Office of the
Deputy Prime Minister

Creating sustainable communities

Draft revised Circular on planning obligations

Consultation document
November 2004

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1. Introduction

Reforming negotiated planning obligations

1. Planning obligations, also known as section 106 agreements, are typically agreements negotiated between local authorities and developers in the context of granting planning consent[1]. They provide a means to ensure that a proposed development contributes to the creation of sustainable communities, particularly by securing contributions towards the provision of necessary infrastructure and facilities required by local and national planning policies.

2. This consultation seeks views on the Government's proposals for reforming and improving the current system of planning obligations in England in the short to medium term. The Government's aim is to create a system that is faster, more transparent and accountable and which gives greater clarity and certainty to all concerned.

3. The draft Circular included in this document sets out some possible changes to the current negotiated system of planning obligations to be made in advance of potentially more major reforms to the system that may come forward in the next 2-3 years, in response to the recommendations of the final report of the Barker Review of Housing Supply (March 2004). Further background on the wider policy context and possible future reforms is given in Chapter 2 'Planning obligations – background to reforms'.

Consulting on our proposals

4. We would welcome your views on the Government's proposals for reform as expressed in the draft Circular. Our objective is to promote debate and ensure that a wide range of views are taken into account before a final revised Circular is issued in 2005. Any comments on the draft Circular and outline of good practice guidance or the partial Regulatory Impact Assessment (Appendix A) and any questions about this consultation should be sent to the address below by 25 January 2005. A proforma for comments is included in Appendix B to this document.

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1 They can also take the form of unilateral undertakings made by developers.

5. Additional copies of this document can be obtained from:

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6. Copies can also be found on the ODPM website at: www.odpm.gov.uk/planning under 'Consultation papers'.

7. It would be helpful if responses from representative groups could provide a summary of the people and organisations they represent.

8. Responses will be made available for public inspection in the ODPM Library. The ODPM will assume that you do not object to this approach to openness unless notified otherwise. If you reply by e-mail, any confidentiality clause generated by your provider will not be taken into account unless you specifically request confidentiality. Consultation responses may also be included in a statistical summary and a summary of responses may subsequently be published on the ODPM website.

9. This consultation is being conducted in accordance with the Government's *Code of practice on written consultation*. The criteria are reproduced in Appendix C of this consultation paper along with a note on consultees at Appendix D.

2. Planning obligations – background to reforms

10. The framework for the current system of planning obligations in England is set out in section 106 (s106) of the Town and Country Planning Act 1990 (as substituted by the 1991 Act) and in DoE Circular 1/97. More detail on the legislative framework is given in Annex A to the draft Circular at Chapter 5 in this consultation document.

11. For a number of years, the current system of planning obligations has been criticised for being 'complex, difficult to agree and [responsible] for delaying the planning process' (*Planning: delivering a fundamental change*, DTLR 2001). In response to some of these criticisms, the Government published a consultation document in 2001 seeking views on legislative proposals aimed at achieving greater simplicity and clarity in the system. Following this consultation, it was decided that many of the necessary reforms could be achieved without legislative change and further work was carried out on streamlining the negotiated route for agreeing planning obligations.

12. The ODPM published a further consultation in November 2003 (*Contributing to sustainable communities – a new approach to planning obligations*) which provided more detail on a number of proposals for reform of the negotiated system of planning obligations and also proposed an Optional Planning Charge. A statement on the way forward following this consultation was published on 30 January 2004 (see Hansard column 20WS – 21WS).

13. Before the Government was able to publish final proposals on these reforms, the final report of the Barker Review of Housing Supply (*Delivering stability: Securing our future housing needs*) was published on 17 March 2004, which recommended that the Government should introduce a Planning-gain Supplement (PGS) tied to the granting of planning permission. This would allow part of landowner development gains to contribute to wider benefits for the community. The report also recommended that, if the Government were minded to do this, planning obligations should be scaled back to cover direct impact mitigation only along with affordable and social housing requirements.

14. The Government agreed that it was in principle acceptable to fund social housing and other measures out of the uplift in land values associated with the development process and the Chancellor of the Exchequer said in the Budget report of 17 March 2004 that he would consider proposals for a PGS and make a decision by the end of 2005.

15. In light of the Barker report's recommendations, the Government reviewed its plans for taking forward the reform of planning obligations foreshadowed in the November 2003 consultation paper and announced its change in approach in a written Ministerial statement on 17 June 2004 (Hansard column 44WS).

