

# **Planning Obligations and Good Neighbour Agreements**

## **Circular 3/2012**

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## 1. INTRODUCTION

1. Scottish Planning Policy underlines the important role of the planning system in supporting the Scottish Government's purpose of increasing sustainable economic growth. The Scottish Government is committed to an inclusive plan-led system and to planning applications being determined through a transparent process of decision making. The planning service should support the delivery of high quality sustainable places in support of the Government's purpose and aspire to high levels of performance and customer service. For development management this requires processes, procedures and an approach that delivers certainty and speed of decision making.
2. This Circular sets out the circumstances in which planning obligations and good neighbour agreements can be used and how they can be concluded efficiently. Planning authorities should promote obligations in strict compliance with the tests set out in this circular. In developing planning obligations, consideration should be given to the economic viability of proposals and alternative solutions should be considered alongside options of phasing or staging payments. Concluding planning obligations, or good neighbour agreements, should not delay the benefits of appropriately planned development that is generally in accordance with policy nor add significant costs for developers and infrastructure providers. The requirement for planning obligations should be identified as soon as possible and relevant parties brought together to ensure that the process flows as smoothly as possible.
3. Planning authorities should ensure that, where obligations under s75 of the Act are required, they are concluded as a matter of urgency. The revised planning performance framework will incorporate consideration of the whole process leading to issue of the decision. Lengthy delays in concluding obligations will have an adverse impact on the reputation and performance of the planning system.
4. This Circular details Scottish Government policy on the use of planning obligations, including unilateral obligations, and good neighbour agreements made under section 75 and section 75D respectively, of the Town and Country Planning (Scotland) Act 1997 as amended by the Planning etc. (Scotland) Act 2006.
5. The Circular also covers provisions set out in the following instruments:
  - The Town and Country Planning (Modification and Discharge of Planning Obligations) (Scotland) Regulations 2010 (SSI 2010 No.432)
  - The Town and Country Planning (Modification And Discharge of Good Neighbour Agreement) (Scotland) Regulations 2010 (SSI 2010 No.433)
  - The Planning etc. (Scotland) Act 2006 (Saving and Transitional Provisions) Order 2010 (SSI 2010 No. 431)

- The Planning etc. (Scotland) Act 2006 (Saving and transitional Provisions) Amendment Order 2011 (SSI 2011 No. 348)

## BACKGROUND

6. The Planning etc. (Scotland) Act 2006 (the 2006 Act) amended the provisions in the Town and Country Planning (Scotland) Act 1997 (the 1997 Act) covering planning obligations (previously known as planning agreements). References to 'the Act' are to the amended legislation.
7. Sections 75, 75A, 75B and 75C deal with planning obligations. Section 75 sets out the framework for planning obligations including:
  - The scope and purpose of a planning obligation
  - That a planning obligation may contain conditions and the extent to which it may require the payment of monies, or provision of infrastructure
  - That a planning obligation (to which the owner is a party) may be registered in the Land Register of Scotland or the General Register of Sasines, making a planning obligation enforceable against future owners or occupiers of the land
  - The provision of powers for planning authorities to enforce the terms of an obligation through direct action
8. Section 75A creates a formal process whereby a person against whom a planning obligation is enforceable may apply to the planning authority to have the obligation either modified or discharged. Section 75B establishes a right of appeal to the Scottish Ministers where the planning authority refuses the application or fails to determine it within two months. The period of two months starts from the date on which the application is taken to have been made<sup>1</sup>.
9. Section 75C addresses the liability of former and incoming owners for compliance with a planning obligation. In particular section 75C(1) sets out that, unless the agreement or unilateral obligation containing the planning obligation states otherwise, a previous owner may be held severally liable with the current owner for any work that should have been carried out or monies that should have been paid under the terms of an obligation. Section 75C does not apply to planning obligations created by agreements entered into before 1 February 2011<sup>2</sup>.
10. Sections 75D-75G relate to Good Neighbour Agreements (GNAs). The sections follow a similar approach to those relating to planning obligations, with section 75D setting out who can enter into a GNA. Sections 75E and 75F set out, respectively, the framework for applications to modify or discharge a GNA and for any subsequent appeal to the Scottish Ministers. Section 75G deals with continuing liability of former owners.

