CD-010

PLANNING OBLIGATIONS

4–1251 **Circular No.:** 1/97
Date of issue: January 1997
Extent: England only. Welsh Office Circular 13/97, *Planning Obligations*, is in identical terms, save for cross-references to cancelled Welsh Office circulars and for having also a Welsh translation, and is not separately reproduced in the *Encyclopedia*.
Background: This circular cancels and supersedes DOE Circular 16/91, Planning and Compensation Act 1991: *Planning Obligations*. The Circular was issued first in draft in January 1996, and the final version contains several changes from the draft. These are shown in the version of the new Circular that was reproduced in the Monthly Bulletin for February 1997, where the usual *Encyclopedia* conventions are observed: new text is enclosed in square brackets; deleted text is in italics in square brackets; editorial comment is assigned to special footnotes. The approach of this Circular towards the use of planning obligations is more positive than that of the 1991 Circular. It contains examples of both good and bad practice, and accepts that "planning obligations may enhance the quality of development and enable proposals to go ahead which might otherwise be refused" (para. B2).

Planning and Compensation Act 1991

Planning Obligations

4–1252 1. Annex A to DOE Circular 16/91 explained the effect of certain of the provisions in sections 12 and 83 of the Planning and Compensation Act 1991. Annex B to that Circular gave policy guidance to local planning authorities on the use to be made of planning obligations under section 106 of the Town and Country Planning Act 1990 as amended by the 1991 Act.

2. The advice contained in Annex B to Circular 16/91 was held to be lawful by the House of Lords in *Tesco Stores Limited v Secretary of State for the Environment and others* [1995] 1 W.L.R. 759; [1995] All E.R. 636. Annex A to this new Circular therefore repeats and reaffirms that advice; it also clarifies existing guidelines on a number of detailed matters.

Policy and the law

3. On a number of occasions the courts have laid down the legal requirements for the validity and materiality of planning obligations.

4 This Circular sets out the Government's *policy* for the use of planning obligations.

Policy: the broad principles

4–1253 5. The planning system should operate in the public interest, and should aim to foster sustainable development, providing homes, investment and jobs in a way that adds to rather than detracts from the quality of the environment. These objectives are achieved through the preparation of development plans and the exercise of development control functions. In granting planning permission, or in negotiating with developers, a local planning auth-

ority may seek to secure modifications or improvements to the proposals submitted for their approval, They may grant permission subject to conditions, and where appropriate they may seek to enter into planning obligations with a developer regarding the use or development of the land concerned or of other land or buildings.

6. To retain public confidence, such arrangements must be operated in accordance with the fundamental principle that planning permission may not be bought or sold. This principle is best served when negotiations are conducted in a way which is seen to be fair, open and reasonable; in this way, and properly used, planning obligations may enhance the quality of development and enable proposals to go ahead which might otherwise be refused. Annex B to this Circular explains the detailed policies which the Secretary of State considers provide the best means of ensuring that there is adherence to this principle.

7. Amongst other factors, the Secretary of State's policy requires planning obligations to be sought only where they meet the following tests:

(i) necessary;
(ii) relevant to planning;
(iii) directly related to the proposed development;
(iv) fairly and reasonably related in scale and kind to the proposed development;
(v) reasonable in all other respects.

8. These matters are more fully spelt out in:

Annex A which sets out the statutory framework for planning obligations.

Annex B which explains the use of policies of the Secretary of State and provides guidance on the use of planning obligations to developers[1] and local planning authorities.

Annex C which describes arrangements for the discharge or modification of planning obligations, as was previously set out in DOE Circular 28/92, Planning and Compensation Act 1991: *Modification and Discharge of Planning Obligations*.

Other matters

9. This guidance is not concerned directly with matters arising from other legislation, *e.g.* the requisitioning of the provision of a water supply or of a public sewer from a water company under the Water Industry Act 1991[2] or previous legislation; or agreements made under the Public Health Act 1936; or agreements about development in the vicinity of trunk roads under section 278 of the Highways Act 1987 (as substituted by the New Roads and Street Works Act 1991), on which the Department of Transport has issued advice in Department of Transport Circular 6/91. **4–1254**

10. This Circular repeats and clarifies existing guidance and should therefore have no effect on local government manpower or expenditure.

11. DOE Circulars 16/91 and 28/92 are now cancelled.

[1] EDITORIAL NOTE: one of the curiosities of the Government Circular as a form of communication is that it is in the form of a letter addressed to the chief executives of local planning authorities. These are its primary recipients; others, like developers, professional advisers and members of the public, receive it as secondary recipients. In this respect it is unlike a Planning Policy Guidance Note, which is an undirected publication of Government policy. It is not clear why this advice has been published as a circular rather than a PPG: its advice is substantive (Annex B) as well as procedural (Annexes A and C), and, as this sentence illustrates, it is aimed at a wider audience than local authorities. The PPG series is intended to be the principal source of policy guidance on planning matters, and circulars are now intended to be used only where it is proposed "to focus on legislative and procedural matters" (PPG1 (revised), *General Policy and Principles* (1997), para. B1.

[2] The use of section 106 of the 1990 Act in order to secure the provision of infrastructure for water supply, sewerage or sewage disposal should not be necessary because it will already be the developer's responsibility to requisition the provision of a water supply by the water company under section 41 of the Water Industry Act 1991 and/or the provision of sewers under section 98, and the provision of associated infrastructure by the water company is financed by infrastructure charges levied by companies under section 146 of the 1991 Act for any new connection.

ANNEX A

PLANNING AND COMPENSATION ACT 1991

Planning obligations

4–1255 A1. [1]Section 12(1) of the 1991 Act substituted sections 106, 106A and 106Bfor section 106 of the Town and Country Planning Act 1990. (Sections 106A and 106B are not dealt with in this Annex.[2]) Section 106 introduced the concept of planning obligations, which comprises both planning agreements and unilateral undertakings. It enables planning obligation to be entered into by means of a unilateral undertaking by a developer as well as by agreement between a developer and a local planning authority. Details of the section substituted are set out below.

