



Law Society
of Scotland

Planning obligations

Report by Law Society of Scotland

September 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Planning obligations

Our Planning Law Sub-committee undertook a public consultation and related work on the subject of planning obligations in terms of Section 75 of the Town and Country Planning (Scotland) Act 1997 (the Act).

Planning obligations are an important part of the planning system and are increasingly used by planning authorities to support infrastructure provision required as a direct consequence of the proposed development. This could include the provision of affordable housing, educational facilities, and transport infrastructure. We are aware of a range of examples of good practice in relation to planning obligations.

While the existing Scottish Government Circular¹ provides advice on the scope of planning obligations and the need for compliance with the five policy tests, it does not provide detailed guidance on many of the practical aspects of planning obligations which often are the subject of detailed negotiations between the parties after a minded to grant decision has been made. There are variations in practice in relation to planning obligations and it is considered that there may be merit in further detailed guidance to enhance consistency of practice, and to assist in reducing delays in the process.

The purpose of the consultation was to identify an evidence base to support good practice in relation to planning obligations. Based on the evidence received from the consultation and discussion events, this paper sets out our proposals (page 5), along with a detailed analysis of the consultation responses and discussion events (page 9).

Our findings have been reported to Scottish Government and these findings will contribute to Scottish Government's review of planning obligations².

¹ Planning Obligations and Good Neighbour Agreements Circular 3/2012.

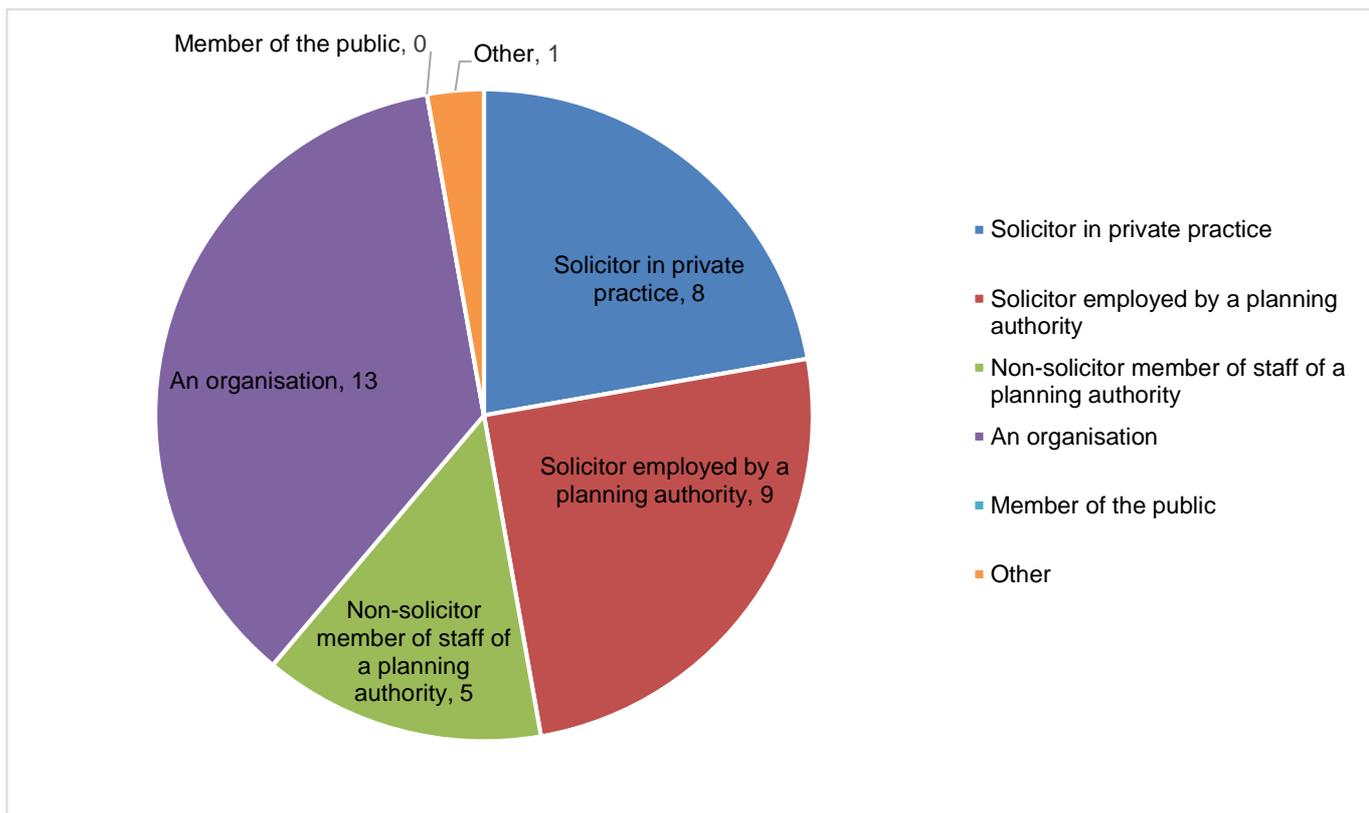
² <https://www.transformingplanning.scot/planning-reform/work-packages/>

Consultation

The public consultation was undertaken between 25 November 2019 and 3 February 2020. We are grateful to those who responded to the consultation.

The consultation was publicised on the Law Society of Scotland's website over the consultation period of 25 November 2019 until 3 February 2020. The consultation was promoted via direct email to solicitors who have informed the Society that they undertake planning work, the Society's Lawscot News email to members, by social media, Journal magazine, Scottish Planning & Environmental Law and by other stakeholders including Scottish Government and the RTPI. We are grateful to all those who supported the promotion of the consultation.

The consultation attracted 31 responses which can be broken down as follows:



Notes:

1. Four of the responses were joint responses by a solicitor employed by a planning authority and a non-solicitor member of staff of a planning authority.
2. Two of the responses were joint responses by a solicitor employed by a planning authority and an organisation.
3. In terms of the 13 responses received from organisations, one of those organisations was SOLAR (the Society of Local Authority Lawyers and Administrators in Scotland), three of those organisations were local government planning authorities, four of those organisations were solicitors' practices, four of those organisations were representatives of the business community and one organisation was a registered charity.

Discussion events

Following the written consultation, we invited a range of organisations and some consultation respondents to take part in a discussion event. As a result of the Covid-19 pandemic, we cancelled our planned event and held three smaller discussion events by video conference in late April and early May 2020. The discussion at these events focussed on four topics:

- Model agreements and in-house styles
- Continuing liability for former owners
- Enforceability of the obligation
- Recording/registration of the obligation

These topics were selected following the analysis of the consultation responses which demonstrated some lack of consensus in respect of these matters. We are grateful to all those who took part in these events.