16. The Government announced its intention to press ahead with identifying and implementing non-legislative changes to the current arrangements for negotiated agreements in the short to medium term, through the revision of Circular 1/97 and the publishing of good practice guidance for local authorities and developers. These proposed changes are the subject of this consultation.

17. Meanwhile, work continues in parallel on proposals for an Optional Planning Charge, on a timetable consistent with that for decisions on the PGS.

18. The Government does not propose for the time being to proceed with making regulations to set planning obligations on a new statutory basis, using the powers established by the Planning and Compulsory Purchase Act 2004 (sections 46 and 47). These powers may be used in response to the Chancellor's decision at the end of 2005 on the Government's response to the Barker Review of Housing Supply.

3. Current policy and practice

19. Current policy on planning obligations, as set out in Circular 1/97, requires fair, open and reasonable negotiation of planning obligations, so that the obligations allow development to go ahead which might otherwise have been refused. The Circular advises local authorities of the 'tests' that they should apply in seeking planning obligations in order to ensure they are in line with the Secretary of State's policy. These policy tests are set out in paragraph 7 of Circular 1/97.

20. However, case law (such as Tesco 1995[2]) confirmed a broader interpretation of the type of developer contribution that can be agreed under s106. It has required only a connection between an obligation and development which is 'greater than *de minimis*'. So in practice, local authorities are accepting contributions from developers that go beyond the definition in Circular 1/97 – contributions that are related to the development but that do not meet the 'necessary' requirement of the Secretary of State's policy tests.

2 *Tesco Stores Ltd v. Secretary of State for the Environment* [1995] held that a local planning authority would not be acting unlawfully by taking into account a planning obligation that did not comply with the policy test provided the matters provided through the planning obligation were capable of being material planning considerations. In order to be a material consideration, the matter should have some connection with the development that was more than *de minimis*.

4. Proposals for reform

21. In putting forward proposals for reform of the current system of planning obligations, the Government is seeking to address a number of the criticisms raised by those who responded to the consultation in 2003 and in subsequent discussions.

22. In response to these criticisms, the Government's main aim is to make changes to the current system in order to promote speed, certainty, transparency and accountability.

23. The proposed changes to the current system of planning obligations set out in the draft Circular included in this document seek to **clarify existing policy** and **build on some of the proposals made for streamlining the system** of negotiated agreements consulted on from November-December 2003. They also seek to **bring the planning obligations system into line with the new system of spatial planning** established by the Planning and Compulsory Purchase Act 2004. The issues raised during the consultation have since been discussed with a wide range of stakeholders, including an Advisory Group chaired by Keith Hill MP, Minister for Housing and Planning, which met on six occasions between May and September 2004. The following organisations were represented on the Group:

British Property Federation
Chartered Institute of Housing
Confederation of British Industry
House Builders Federation
Local Government Association
National Housing Federation
Planning Officers Society
Royal Institute of Chartered Surveyors
Royal Town Planning Institute

24. The draft Circular will be supported by good practice guidance being prepared by Halcrow Group consultants, in consultation with a range of stakeholders. For purposes of clarity, a full draft of the good practice guidance will not be published for consultation until the policy contained in the Circular has been finalised following consultation. However, an outline of the proposed content of the guidance is reproduced at Chapter 6 in order to show the likely shape of the overall package to be made available to local authorities and developers. Consultees' comments on the proposed structure are also welcome.

Summary of reform proposals

a) Revisions to Circular 1/97

The main changes to Circular 1/97 proposed in the draft Circular in this document, and on which consultees' views are sought are as follows (paragraph numbers in this section refer to Annex B of the draft Circular in Chapter 5):

1. Retention/simplification of policy tests (paragraphs 1-10)
2. New typology for the use of planning obligations (paragraphs 3 and 11-16)
3. Clarification of policy on contributions for affordable housing (paragraphs 12-14)
4. Clarification of guidance on use of maintenance payments (paragraph 18)
5. Clarification of guidance on pooled contributions (paragraphs 19-21)
6. Stronger emphasis on national, regional and local plan policies (paragraphs 8 and 24-27)
7. Encouragement of joining up across all public sector infrastructure providers (paragraph 28)
8. Encouragement of use of formulae and standard charges (paragraphs 29-31)
9. New guidance on use of standard agreements/undertakings (paragraph 32)
10. New guidance on use of independent third parties (paragraphs 33-35)
11. New guidance on cost recovery (paragraph 36)
12. Encouragement of the use of unilateral undertakings (paragraphs 38-40)
13. New guidance on monitoring of implementation of planning obligations (paragraph 41).