A2. Section 106(1) provides that anyone with an interest in land may enter into a planning obligation by [*sic*][3] the local planning authority identified in the instrument creating the obligation. Such an obligation may be created by agreement or by the person with the interest making an undertaking. The use of the term "planning obligation" reflects the fact that obligations may be created other than by agreement between the parties (that is, by the developer making an undertaking). Such obligations may restrict development or use of the land; require operations or activities to be carried out in, on, under or over the land; require the land to be used in any specified way; or require payments to be made to the authority either in a single sum or periodically.

A3. The obligations created run with the land (as do planning agreements made under old section 106 of the 1997 Act) so they may be enforced against both the original covenantor and against anyone acquiring an interest in the land from him. The obligations can be positive (requiring the covenantor or his successors in title to do a specified thing in, on, under or over the land) or negative (restricting the covenantor, or his successors from developing or using the land in a specified way). Planning agreements have commonly been made both under section 106 and under section 33 of the Local Government (Miscellaneous Provisions) Act 1982 which provides expressly for positive covenants. It is no longer necessary for section 33 of the 1982 Act to be used in the planning context, given the scope of section 106. The scope of section 33 has been confined to non-planning contexts by paragraph 6 of Schedule 7 to the 1991 Act.

4–1256 A4. Section 106(2) provides that a planning obligation may:

(i) be unconditional or subject to conditions;

(ii) impose any restriction or requirement in section 106(1)(a) to (c) for an indefinite or specified period (thus enabling, for instance, an obligation to end when a planning permission expires);

(iii) provide for payments of money to be made, either of a specific amount or by reference to a formula, and require periodical payments to be paid indefinitely or for a specified period.

A5. Section 106(3) provides that, as previously with agreements, planning obligations shall be enforceable against the original covenantor and his successors in title.

A6. Section 106(4) enables the instrument which creates the planning obligation to limit the liability of covenantors to the period before they cease to have an interest in the land. This enables someone entering into a planning

[1] EDITORIAL NOTE: the material in this Annex did not appear in the draft, but reproduces with minor amendments the text of Annex A of DOE Circular 16/91, *Planning and Compensation Act 1991. Planning Obligations*.

[2] EDITORIAL NOTE: these sections are dealt with in Annex C

[3] EDITORIAL NOTE: the word "enforceable" seems to be missing from the text: it is drawn from para A2 of DOE Circular 16/91, which referred to "a planning obligation enforceable by the local planning authority"

obligation to cease to be bound by its terms once he has disposed of his interest in the land concerned.

A7. Sections 106(5), (6), (7) and (8) contain provisions for enforcing planning obligations. Section 106(5) provides for restrictions or requirements imposed under a planning obligation to be enforced by injunction. Section 106(6) provides that, in addition to section 106(5), if the developer is in breach of a requirement to carry out works on the land, the authority may enter the land and do so itself and recover its reasonable expenses. Section 106(7) provides that the authority, before exercising its powers to enter the land, shall give not less than 21 days' notice of its intention to do so to any person against whom the obligation is enforceable. Section 106(8) provides that any person who wilfully obstructs the authority if it enters the land under subsection (6)(a) shall be guilty of an offence and be liable to a fine of up to level 3 on the standard scale (currently £1000).

A8. Section 106(9) requires that a planning obligation may only be entered into by a deed which: states that the obligation created is a planning obligation; identifies the land concerned; identifies the person entering into the obligation and states his interest; and identifies the authority by whom the obligation may be enforced. Section 106(10) requires a copy of the deed to be given to the local planning authority by whom it is enforceable.

A9. Section 106(11) provides that a planning obligation is a local land charge for the purposes of the Local Land Charges Act 1975. If a local land charge is not registered, it remains binding against a purchaser of the land, but the purchaser is entitled to compensation for non-registration. Under section 8 of the 1975 Act any member of the public has a right of access to the local land charges register, which is maintained by every London borough and district council. The register contains a description of the charge, including a reference to the relevant statutory provision, and says where relevant documents may be inspected.

4–1257 A10. Section 106(12) enables the Secretary of State to make regulations specifying that money to be paid or expenses recoverable under a planning obligation shall be a charge on the land. This would assist a local planning authority in proceedings to recover such sums.

A11. Section 106(13) defines the terms "land" and "specified" used in section 106.

A12. Section 12(2) makes an insertion into section 296(2) of the 1990 Act so that the local planning authority may not enforce a planning obligation against Crown land, either by injunction or by entering the land, without the consent of the "appropriate authority" (*i.e.* the Crown body responsible for the land concerned).

A13. Section 12(3) inserts section 299A into the 1990 Act. Section 299A(1) provides that the appropriate authority may enter into a planning obligation in relation to any Crown or Duchy interest in land. The obligation is enforceable to the extent mentioned in new section 299A(3). Section 299A(2) provides that a planning obligation under section 299Amay only be entered into by an instrument executed as a deed which: states that the obligation concerned is a planning obligation; identifies the land concerned; identifies, the appropriate authority and states the Crown or Duchy interest; and identifies the local planning authority by whom the obligation may be enforced. Section 299A(3) provides that a planning obligation under this section may be enforced against any person with a private interest derived from a Crown or Duchy interest. Section 299A(4) applies most of the provisions of sections 106, 106A and 106B to obligations entered into under section 299A. Section 299A(5) requires the consent of the appropriate authority to be obtained before a planning obligation in respect of Crown or Duchy land is enforced.

Consequential amendments

A14. Section 83 of the 1991 Act, which applies to England and Wales, Scot-

land and Northern Ireland, amended section 91A of the Income and Corporation Taxes Act 1988, consequential upon section 12. Section 91A of the 1988Act provides that, where a person makes a site restoration payment in the course of carrying on a trade the payment shall be allowable as a deduction against profits or gains for the relevant tax period.

ANNEX B

PLANNING OBLIGATIONS

4–1258 B1. This guidance gives advice on the proper use of planning obligations made under section 106 of the Town and Country Planning Act 1990 (as substituted by section 12 of the Planning and Compensation Act 1991) and of similar obligations under other powers including local legislation. It sets out the policies to which the Secretary of State and the Planning Inspectorate[1] will have regard in determining applications or appeals and which local planning authorities should also take into account when considering planning applications and drafting development plan policies.