Proposals

Following our analysis of the consultation responses and related discussion events, we are satisfied that there is a strong evidence base from stakeholders for the following proposals to be made in relation to the Scottish Government's review of Circular 3/2012. It is considered that if taken forward, these proposals would improve the efficiency and transparency of the planning process with regard to the completion and registration of planning obligations (Section 75 Agreements) facilitating earlier release of planning permissions.

Our proposals are as follows:

Model agreements and in-house styles

- Planning authorities should be encouraged to consult upon and publish a model planning obligation, recognising the need for this to be reviewed regularly and updated as appropriate. It is important that the need for flexibility of the model is recognised as bespoke arrangements may apply, while having regard to the model and reflecting the desired objective of efficiency. The model should be easily accessible on the planning authority's website. An explanatory note to accompany the model agreement may be needed.
- A Scotland-wide model planning obligation would be difficult to achieve at present due to varying practice and the specificity required in obligations in order to accommodate the circumstances of particular cases. However, it is suggested that standard clauses be developed on a range of matters (such as excluding liability for former owners, ultimate owners and statutory undertakers and registration of planning obligations), the use of which would be optional, but encouraged. Such standard clauses could be incorporated as an Appendix to the replacement Planning Obligations Circular. We would be willing to assist in the preparation of standard clauses.

Heads of terms and processing agreements

- Agreement of heads of terms for a planning obligation should always be encouraged before a minded-to-grant decision and preferably at as early a stage as possible in the process. While the key requirements for a planning obligation should be clearly set out in Handling Reports, there should be a degree of flexibility delegated to officers, particularly around the timings of payments, as otherwise any change may need to be reported back for a fresh decision .
- A processing agreement should be agreed for complex planning obligations, setting out a timescale for the planning obligation's completion and which should include any third parties such as landowners.

Parties to the agreement

- The Circular should be updated to reflect that the parties to a planning obligation (but not a unilateral obligation) must include, as a minimum, the planning authority and the owner of the land. There is nothing in the Town and Country Planning (Scotland) Act 1997 prohibiting other parties from entering a planning obligation (including the applicant/developer and/or a heritable creditor) although the obligations will only 'run with the land' and transmit to successors in title where they are entered into by

the owner of the land and the planning obligation is registered or recorded. There is no requirement for heritable creditors to be a party to the agreement (as consenters) but if granting a letter of consent, heritable creditors should be aware that, where they are in lawful possession of security subjects, they will be bound by the planning obligation.

Site area

- Under the Town and Country Planning (Scotland) Act 1997, a planning obligation has no particular dependency on a planning application, but in practice it is rarely the case that a planning obligation is entered into without an associated planning application. The Circular should be updated to reflect that a planning obligation need not apply to the whole 'red line' planning application site area. Frequently a planning site area contains land that is outwith the control or ownership of the owner (e.g. a public road). The Circular should be updated to encourage planning authorities to be flexible in their approach to the extent of the land to be captured under a planning obligation and should do so having regard to the risk that a reduction in the area of land to be captured poses to the enforceability of the planning obligation in any given circumstance.

Planning consents

- The Circular should be updated to clarify that a planning obligation through appropriate wording may apply to both the original application and future applications granted under section 42 of the Town and Country Planning (Scotland) Act 1997 or renewals of the original permission. Permissions are frequently subject to section 42 applications and renewals, and such a provision would greatly improve the speed with which these could be granted as a fresh planning obligation will not be required.
- The Circular should reflect that such an approach is to be encouraged where appropriate in the circumstances of the case and may be subject to certain parameters, for example, where there is no material change to the development itself or the policy requiring developer contributions.

Continuing liability for former owners (section 75C)

- The Circular should be updated to reflect that, while the approach to this matter requires to be based on risk to the planning authority, it will generally be appropriate to exclude liability under a planning obligation for former owners other than in relation to antecedent breaches.

Enforceability against successors in title

- The Circular should be updated to reflect that it will generally be appropriate to exclude liability under a planning obligation for *bona fide* purchasers of individual residential properties, with the exception of specific provisions relating to affordable housing where these will always apply. We consider it unreasonable for *bona fide* purchasers of individual residential properties to be liable for any planning obligation as this could adversely affect the property's value and marketability. Planning authorities may utilise staged payment arrangements throughout the progress of the development towards final completion to minimise potential risk.

Enforceability against statutory undertakers

- The Circular should be updated to reflect that it will generally be appropriate to exclude liability under a planning obligation for any statutory undertaker who proposes to place infrastructure on a development site, noting that most planning authorities already accept this. We consider that when acting in their capacity as statutory undertakers, they should not to be liable for any planning obligation.

Enforceability of planning obligations

- The Circular should be updated to reflect that a planning obligation does not require to set out the common law remedies that may be available to the planning authority in the event of a breach of terms of the contract. The remedies that would be available at common law will include damages, specific implement and interdict. A planning obligation may contain bespoke remedies, and these would need to be carefully considered.
- We consider it unreasonable for a planning obligation to provide that an appropriate remedy for a material breach of the obligation is for the planning authority to be entitled to revoke the permission without payment of compensation, other than in the limited circumstances referred to in the section below regarding 'Recording or registration of a planning obligation'. The Circular should be updated to reflect this position. Such a remedy should not be necessary and potentially places subsequent purchasers or occupiers (including homeowners) in a vulnerable position whereby they will not have the benefit of planning permission.

Recording or registration of a planning obligation

- The Circular recognises that a planning obligation will only bind successors in title if it is registered in the Land Register or recorded in the appropriate Division of the General Register of Sasines. When a planning obligation is received by the Keeper, it will be acknowledged. Both parties will have an interest as the acknowledgement will normally be the contractual trigger for the release of the planning permission.
- There is a risk that the Keeper may, sometime after acknowledgement but before registration, reject the planning obligation. While parties will ensure that this risk is minimised, a latent risk remains. The planning authority has no statutory mechanism to require the landowner to enter into an amended or new planning obligation. Managing this risk between the parties is an important contractual component of any transaction and can be dealt with by way of a provision in the planning obligation or in a separate letter.
- The Circular should be updated to reflect that where rejected by the Keeper, the planning obligation may need to be amended or a new obligation entered into. In circumstances where the owner of the land is unwilling to amend or enter into a new planning obligation, or has become insolvent (and thus is unable to amend or enter into a new planning obligation), it is considered reasonable for the planning authority in these limited circumstances to reserve the right to revoke the planning permission without payment of compensation in order to protect its position.