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<sup>1</sup> Regulation 4 of the Town and Country Planning (Modification and Discharge of Planning Obligations) (Scotland) Regulations 2010.

<sup>2</sup> The Planning etc. (Scotland) Act 2006 (Saving and Transitional Provisions) Order 2010

### **Previous Circulars and guidance**

11. This Circular replaces and revokes Circular 1/2010 and the Annex to Circular 1/2010. It also translates into policy the advice contained in the Chief Planner's letter of November 4, 2011 regarding occupancy restrictions.

## 2. PLANNING OBLIGATIONS

### SCOPE AND LIMITATIONS

12. 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 obligations 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. In this way development can be permitted or enhanced and potentially negative impacts on land use, the environment and infrastructure can be reduced, eliminated or compensated for. Planning obligations should be agreed between the parties involved; developers should not be required to enter into a planning obligation. Where known in advance, the need for a planning obligation can usefully be set out in the development plan or as part of pre-application discussions.
13. It is not possible to indicate all circumstances in which planning obligations are appropriate. Planning authorities should take decisions based on the relevant development plan, the proposed development, and the tests set out in this circular. Where a planning obligation is considered essential, it must have a relevant planning purpose and must always be related and proportionate in scale and kind to the development in question. These principles are central to the guidance that follows.

### POLICY TESTS

14. Planning obligations made under section 75 of the Town and Country Planning (Scotland) Act 1997 (as amended) should only be sought where they meet all of the following tests:
  - **necessary to make the proposed development acceptable in planning terms (paragraph 15)**
  - **serve a planning purpose (paragraph 16) and, where it is possible to identify infrastructure provision requirements in advance, should relate 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 17-19)**
  - **fairly and reasonably relate in scale and kind to the proposed development (paragraphs 20-23)**
  - **be reasonable in all other respects (paragraphs 24-25)**

## Necessity test

15. Planning obligations or other legal agreements should not be used to require payments to resolve issues that could equally be resolved in another way. Where a planning permission cannot be granted without some restriction or regulation, and before deciding to seek a planning obligation, the planning authority should consider the following options in sequence:

**i) The use of a planning condition:** Planning conditions are generally preferable to a planning or legal obligation, not least as they are likely to save time and money for all concerned. The guidance contained in Circular 4/98: The Use of Conditions in Planning Permissions should be followed.

**ii) The use of an alternative legal agreement:** for example, an agreement made under a different statute, such as the Local Government (Scotland) Act 1973, the Countryside (Scotland) Act 1967, the Sewerage (Scotland) Act 1968, the Roads (Scotland) Act 1984 etc. A planning obligation is not necessary where the obligations for a landowner or developer may be implemented, for example, by a one-off payment towards the cost of infrastructure provision or the maintenance of open space.

There should be a presumption that this option be used where contributions are being sought for community benefits which, while desirable, do not directly serve a planning purpose. Such benefits might include, for example, provision of infrastructure which is desirable but not essential.

While it would be for a planning authority to satisfy itself that a legal agreement was required, a legal agreement made under other legislative powers would not necessarily be required to meet all the policy tests required of planning obligations.

**iii) The use of a planning obligation:** Planning authorities should be clear that a planning obligation is only necessary where successors in title need to be bound by the required obligation, for example where phased contributions to infrastructure are required.

## Planning purpose test

16. Planning authorities should satisfy themselves that an obligation is related to the use and development of land. This judgement should be rooted primarily in the development plan<sup>3 4</sup>. This should enable potential developers to be aware when undertaking development appraisals and in designing their proposals of the:

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<sup>3</sup> Scottish Planning Policy. <http://www.scotland.gov.uk/Publications/2008/10/28115149/2>

<sup>4</sup> Planning Circular 1/2009: Development Planning. <http://www.scotland.gov.uk/Publications/2009/02/13153723/9>

- likelihood of a planning obligation being sought, and,
- likely financial requirements of that planning obligation.