General policy

B2. Properly used, planning obligations may enhance the quality of development and enable proposals to go ahead which might otherwise be refused. They should, however, be relevant to planning and directly related to the proposed development if they are to influence a decision on a planning application.[2] In addition, they should only be sought where they are necessary to make a proposal acceptable in land-use planning terms.[3] When used in this way, they can be key elements in the implementation of planning policies in an area. For example, planning obligations may involve transport-related matters (*e.g.* pedestrianisation, street furniture and lighting, pavement and road surfaces—design and materials, and cycle ways). Planning obligations may relate to matters other than those covered by a planning permission, provided that there is a direct relationship between the planning obligation and the planning permission. But they should not be sought where this connection does not exist or is considered too remote. Planning obligations thus have a useful role to play in the planning system. The tests to apply for their use are that they should be necessary, relevant to planning, directly related to the proposed development, fairly and reasonably related in scale and kind to the proposed development and reasonable in all other respects.[4]

[1] EDITORIAL NOTE: the amendment between draft and final version is worthy of comment. The draft referred to "his inspectors". The Planning Inspectorate has since April 1992 been an Executive Agency, separately administered and responsible for its own finances.

[2] EDITORIAL NOTE: this sentence and the next capture three elements of the Government's policy test for the acceptability of planning obligations. Two further elements are included in the restatement of the test at the end of the paragraph (fairly and reasonably related in scale and kind to the proposed development; reasonable in all other respects).

[3] EDITORIAL NOTE: this passage was accepted as a valid statement of *policy* by the Court of Appeal in *R. v. Plymouth City Council, ex p. Plymouth and South Devon Co-operative Society Ltd* (1993) 67 P. & C.R. 78, but the Court rejected the argument that it was a test of the *validity* of a planning obligation, or of a grant of planning permission based upon such an obligation. A planning obligation might lawfully provide for contributions by a developer which were not necessary (in the sense of being limited to that whatever was needed to overcame what would otherwise be planning objections to the proposed development).

[4] EDITORIAL NOTE: In *Tesco Stores Ltd v. Secretary of State for the Environment*, Lord Hoffmann observed that "... the first limb of the test in paragraph B5 of Circular 16/91 marches together with the requirements of the statute. But the second—the test of necessity (and proportionality)—does not. It is well within the broad discretion entrusted to planning authorities by section 70 of the Town and Country Planning Act 1990. But it is not the only policy which the Secretary of State might have adopted. There is nothing in the Act of 1990 which requires him to adopt the tests of necessity and proportionality. It is of course entirely consistent with the basic policy of permitting development unless it would cause demonstrable harm to interests of acknowledged importance. But even that policy is not mandated by Parliament"

B3. Acceptable development should never be refused because an applicant is unwilling or unable to offer benefits. Unacceptable development should never be permitted because of unnecessary or unrelated benefits offered by the applicant. Those benefits or parts of benefits which go beyond what is strictly necessary should not affect the outcome of a planning decision. Local planning authorities should not seek such benefits and should not allow themselves to be improperly influenced by them. Developers should not attempt to overcome valid objections to their proposals by offering extra inducements—*i.e.*, unrelated inducements intended to satisfy objectors, influence the planning decision, or have wider development implications.

B4. The Secretary of State considers that local planning authorities and developers should place more emphasis on the overall quality of a development proposal than on the number and nature (or value) of planning benefits they can obtain or offer. Planning obligations—relevant to planning—may provide an added means of ensuring high quality development. But good quality is an integral part of development and should be at the heart of all planning; the provision of add-on benefits should not be regarded as an acceptable alternative to such an integrated approach. An obligation which goes beyond the guidance set out in this Annex will not necessarily be unlawful. But it should be given very little weight in the determination of an application. If more is offered than is necessary, the benefits or the parts of those benefits which are unnecessary should not be allowed to affect the decision.[1] This general policy, and the advice in the paragraphs which follow, apply equally to agreements and to unilateral undertakings provided—at appeal or otherwise—by developers.

Unilateral Undertakings

4–1259 B5. It is reasonable to expect developers and local planning authorities to try to resolve any planning objections the authority may have to the development proposal by agreement in accordance with this guidance. Where a developer considers that negotiations are being unnecessarily protracted or that unreasonable demands are being made, he may wish to enter into a planning obligation by making a unilateral undertaking. Unilateral undertakings, like other planning obligations, are usually drafted so that they come into effect at the time when planning permission is granted and provide that unless and until the developer implements the permission (by carrying out a material operation as defined in section 56(4) of the 1990 Act), he is under no obligation to comply with the relevant covenants.

B6. The use of unilateral undertakings is therefore expected to be principally, but not solely, at appeals, where there are planning objections which only a planning obligation can resolve, but the parties cannot reach agreement. Where a developer provides or offers an undertaking at appeal, it will be referred to the local planning authority to seek their views, Such an undertaking should be in accordance with this guidance, as should unilateral undertakings or offers to enter into undertakings made in other circumstances, Undertakings should be relevant to planning and directly related to the needs created by the development proposal concerned.

Reasonable benefits

4–1260 B7. Planning obligations have a positive role to play in the planning system. Used properly, they can remedy genuine planning problems and

[1] EDITORIAL NOTE: See n.9 above.

enhance the quality of development. They can provide a means of reconciling the aims and interests of developers with the need to safeguard the local environment or to meet the costs imposed as a result of development—*e.g.* the full cost of essential community facilities required as a direct result of a proposed development. So, for example, where development will create a need for extra facilities—*e.g.* new access roads, bus shelters, open spaces or measures to safeguard the environment—it may be reasonable for developers to meet or contribute towards the cost of providing such facilities. But local planning authorities should only require developers to provide these facilities through planning obligations if it would be wrong on land-use planning grounds to grant planning permission without them. What this means in practice will depend on the circumstances of each case.

B8. The following paragraphs give a general indication of what might be reasonable. They give some examples of the circumstances in which certain types of benefit can reasonably be sought or taken into account in connection with an application for planning permission. They are not intended as an exhaustive list of what may be acceptable in all cases. Establishing the relationship between a particular planning benefit and an individual development must be a matter of planning judgment, exercised in the light of local circumstances, rather than an issue for detailed national prescription.