Responsibility for recording/registration of planning obligations

- The Circular should confirm that either party may take responsibility for sending a planning obligation for recording or registration. Parties should agree, at the outset of negotiations, who will take this responsibility.
- Where a landowner is presenting:
 - an appropriate contact email address for the planning authority should be provided on the application form, and
 - an undertaking should be given by the applicant not to withdraw the deed from the register ahead of full registration.

Unused contributions

- Planning obligations should provide for unused financial contributions paid to a planning authority to be returned to the payer if they are not used or expended within a particular period of time.
- The Circular should provide guidance on the appropriate period, recognising that this will depend on the particular circumstances relative to the planning obligation (such as what the contributions are to be used for) and also that it will be appropriate to consider the period relative to Local Development Plan review cycles and local planning policy.

Analysis of responses and discussion events

Section 1 – about you

All respondents provided details of either themselves and/or their organisation. One respondent did not wish their comments to be attributed. Two respondents were not willing to be contacted by the Law Society of Scotland in relation to any future discussions on planning obligations.

Section 2 – preliminary matters

Model agreements and in-house styles

Many planning authorities have model agreements or in-house styles for planning obligations. Where the terms of these are generally accepted, this can help to streamline the negotiation process. Sometimes these model agreements are publicly available.

4. Should all planning authority model agreements be publicly available and accessible online?

27 of the 31 respondents supported planning authority model agreements being publicly available and accessible online on the basis of increased efficiency, consistency and transparency. Some respondents did not favour a model agreement, referring to the need for agreements to be framed on a case by case basis, relevant to the particular circumstances of the case.

5. Should planning authorities consult with stakeholders on their model agreement and any changes? Please explain your reasons.

25 out of 31 respondents broadly agreed that planning authorities should consult with stakeholders on their model agreement and any changes. 5 respondents did not favour consultation. 1 respondent did not answer this question.

A number of those who favoured consultation took the view that such an exercise would be helpful in achieving a model agreement and thought it should be left to the planning authority to determine who should be consulted. Some of those in favour of consultation stated that there should be consultation with a move towards standardisation.

Those who did not favour consultation indicated that they did not consider a model agreement was appropriate or necessary. One respondent stated that consultation would likely result in a myriad of suggestions which would be difficult to accommodate.

6. What are your views on having a Scotland-wide model planning obligation and/or having standardised wording for an obligation?

The question of a Scotland-wide model obligation drew mixed responses. 21 respondents broadly favoured a Scotland-wide model planning obligation. Some of those who supported a model agreement in principle indicated that there may be practical difficulties in achieving consensus on this, one difficulty cited being the different approaches planning authorities take to the delivery of affordable housing.

One respondent, a solicitor in private practice who was in favour of a Scotland-wide model planning obligation, noted that such a standard model is used in England and Wales. It should be noted that the standard model dates from 2010. Another solicitor in private practice who also supported a Scotland-wide model and referred to the England and Wales model, noted that there was no indication that all was well in England and Wales in relation to planning obligations.

10 respondents did not agree with having a Scotland-wide model planning obligation. Of those respondents, 2 were solicitors in private practice or firm of solicitors. Some concern was raised around a Scotland-wide model or standard wording being unduly restrictive and noted that there is a need for planning authorities to be in a position to exercise some flexibility in their approach to such a Scotland-wide obligation.

Discussion events

As referred to above, the topic of model agreements and in-house styles was considered at the discussion events. It was generally agreed that where a planning authority had a style, this should be publicly available and consultation with stakeholders was appropriate, at least on major changes to the style. It was noted that some planning authorities already host their style agreement on their website but that in some cases, these would merit being more clearly accessible on the website. The need to keep styles up-to-date was recognised. Participants widely noted that while styles were generally helpful, these should not be too prescriptively applied as there remained a need for flexibility and room for negotiation.

Participants broadly agreed that a Scotland-wide model planning obligation would currently be difficult to achieve in practice. It was recognised that the publication of NPF4 may play a role in bringing greater consistency and collaboration in respect of planning matters generally, including in respect of planning obligations. While it was considered that there would be practical challenges to achieving a full Scotland-wide style planning obligation, participants broadly recognised that there would be merit in model or style clauses being available across Scotland, similar to the model conditions provided in 'Planning Circular 4/1998: the use of conditions in planning permissions'. Participants noted that some matters may lend themselves to style clauses more than others, for example, style clauses regarding liability for future owners and registration of planning obligations would likely be readily achievable, however clauses concerning contributions and affordable housing were more closely tied to the individual planning authority's local development plan and policies. It was broadly agreed that style clauses would help to bring greater efficiency to the negotiation of planning obligations while maintaining scope for flexibility and negotiation where appropriate. It was recognised that the status of any model clauses or a style agreement would need to be clear to all those using them.

Heads of terms and processing agreements

It may be advantageous for planning authorities and landowners to agree heads of terms for a planning obligation and a processing agreement to set out a timescale for completion of the planning obligation at an early stage and for these to be enshrined in the relevant officer's report. Although not binding, these can form a useful guide to streamline negotiations and assist in the completion of planning obligations.

7. What are your views in relation to agreement of heads of terms and processing agreements?

All respondents who answered this question (30 respondents) supported the agreement of heads of terms for a planning obligation and a processing agreement to set out a timescale for the planning obligation's completion.

Some planning authorities highlighted the need to agree heads of terms as soon as possible. A solicitor organisation respondent highlighted the usefulness of reference to the policy basis for contributions in the heads of terms in the interests of transparency. One planning authority respondent saw the need for processing agreements but noted that having detailed heads of terms should reduce the need for these as an additional area of documentation.

Some concern was expressed around the practicalities of enshrining heads of terms in the relevant officer's report. In particular, it was noted there may be consequential delay if a further officer's report is required where the heads of terms or the timeframe require to be amended.

Parties to the agreement

The Act does not preclude parties other than the landowner and the planning authority being a party to a planning obligation.

For example, it is common practice for a heritable creditor to enter the planning obligation as a consentor. Not to do so may breach a loan facility or standard security. A heritable creditor could be bound by the obligation as if it were a person deriving title from the landowner by calling up the standard security and entering into possession. Alternatively, a heritable creditor may issue a separate consent letter.

Occasionally, a developer who is not otherwise a party to a planning obligation or a tenant with a registered lease may also be a party to planning obligation as they have an interest in the land.

8. What is your view on a planning authority requiring a heritable creditor to be a party to a planning obligation?

There were mixed responses to this question.

