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2010

ANNEX TO CIRCULAR 1/2010: PLANNING AGREEMENTS. PLANNING OBLIGATIONS AND GOOD NEIGHBOUR AGREEMENTS

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## **Scottish Planning Series**

### **PLANNING CIRCULAR 1/2010**

#### **Annex to Circular 1/2010: Planning Agreements. Planning Obligations And Good Neighbour Agreements**



## **PLANNING SERIES:**

**Scottish Planning Policy (SPP)** is the statement of Scottish Government policy on nationally important land use planning matters.

**National Planning Framework (NPF)** is the Scottish Government's strategy for Scotland's long term spatial development.

**Circulars** contain Scottish Government policy on the implementation of legislation or procedures.

Statements of Scottish Government policy in the SPP, NPF and Circulars may be material considerations to be taken into account in development plans and development management decisions.

Designing Places and the West Edinburgh Planning Framework have the same status in decision making as the SPP and NPF.

**Planning Advice Notes** provide advice and information on technical planning matters.

Further information in the Scottish Government's role in the planning system is available on <http://www.scotland.gov.uk/Topics/Built-Environment/planning>

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## INTRODUCTION

1. This Annex to Circular 1/2010: Planning Agreements sets out Scottish Government policy in respect of planning obligations (formerly known as planning agreements) and good neighbour agreements made under section 75 and section 75D of the Town and Country Planning (Scotland) Act 1997 as amended by the Planning etc (Scotland) Act 2006. The Annex also covers provisions set out in the following regulations;
  - 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); and,
  - The Planning etc (Scotland) Act 2006 (Saving and Transitional Provisions) Order 2010 (SSI 2010 No 431)

## GENERAL PRINCIPLES AND POLICY

2. While the amended section 75 introduces some new elements, the fundamental principles relating to planning obligations, or planning agreements as they were previously known, remain unchanged. Planning authorities and other parties should continue to have reference to the guidance set out in Planning Circular 1/2010: *Planning Agreements* when considering whether a planning obligation is required and the procedures and practices to be followed in negotiating and concluding an obligation. This Annex focuses on significant areas of new legislation introduced by the Planning etc (Scotland) Act 2006.

## BACKGROUND

3. The Planning etc (Scotland) Act 2006 (the 2006 Act) amends the Town and Country Planning (Scotland) Act 1997 (the 1997 Act) replacing the existing section 75 with a revised section 75 and adding new sections 75A -75G.
4. Sections 75, 75A, 75B and 75C deal with planning obligations. These were previously known as planning agreements or 'section 75 agreements'. Section 75 sets out the framework for planning obligations including such matters as;
  - What a planning obligation may do, that it may contain conditions and the extent to which it may require the payment of monies, etc;
  - Who can enter into a planning obligation;



- That a planning obligation (to which the owner is a party) may be registered in the General Register of Sasines or the Land Register of Scotland, making it enforceable against future owners or occupiers of the land; and
  - The provision of powers for planning authorities to enforce the terms of an obligation through direct action.
5. Section 75A establishes 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 follows on from that and establishes a right of appeal to the Scottish Ministers where the planning authority refuse the application or fail to determine it within the set time period of two months. The period of two months starts from the date on which the application is taken to have been validated in accordance with regulation 4 of the Town and Country Planning (Modification and Discharge of Planning Obligations) (Scotland) Regulations 2010.
  6. 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 relevant instrument 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. The Planning etc. (Scotland) Act 2006 (Saving and Transitional Provisions) Order 2010 provides that section 75C does not apply to planning agreements entered into before 1 February 2011.
  7. Sections 75D-75G relate to good neighbour agreements (GNAs). The sections follow a similar layout 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 in a similar fashion to section 75C.

## **PLANNING OBLIGATIONS**

### **Unilateral obligations**

8. The revised section 75 makes 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 simply sought to duplicate the terms of a unilateral agreement.

9. 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. 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 incoming 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.

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

10. 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 that person or persons a minimum of 21 days notice of their intentions.
11. 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.

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

#### **General principles**

12. The provisions in both the primary legislation and the 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.

#### **Who can enter into a GNA?**

13. 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.





14. In the case of a body or trust, other than a community council, the body must be recognised by the planning authority as meeting the criteria set out above; i.e. that the members or trustees have a substantial connection with the land and that the body seeks to preserve or enhance amenity.
15. There is no provision in the legislation for any person to propose or enter into a unilateral GNA.

#### **What can a GNA require?**

16. 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.
17. As with a planning obligation, a GNA (to which an owner of the land is a party) may be registered in the General Register of Sasines or the Land Register of Scotland, making it enforceable against future owners or occupiers of the land.
18. A GNA should not be viewed as an alternative to a planning obligation. A planning authority should not generally seek to make it a requirement for the grant of planning permission that a GNA be put in place.

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

19. 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**

20. 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**

21. 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).
22. 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**

23. 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.
24. On receipt of an application, it is then the responsibility of the planning authority to notify these interested parties of the details 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.
25. 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**

26. 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.



27. An application to a planning authority for modification or discharge of a GNA may be made by either party to the GNA. The 1997 Act 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 may mean that the application cannot be validated.

#### **Determination of an application**

28. The planning authority is to issue notice of their decision in respect of the application within two months of the date of validation.
29. In determining an application the planning authority may, depending on whether the application is for the modification or discharge of the obligation, determine that the obligation be discharged or that the proposed modification to the obligation be made. The authority may also determine that the obligation 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, as set out in the application.
30. 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 11-22 of Circular 1/2010.
31. 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 meant that the obligation is no longer reasonable and that a modification to reflect the change in circumstances was 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.
32. Where a planning obligation or GNA has been registered in the General Register of Sasines or in the Land Register of Scotland, any determination to modify or discharge the obligation or GNA does not take effect until the determination is also registered 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

33. Under sections 75B and 75F 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 fail to give notice of their 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 their decision it is assumed that the authority have determined that the planning obligation is to continue to have effect without modification.
34. 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.
35. 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.
36. 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; or
  - To determine that the obligation should continue to have effect without modification (i.e. to refuse the appeal).



37. Most appeals will in practice be delegated to Inquiry 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, DPEA may make arrangements for an inquiry or hearing session to take place and the Reporter may decide that witnesses should be placed under oath.
38. Once the Scottish Ministers, or a Reporter exercising delegated powers, has 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 1997 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 REGISTERING MODIFICATION OR DISCHARGE OF PLANNING OBLIGATIONS OR GOOD NEIGHBOUR AGREEMENTS.**

39. Basic registration criteria for the General Register of Sasine and the Land Register of Scotland 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 deed. Determinations should also include a reference to the date of registration of the planning obligation or GNA to be discharged or modified.
  - Deeds should be of self proving status as provided for in s. 3 and schedule 1, read in conjunction with schedule 2, paragraphs 1 and 4 of the Requirements of Writing (Scotland) Act 1995<sup>1</sup> and accompanied by a Sasine Application Form or Form 2 and appropriate fee. Further details are available from [www.ros.gov.uk](http://www.ros.gov.uk).
  - Subjects in the General Register of Sasine should be described sufficiently to identify them and include a statutory reference to the prior titles<sup>2</sup>. Deeds to be registered in the Land Register should narrate the title number(s) of the land affected and the subjects must be identifiable on the Ordnance survey map<sup>3</sup>.

<sup>1</sup> c.7

<sup>2</sup>s.8 Conveyancing (Scotland) Act 1924 c.27

<sup>3</sup> s.4 Land Registration (Scotland) Act 1979 c.33



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