B9. In general, it will be reasonable to seek, or take account of, a planning obligation if what is sought or offered:

(i) is needed from a practical point of view to enable the development to go ahead and, in the case of a financial payment, will meet or contribute towards the cost of providing such necessary facilities in the near future (planning obligations may be drafted so that they include a covenant by the local planning authority to the effect that a sum or sums paid by the developer to the authority for the purpose of meeting or contributing towards the costs of providing such facilities shall be repaid to the developer on or by a specified date if they have not been used for that purpose); or,

(ii) is necessary from a planning point of view and is so directly related to the proposed development and to the use of land after its completion that the development ought not to be permitted without it.

In other words, where a proposed development would, if implemented, create a need for particular facilities or would have a damaging impact on the environment or local amenity or would adversely affect national or local policies, and these matters cannot be satisfactorily resolved through the use of planning conditions, it will usually be reasonable for planning obligations to be sought or offered to overcome these difficulties. Local planning authorities are encouraged to work together in seeking appropriate arrangements.

4–1261 B10. Some examples of such arrangements are: offers to provide or contribute towards new access roads, improved junction layouts or extra car parking facilities. In some circumstances, on sites proposed for major development inadequately served by modes[1] other than the private car, to improve accessibility the provision of contributions may be appropriate towards, *e.g.* new/improved rail/bus stations or facilities, park-and-ride schemes, improved bus services/shelters and other capital items, widened access, turning spaces, and improved measures for cyclists/pedestrians (in line with PPG13 aims). It is more likely that the need for contributions—where justified in accordance with the policy objectives set out in this Circular—will apply to locations away from town centres which need to be made more accessible, than to town centres themselves. Similarly, the provision of community facilities, *e.g.* reasonable amounts of small areas of open space, social, educational, recreational or sporting facilities, may be acceptable, provided that

[1] EDITORIAL NOTE: this appears to be a reference to modes of transport.

such facilities are directly related to the development proposal and the need for them arises from its implementation and they are related in scale and kind (see paragraph B12). There is also the issue of timing of replacement provision. New replacement sports pitches can take up to two years before they are available for use. Developers should recognise the need to provide a replacement that is ready and available for use at the time of loss rather than at some unknown point in the future. In respect of substitute areas of, *e.g.* rights of way, open space, open access land, the priority should be to secure the most appropriate—not the easiest—substitute provision.

B11. Further examples of appropriate planning obligations might include arrangements:

(i) to ensure an acceptable balance of uses in a mixed-use development (although in most cases the layout and phrasing of such proposals may be adequately addressed through the use of planning conditions see paragraph B27 below);

(ii) to secure the inclusion of an element of, *e.g.* affordable housing in a larger residential or mixed-use development (see separate advice in DOE Circular 13/96, *Planning and Affordable Housing*[1].

(iii) to offset (through substitution, replacement or regeneration) the loss of or impact on a resource present on a site or nearby, *e.g.* the loss of a wetland habitat on a site offset by opening up a culverted stream or river, or the impact on a canal of an adjacent housing development.

(iv) to protect or reduce harm to protected sites or species acknowledged to be of importance[2] (here also, it may be more appropriate to address this matter through the use of planning conditions).

Where it is necessary planning obligations may also be used to offset the loss of or impact on any resource present on the site prior to development. For example, where a development site includes an existing open space or woodland which will be lost as a result of the proposal, it may be acceptable to seek agreement from the developer to provide a replacement or alternative facility where necessary and reasonable either on another part of the site or on other land over which he has control. Depending on local circumstances, it may not be essential to provide an exact substitute; so, for example, a wooded walkway may in some cases be an acceptable replacement for a green space. However, there should be some relationship between what is lost and what is to be offered: for example, an indoor sports centre will not generally be an acceptable replacement for open parkland.

4–1262

B12. If a planning obligation is in line with the guidance set out in the preceding paragraphs, a further test has to be applied. This is whether the extent of what is sought or offered is fairly and reasonably related in scale and kind to the proposed development, as well as being reasonable in all other respects. For example, a reasonable obligation would seek to restore facilities, resources and amenities to a quality equivalent to that existing before the development. Developers may reasonably be expected to pay for or contribute to the cost of infrastructure which would not have been necessary but for their development. The effect of such infrastructure investment may be to confer some wider benefit but payments should be directly related in scale to the benefit which the proposed development will derive from the facilities to be provided. Developers should not be expected to pay for facilities which are needed solely in order to resolve existing deficiencies nor should attempts be made to extract excessive contributions to infrastructure costs

[1] EDITORIAL NOTE: now superseded and cancelled by Circular 06/98, *Affordable Housing*.

[2] The Department welcomes the initiatives taken by some developers in creating nature reserves, planting trees, establishing wildlife ponds and providing other nature conservation benefits. This echoes the Government's view in *This Common Inheritance*, Cm. 1200 that local authorities and developers should work together in the interests of preserving the natural environment. Planning policy guidance on the use of conditions and planning obligations in the interests of nature conservation is set out in PPG9 (Nature Conservation) (England only): see in particular paragraph C4.

from developers. It might on occasions be considered acceptable for an obligation to be sought where it would overcome an existing constraint which is materially exacerbated by the proposal. However, developers should not be asked, for example, to fund local road improvements unless the need for these improvements arises mainly from the proposed development. In addition, situations may arise where an infrastructure problem exists prior to the submission of an application for planning permission. Although the need to improve, upgrade or replace such infrastructure does not arise directly from the proposed development, it would clearly be inappropriate to grant planning permission for a development which would exacerbate a situation which is already unsatisfactory. However, developers may reach agreement with an infrastructure undertaker to bring forward in time a project which is already programmed but is some years from implementation.

B13. In some cases, particularly where major redevelopment is proposed for a large area, it may also be reasonable for a number of developers to contribute jointly to an improved facility which will be of benefit to all of them and to the community at large. But they should only be expected to do so if their proposals have created some need for the facility, and their level of contribution would have to be fairly and reasonably related to the level of demand created by their development. Planning obligations should never be used as a means of securing for the local community a share in the profits of development, *i.e.* as a means of securing a "betterment levy".[1] Planning authorities should, however, be aware of the financial consequences for developers of entering into an agreement. For example, an agreement which requires the payment of substantial sums of money before the development gets under way could prejudice the viability of a project. In such circumstances phasing of payments in relation to the phasing of development should be considered.

