST**

21. A planning agreement should be reasonable in the particular circumstances of the case. The requirement in the planning agreement should be so directly related to the regulation of the proposed development that it should not be permitted without it. In the case of financial payments, these should contribute to the cost of providing necessary facilities required as a consequence of or in connection with the development.
22. 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. Planning agreements should not, however, be used where this connection does not exist or is too remote to be considered reasonable.

### **PROCESS**

23. The Scottish Government, as part of its wider efforts to reform the planning system, wishes to improve the speed, efficiency and transparency of preparing and agreeing planning agreements. This means that:
  - planning agreements should only be used where they meet the tests set out in this circular;
  - infrastructure requirements and the potential implications for the use of planning agreements should be identified in strategic and local development plans and the associated action programmes;
  - supplementary guidance should specifically identify expected contributions;
  - developing, negotiating and concluding of planning agreements should be effectively managed;

- there should be early identification of heads of terms which can then be worked into the detail of any agreement;
- swifter finalisation of planning agreements should enable planning permissions to be issued more promptly; and
- implementation of agreements should be monitored.

**PUBLICITY OF PLANNING AGREEMENTS**

24. The Development Management Regulations<sup>7</sup> require a summary of the terms of any Section 75 agreement to be recorded in the Register of Applications maintained by the planning authority.

**EFFECTIVE, EFFICIENT MANAGEMENT OF PLANNING AGREEMENTS**

25. The process of concluding an agreement is integral to the planning decision making process 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 processing agreements, project management approaches, or 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 transparency and the efficiency of the planning agreements process.
26. 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 for planning agreements set out in the development plan or associated guidance and of development economics; to ensure that requirements are based on a properly informed understanding of what a development project can reasonably be expected to bear.

**THE PLAN LED APPROACH**

27. The development plan should be the point at which consideration of the potential need for and use of planning agreements begins. Planning authorities should include policies on the use of planning agreements in their development plans. These create an opportunity to involve the local community and development industry in the process of policy development and associated supplementary guidance and to clarify early the expected levels of contributions that might be sought from developers.

<sup>7</sup> The Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008 (Schedule 2, paragraph 4 (d))



28. It is not possible, however, to anticipate every situation where the need for a planning agreement will arise in development plans. Where the need for an agreement emerges during the planning application process planning authorities should assess the case against the policy in this circular and inform the applicant as soon as practicable.

### **POLICIES AND SUPPLEMENTARY GUIDANCE**

29. When drafting development plans and associated guidance planning authorities should work with infrastructure providers, other local authority departments and consultees to undertake a robust assessment of infrastructure requirements, the funding implications and the timescales involved. From this the level of provision that needs to be provided through planning agreements can be identified. 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 strategic development plan or local development plan, and be subject to scrutiny or examination. Methods and exact levels of contributions should be included in supplementary guidance. Standard charges and formulae should be set out in a way that helps landowners and developers predict the size and types of commitments likely to be sought.
30. 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<sup>8</sup>. Planning authorities drafting supplementary guidance should highlight constraints and indicate the planning, design and environmental considerations they aspire to.
31. Where planning authorities propose to use standard charges and formulae, they should include these in supplementary guidance along with information on how monies will be held, how they will be used and how they will be returned to the developer if applicable. 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.
32. 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 policies and supplementary guidance.

<sup>8</sup> Scottish Planning Policy (paragraph 20).

**DEVELOPMENT MANAGEMENT PROCESS**

33. The negotiation of planning agreements should not delay unduly or unnecessarily the development project or the development management process. All parties should proceed as quickly as possible towards the resolution of the heads of terms in an agreement. This should occur, where possible, during pre-application discussion, so that, should an appeal be lodged, the heads of terms are already a matter of record. Working practices should highlight deadlines and ensure good co-operation between parties. This will facilitate an early decision on the necessity for a planning agreement, in accordance with the tests set out previously and the particular circumstances of the proposal.
34. Having decided on the need for a planning agreement, negotiation on proposed heads of terms 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).
35. 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. By that point, it will normally already have been established whether, in principle, an agreement is required to resolve outstanding matters, and also the likely content of the agreement. To help minimise the time taken to issue the agreement post-decision, planning authorities should make clear the likely terms of the agreement at the date of the decision. Similarly, any report to a committee of the Council or the full Council should outline the principal components of the agreement being sought.
36. 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. Planning authorities should also consider draft agreements or heads of terms prepared by developers. Where appropriate, planning agreements should form part of any processing agreement made in respect of a planning application. Planning authorities are encouraged to confirm the agreement of relevant consultees to the heads of terms before entering final negotiation and concluding an agreement. Heads of terms, once agreed by both parties and by the relevant committee, should not generally be revised or renegotiated. To further speed up the process planning authorities should consider delegating powers to officials to conclude the agreement.



37. A developer has the opportunity to conclude the planning agreement at an early stage and before a decision is reached as to whether planning permission can be granted. To avoid any risk of being bound by its terms irrespective of the planning authority's decision, the agreement can include a clause that it would come into effect only if and when planning permission is granted. This can reduce delays in the process, by removing the need to negotiate and conclude the agreement only after the authority becomes minded to grant consent.
38. Planning agreements should contain only those matters that are justified when considered against the tests set out in paragraph 11 and agreements should be restricted to specific purposes. It is not appropriate to include other matters such as the conditions attached to the associated planning permission.

### **REGISTERING THE PLANNING AGREEMENT**

39. Where planning authorities wish the provisions of a planning agreement to be enforceable against successors in title the agreement must be recorded in the Register of Sasines or registered in the Land Register of Scotland.
40. While there may be some risk for planning authorities in issuing a planning permission prior to the registering of the agreement they may consider issuing permission immediately on receipt of acknowledgement by the Keeper of the Registers of Scotland (Sasines and Land Registers) that the agreement has been received. The provisions of the agreement run from the date on which the Keeper acknowledges receipt and, while there may be a small risk that an agreement might be returned because of a technical defect or that the land could be sold before the agreement is registered; there are situations where the timeous issue of planning permission can be crucial to the development proceeding. The planning authority would need to consider whether that risk is minimal and acceptable.

### **MONITORING OF PLANNING AGREEMENTS**

41. Planning authorities should have in place mechanisms and procedures for confirming that infrastructure and facilities to be provided under planning agreements are delivered. Planning authorities should designate a responsible officer for this role.
42. When infrastructure or facilities are 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 if required.

**VARIATION/MODIFICATION OF PLANNING AGREEMENTS**

43. Once concluded a planning agreement forms a legal contract between the planning authority and the developer, along with any other signatory (e.g. landowner, infrastructure provider, etc). As such it may be modified only by mutual agreement.

**RESOURCES AND FINANCIAL CONSIDERATIONS**

44. The guidance in this circular clarifies existing processes and as such is not expected to have additional expenditure or resources implications for local authorities.

**PREVIOUS CIRCULARS**

45. This circular replaces circular 12/1996 which is now revoked.

**FURTHER INFORMATION**

46. Further information is available from
- Directorate for the Built Environment  
Scottish Government  
Victoria Quay  
Edinburgh  
EH6 6QQ
- [planningmailbox@scotland.gsi.gov.uk](mailto:planningmailbox@scotland.gsi.gov.uk)

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