19 respondents took the view that a heritable creditor should be involved in the agreement. Those supporting this took different views on whether this should be by way of the heritable creditor being party to the obligation

or simply providing a letter of consent to the obligation. Some issues were raised in relation to the requirement for a heritable creditor to be a party to the obligation as this would delay the process. One respondent noted that the issue of planning authorities insisting that the heritable creditor be party to the obligation had arisen in the past as Registers of Scotland at one time rejected planning obligation when this had not been done. It was noted that this was no longer an issue.

7 respondents who did not see the need for a heritable creditor to be a party to the obligation referred to the terms of section 75(11), which states:

(11) But where a heritable creditor is in lawful possession of security subjects which comprise the land, then “owner” includes the heritable creditor.

In terms of section 75(11), the heritable creditor becomes the owner of the land when in lawful possession of the security subjects and is therefore bound by the terms of the obligation.

9. Are there any other parties who you consider should be a party to a planning obligation? Please provide your reasons.

A number of views were expressed on this matter.

One respondent, a non-solicitor member of staff of a planning authority, stated that the landowner/developer relationship should be kept separate from the planning obligation as to involve both parties may prolong the process.

Another respondent, being a solicitor in private practice, stated that it is sometimes necessary, or at least helpful, to include the planning applicant as party to the obligation in circumstances where the applicant is different to the landowner. The reasoning for this was that the obligation can separate out obligations which the planning authority may be content to see rest with the applicant from those which ‘run with the land’. An example cited is the applicant’s obligation to pay planning fees. Having this set out in the agreement would dispense with the need for a ‘back to back’ contract between the applicant and the landowner.

Another point raised by this respondent was in relation to larger scale developments, where there may be the concept of a ‘lead developer’. The applicant may be taking on certain obligations to agree things with the planning authority at a later point - i.e. after issue of the consent. If the overall site is to be sold in parcels, the authority may prefer to know that it will be dealing with one housebuilder company or strategic land developer rather than multiple landowners, who have inherited obligations by virtue of acquiring title to part of the site.

Site Area

The relevant legislation and guidance are silent as to whether a planning obligation should apply to the whole ‘red line’ planning application site. A planning application site may be in multiple ownerships. There may be parcels of land or adopted roads over which a planning obligation need not extend as the land to be included

in the obligation carries adequate protection for the enforcement and delivery of the obligation. In some circumstances, the site area may extend beyond the area which needs to be covered by the planning obligation.

10. What are your views on a planning obligation applying to the whole 'red line' site?

15 respondents did not think that the planning obligation required to apply to the whole 'red line' site. The remaining respondents either said it depended on the circumstances (9 respondents) or favoured or gave qualified support for the obligation applying to the whole 'red line' site (7 respondents).

One respondent, a solicitor in private practice, stated that if obligations for payment of money are connected to the occupation of a certain number of houses, then the agreement only needs to apply to the land which is to be developed for housing. There is no need to bind adopted roads, landscape areas or land needed for utilities.

The majority of respondents who favoured the obligation applying to the whole 'red line' site, indicated that the approach to be taken depended on the circumstances of the case.

Some respondents highlighted that section 75 does not explicitly state that a planning application is required. It was felt by some that the question of the obligation extending over the 'red line' site area should be considered on a case by case basis, depending on the circumstances and in particular, the need for the planning obligation to capture a valuable piece of part of the development in order to enforce the obligation.

One respondent, a trade organisation, stated that a planning obligation should apply to the whole 'red line' site as that is the area that will benefit from the resultant planning permission.

Another respondent, a solicitor employed by a planning authority, took the view that obligations which apply to the whole application site or require to be secured over that site should apply to the 'red line' site. This is important in relation to where a planning obligation is required as part of an application that is for a large development and is on a phased basis. This respondent also acknowledged that there are certain circumstances where an obligation may only relate to a particular part of the site.

The point of enforceability of conditions being an issue where the agreement does not cover the whole 'red line' was made by a solicitor employed by a planning authority against the background of a large site with multiple owners. The obligation would be better enforced against the wider site than the specific owner.

One point raised in favour of applying the obligation to the whole 'red line' site was where the applicant moved the location of affordable housing following planning consent. This therefore dispensed with the need for a new obligation.

Section 3 – application of the obligation

Planning consent

The relevant legislation and guidance are silent as to whether a planning obligation should apply to a particular planning consent. Some planning authorities provide for a planning obligation to apply only to a particular planning application. If this approach is taken, and a revised application is submitted (including a section 42 application to vary conditions), a new planning obligation will be required. Other planning authorities include clauses in the planning obligation which seek to ensure that that obligation applies to the original application and to any variations under a section 42 application, subject to certain parameters, for example, no material change to the development or the policy requiring developer contributions.

11. What are your views about providing for section 42 applications to be included in a planning obligation, the result of which would mean that a new planning obligation would not be required?

18 respondents broadly supported providing for section 42 applications to be included in a planning obligation. A further 6 respondents noted that this should depend on the circumstances of the case.

Some responding as or on behalf of planning authorities noted that individual planning authorities considered this point on a case by case basis.

While identifying the need to have a specific link between a planning obligation and specific consent, a suggestion from a planning authority was a simple clause in the planning obligation stating that the obligation is applicable on the principal permission as well as any other permission. One planning authority stated that it has a model agreement to include an element of 'future proofing' by including reference in the obligation to any planning permission granted under section 42.

However, one respondent stated that, while the planning obligation should relate to the development and operation of the land and accordingly there is no need to link it to specific consents, there could be a complex site with multiple consents and different obligations. Therefore, developers need clarity on which consent and relevant obligation is being implemented with the resultant need to link the planning obligation to specific consents.

Continuing liability for former owners

The default position under section 75C of the Act is that, unless the contrary is set out in the planning obligation, former owners (once the ownership has been transferred) continue to be bound by the planning obligation until such time as it has been met in full. The Circular does not address the issue of when it is appropriate to state the contrary in the planning obligation. A planning obligation which has not excluded liability for former owners may cause difficulties for landowners when disposing of their interest as they will continue to be liable should the current owner default.

12. In your view, in what circumstances would it be appropriate to exclude continuing liability for former owners?

20 respondents considered it would be appropriate to exclude liability of former owners, at least in some circumstances. While some respondents took the view that it is appropriate to exclude liability of former owners in all circumstances, others qualified this to the extent of there being no liability where the former owner was not in breach of the planning obligation at the time they disposed of the land.

A number of respondents questioned whether section 75C was necessary. One respondent, a solicitor practice, provided the basis of this as being that a planning authority can enforce the provisions of the planning obligation with greater speed and force against the current owner and therefore section 75C may be unnecessary. Another respondent, a solicitor in private practice, took the view that section 75C should be repealed, citing that there was no equivalent provision in the planning acts of other UK jurisdictions.

