

Planning obligations

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. We seek to influence the creation of a fairer and more just society and are strongly committed to our statutory duty to work in the public interest and to both protect and promote the rule of law.

Planning obligations

Planning obligations in terms of Section 75 of the Town and Country Planning (Scotland) Act 1997 (the Act) 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. 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.

Our Planning Law Sub-committee undertook a public consultation between November 2019 and February 2020. 31 responses were received from a variety of respondents – solicitors in private practice, solicitors and non-solicitor staff employed by planning authorities and a range of organisations. Three virtual discussion events were held during May 2020. 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. Our findings have been reported to Scottish Government and these findings will contribute to Scottish Government's review of planning obligations².

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 facilitating earlier release of planning permissions.

Our proposals are as follows:

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

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

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.



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