### **Relationship to proposed development test**

17. Planning obligations must relate to the development being proposed. Where a proposed development would either; create a direct need for particular facilities, place additional requirements on infrastructure (cumulative impact) or have a damaging impact on the environment or local amenity that cannot be resolved satisfactorily through the use of planning conditions or another form of legal agreement, a planning obligation could be used provided it would clearly overcome or mitigate those identified barriers to the grant of planning permission. There should be a clear link between the development and any mitigation offered as part of the developer's contribution. In addition, when determining whether a planning obligation is required, planning authorities should take account of the existence of any other agreements or conditions relating to infrastructure provision that already apply to the development.
18. Planning obligations should not be used to extract advantages, benefits or payments from landowners or developers which are not directly related to the proposed development. The obligation should demonstrate that this test is met by specifying clearly the purpose for which any contribution is required, including the infrastructure to be provided.
19. In reaching decisions on applications for planning permission, planning authorities should attach no weight to offers made to undertake works, donate monies, or provide other incentives if these do not meet the tests contained in this circular for inclusion within an obligation. Planning authorities should also not be influenced by the absence of such offers. Authorities should bear in mind that obligations may be subsequently challenged either through an application to modify or discharge the obligation, on appeal against refusal to modify or discharge, or indeed in the Courts.

### **Scale and kind test**

20. Planning obligations must be related in scale and kind to the proposed development. Developers may, for example, reasonably be expected to pay for, or otherwise contribute towards the provision of, infrastructure which would not have been necessary but for the development. In assessing such contributions planning authorities may take into account the cumulative impact of a number of proposed developments, and use obligations to share costs proportionately. An 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 towards the costs of infrastructure or to obtain extraneous benefits are unacceptable.



21. Planning obligations 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 seek to address this through a planning obligation. It is inappropriate to grant planning permission for a development which would demonstrably exacerbate a situation which was clearly already unsatisfactory.
22. Entering into an obligation can have financial consequences for developers and may make proposals uneconomic. Cash flow will also be affected where substantial sums of money have to be paid either before the development gets under way or at an early stage in construction. Staged or phased payments could help the overall viability and success of a project.
23. This is particularly relevant where infrastructure requires to be put in place before the development is completed, but the cost of doing so would make the development unviable. Planning authorities should give consideration to the possibility of infrastructure being funded, and development thus enabled, through other mechanisms, with costs being recovered through staged payments as development progresses.

### **Reasonableness test**

24. Planning obligations should be reasonable in the circumstances of the particular case. The following questions should be considered:
  - is an obligation, as opposed to conditions, necessary to enable a development to go ahead? (this question should have regard to the necessity test set out in paragraph 15 above)
  - in the case of financial payments, will these contribute to the cost of providing necessary facilities required as a consequence of or in connection with the development in the near future?
  - is the requirement in the obligation so directly related to the regulation of the proposed development that it should not be permitted without it?
  - will the obligation mitigate the loss of, or the impact upon, any amenity or resource present on the site prior to the development?
25. Where the answer to any of the questions would be no, a planning obligation is generally not appropriate.

### **PROCESS**

26. The speed, efficiency and transparency of preparing and agreeing planning obligations are essential elements in delivering a high quality

planning service. Early engagement between parties and the use of pre-application discussions is strongly encouraged as is the use of processing agreements or other project management tools. Planning authorities need to consider:

- identifying infrastructure requirements in strategic and local development plans and the potential implications for the use of planning obligations
- more specific identification of expected contributions in Supplementary Guidance
- the effective management of developing, negotiating and concluding planning obligations
- clear presumption that planning obligations should only be used where they meet the policy tests set out in the Circular
- early and appropriate identification of Heads of Terms which can then be worked into the detail of any obligations
- drafting template or model obligations where similar circumstances are likely to be repeated
- swifter issuing of planning permission following finalisation of planning obligations
- monitoring to ensure that obligations are met

### **Public awareness of planning obligations**

27. The Development Management Regulations<sup>5</sup> require a summary of the terms of any section 75 planning obligation to be recorded in the Register of Applications maintained by the planning authority.