The question of the opt-out of section 75C was considered by some respondents as being a matter of commercial risk and negotiation. One respondent noted that obligations in relation to, for example, minerals or energy obligations should not be 'contracted out of' in this manner and that continuing liability should apply in such circumstances.

13. In what way can the interests of the planning authority be sufficiently protected without continuing liability for a former owner?

There were a variety of responses to this question.

7 respondents specifically noted that taking action against the current owner provides sufficient protection.

One planning authority reiterated that this was again a question of risk and whether the risk should remain with the developer, the planning authority or the successor in title.

One respondent, a solicitor practice identified that the planning authority already has a variety of measures such as a payment action, specific implement or interdict available if the planning obligation is breached. This respondent also stated that they were unaware of any planning authority successfully pursuing a former landowner as a result of a breach by a current landowner.

One respondent, a planning authority solicitor, suggested that there could be a statutory obligation on the former owner to advise the planning authority of a change in ownership or control, failing which the former owner will remain liable.

Two respondents referred to the possible use of a bond or similar covenant from the developer.

Discussion events

The issue of continuing liability for former owners was discussed at the events. Participants agreed that in practice, most planning authorities are willing to exclude liability for former owners, usually with the exception of antecedent breaches. It was noted that where mineral consents are in place, this may mean that it is

reasonable for a planning authority to insist upon liability of a former owner remaining. Some participants noted that issues of contingent liability arise as a result of the application of section 75C and these are not properly dealt with by the provisions of section 75C. It was also noted that this can give rise to contractual difficulties between a former and incoming landowner.

A number of participants considered that a notification procedure (i.e. where the outgoing landowner is required to notify the planning authority of the transfer of ownership in order to end their continuing liability) was undesirable and did not sufficiently address the question of commercial liability. Indemnities were also considered not to be an ideal mechanism. It was recognised that these had limited value in some situations and there would be costs involved in putting any kind of security in place.

A number of participants highlighted that the approach to continuing liability was principally a matter of risk. Participants broadly agreed that staged payments were appropriate and would reduce the risk for planning authorities, perhaps making it acceptable to a planning authority to exclude liability of a former owner. It was noted that guidance in the Circular on methods to reduce risk, including staged payments, would be appropriate.

Enforceability against successors in title

This principally relates to residential developments where the dwelling houses or flats will be sold to individual purchasers and their successors (commonly referred to as 'ultimate owners').

Under the Act, a planning obligation runs with the land and is therefore enforceable against any landowner. In practice, this may expose an ultimate owner to liability under the agreement where the landowner has not complied with its obligations. This could adversely impact upon the ability of a house purchaser to secure lending. In negotiating planning obligations, parties can agree to expressly exclude liability of an ultimate owner. The Circular is currently silent on this matter.

14. What are your views as to excluding liability of an ultimate owner in a residential development?

26 respondents supported the exclusion of liability of an ultimate owner in at least some circumstances. Other respondents did not answer the question or raised points for consideration only rather than providing a direct answer.

Some respondents qualified their support of an exclusion, for example to individual owners only or in circumstances where no occupation or use restrictions applied. Some concerns were expressed by one solicitor employed by a planning authority that there may be difficulties if obligations such as the formation of roads had not yet been implemented. This respondent did state, however, that requests to exclude ultimate owners from liability were approved, if appropriate, in the context of the particular application. Some respondents raised the issues of affordable housing obligations and obligations pertaining to common areas (for example, woodland) meriting continued liability.

Other respondents highlighted that the decision to exclude was one of risk and not one of law meaning that practice can differ among planning authorities.

It was noted that some planning authorities have standard clauses which cover the position regarding exclusion of liability for bona fide third-party purchasers of individual housing units.

One respondent, a planning authority solicitor, outlined their practice, relating to for example an 80-unit development, of exclusion of liability of the first 19 units until payment on completion of the 20th unit and thereafter exclusion of liability of the next 20 units until the second payment was made etc.

The issue of lenders being unwilling to lend to purchasers where the ultimate owner may be bound was raised by some although other respondents mentioned that no evidence of this difficulty had been provided in practice.

Enforceability against statutory undertakers

Statutory undertakers (as defined in section 214 of the Act) may wish to own land in a development for their infrastructure. Statutory undertakers may not wish to acquire a site where that would expose them to liability under a planning obligation. In negotiating a planning obligation, parties may agree to expressly exclude liability of a statutory undertaker. The Circular is currently silent on this matter.

15. What are your views as to excluding liability of a statutory undertaker?

26 respondents generally agreed with the exclusion of liability for a statutory undertaker. Some responses were qualified, for example noting that there may be cases where the exemption should not apply where the statutory undertaker is benefiting from the planning consent.

3 respondents stated that the planning obligation does not in any event apply to statutory undertakers and it is only at the insistence of statutory undertakers' agents that planning authorities accept such unnecessary exclusion clauses. It was noted that a statutory undertaker may take title by statutory conveyance.

One planning authority solicitor stated that exclusion of statutory undertakers is reasonable but has to be considered in the context of the particular application site. This reflected other responses which stated that the question should be considered on a case by case basis.

A private practice solicitor identified the example of a grid connection infrastructure serving a wind farm development being a case where the exemption should not apply.

One response from a planning authority provided the following style used in their obligation

“The terms of this Agreement shall not be enforceable against utility providers which for example may be (but is not restricted to) providers of telecommunications, gas, water, electricity etc. to the Development but only to the extent that they are exercising their functions in providing such utilities to the Development.”

Another respondent, a solicitor in private practice, also identified instances such as water treatment works which would give rise to the necessary obligation. This respondent made reference of a section 69 agreement (developer contribution) being used instead of a section 75 obligation on the basis that a statutory undertaker would have the resources to deliver on this obligation.

Discussion events

While discussion at the events focused primarily on enforceability of the obligation in the event of a breach, enforceability against ultimate owners (i.e. purchasers of a residential property within a development) and statutory undertakers was also touched upon. There was general agreement among participants that *bona fide* home purchasers and statutory undertakers should be excluded from liability. It was recognised that most planning authorities are content to exclude liability, although this is generally at the request of the landowner or developer. Where this is not done at the outset, it is common practice to seek individual discharges or letters of comfort to cover the situation for individual purchasers. It was recognised that in some circumstances, for example in respect of affordable homes, some liability would still be required in order to adhere to affordable home conditions.