b) Changes to appeal time limits (in paragraph A38 of Annex A to the draft Circular in Chapter 5)

Consultees' views are also sought on the proposal to reduce from 6 to 3 months the time limit for appeals relating to refusals by local planning authorities of applications for the modification and discharge of planning obligations. This would bring the time limit for appeals in line with that for appeals made under section 78 of the Town and Country Planning Act 1990.

Discussion of reform proposals

a) Revisions to Circular 1/97

1. Retention/simplification of policy tests (Annex B of draft Circular, paragraphs 1-10)

25. The revised Circular retains the policy tests from Circular 1/97 whilst simplifying and clarifying the first policy test for acceptable planning obligations, by placing greater emphasis on the requirement for obligations to be necessary in order to make the development **acceptable in planning terms**. This removes some of the ambiguity cited by a number of stakeholders over what is 'necessary' for a development to proceed, and places greater emphasis on the need for a link between the contribution sought and the presence of a relevant policy in local or national planning policy, whilst still maintaining a requirement for contributions to be 'reasonable'.

26. The decision to retain the policy tests from Circular 1/97 but clarify the 'necessary' requirement in this way is set against a background of widely differing views amongst stakeholders about the appropriate boundary between private and public funding for infrastructure. Whilst there is merit in extending the scope of s106 to cover a wider range of more diffuse impacts, thereby ensuring that communities benefit from new development, it is the Government's view that s106 is not the right mechanism with which to achieve the successful capture of development gain. We are therefore proposing in the revised Circular that s106 should continue to be an impact mitigation or positive planning measure linked to planning necessity and that it should not be used for tax-like purposes such as the capture of land value increases for purposes not directly necessary for development to proceed. Local planning authorities and developers will still be able to put in place agreements outside the planning system in order to secure funding for infrastructure that is not necessary in planning terms for the development to proceed.

27. In essence, the re-emphasis of the policy tests in Circular 1/97 is not seeking to deprive local communities of the infrastructure that the Local Development Framework deems is necessary to allow development to proceed. Rather, it is seeking to discourage the offering by developers of facilities that are not required by the development, in order to make clear that planning permission is not being bought or sold.

2. New typology for the use of planning obligations (paragraphs 3 and 11-16)

28. The Circular uses one typology for the many different uses of planning obligations that were included in Circular 1/97 i.e. prescription/compensation/mitigation. This draws together the previously disparate references to the categories of use of planning obligations and establishes a simple typology for the different types of obligation permitted under the 1991 Act.

3. Clarification of policy on contributions for affordable housing (paragraphs 12-14)

29. Given the importance of affordable housing in delivering sustainable communities, but the perceived lack of clarity over its inclusion in planning obligations, the revised Circular seeks to clarify the rationale for including affordable housing in obligations. At the moment, whilst falling within the scope of Circular 1/97, it could be argued that affordable housing is somewhat distinct from the other 'impact mitigation' measures that are often provided. This is

because there is no site-specific compensatory requirement to be met through a planning obligation – rather a positive planning objective to be secured, namely the creation of mixed communities.

30. The revised draft Circular therefore separates out affordable housing policy from impact mitigation or compensation policies, whilst still requiring affordable housing contributions to fall within the Secretary of State's policy tests. This makes clear that in seeking the delivery of affordable housing through s106, local planning authorities are thereby prescribing the nature of the development (in line with Planning Policy Guidance Note 3 (Housing)) rather than mitigating its impacts. In effect, this is legitimising current practice. The approach is also in line with the distinction drawn by Kate Barker in her final report between impact mitigation and affordable housing.

4. Clarification of guidance on use of maintenance payments (paragraph 18)

31. In a similar way to decisions about the boundary of acceptability for developer contributions as a whole, defining what should be the scope of maintenance payments gives rise to a wide variety of responses from stakeholders. The revised draft Circular seeks to take a balanced approach to the issue, by allowing local authorities to require contributions to maintenance from developers for a limited period where a new piece of infrastructure is predominantly for the use of the development concerned, or cannot immediately be supported by mainstream public funding, but by proposing that these contributions should be circumscribed with time limits and payment amounts agreed in advance.