### **Effective management of planning obligations**

28. Where a planning obligation is being sought, the process of concluding the obligation is integral to the decision-making process on the grant of planning permission and should be given high priority by all parties. There should be effective cross - service management within the local authority to minimise delay and additional costs to all parties involved. Planning authorities are encouraged to use pre-application discussions with relevant agency involvement, processing agreements, other project management approaches or codes of practice in negotiating planning obligations, so as to make clear the level of service a developer can expect and the issues to be agreed at each milestone. This should help to increase transparency and the efficiency of the planning obligations process. Lengthy delays in concluding obligations are not acceptable given the adverse impact this has on delivery of sustainable economic growth and the reputation of the system.

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<sup>5</sup> The Town and Country planning (Development Management Procedure) (Scotland) Regulations 2008

29. Planning authorities are encouraged to identify consistent points of expertise and contact within the local authority responsible for liaison and negotiations with developers. It is important that such contacts have an effective understanding both of the requirements for planning obligations set out in the development plan and of development economics to ensure that requirements are based on an informed understanding of what a development project can reasonably be expected to bear both as a total cost and in the scheduling of payments for all obligations.

### **The Plan led approach**

30. The development plan should be the point at which consideration of the potential need for and use of, planning obligations begins. The adoption of formal policies on the use of planning obligations is strongly encouraged. These create an opportunity to involve the local community and development industry in the process of development plan policy development, including supplementary guidance, and to clarify early the expected costs of any contributions that might be sought from developers.
31. Development plans cannot, however, anticipate every situation where the need for a planning obligation will arise. Where the potential need for an obligation emerges during the development management process, planning authorities should assess the case against the guidance in this circular and inform the applicant as soon as practicable.

### **Policies and Supplementary Guidance**

32. In drafting development plans, 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 to be delivered under planning obligations 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 SDP or LDP, where they will have been subject to scrutiny at examination. Methods and exact levels of contributions should be included in statutory supplementary guidance.
33. Where standard charges and formulae are applied to individual developments, they should reflect the actual impacts of, and be proportionate to, the development and should comply with the general tests set out in this circular. Any obligation should be acceptable to all parties involved. 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 for specific sites or general locations prior to submitting a planning application.
34. Supplementary guidance should not be applied to the consideration of development proposals until it has been agreed formally by the

authority. Planning authorities drafting supplementary planning guidance (including masterplans, development briefs, action plans, etc), should highlight constraints and describe their planning, design and environmental aspirations. Statutory supplementary guidance must be derived from the strategic or local development plan and be the subject of consultation.<sup>6</sup>

35. Where planning authorities propose to rely on standard charges and formulae, they should include these in supplementary guidance along with information on how standard charges have been calculated, how monies will be held, how they will be used and, if applicable, how they will be returned to the developer.
36. Where a planning application is not granted because of a failure to conclude a planning obligation any appeal should consider, amongst all other relevant matters, whether or not the planning authority has highlighted potential development constraints in the development plan or relevant development briefs.