Some participants noted that there is no policy justification for a planning authority to take contributions from an ultimate owner or utility provider in a 'normal' commercial or residential development, as these parties are not the beneficiaries of the uplift in land value. It was considered inappropriate for significant contributions to rest on an individual purchaser. Practical difficulties in securing a utility provider to carry out work on site was noted if there is to be any liability for them under a planning obligation.

It was recognised that this matter also reflects a need for the balancing of risk for planning authorities and that staged payments would be a means by which risk exposure could be reduced.

Enforceability of planning obligations

Planning authorities sometimes seek to include provision in an agreement that in the event of a material breach of the obligation, the planning authority is entitled to revoke the planning permission to which the obligation relates without the payment of compensation. Such an approach may not be acceptable to funders nor ultimate owners. The impact of development may not be offset.

16. What are your views on such a provision?

21 respondents considered it was not appropriate for the planning authority to revoke planning consent.

It was recognised by many respondents that this was an inappropriate approach as there were contractual remedies available such as specific implement, interdict etc. One example of revocation being an inappropriate approach cited by a solicitors' practice was related to the provision of car parking spaces secured by separate consent from the main consent for flats. In that case, non-compliance with the planning obligation for the car park could have voided the consent for the block of flats, going beyond what is

necessary. One respondent noted that in a residential development scenario, this might involve individual house holders losing their planning permission.

8 respondents broadly agreed it could be appropriate for a planning authority to revoke planning consent, 6 of whom qualified the circumstances in which this was appropriate, for example, depending on the scale of the impact of the breach.

Some planning authorities did, however, advise that they would include this provision in the planning obligation, particularly given that the whole point of the obligation is to offset the impact of the consent and that, depending on the scale of the impact not being addressed in terms of breach, revocation of the planning consent may be appropriate.

One organisation supported the provision on the basis of some material breaches meaning that the mitigation required would not be delivered. Reference was made to a Special Protection Area (SPA) only receiving planning consent to a project after ensuring EU Habitats Directive compliance and having also ruled out all potential adverse effects. The 'no adverse effects' judgement will rely on delivery of mitigation in terms of the obligation and the respondent noted that it is therefore critical that there is provision for revocation in such circumstances where mitigation is not being delivered.

One respondent, a solicitor in private practice, highlighted the provisions of sections 65-67 of the 1997 Act which allows for the revocation of planning consent, although the planning authority would be liable to pay compensation.

17. Are there any alternative approaches that could be adopted?

Almost all respondents agreed that alternative approaches were available. Options referred to include: specific implement of contractual obligations; interdict or interim interdict; enforcement of planning conditions or obligations; action to remedy breach in line with section 75(7) and recover expenses.

One planning authority planner noted that a breach of a planning obligation is a contractual matter and that raising a court action for breach may not be successful whereas breach of planning consent on the basis of revocation would result in separate enforcement action.

Discussion events

The matter of enforceability of planning obligations was discussed. It was noted that the matter is complex – for example, what constitutes a 'material breach' and has the landowner/developer been given sufficient time to rectify the breach?

The extent to which such clauses were used in practice was queried. It was recognised that in some cases, planning authorities may simply rely on the threat of any such clause to reach a negotiated position. Some participants reported planning authorities providing for such clauses in their obligations, although in some cases, this only related to circumstances where an agreement was not successfully registered/recorded. This gave rise to a question as to whether only those who are parties to the agreement could experience loss of

planning permission. It was noted that the move to staged payments has generally reduced issues around these clauses.

Participants generally considered that revocation of planning permission was a 'nuclear' or 'sledgehammer' option and that common law or contractual remedies should be used as an alternative. It was noted that such clauses were an issue for funders.

It was noted that a planning obligation should be structured in such a way as to stop development where there has been a breach until it is remedied. This would reflect the underlying purpose of an obligation in that if the impact of development is not being mitigated (i.e. by compliance with the obligation) then the development should be halted until such time as the breach is remedied.

Section 4 - settlement, registration and post-implementation

Settlement procedures and reports on title

There are differences in practice in how planning authorities and developers approach the settlement of transactions involving planning obligations. There appear to be differences in the approaches of planning authorities in the title reports (legal and continued reports) and undertakings they require before planning permission is released. We consider that there would be merit in a standard approach.

18. What reports and other pre-settlement documentation do you consider is required before planning permission is released?

Respondents listed the following documentation:

- Legal and Continued Reports, including personal searches
- Search in the Register of Insolvencies
- Certificate of Title/report on title/relevant title documents
- Plans Report (if plan needed)
- Company Charges Search
- Particulars of signing for Deed and evidence of authorised signatories' power to sign, for example information from company file; Power of Attorney
- Fee undertaking/payment of Fees
- Consent from heritable creditors and any other relevant parties (if separate from planning obligation)
- Signed or certified copy of the planning obligation
- Keeper's acknowledgement of receipt of planning obligation for recording/registration
- Signed letter of undertaking by the landowner and solicitor to mitigate the potential rejection of an agreement by Registers of Scotland
- Opinion to deal with foreign opinion letters in relation to the capacity of foreign companies to enter into certain types of transaction

- Application for registration in the Books of Council and Session, and cheques for recording/registration dues
- Letters of non-crystallisation as appropriate

There are differences in practice in how planning authorities and developers approach the settlement of transactions involving planning obligations. There appear to be differences in the approaches of planning authorities in the title reports (legal and continued reports) and undertakings they require before planning permission is released.

One respondent, a solicitor in private practice, stated that a legal report and a continuation report would only be necessary where the site subject to the planning obligation is to be recorded in the General Register of Sasines. When registered in the Land Register, it is suggested that a copy of the title sheet would suffice. It was also noted in this response that the cost of obtaining a copy of the title sheet from ScotLIS (Scotland's Land Information Service) is considerably cheaper than the cost of a land report from Registers of Scotland. ScotLIS also provides information relating to any pending registration applications which enables local authorities to be certain that there are no applications pending registration which may adversely affect registration of the planning obligation.

19. Can you suggest any ways in which the settlement process can be streamlined while ensuring that the interests of the planning authority are protected?

Respondents provided a variety of suggestions to streamline the process.

In general, better preparation and presentation of documentation was identified. One response from a planning authority solicitor saw the need for earlier searches to flush out any issues. Some respondents referred to the use of Certificates of Title as opposed to review of titles by the planning authority. One respondent suggested the developer or landowner's solicitor undertake the registration process, rather than the planning authority.