5. Clarification of guidance on pooled contributions (paragraphs 19-21)

32. The revised Circular seeks to clarify the Government's position on the use of pooled contributions by making clear that their use, when clearly linked to specific infrastructure and therefore not 'tax-like', can support development and ensure a fairer and more equitable distribution of the costs of new infrastructure.

6. Stronger emphasis on national, regional and local plan policies (paragraphs 8 and 24-27)

33. In contrast to Circular 1/97, the revised Circular does not include a wide range of examples of appropriate uses of planning obligations, on the basis that this is not a matter for national prescription. Rather, the Circular makes clear (in paragraph 8) that if a local community has decided, through its development planning processes, that development should comply with certain agreed policies, it is acceptable to require development to contribute to the matters contained within those policies through planning obligations, where they are not addressed in the application itself and cannot be met through conditions. This therefore places a greater emphasis on the policy framework contained in local, regional and national documents, where they have had the opportunity to be thoroughly scrutinised by the public and by developers.

34. As required by Circular 1/97, local planning authorities will continue to be required to include general planning obligations policies in the new style Development Plan Documents. The revised Circular recommends that local planning authorities should set out in detail what they will expect their planning obligations to deliver in Supplementary Planning Documents (SPD). This will provide greater clarity and certainty for both the development industry and the community. In the face of the concurrent timetables for the preparation of Local Development

Frameworks and decisions on the Planning-gain Supplement and Optional Planning Charge (see paragraph 4 of the draft Circular), local planning authorities will need to adopt a pragmatic approach to the early preparation of SPD to provide the detail needed to support their decision-making function.

7. Encouragement of joining-up across all public sector infrastructure providers (paragraph 28)

35. It is important that any planning obligations policy contained in a Local Development Framework has the potential to require contributions to all aspects of public infrastructure that may be affected by development (e.g. health, education, flood defence, highways, culture and sport). The revised Circular therefore introduces the concept of a joined-up approach to planning obligations policies and consideration of applications involving obligations, whilst seeking to minimise the additional administrative burdens placed on public infrastructure providers. This is consistent with the concept of spatial planning introduced by the Planning and Compulsory Purchase Act 2004.

8. Encouragement of use of formulae and standard charges (paragraphs 29-31)

36. The use of standard formulae and charges, where they are designed in accordance with the other provisions of the revised Circular, can lead to the quicker resolution of negotiations and greater certainty for developers. The revised Circular therefore explicitly encourages the use of standard charges within certain parameters, in contrast to Circular 1/97 which provoked confusion over the legitimacy or otherwise of the use of standard charges.

9. New guidance on use of standard agreements/undertakings (paragraph 32)

37. The revised Circular also includes new guidance on the use of standard legal documents in the preparation of planning obligations, aimed at speeding up the process of agreement.

10. New guidance on use of independent third parties (paragraphs 33-35)

38. A number of stakeholders have raised the usefulness of involving expert third parties (for example mediators) in planning obligations in order to speed up their resolution. This is addressed for the first time in the revised Circular.

11. New guidance on cost recovery (paragraph 36)

39. The revised Circular sets out when it is reasonable for local planning authorities to recoup some of the costs incurred during the process of agreeing planning obligations, with the emphasis being on the need for any such payments to be related to increases in the speed and efficiency with which the agreements are resolved.

12. Encouragement of the use of unilateral undertakings (paragraphs 39-40)

40. Unilateral undertakings are most commonly submitted by developers where an application is subject to an appeal. The Circular acknowledges this situation, but also encourages the use of unilateral undertakings where it is possible for the developer to ascertain the likely requirements of the local planning authority in advance. This is likely to be increasingly the case where local planning authorities set out detailed policies (particularly those based on formulae and standard charges) as part of their Local Devolpment Framework. In these cases,

developers are encouraged to submit unilateral undertakings alongside their planning applications, in the interests of speed.

13. New guidance on monitoring of implementation of planning obligations (paragraph 41)

41. The draft revised Circular stresses the importance of monitoring the implementation of planning obligations in a systematic and transparent way, noting the importance of information being available to other local authority departments, developers and members of the public.

b) Changes to appeal time limits (paragraph A38 of Annex A to the draft Circular)

42. Consultees' views are also invited on the question of whether to reduce the current time limit for appeals relating to refusals by local planning authorities of applications for the modification and discharge of planning obligations.