4–1263 B14. The costs of subsequent maintenance and other recurrent expenditure should normally be borne by the body or authority in which the asset is to be vested. Payments should be time limited and not be required in perpetuity by planning obligations. As a general rule, the planning authority should not attempt to impose commuted maintenance sums when considering the planning aspects of the development. Exceptions may be made, for example:

- where additional highway works are an essential prerequisite to the granting of planning permission and an agreement is entered into under section 278 of the Highways Act 1980 (which specifically provides for maintenance payments); or,

[1] EDITORIAL NOTE: this expression suggests some confusion between the quite different concepts of "betterment" and "development profits". "Betterment" may be defined as "any increase in the value of a parcel of land that can be attributed to factors other than the effort or investment of the owner or occupier of that parcel" (see further Grant, "Betterment again?" in *The Planning Balance in the 1990s*, JPEL Occasional Paper No 18 (1992), P. 67). Development profits may be made without any element of betterment: indeed, betterment may not accrue to the developer at all, but to the landowner from whom the developer acquires land. It is its unearned character that has made it politically popular for differential taxation by Governments. Yet there is a fundamental relationship between betterment and planning gain which remains under-researched and misunderstood, largely because of the secretive character of land transactions In some cases, no doubt, developers' contributions come out of developers' profits, and this is most likely to be the case (1) where there is no land transaction involved, *e.g.* extension or redevelopment of the developer's own premises; or (2) where the local authority's demand comes after the developer has acquired the land, and was unanticipated at the time of that acquisition But demands for developers' contributions are a foreseeable factor in any development calculation, whoever ultimately develops the land, and in the case of housing development on green field sites, or the superstore development with which many of the recent cases have been concerned, the developer will attempt to ensure that the burden is transferred, commonly by means of an option agreement, into the land price Hence the willingness of many developers to make contributions towards off-site infrastructure: the process is in effect one whereby the landowner's unearned private increment ("betterment") is transferred to the provision of public goods This outcome resembles the outcome of a process of direct taxation of that private increment, but without the intermediation of the Treasury, and with hypothecation of the revenues. The Government's sensitivity to charges that the policies outlined in this circular in effect constitute covert taxation of land-value increment is further demonstrated in para. B17.

- in the case of funding for public transport—particularly if this will assist the achievement of sustainable development, and including the possibility of a contribution to revenue support of services—but for a limited period in the short term only and with a maximum cost;
- in the case of areas of open space, recreational facilities, children's play space, woodland or landscaping principally of benefit to the development itself rather than to the wider public.

B15. Authorities should be particularly careful to guard against attempting to secure a list or range of desirable benefits from developers, even if they consider such benefits to be related in some way to the proposed development. Highway authorities, in particular, should be certain that there is a specific and direct connection before suggesting that local planning authorities need to require contributions towards sustainable transport provision. Authorities should bear in mind that attempts to secure additional benefits may be counter-productive: if they seek more than is justified, they may frustrate worthwhile development proposals or put at risk their plans for their areas.

Development plan policies

B16. Plans can, and should, set out the matters which must be addressed in order for development to proceed. This lays the basis for justifying any planning obligations which may be sought, *i.e.* the development plans form an important framework into which a planning obligation should fit, and help to avoid future uncertainty. The broader opportunities for considering a strategy[1] and integrated approach towards planning obligations should be considered by local planning authorities. For instance where a local planning authority is likely to seek planning obligations in connection with a particular type of development or in relation to specific development sites, they should make this clear by setting it out in policies in their local plan or in Part II of their Unitary Development Plan (see paragraph 5.25 of PPG12 (Development Plans and Regional Planning Guidance) (England only) [see now PPG12, *Development Plans* (1999)]). Such policies should be justified by reference to the guidance outlined in this Annex. By including policies in development plans about the circumstances in which planning obligations would be sought there is an opportunity for the local community and the development industry to comment. However, the existence of plan policies should not preclude negotiation on proper and appropriate planning obligations on their merits in relation to individual planning proposals.[2] It is useful for local people and developers to have some indication of what might be expected but, since planning obligations must be directly related to individual proposals if they are to be given any weight, it is not acceptable to set out precise requirements or to impose rigid formulae. Where local planning authorities attempt to go beyond this guidance, the Secretary of State is likely to object to their draft policies. **4–1264**

B17. Policies concerning planning obligations in development plans **4–1265**

[1] EDITORIAL NOTE: "strategic"?

[2] EDITORIAL NOTE: it is striking that this paragraph makes no mention of section 54A and the plan-led system. Yet the spirit is here: if a development plan were to contain detailed policies as to developers' contributions, then the room for case-by-case negotiation would be limited. This would have the disadvantage recognised by this paragraph, that it would not necessarily be properly attuned to the costs created by individual sites, but it might have the advantage of allowing developers and landowners to calculate with certainty, and from an early stage in the process, their total off-site liabilities This paragraph effectively discourages authorities from pursuing an "impact fees" approach, popular amongst local authorities in the United States under which contribution requirements are defined in accordance with a capital programme for public development costs to service anticipated private development, and costs apportioned between sites on the basis of a formula, normally expressed in terms of a specific amount per dwelling-house or per square foot of commercial or industrial development.

should not be unduly prescriptive but should address land use planning matters first and foremost rather than *e.g.* funding or other financial matters. Examples of local plan policies which are likely to be unacceptable to the Secretary of State, however, include those which:

(i) fail to take account of the advice in this Circular;

(ii) seek benefits which are not directly related to a particular development proposal. For example, it could be unacceptable for a local planning authority to seek provision of cycle routes or children's playgrounds in relation to proposals for sheltered housing for the elderly;

(iii) are based on a blanket formulation. This may not take proper account of whether the contribution is fairly and reasonably related to the development proposed. For example, it would be unacceptable to seek to ensure that all housing developments of more than thirty dwellings provide children's play areas since some of them may not be suitable for family homes;

(iv) seek contributions to a general fund to be used to finance a number of facilities or a specific facility, unless such facilities would be directly related to individual development proposals;

(v) require developers to meet the cost of resolving existing problems unless the proposed development would materially exacerbate the situation (see paragraphs B17 and B12 above).