### **Planning obligations and development management**

37. The negotiation of planning obligations 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 obligation. This should occur, where possible, during pre-application discussions, so that, should an appeal be lodged, the Heads of Terms are already a matter of record. Section 35B (3) of the 1997 Act<sup>7</sup> requires a twelve week period for pre-application consultation for developments which are considered as National<sup>8</sup> or Major<sup>9</sup>. This, in the case of Major applications, offers an opportunity for agreement of appropriate Heads of Terms for any necessary planning obligation and for milestones to be incorporated in any processing agreement. The aim should be to proceed in accordance with previously agreed deadlines and working practices. This should facilitate an early decision on the necessity for a planning obligation, in accordance with the policy tests set out in paragraphs 15 -25 and the particular circumstances of the proposal.
38. 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 obligation. By that point, it will normally already have been established whether, in principle, they would be prepared to enter into such an obligation to resolve outstanding matters, and also

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<sup>6</sup> Planning Circular 1/2009; Development Planning:

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

<sup>7</sup> Section 35B of the Town and Country Planning (Scotland) Act 1997 as inserted by section 11 of the Planning Etc (Scotland) Act 2006.

<sup>8</sup> National developments are development or classes of development designated as such in the National Planning Framework under section 3A(4)b) of the Town and Country Planning (Scotland) Act 1997 as inserted by section 1 of the Planning Etc (Scotland) Act 2006

<sup>9</sup> Major developments are developments as defined in the Town and Country Planning (Hierarchy of Developments) (Scotland) Regulations 2009.

the likely content of the obligation. To help minimise the time taken to issue the legal agreement concerned post-decision, planning authorities that are minded to grant planning permission subject to a planning obligation should make clear the likely terms of the obligation at the date of the decision. Similarly, any report to the Council or a Committee of the Council should outline the principal components of the obligation being sought.

39. The Heads of Terms, should contain as much financial detail as possible and should make reference to policies and other material (such as standard charges and formulae) contained in the development plan. To speed up the process, planning authorities should use model obligations, clauses, or templates. Developers may wish to consider whether a unilateral obligation might be appropriate. Planning authorities should also consider draft obligations or Heads of Terms prepared by developers, rather than undertaking this work themselves. Where appropriate, planning obligations should form part of any processing agreement made in respect of a planning application. Planning authorities should confirm the agreement of relevant consultees to the Heads of Terms before entering final negotiation and concluding an obligation. To further speed up the process, planning authorities should empower officials to complete the drafting of the obligation.
40. The developer has the opportunity to conclude a planning obligation 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 obligation can include a clause that it would come into effect only when planning permission for the development in question is granted. This can reduce delays in the process, by removing the need to negotiate and conclude the obligation only after the authority becomes minded to grant consent.

### **Concluding planning obligations**

41. Planning obligations should contain only those matters that are justified when considered against the tests at paragraphs 15-25 and should be restricted to specific purposes. It is not appropriate to include other matters such as conditions attached to an associated planning permission.

### **Registering the planning obligation**

42. Where planning authorities wish the provisions of a planning obligation to be enforceable against successors in title the obligation must be registered in the Land Register of Scotland (where the property to which it relates is registered in that register) or alternatively it must be recorded in the General Register of Sasines, as appropriate.
43. Concern has been expressed about the delay, which can be several weeks, between finalising an obligation and the issue of planning

permission. This will include the period where the obligation is undergoing registration or recording. The provisions of the obligation run from the date on which the obligation is registered or recorded. This means that there may be risks for planning authorities in issuing planning permission prior to such registration or recording. On receipt of an application for registration or recording, the Keeper of the Registers of Scotland will issue an acknowledgement of the date of receipt. Particular processes apply to each register but, in general, the registration or recording process will be completed when the Keeper has considered the application in full. However, the date of registration/recording remains the date set out in the Keeper's acknowledgment, even where the Keeper's final decision to register or record is taken at a later date. The planning authority may therefore consider issuing permission immediately on receipt of the Keeper's initial acknowledgement. There may be a small risk that an obligation might be returned, withdrawn or registration refused because of a technical defect, or that the land could be sold before the obligation is registered or recorded. However, there are situations where the timeous issue of planning permission can be crucial to the development proceeding. The planning authority would need to establish that the risk was minimal and acceptable.

### **Monitoring of planning obligations**

44. Planning authorities should have mechanisms and procedures in place for confirming that infrastructure and facilities to be provided under planning obligations are delivered. Planning authorities should designate a responsible officer for this purpose.
45. When infrastructure or facilities are to be put into place as a result of planning obligations account should be taken of that provision in the course of revising development plans and local policies. Standard charges and formulae should similarly be reviewed.