43. Regulation 7 of The Town and Country Planning (Modification And Discharge Of Planning Obligations) Regulations 1992 (SI 1992/2832) provides that any appeal to the Secretary of State must be made within 6 months of the date of the local 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).

44. This 6 month limit differs from the 3 month limit which now applies to appeals made under section 78 of the Town and Country Planning Act 1990, following the Town and Country Planning (General Development Procedure) (England) (Amendment) Order 2003 (SI 2003/2047).

45. The number of appeals made relating to the modification and discharge of planning obligations in any one year is small, but there are arguments in favour of bringing the time limit for these appeals in line with that for other appeals. This could be done by a straightforward amendment to the General Development Procedure Order, accompanied by a letter to all planning authorities.

46. Consultees are invited to comment on the merits or otherwise of reducing the time limit for appeals against refusals of applications for the modification and discharge of planning obligations.

5. Draft Circular on planning obligations

Introduction

1. The purpose of this Circular is to provide revised guidance to local authorities in England on the use of planning obligations under section 106 of the Town and Country Planning Act 1990 as substituted by the 1991 Act. The Circular does not concern sections 46 and 47 of the Planning and Compulsory Purchase Act 2004.

2. This Circular replaces Department of the Environment Circular 1/97, which is hereby cancelled. This Circular clarifies the basis on which planning obligations should be assessed for their acceptability in *policy* terms and gives further guidance on the *process* of securing obligations.

3. On a number of occasions, the Courts have laid down the legal requirements for the validity and materiality of planning obligations. These are different from the Secretary of State's policy for the use of planning obligations, which are set out in Annex B to this Circular.

4. This Circular sets out some of the reforms to the planning obligations system proposed in the consultation paper *Contributing to sustainable communities: a new approach to planning obligations,* published on 6 November 2003. The changes in this Circular concern only the negotiation of planning obligations and do not introduce an Optional Planning Charge as proposed in the Government's November 2003 consultation paper. This is in line with the Minister for Housing and Planning's statement to Parliament of 17 June 2004 (Hansard 44WS). A decision on the introduction of an Optional Planning Charge will be made in the context of the Government's response to the Barker Review of Housing Supply *Delivering stability: Securing our future housing needs* (17 March 2004). The Review's final report recommended the introduction of a Planning-gain Supplement (recommendation 26) accompanied by a 'scaled-back' system of planning obligations – both of which would require legislation. This Circular therefore concerns the improvements to the current system which the Government would like to make in the interim period before further reforms are brought forward.

5. This Circular is structured as follows:

   Annex A which sets out the statutory framework for planning obligations, including the arrangements for the discharge or modification of planning obligations; and

   Annex B which explains the policies of the Secretary of State and provides guidance on the use of planning obligations. These are the policies to which the Secretary of State will have regard in determining applications or appeals and which local planning authorities should also take into account when determining applications and drafting plan policies.

6. Further, more detailed information on the application of this Circular is given in the Good Practice Guide on Planning Obligations published by the Office of the Deputy Prime Minister *(available when final version of Circular is published)*.

MRS J M BAILEY,
Head of Planning Policies Division, Office of the Deputy Prime Minister

Addressed to:

The Chief Executives of:

County Councils in England
District Councils in England
Unitary Authorities in England
London Borough Councils
Greater London Authority
Regional Planning Bodies
Regional Development Agencies
Council of the Isles of Scilly

The Town Clerk, City of London
The National Park Officer, National Park Authorities in England
The Chief Planning Officer, The Broads Authority

Annex A

Statutory Framework for planning obligations Planning and Compensation Act 1991

Planning obligations

A1. ***Section 12(1)* of the 1991 Act** substituted sections 106, 106A and 106B for section 106 of the Town and Country Planning Act 1990. Section 106 introduced the concept of planning obligations, which comprises both planning agreements and unilateral undertakings. It enables a 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 sections substituted are set out below.

A2. ***Section 106(1)*** provides that anyone with an interest in land may enter into a planning obligation enforceable by 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 1990 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).

A4. ***Section 106(2)*** provides that a planning obligation may:

i. be unconditional or subject to conditions;

ii. impose any restriction or requirement in 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 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 116(6)* provides that, in addition to 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, unitary authority 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.

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 296(2)*** provides 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' (ie the Crown body responsible for the land concerned).