Some respondents suggested that the procedure could be streamlined by signing in counterpart (the process whereby all parties to a document sign a separate physical copy and then exchange the resultant copies so that each ends up with a set of each of the copies signed by the other parties). One respondent noted that there can be delays in the physical signing of the deed by the planning authority and that some planning authorities make arrangements to receive the signed deed in person, have it signed immediately and taken for registration.

One organisation, however, noted that on the question of streamlining the process, that significant amounts of money can rest on the basis of the planning obligation and the same professional care should be taken as with any other commercial or property transaction. The settlement process should therefore not be seen as an unnecessary part of this process nor given any less importance.

Recording or registration of a planning obligation

It is common for the parties to a planning obligation to agree that planning permission will be granted at the point or shortly after the Keeper acknowledges receipt of the planning obligation and not when it is registered or recorded. This is to prevent what may be an uncertain and lengthy delay in issuing the permission. There is a possibility that the Keeper will subsequently reject a planning obligation, for example where there is an error in the deed, meaning it needs to be amended and re-presented for recording or registration. If this occurs, the planning authority may be vulnerable because planning permission has been issued and the landowner could refuse or be unable to complete a new planning obligation.

This matter may be covered by a separate undertaking or by provisions in a planning obligation whereby the landowner undertakes to complete any required remedial work in a set time frame and to ensure that a replacement obligation is recorded or registered.

We are aware of planning authorities seeking to reserve the right to revoke the associated planning permission without the payment of compensation where a planning obligation is rejected for recording or registration, particularly where there is a refusal to comply with a request to rectify the issue causing the rejection or where an insolvency event has occurred. A difficulty with this approach is that the planning obligation may be rejected sometime after a transaction has settled, and the price paid on the basis that permission has been granted. This approach could be unacceptable to a landowner, ultimate owner or funder but could leave the planning authority with no means to implement the planning obligation.

20. Do you have any views as to how to ensure planning authorities are protected in circumstances where a planning obligation is rejected for recording or registration and planning permission has been granted including if there is an insolvency event?

Views were expressed by two solicitors employed by planning authorities that the situation of a planning obligation being rejected once the Keeper had acknowledged receipt should be uncommon. One stated that this might be a theoretical issue rather than a real one.

One suggestion from a solicitor in private practice was that planning consent is subject to a planning condition that development cannot commence until a planning obligation is recorded or registered, although conceded that such a condition may be subject to challenge.

The prospect of revocation of planning consent was raised by 7 respondents. One noted that clauses in the planning obligation could provide for remedial action to be taken by the landowner within specific timescales and that revocation could take place in the event of failure to comply.

The concern of disposal of land in the period between issue of consent and registration of the obligation was raised by one respondent, a solicitor in private practice. This respondent noted that such a risk can be addressed by the landowner undertaking to ensure that any sale is subject to the purchaser entering into an undertaking to rectify registration issues. 6 respondents referred to the possibility of such an undertaking being provided. Where the intention is for land to be sold to a developer immediately after grant of planning permission, one respondent stated that it is not unusual for that developer to provide the undertaking prior to

release of the planning permission. In this respondent's experience, local authorities tend to consider that this approach provides them with sufficient comfort.

A number of respondents referred to providing for this in the obligation itself. One respondent, a solicitor in private practice, noted that revocation provisions are now contained in planning obligations and that planning authorities can include a clause preventing land from being transferred between conclusion of the obligation and registration/recording.

In the event of insolvency, one respondent noted that there may be continuing obligations to complete the registration process in the planning obligation anyway, which would need to be honoured by the insolvency practitioner appointed.

One respondent provided a style letter of undertaking with contractual effect which may be requested requiring the developer/landowner to cooperate with any remedial steps required / take reasonable steps to in order to facilitate registration and to make successors bound by the agreement if a transfer takes place.

Discussion events

Issues around recording or registration of a planning obligation were discussed. It was noted that the starting point for a planning authority is that without a planning obligation, the permission would not be granted, and therefore, some participants considered robust provisions are needed for the limited circumstances where there is a problem with registration to ensure that the planning authority can enforce the obligation. Others noted that the obligation should be subservient to the planning permission and so arguably the permission should not be jeopardised if there is a difficulty with the obligation.

Participants considered it appropriate to distinguish between circumstances where there has been an error in the deed and the landowner seeks to comply to rectify the issue (in which case revocation of the permission is unlikely to be reasonable), and a scenario where the landowner sees a rejection as an opportunity to frustrate the planning obligation (in which case an approach to revoke the permission may be considered reasonable).

It was recognised that clauses to revoke planning permission when an obligation is rejected for recording or registration were as much an incentive rather than an encumbrance and should encourage a landowner to work with a planning authority to resolve any issues with the obligation. The discussion also highlighted that the possibility of revocation of the permission is likely to be considered by the lender to be of such concern that they are likely to wish all possible steps to be taken so as to avoid revocation of the permission.

It was noted that in practice, letters of undertaking are often used to cover the period until the deed is recorded or registered, for example a landowner undertaking that there will not be any development until any issue is resolved and there will be no transfer of the land other than to a first house-builder. One suggestion made was the possibility of having a planning condition requiring a fresh planning obligation to be completed if the first cannot be recorded or registered. It was noted that such a condition may be subject to challenge. It was also noted that in some cases, the situation is covered by a provision in the planning obligation requiring the landowner to take whatever steps are required to rectify the issue. A concern with this approach was noted in

that a party may advance an argument that they are not bound by the terms of the obligation and therefore that the relevant condition does not apply.

Responsibility for recording/registration of planning obligations

A planning obligation must be registered in the Land Register or recorded in the General Register of Sasines in order to transmit its obligations to successors in title. There seems to be variable practice as to which party takes responsibility for registration or recording.

21. Do you have a view as to which party should be responsible for recording or registering the planning obligation?

14 respondents favoured the landowner taking responsibility for recording or registering the obligation. 3 respondents favoured the planning authority taking responsibility, all of which were planning authorities or solicitors for planning authorities. 12 respondents indicated that either party could take responsibility or that it should vary depending on circumstances.

One respondent, a solicitor in private practice, stated that it may be better for the applicant to present on the basis that the developer may be taking title simultaneously and could therefore present both title and obligation together. A planning authority respondent noted the issue of limited planning authority resources being a reason why the applicant should present and therefore ensure the quicker issue of the planning consent.

Some respondents expressed the view that the deed is for the benefit of the planning authority, and so the planning authority's solicitor should maintain control of this process. One concern expressed was that there would be no guarantee the planning authority would be notified if the Keeper rejected a deed which was presented by the applicant.