(vi) allocate precise costs in advance. It is not feasible for local planning authorities to spell out detailed requirements (such as £X per unit or Y% of overall costs) since it is impossible to know exactly what is involved until an individual development proposal has been made. For similar reasons, it is not acceptable for local planning authorities to seek to secure a percentage of enhanced land value[1];

(vii) require maintenance payments other than in special circumstances (see paragraph B14 above).

B18. Local planning authorities should also bear in mind that local plan policies do not provide a guarantee that attempts to secure extra planning benefits will always be successful: whether obligations are sought, required or offered, their relevance to a planning decision will always depend on the circumstances of the individual application.

[1] In *R. v. South Northamptonshire District Council, ex p. Crest Homes plc* [1994] 3 PLR 47; [1995] J.P.L. 200; the Court of Appeal considered a series of planning obligations which included a formula based on the enhanced value of the land. On the facts of the case, the planning obligations were held to be lawful, but this should not be interpreted as providing a justification for similar arrangements in other circumstances. As Lord Justice Henry explained, the facts of the case were crucial "because they legitimise a formula which, if used in other factual contexts, could be struck down as an unauthorised local development land tax" ([1994] 3 PLR 47 at 61D).

EDITORIAL NOTE: this footnote confirms the Department of the Environment's general reluctance to allow levels of developers' contributions to reflect levels of "betterment" (or "development profits": see para. B13 above). Yet there are two qualifications: (1) the advice is proffered here solely in the context of development plan policies, and is therefore a further warning to local planning authorities not to engage at that stage in an "impact fees" approach (see the footnote to para. B16 above). It is not apparently intended, however, to extend to development control negotiations, which was the point at issue in the *Crest Homes* case; (2) it provides a somewhat negative picture of the *Crest Homes* case. The reality is that the authority and the landowners reached an agreement as to the capital requirements for off-site works, and that they had agreed that instead of a flat-rate contribution, the landowners' contributions should instead be expressed as a proportion of land value uplift. This meant that there was an element of risk-sharing on the part of the local planning authority: if the land-value increase was less than anticipated (in fact the situation) they stood to get less than the total cost of the works they were committed to undertake; if it was more, they stood to receive a surplus (which, under one of the agreements, was then to be "allocated for further community benefit in Towcester and its environs." The positive lesson to emerge from the *Crest Homes* case is that the courts will uphold transactions which provide for the calculation of contributions on the basis of land-value increase, provided that the purpose is to achieve an alternative to flat rate contributions, but would not uphold a simple tax on land value increase Against the factual basis in that case, the court found it "impossible to contend that in applying the formula based on a percentage of the value added to the land by the grant of planning permission the council were either introducing an unauthorised development land tax or trafficking in planning consents" (per Henry LJ at [1994] 3 PLR 60).

Public involvement

B19. Local planning authorities are reminded that as far as practicable, the planning system must be seen to operate in the public interest.[1] There is an obvious and legitimate interest in planning obligations; the process of negotiating planning obligations should therefore be conducted as openly, fairly and reasonably as possible. Planning obligations must be registered as local land charges. There is an obvious and legitimate public interest in planning obligations being publicly available. Members of the public should be given every assistance in locating and examining planning obligations which are of interest to them. As a minimum, planning obligations and related correspondence should be listed as background papers to the committee report relating to the development proposal concerned (see section 100D of the Local Government Act 1972). Authorities would need a very strong case either to exclude the press and public when discussing a planning obligation or to determine that connected correspondence should be kept from public view. Only in very exceptional cases should local planning authorities agree to the imposition of a duty of confidentiality in respect of planning obligations. Authorities should note that section 100I of the 1972 Act confers order-making powers on the Secretary of State, which enable the categories of exemption from the access to information provisions to be changed. **4–1266**

Use of Planning Conditions

B20. It is important to recognise that if there is a choice between imposing conditions and entering into a planning obligation, the imposition of a condition which satisfies the policy tests of DOE Circular 11/95 is preferable because it enables a developer to appeal to the Secretary of State. The terms of conditions imposed on a planning permission should not be re-stated in a planning obligation; that is to say, an obligation should not be entered into which requires compliance with the conditions imposed on a planning permission. Such obligations entail unnecessary duplication and frustrate a developer's right of appeal. **4–1267**

B21. Local planning authorities are reminded that they should not use a

[1] EDITORIAL NOTE: given the reluctance shown by the Court of Appeal in *R. v. Plymouth City Council, ex p. Plymouth and South Devon Co-operative Society Ltd* (1993) 67 P & C.R. 78, and the House of Lords in *Tesco Stores Ltd v. Secretary of State for the Environment* [1995] 1 W.L.R. 759; [1995] 2 All E.R. 636 to intervene where a planning obligation provided benefits to a local planning authority going beyond those strictly necessary for the development itself, it might be thought surprising that the circular did not place correspondingly greater emphasis on the need for openness and public access to information. This paragraph goes no further than para. B13 of DOE Circular 16/91, save for the exhortation that the process of negotiating planning obligations should be conducted as openly, fairly and reasonably as possible. This approach signifies that the Secretary of State has decided not to amend the legislation to make it a requirement that planning obligations should be placed in the register of planning applications. It seems odd that planning conditions should appear in that register, but that planning obligations should not. If such a requirement were imposed, then there would be no need for the suggestion that authorities should give members of the public "every assistance in locating and examining planning obligations which are of interest to them": they would have access to them as of right. Nor has the Secretary of State accepted the argument that a proposal by a local planning authority to grant planning permission subject to a planning obligation should be advertised, as with a proposal to grant permission for development that is not in accordance with the development plan. Exclusion of the press and public (against which authorities are counselled in this paragraph) will often in practice become an issue only if the press and public are aware that a planning obligation is under consideration. There will also be some circumstances (*e.g.* where the purpose of an obligation is environmental protection) when the disclosure of the terms of a planning obligation will be required by the E.C. Directive on the Freedom of Access to Information on the Environment (90/313/EEC) and the Environmental Information Regulations 1992 (S.I. 1992 No. 324), although the extent of these requirements remains unclear. Nonetheless, it is noteworthy that the Department of the Environment sees its registers of environmental information, including planning registers, as important elements in its strategy for meeting the Directive's requirements: see further the First Report of the House of Lords' Select Committee on the European Communities, *Freedom of Access to Information on the Environment* (Session 1996–97; H.L. Paper 9), p 35.

planning obligation as a means of securing developers' agreement to follow policies or practices that would be unlawful for the authorities themselves.