A13. ***Section 299A*** also relates to Crown land. *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 299A may 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, Scotland and Northern Ireland, amends section 91A of the Income and Corporation Taxes Act 1988, consequential upon section 12. Section 91A of the 1988 Act 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.

Modification and discharge of planning obligations

A15. ***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 sections l06A and 106B. The Secretary of State considers that the variation of obligations by agreement between the parties is to be preferred to the formal application and appeal procedures.

A16. ***Section 106A(2)*** provides that any agreement between the parties to modify or discharge a planning obligation shall be by deed.

A17. ***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.

A18. ***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 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.

A19. ***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 an 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.

A20. ***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 Secretary of State considers that the expression 'no longer serves any useful purpose' should be understood in 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.

A21. ***Section 106A(7)*** provides that the authority shall notify the applicant of its decision within a period prescribed by the Secretary of State.

A22. ***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.

A23. ***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.

A24. ***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.

A25. ***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 106A(6)(a)), the applicant may appeal to the Secretary of State.

A26. ***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.

A27. ***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.

A28. ***Section 106B(4)*** applies 106A(6) to (9) in relation to appeals to the Secretary of State as they apply in relation to applications to authorities. The Secretary of State 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.

A29. ***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 2000 (SI 2000/1628).

A30. If either principal party exercises their right to be heard, the Secretary of State will consider whether to hold a local inquiry or to offer them the option of a less formal hearing, following the procedure in the Town and Country Planning (Hearings Procedure) (England) Rules 2000 (SI 2000/1626). Where there is a local inquiry the spirit of the Town and Country Planning (Inquiries Procedure) Rules 2000 (SI 2000/1624) or of the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) Rules 2000 (SI 2000/1625) 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.

A31. ***Section 106B(6)*** provides that the determination of an appeal to the Secretary of State under this section shall be final.

A32. ***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 (SI 1992/2832)

A33. **The Town and Country Planning (Modification and Discharge of Planning Obligations) Regulations 1992 (SI 1992/2832) came into force on 10 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.

A34. ***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 obligation relates and any other information which the applicant considers relevant to determine the application.

A35. ***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.

A36. ***Regulation 5*** makes provision for the local planning authority to publicise 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.

A37. ***Regulation 6*** prevents 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.

A38. ***Regulation 7*** provides that any appeal to the Secretary of State shall be made within [3 or 6] months of the date of the authority's decision notice refusing the application, or in the case of non-determination within [3 or 6] months of the expiry of the period specified in Regulation 6(2). The relevant appeal forms may be obtained from the Planning Inspectorate.

A39. ***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.

Annex B

Planning obligations

Policy: the broad principles

1. The principal objective of the planning system is to deliver sustainable development, through which key Government social, environmental and economic objectives are achieved. The delivery of these goals is provided for in a framework of development documents, in which local communities are positively involved and through a transparent system of decision-making on individual applications.

2. In dealing with planning applications, local planning authorities consider each on its merits and reach a decision based on whether the application meets the requirements of the relevant development plan, unless material considerations indicate otherwise. Where applications do not meet these requirements, they may be refused. However, in some instances, it may be possible to make acceptable development proposals which might otherwise be unacceptable, through the use of **planning conditions** (see Department of the Environment Circular 11/95) or where this is not possible, through **planning obligations**. (Where there is a choice between imposing conditions and entering into a planning obligation, the imposition of a condition is preferable (see paragraph 42)).

3. **Planning obligations** (or 'section106 agreements') are private agreements negotiated, usually in the context of planning applications[3], between local planning authorities and persons with an interest in a piece of land (or 'developers'), and **intended to make acceptable development which would otherwise be unacceptable in planning terms**. Obligations can also be secured through unilateral undertakings by developers. For example, planning obligations might be used to **prescribe** the nature of a development (e.g. by requiring that a given proportion of new homes are affordable); or to secure a contribution from a developer to **compensate** for loss or damage created by a development (e.g. loss of open space) or to **mitigate** a development's impact on the locality (e.g. through increased public transport provision). The outcome of all three of these uses of planning obligations should be that the proposed development concerned is made to comply as far as practicable with published local, regional or national planning policies.

4. Planning obligations are unlikely to be required for all developments but their use should be encouraged whenever appropriate according to the Secretary of State's policy set out in this Circular. There are no hard and fast rules about the size or type of development that should attract obligations.