### **Unilateral obligations**

46. The revised section 75 includes provision that a person may unilaterally propose and draft a planning obligation in respect of land which they own or control. The existence of a unilateral obligation would not preclude the planning authority seeking an obligation where there were matters which the planning authority considered should be the subject of a planning obligation and such matters were not sufficiently addressed by any other obligation (including any unilateral obligation) in place. A planning authority should not, however, seek a planning obligation that would simply duplicate the terms of a unilateral obligation. While there is no statutory requirement for a person preparing a unilateral obligation to do so, early engagement and discussion with the relevant planning authority is strongly encouraged.
47. As with any other planning obligation, the relevant instrument (to which the owner of the land is party) containing a unilateral obligation may be

registered in the Land Register of Scotland or recorded in the General Register of Sasines as appropriate.

48. Such registration may be undertaken by the owner of the land. Once registered the obligation is, unless it specifically provides otherwise, enforceable by the planning authority against future owners of the land. In so far as an obligation may contain negative obligations it is also enforceable, as with other planning obligations, against the tenant or occupier of the land.

### **Obligations imposing restrictions on the use of land or buildings**

49. While the most common use of planning obligations is to ensure the provision of infrastructure to make a development acceptable in planning terms, there is a limited role for obligations in restricting the use of land or buildings.
50. Such restrictions have historically been used particularly in respect of housing in rural areas. Imposing restrictions on use are rarely appropriate and so should generally be avoided. They can be intrusive, resource-intensive, difficult to monitor and enforce and can introduce unnecessary burdens or constraints. In determining an application, it may be appropriate for the planning authority to consider the need for the development in that location, especially where there is the potential for adverse impacts. In these circumstances, it is reasonable for decision-makers to weigh the justification against the potential impacts, for example on road safety, landscape quality or natural heritage, and in such circumstances it may be appropriate for applicants to be asked to make a land management or other business case.
51. Where the authority is satisfied that an adequate case has been made, it should not be necessary to use a planning obligation as a formal mechanism to restrict occupancy or use.

### **Enforcement of operations required by a planning obligation**

52. Section 75(7) of the 1997 Act (as amended) provides a power for planning authorities, where operations required to be carried out by a planning obligation have not been undertaken, to enter the land and carry out the operations themselves. Any expenses incurred in doing so may be recovered from the person or persons against whom the planning obligation is enforceable. Before taking any direct action the planning authority must give the person or persons a minimum of 21 days notice of their intentions.
53. A person against whom an obligation is enforceable is generally the owner of the land but may also be, depending on the obligation, a tenant or any other person who has use of the land.

### **3. GOOD NEIGHBOUR AGREEMENTS (GNAs)**

#### **General principles**

54. The provisions in the primary legislation and regulations in respect of GNAs broadly follow a similar approach to those set out for planning obligations, although there are a number of significant differences.

#### **Parties to a GNA**

55. A GNA is entered into between a person, for example a landowner or developer, and a community body (as opposed to a planning authority). A community body is defined (section 75D of the 1997 Act as amended) as being either:
- the community council for the area in which the land in question (or any part of that land) is situated; or,
  - a body or trust whose members or trustees have a substantial connection to the land in question and whose object or function is to preserve or enhance the amenity of the local area where the land is situated.
56. In the case of a body or trust, other than a community council, the body must be recognised (and notified) by the planning authority as meeting the criteria set out in the second bullet point above.
57. There is no provision in the legislation for any person to propose or enter into a unilateral GNA.