B22. In the interests of speed, and if both parties agree, the first draft of an agreement creating a planning obligation may be prepared by the developer's solicitor or by a solicitor approved by the local planning authority whose fees are met by the developer.

B23. It is not expected that a local authority would dispose of land or other assets—or give any other consideration under the terms of a planning obligation made in accordance with the guidance in this Circular. Any payment made by the developer in line with this guidance ought to be a contribution towards costs which the local authority will incur in relation to the development. In these circumstances, a section 106 planning obligation should not therefore amount to a credit arrangement within the meaning of Part IV of the Local Government and Housing Act 1989, nor should the authority have obtained anything which would be a capital receipt as defined by Part IV. The authority should not, therefore, be required to set aside part of any such receipts as provision for credit liabilities.

Mineral developments

B24. While the same guiding principles apply, it should be noted in connection with mineral developments that special considerations also apply to the use of planning obligations and to the imposition of conditions. These are set out in MPG2 and DOE Circular 25/85 [see now MPG2, *Applications, Permissions and Conditions* (1998)].

Persons interested in land

4–1268 B25. Attention is drawn to the statutory requirement that a developer must have an interest in the land before he can enter into a planning obligation. Before accepting that a planning obligation resolves planning objections to a proposed development, authorities should take care to ensure that all those who might need to be directly involved in complying with its provisions (*e.g.* all those interested in the land including tenants and mortgagees, and also guarantors etc.) have entered into it. At an appeal, the Inspector may seek evidence of title if it has not been demonstrated that the developer has the requisite interest. Where a trunk road is involved, the developer will also need the agreement of the relevant highway authorities and any necessary highway orders.

Transfer of interests in land

4–1269 B26. Planning obligations should not include the transfer of interests in land or positively worded requirements for such transfers. Other statutory powers provide authority for the transfer of interests in land. For example, the imposition of positively worded requirements for the transfer of interests in land can be included in an option agreement made under section 120 of the Local Government Act 1972 and any other necessary powers such as section 16 of the Greater London (General Powers) Act 1974. The actual transfer of an interest in land should also be included in an instrument separate from planning obligations. In some cases, it may be appropriate to include a negatively worded requirement in a planning obligation, which restricts the use or development of land until the transfer of ownership has taken effect.

Conclusion

4–1270 B27. The Secretary of State will deal with each planning application which

comes before him on its merits, but he is unlikely to attach weight to demands by a local planning authority—or offers by a developer—which go beyond this guidance. If a planning authority seeks unreasonable planning obligations in connection with a grant of planning permission it is open to the applicant to refuse to enter into them; he has the right of appeal to the Secretary of State against a refusal of permission or the imposition of a condition, or the failure to determine the application. Such appeals will be considered in accordance with the advice given in this Circular. Where an appeal has arisen because of what seems to the Secretary of State to be an unreasonable demand on the part of the local planning authority, and a public local inquiry has been held, he will consider sympathetically any application which may be made to him for an award of costs. Similarly, where an appellant has refused to meet a reasonable requirement by the local planning authority, applications for an award of costs against the former will also be sympathetically considered.

B28. The Secretary of State therefore expects local planning authorities and developers to adhere to the guidance set out in this Circular. They are reminded that the Courts have held that Government policies are themselves material considerations to be taken into account when planning decisions are made. They will also wish to bear in mind that the Secretary of State has the power to intervene in the operation of the planning system (*i.e.* to call in or direct the modification of development plans, to call in planning applications for his own decision, to revoke or modify planning permissions, or to discontinue land uses). The Secretary of State will also give serious consideration to the exercise of his powers to intervene whenever he believes that the policies set out in this Circular are being ignored or misapplied.

B29. In addition, developers have a right to appeal to the Secretary of State if local planning authorities decide that a planning obligation shall continue to have effect without modification (or fail to determine an application for their notification or discharge within the prescribed period) after five years of the date on which they were entered into. (See Annex C to this Circular for further details.) The Secretary of State will have regard to the policies explained in this Circular when determining such appeals.

ANNEX C

MODIFICATION AND DISCHARGE OF PLANNING OBLIGATIONS[1]

4–1271

C1. *Section 106A(1)* provides that a planning obligation may not be modified or discharged except by agreement between the authority and the person or persons against whom it is enforceable, or in accordance with new sections 106A and 106B. The Department considers that the variation of obligations by agreement between the parties is to be preferred to the formal application and appeal procedures.

C2. *Section 106A(2)* provides that any agreement between the parties to modify or discharge a planning obligation shall be by deed.

C3. *Section 106A(3)* provides that anyone against whom a planning obligation is enforceable may, at any time after the "relevant period" expires, apply to the local planning authority concerned for the obligation to be modified as specified in his application or for it to be discharged.

C4. *Section 106A(4)* defines "relevant period" as such period as may be prescribed by the Secretary of State in regulations, failing which the period is to be five years from the date the obligation is entered into. The Secretary of

[1] EDITORIAL NOTE: this part of the circular reproduces advice formerly contained in DOE Circular 28/92, *Planning and Compensation Act 1991 Modification and Discharge of Planning Obligations*, which is now cancelled for England.

State has decided not to prescribe a relevant period. It would not be reasonable to allow an obligation to be reviewed very soon after it had been entered into. This would give no certainty to a local planning authority which had granted planning permission on the understanding that a developer would meet certain requirements. Other affected parties might also be disadvantaged by allowing obligations to be swiftly brought to an end. On the other hand, where over a period of time the overall planning circumstances of an area have altered it may not be reasonable for a landowner to be bound by an obligation indefinitely. Allowing the five year period to stand appropriately reconciles these various considerations.

C5. *Section 106A(5)* prevents any applicant for modification of a planning obligation from specifying a modification which imposes an obligation on some other person against whom the original obligation is enforceable. Thus it would not be possible, for example, for the original covenantor who had since leased part of the land to a third party to apply for a modification that would transfer the whole obligation to the part of the land which had been leased.