5. The Secretary of State's policy requires, amongst other factors, that planning obligations are only sought where they meet all of the following tests:

3 They can also be used in relation to Local Developments Orders (*Note: once the relevant provisions in the Planning and Compulsory Purchase Act 2004 have been commenced*).

A planning obligation must be:

(i) necessary to make the proposed development acceptable in planning terms;

(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.

6. The use of planning obligations must be governed by the fundamental principle **that planning permission may not be bought or sold**. It is therefore not legitimate for unacceptable development to be permitted because of benefits or inducements offered by a developer which are not necessary to make the development acceptable in planning terms (see 5(i)).

7. Similarly, 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'.

The Secretary of State's policy tests

8. As summarised above, it will in general be reasonable to seek, or take account of, a planning obligation, if what is sought or offered is **necessary** from a **planning** point of view i.e. in order to bring a development in line with relevant local, regional or national planning policies. Local Development Framework policies are therefore a crucial pre-determinant in justifying the seeking of any planning obligations since they set out the matters which must be addressed in order for development to proceed. Obligations must also be so **directly related to proposed developments** that the development ought not to be permitted without them – for example, there should be a functional or geographical link between the development and the item being provided as part of the developer's contribution.

9. Within these categories of acceptable obligations, what is sought must also be **fairly and reasonably related in scale and kind to the proposed development** and **reasonable in all other respects**. For example, developers may reasonably be expected to pay for or contribute to the cost of all, or that part of, infrastructure which would not have been necessary but for their development. The effect of the infrastructure investment may be to confer some wider benefit on the community but payments should be directly related in scale to the impact which the proposed development will make or to the benefit it will derive from the facilities to be provided. Planning obligations should not be used solely to resolve existing deficiencies in infrastructure provision.

10. In some instances, perhaps arising from different regional or site-specific circumstances, it may not be feasible for the proposed development to meet all the requirements set out in local, regional and national planning policies and still be economically viable. In such cases, and where the development is needed to meet the aims of the development plan, it is for the local authority and other public sector agencies to decide what is to be the balance of contributions made by developers and by the public sector infrastructure providers in its area supported, for

example, by local or central taxation. If, for example, a local authority wishes to encourage development, it may wish to provide the necessary infrastructure itself, in order to enable development to be acceptable in planning terms and therefore proceed, thereby contributing to the sustainability of the local area. Decisions on the level of contributions should be based on negotiation with developers over the level of contribution that can be demonstrated as reasonably being made whilst still allowing development to take place.

Examples of the use of planning obligations

11. The following paragraphs give a general indication of what might reasonably be achieved through the use of planning obligations. However, establishing the relationship between a particular planning benefit and an individual development must be a matter of planning judgement, exercised in the light of local circumstances, rather than an issue for detailed national prescription.

Prescribing the nature of the development to achieve planning objectives

12. Planning obligations can be used to secure the implementation of a planning policy in order to make acceptable a development proposal that would otherwise be unacceptable in planning terms. For example, planning obligations can be used to secure the inclusion of an element of affordable housing in a residential or mixed-use development where there is a residential component.

13. A requirement through a planning obligation for the provision of an element of **affordable housing** in a residential development should be in line with Local Development Framework policies on the creation of mixed communities. As per the guidance in Planning Policy Guidance Note 3 (Housing) (PPG3), Local Development Frameworks should identify the need for affordable housing and should set site-size thresholds above which the provision of a specified proportion of affordable housing would be expected.

14. The presumption is that the affordable housing elements of residential developments required by local policies on mixed communities and provided through planning obligations should be provided in-kind and on-site. However, there may be certain circumstances, which should be specified in the Local Development Framework, where it may not be necessary for provision to be on-site, and where a contribution on another site or a financial contribution may represent a more appropriate option. These are set out in PPG3.

Compensating for loss or damage caused by a development

15. Planning obligations might be used to offset through substitution, replacement or regeneration the loss of, or damage to a resource present or nearby, for example, the loss of a wetland habitat; open space; or right of way. It may not be necessary to provide an exact substitute of the item lost, but there should be some relationship between what is lost and what is to be offered. A reasonable obligation will seek to restore facilities, resources and amenities to a quality equivalent to that existing before the development.