#### **Scope of a GNA**

58. Section 75D (1) sets out that a GNA may govern 'operations or activities relating to the development or use of land, either permanently or during such period as may be specified in the agreement'. A GNA may make provision, for example, that information is provided to the community body regarding the nature and progress of development on a site. It should be stressed, however, that a GNA may not require any payment of monies.
59. As with a planning obligation, a GNA (to which an owner of the land is a party) may be registered in the Land Register of Scotland or the General Register of Sasines, making it enforceable against future owners or occupiers of the land.
60. A GNA should not be viewed as an alternative to a planning obligation. A planning authority should not seek to make it a requirement for the grant of planning permission that a GNA be put in place.



#### **4. MODIFICATION OR DISCHARGE OF A PLANNING OBLIGATION OR GOOD NEIGHBOUR AGREEMENT**

61. The processes for submission of an application for modification or discharge of a planning obligation or a GNA, and subsequent determination of the application by the planning authority, are for the most part similar, although there are some minor differences as detailed below.

##### **Modification or discharge of a planning obligation**

62. Section 75A(1) sets out that, where a person against whom a planning obligation is enforceable wishes to modify or discharge the obligation, they have to apply (under section 75A(2)) to the planning authority seeking their agreement for the modification or discharge.

##### **Submitting an application for modification or discharge**

63. The Town and Country Planning (Modification and Discharge of Planning Obligations) (Scotland) Regulations 2010 set out (regulation 3) the items and information an applicant is to submit to the planning authority. Regulation 4 stipulates that the application is deemed to have been made on the date on which the last of these items or information is received (the validation date).
64. Planning authorities have discretion (regulation 6) to require an applicant to supply any further information, documents or material they consider necessary to enable them to deal with the application. Where a planning authority seeks further information this does not affect the validation date; i.e. the validation date remains the date on which the last item or information required under Regulation 3 is received.

##### **Notification of application to interested parties**

65. Under Regulation 3, the applicant must provide to the planning authority a statement setting out, to the extent known to the applicant, the names and addresses of any other parties to the planning obligation and of any other interested parties. An interested party is defined as (other than the applicant); the owner of the land and/or any other person against whom the planning obligation is enforceable.
66. On receipt of an application, it is then the responsibility of the planning authority to notify these interested parties of the name of the applicant (regulation 5). The notification must, in addition to providing details of the application and the modification sought, state how representations can be made to the planning authority and the date by which they must be made. This is a minimum of 21 days from the date notification is served.
67. The planning authority is only required to serve notice to interested parties at the addresses identified by the applicant, and is not required to make any further investigations where parties cannot be contacted using this information.

## **Application for the modification or discharge of a good neighbour agreement**

68. As with applications for modification or discharge of planning obligations, the planning authority may determine (depending on whether the applicant seeks a modification or discharge of the GNA) that the GNA be discharged, that it continue in force with no modification, or that it be modified as per the amendment sought in the application.
69. An application to a planning authority for modification or discharge of a GNA may be made by either party to the GNA. Section 75E(2) provides that this should only be done where the parties are unable to reach agreement on the modification or discharge of the GNA. The Town and Country Planning (Modification and Discharge of Good Neighbour Agreement) (Scotland) Regulations 2010 therefore require that any application is accompanied by evidence that attempts have been made to negotiate the amendment of the GNA. Failure to supply this evidence will mean that the application cannot be validated.

## **Determination of an application for modification or discharge**

70. The planning authority is to issue notice of their decision in respect of the application within two months of the date of validation.
71. In determining an application for discharge of a planning obligation or GNA, the planning authority may determine either that the obligation or GNA be discharged or that it is to continue to have effect without modification.
72. In determining an application for modification, the planning authority may determine that the obligation be modified as per the proposed modification or should continue in its current form. The legislation does not permit the planning authority to determine that the obligation should be subject to any modification other than the modification, or modifications, set out in the application.
73. The provision of a formal process by which a planning obligation can be modified or discharged does not alter the criteria set out elsewhere for determining whether or not an obligation is required. Any application for modification or discharge should be considered against the policy tests set out in paragraphs 15-25.
74. This is not to say that there should be a presumption against any application. The planning authority should take into account any changes in circumstances; for example, it may be that external factors affecting the development mean that the obligation is no longer reasonable and that a modification to reflect the change in circumstances is appropriate. It is therefore important that the applicant clearly sets out their grounds for seeking a modification and the exact terms of the modification sought.
75. Where a planning obligation or GNA has been registered in the Land Register of Scotland, or recorded in the General Register of Sasines, any determination to modify or discharge the obligation or GNA does

not take effect until the determination is also registered or recorded in the appropriate register. It is a matter for the applicant to ensure that this is done in order that the determination can take effect.