C6. *Section 106A(6)* provides that an authority which receives an application for modification or discharge of a planning obligation may determine it by refusing it; or, if the obligation no longer serves any useful purpose, by discharging it, or, if the obligation would serve a useful purpose equally well with the modifications specified by the applicant, by consenting to the modifications sought. The Department considers that the expression "no longer serves any useful purpose" should be understood in land-use planning terms. Thus, if an obligation's only remaining purpose is to meet some non-planning objective it will generally be reasonable to discharge it.

4–1272 C7. *Section 106A(7)* provides that the authority shall notify the applicant of its decision within a period prescribed by the Secretary of State.

C8. *Section 106A(8)* provides that where the authority determines that a planning obligation shall have effect subject to modification, the modified obligation shall be enforceable from the date on which the applicant is sent a notice of determination.

C9. *Section 106A(9)* empowers the Secretary of State to make regulations with respect to the form and content of applications, the publication of notices of such applications, procedures for considering any representations on the applications and the notices to be given to applicants of the authority's determination.

C10. *Section 106A(10)* provides that section 84 of the Law of Property Act 1925 shall not apply to planning obligations. Section 84 empowers the Lands Tribunal to modify or discharge restrictive covenants, including those contained in a planning obligation. It is considered to be of limited application in the planning context, because the test of obsolescence which it imposes is stringent, and it does not cover positive covenants. The section has been disapplied to prevent any overlapping of the 1925 and 1990 jurisdictions.

C11. *Section 106B(1)* provides that where a local planning authority fails to give notice of its determination of an application for modification or discharge of a planning obligation within the period prescribed under section 106A(7), or to refuse such an application (see section 106A(6)(a)), the applicant may appeal to the Secretary of State.

C12. *Section 106B(2)* provides that an appeal against an authority's failure to give notice of its determination of an application shall be treated in the same way as an appeal against refusal of an application.

C13. *Section 106B(3)* enables the Secretary of State to make regulations prescribing the period within which notice of such appeals shall be given and the manner in which they shall be made.

4–1273 C14. *Section 106B(4)* applies section 106A(6) to (9) in relation to appeals to the Secretary of State as they apply in relation to applications to authorities. The Department does not intend to make regulations prescribing a

period within which appeals must be determined by the Secretary of State. The time taken to determine such appeals will, however, be compatible with the published targets for determining appeals under section 78 of the 1990 Act. **4–1273**

C15. *Section 106B(5)* gives either party to an appeal the right to a hearing. When an appeal is made, the appellant and the local planning authority will be asked to state whether they wish to be heard before an Inspector, or whether they are content for the appeal to be determined by exchanges of written representations. If neither party asks to be heard, and if the Secretary of State does not consider a local inquiry necessary, the appeal will be dealt with by written representations, following *mutatis mutandis* the spirit of the Town and Country Planning (Appeals) (Written Representations Procedure) Regulations 1987 (S.I. 1987 No 771).

C16. If either principal party exercises their right to be heard, the Department will consider whether to hold a local inquiry or to offer them the option of a less formal hearing, following the procedure in the *Code of Practice for Hearings* at Annex 2 to DOE Circular 15/96, *Planning Appeal Procedures*. Where there is a local inquiry the spirit of the Town and Country Planning Appeals (Inquiries Procedure) Rules 1992 (S.I. 1992 No 2738) or of the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) Rules 1992 (S.I. 1992 No 2739) will be applied. In the light of experience it will be considered whether the Rules should be formally adapted to such appeals or whether a separate set of Rules should be produced.

C17. *Section 106B(6)* provides that the determination of an appeal to the Secretary of State under this section shall be final.

C18. *Section 106B(7)* applies Schedule 6 to the 1990 Act (Determination of Certain Appeals by Person Appointed by Secretary of State), allowing appeals to be determined by an Inspector appointed by the Secretary of State.

The Town and Country Planning (Modification and Discharge of Planning Obligations) Regulations 1992 (S.I. 1992 No 2832)

4–1274 C19. The Town and Country Planning (Modification and Discharge of Planning Obligations) Regulations 1992 (S.I. 1992 No 2832) came into force on 17 December 1992. The regulations enable applications to be made to the enforcing local planning authority for the modification and discharge of planning obligations, and for appeals to be made to the Secretary of State where such applications are refused or not determined. The procedures in these regulations apply only to planning obligations entered into under section 106 or section 299A of the Town and Country Planning Act 1990, as substituted and inserted by section 12 of the Planning and Compensation Act 1991. They do not apply to agreements entered into under other powers, including section 106 as originally enacted.

C20. *Regulation 3* of the 1992 regulations provides that an application for modification or discharge of a planning obligation shall be on a form provided by the local planning authority and sets out which information such a form shall require. An application is required to include the information specified by the form, a map identifying the land to which the application relates and any other information which the applicant considers relevant to determine an application.

C21. *Regulation 4* provides for the notification of applications for modification or discharge to persons (other than the applicant) against whom the obligation is enforceable. The relevant forms and certificates are set out in the Schedule to the regulations.

4–1275 C22. *Regulation 5* makes provision for the local planning authority to pub licise applications in accordance with the form set out in Part 3 of the Schedule, and to invite representations to be made. Authorities are also required to

make a copy of the application and the relevant part of the instrument which created the obligation available for inspection during the 21 day period available for representations.

4–1275 C23. *Regulation 6* prevent authorities from determining applications until the 21 day period for representations has expired, and requires them to give written notice of their decision within 8 weeks of receipt of the application, or such other period as they and the applicant may agree in writing. Decision notices must state the authority's reasons clearly and precisely, and set out the applicant's right of appeal.

C24. *Regulation 7* provides that any appeal to the Secretary of State shall be made within 6 months of the date of the authority's decision notice refusing the application, or in the case of non-determination within 6 months of the expiry of the period specified in regulation 6(2). The relevant appeal forms may be obtained from the Planning Inspectorate in Bristol.

C25. *Regulation 8* enables all classes of appeal to be determined by Planning Inspectors. The Secretary of State may decide to recover individual appeals for his own determination in line with the published criteria for planning appeals.