One organisation highlighted the varied approach at present with reference to the current registration process which ensures all parties whose email addresses are listed on the forms receive Keeper acknowledgements, copied into correspondence and are informed when the process is complete. Therefore, either party can present with no significant risk to the planning authority. If the applicant presented, this respondent stated that an appropriate undertaking should be given to the planning authority by the applicant not to withdraw the deed from the Register ahead of full registration.

Reference was made by one respondent, a solicitor in private practice, to planning authorities insisting upon a planning obligation to be submitted for registration by the landowner, despite the landowner's solicitor advising that it was agreed registration would be dealt with by the developer's solicitor.

Another private practice solicitor respondent highlighted the difference between unilateral obligations where it is their view that the applicant should register or record and bilateral or multilateral obligations where it is their view that the planning authority should register. This respondent noted that it may be contrary to the interest(s)

of any person other than a planning authority for such a party to record/register a bilateral or multilateral planning obligation and solicitors should not do something contrary to a client's interest(s).

A solicitors' practice noted that it is a matter for the individual planning authority, although their experience is that it is more common for developer/landowner to arrange registration as often this will take place as part of a wider property transaction. The matter can be regulated as between the planning authority and the developer/landowner through a letter of undertaking.

Unused contributions

It is common for planning obligations to provide for unused financial contributions paid to a planning authority to be returned to the payer if they are not used or expended within a particular period of time. That period can vary between planning authorities which may be due to the differing timescales for delivering the relevant infrastructure.

22. Do you have view as to whether unused contributions should be returned to the payer?

All respondents who answered this question (29 respondents) agreed that unused contributions should be returned to the payer, many stating that this should be done on the basis that the contributions cannot be spent for the intended purpose.

One organisation noted that the circumstances and time frame for repayment for contributions for different types of infrastructure may be a matter that is specifically addressed in a Planning Authority's Local Development Plan (LDP) or via Supplementary (Planning) Guidance and that if the Planning Authority has not set out such provisions in their LDP or Supplementary Guidance, then it should be agreed on a case-by-case basis when the planning obligation is being agreed.

One response from non-solicitor member of staff of a planning authority raised the contentious issue of where Council capital planning and financial strategy processes are configured to align with or support planning obligations agreed, forecast or accrued and that financial revenue consequences of new infrastructure provision are not accounted for in the setting of planning obligations. This led to a contention of strain on the public purse to provide these monies and/or services whether or not all forecasted planning obligation contributions have been received. This respondent also highlighted that Circular 3/2012 and associated practice should reflect on this and the inherent link between a new development (and in turn infrastructure provision) and local authority revenue budgets. This respondent also outlined that it is fair to return contributions where circumstances require this, particularly if mitigation put in place was lower in cost than previously thought. Where contributions are returned, appropriate and associated interested accrued should also be included per financial management practice.

23. If so, what should be the appropriate period that applies?

There were varying responses to this question. 15 respondents indicated that the appropriate time scale would depend on the circumstances relative to the obligation. A further 10 respondents cited periods of between 5 and 10 years, one of whom noted that this was in accordance with LDP review cycles. 2 respondents suggested periods of longer than 10 years. One of these respondents suggested a period of 15-20 years in respect of secondary education and some transport projects.

One response from a planning authority solicitor and non-solicitor member of staff noted that their planning authority's model obligations include a standard 7-year period for spending or committing to spend contributions (the 7-year period is taken from the date of final payment in the case of phased payments, and a commitment to spend is defined as being legally committed by way of a contract or other binding commitment). This response did state, however, that there may be cases where the 7-year period needs to be varied to account for the circumstances of individual developments.

A response from a solicitor in private practice noted having had experience of local authorities seeking provision for repayment after 30 years. The response further stated that if a contribution can sit unused for almost 30 years, it is considered that there is unlikely to be a sufficient relationship between the development and the contribution to justify its requirement. In some cases, however, it was noted that a planning authority may pay for infrastructure over such a period of time. Provided a planning authority can demonstrate it is contractually committed to spend the money received then this should be sufficient.

Section 5 – other comments

24. Do you have any further comments on planning obligations?

A wide variety of other comments were received. The emerging themes were:

- There is a lack of clarity around the ability of planning authorities to recover costs from the applicant, particularly so where the planning authority employs external planning solicitors. It was contended that these costs could be considerable, benefit the landowner, and were not part of the planning application fee. Guidance in relation to this would be welcome.
- Training and education are needed to ensure that each planning authority has an officer(s) equipped to deal with section 75 negotiations and the underlying market considerations.
- Uniformity of approach within planning authorities to planning obligations is required - differing views/expectations from certain departments and what the planning authority can legitimately secure can cause frustration.
- Each planning authority should have a clear policy on the level of planning obligations sought for their area.

- An improved Circular on planning obligations making it clear that 'roof tax' arrangements are competent provided they comply with the *Elsick* judgement³ would be welcome.
- Clarity is required on how the proposed infrastructure levy will sit alongside planning obligations.
- A standard form document for the issue of section 75A decisions would be welcome. The decision notices must be in a form that is capable of being registered and the standard form document should therefore be approved by the Keeper.
- Relevant Local Development Plan and Supplementary Guidance related to planning obligations should be subject to the detailed scrutiny of Reporters (as part of a development plan examination process or otherwise) so that there is a robust basis (including evidence base) for planning obligations.
- The situation following the recent Scottish Government direction (17 January 2020) that the City of Edinburgh Council should not adopt and issue their 'Developer Contributions and Infrastructure Delivery' Supplementary Guidance was noted as being unsatisfactory – in that case due to flaws in that guidance.
- Challenging LDP/Supplementary Guidance provisions through the process of applications to modify or discharge planning obligations.

Discussion events

There was little opportunity for discussion on additional matters at the events, but the following matters arose:

- Issues around delay in planning authority solicitors obtaining instructions from the relevant planning officer. It was noted that an allocated planning obligation officer can be helpful in bridging this gap.
- It was noted that having a *de facto* approach to taking a case requiring a planning obligation back to a Planning Committee after a fixed period of time where a planning obligation has not been agreed may lack flexibility. Some participants noted that detailed heads of terms agreed at officer level would help to reduce delays.
- It was noted that submitting a draft planning obligation along with the planning application may help to expedite the process, however, it was recognised that contribution rates are sometimes on a case-by-case basis and parties may be reluctant to invest resources in working on a planning obligation before an application has been approved.

³ *Aberdeen City and Shire Strategic Development Planning Authority (Appellant) v Elsick Development Company Limited (Respondent) (Scotland)* [2017] UKSC 66



For further information, please contact:

Alison McNab

Policy Team

Law Society of Scotland

DD: 0131 476 8109

alisonmcnab@lawscot.org.uk