## **RIGHT OF APPEAL TO SCOTTISH MINISTERS**

76. For both planning obligations and GNAs, where an application to modify or discharge is refused, there is a right of appeal to the Scottish Ministers in certain circumstances. In respect of planning obligations the person who applied for the obligation to be modified or discharged may appeal if the planning authority decides that the obligation should not be modified or if the planning authority fails to give notice of its decision within the 2 month period allowed. The appeal must be made to the Scottish Ministers within 3 months beginning either with the date of the planning authority's decision or the end of the 2 month period. Where the appeal is on the grounds that the planning authority has failed to give notice of its decision it is assumed that the authority has determined that the planning obligation is to continue to have effect without modification.
77. For good neighbour agreements either the community body or the person against whom the GNA is enforceable may appeal the planning authority decision (or failure to reach a decision) to the Scottish Ministers. It should be noted that the person or body who appeals need not be the person or body who originally sought the modification or discharge of the GNA. An appeal may therefore be made against a planning authority decision to allow an application to modify or discharge a GNA. The appeal must be made to the Scottish Ministers within 3 months beginning either with the date of the planning authority's decision or the end of the 2 month period.
78. The Town and Country Planning (Appeals) (Scotland) Regulations 2008 apply (with modifications) to all appeals made in respect of either planning obligations or GNAs. Detailed guidance on appeals procedures, including how to appeal and what information is to be submitted by the appellant and the planning authority, is contained in Planning Circular 6/2009: Planning Appeals.
79. On appeal, the Scottish Ministers have powers, depending on whether the appellant is seeking discharge or modification of the planning obligation or good neighbour agreement, to;
  - Discharge the obligation
  - To determine that the obligation should be modified in accordance with the changes sought in the application
  - To determine that the obligation should continue to have effect without modification (i.e. to refuse the appeal)
80. Most appeals will in practice be delegated to Reporters for determination. Appeals will normally be determined through written

submissions. In some cases disputes about the relevant facts may necessitate the hearing of evidence. In such circumstances, the Reporter may make arrangements for an inquiry or hearing session to take place and the Reporter may decide that witnesses should be placed under oath.

81. Once the Scottish Ministers, or a Reporter exercising delegated powers, have decided an appeal, they cannot reconsider or correct it. A further appeal can be made to the Court of Session, under section 239 of the Act, within 6 weeks of the date of decision, on the ground that the action is not within the powers of the Act or that any “relevant requirement” as defined in section 239 has not been complied with.

## **REGISTRATION REQUIREMENTS FOR THE LAND REGISTER OF SCOTLAND AND THE GENERAL REGISTER OF SASINES**

82. Standard registration criteria for the Land Register of Scotland and the General Register of Sasines apply to planning obligations (including unilateral obligations), GNAs and determinations as follows:
  - Reference to the appropriate section of the Town and Country Planning (Scotland) Act 1997, as amended by the Planning etc. (Scotland) Act 2006 should be narrated in the body of the document to be registered.
  - Determinations should also include a reference to the date of registration or recording of the planning obligation or GNA to be discharged or modified.
  - Documents to be registered should be of self proving status as provided for in the Requirements of Writing (Scotland) Act 1995 and should be accompanied by appropriate application form and fee. Further details are available from [www.ros.gov.uk](http://www.ros.gov.uk).
  - Documents to be recorded in the General Register of Sasine should describe the property affected sufficiently to identify it. Documents to be registered in the Land Register should narrate the title number(s) of the property affected.



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