Mitigating the impact of a development

16. Where a proposed development would, if implemented, create a need for a particular facility that is relevant to planning but cannot be required through the use of planning conditions (see paragraph 42), it will usually be reasonable for planning obligations to be secured to meet this need. For example, where a proposed development is not acceptable in planning terms due to inadequate access or public transport provision, planning obligations might be used to secure contributions towards a new access road or provision of a bus service. Similarly, if a proposed development would give rise to the need for additional or expanded community infrastructure, for example, a new school classroom, which is necessary in planning terms and not provided for in an application, it might be acceptable for contributions to be sought towards this additional provision through a planning obligation.

Types of contribution

17. Contributions may either be in kind or in the form of a financial contribution. In the case of financial contributions, payments can be made in the form of a lump sum or an endowment, or if beneficial to all parties and not unduly complex, as phased payments over a period of time, related to defined dates, events and triggers.

Maintenance payments

18. Where contributions are secured through planning obligations towards the provision of facilities which are predominantly for the benefit of the users of the associated development or neighbouring residents, it may be appropriate for the developer to contribute to their subsequent maintenance. As a general rule, however, where an asset is intended for wider public use, the costs of subsequent maintenance and other recurrent expenditure associated with the developer's contributions should normally be borne by the body or authority in which the asset is to be vested. Where contributions to the ongoing maintenance of new facilities are appropriate, these should reflect the time lag between the provision of the new facility and its inclusion in public sector funding streams. Payments should be time-limited and not be required in perpetuity by planning obligations. Local authorities and developers should agree the type of payments to be made e.g. regular payments, or commuted sums, all with a clear audit trail.

Pooled contributions

19. Where the combined impact of a number of developments creates the need for infrastructure, it may be reasonable for the associated developers' contributions to be pooled, in order to allow the infrastructure to be secured in a fair and equitable way. Similarly, where the off-site provision of affordable housing is sought (in line with PPG3 and the relevant Local Development Framework), it may be reasonable to pool a number of contributions. Pooling can take place both between developments and between local authorities where there is a cross-authority impact. Local authorities should set out in advance the need for this joint supporting infrastructure and the likelihood of a contribution being required, demonstrating both the direct relationship between the development and the infrastructure and the fair and reasonable scale of the contribution being sought. There should be a clear audit trail between the contribution made and the infrastructure provided.

20. In some cases, individual developments will have some impact but not sufficient to justify the need for a discrete piece of infrastructure. In these instances, local planning authorities may wish to consider whether it is appropriate to seek contributions to future provision (in line with the requirements for demonstrating need as set out above).

21. In the event that contributions are made towards specific infrastructure provision but the infrastructure is not provided within an agreed timeframe, arrangements may be made for contributions to be returned to developers.

A fast, predictable, transparent and accountable system

22. It is important that the negotiation of planning obligations does not unnecessarily delay the planning process, thereby holding up development. It is therefore essential that all parties proceed as quickly as possible towards the resolution of obligations in parallel to planning applications (including through pre-application discussions where appropriate) and in a spirit of early warning and co-operation, with deadlines and working practices agreed in advance as far as possible. The good practice guidance accompanying this Circular gives examples of a number of ways in which the planning obligations process can be streamlined and made more predictable and transparent, but the following practices (in paragraphs 24 – 41 below) are especially encouraged within local authorities.

23. Local authorities may wish to consider the development of codes of practice in negotiating planning obligations, so as to make clear the level of service a developer can expect and in order to increase public confidence in the planning obligations system.

Local planning obligations policies

24. In order to allow developers to predict as accurately as possible the likely contributions they will be asked to make through planning obligations and therefore anticipate the financial implications for development projects, local authorities should seek to include as much information as possible in their published documents in the Local Development Framework. In line with previous advice in Circular 1/97, local planning authorities should include in their new style Development Plan Documents high level policies about the principles and use of planning obligations – i.e. matters to be covered by planning obligations and factors to be taken into account when considering the scale and form of contributions – if these are not already covered in their 'saved' policies under schedule 8 to the Planning and Compulsory Purchase Act 2004.

25. More detailed policies expanding on the principles set out in the Development Plan Document (e.g. application to specific localities and likely quantum of contributions) ought then to be included in Supplementary Planning Documents. These more detailed policies might include matrices for predicting the size and types of obligations likely to be sought for specific sites; sub-plan areas; or windfall sites. Where local authorities do not have existing high level planning obligations policies in their adopted Local Plan or Unitary Development Plan, they should apply the policies set out in this Circular through a Supplementary Planning Document setting out the local application of the policies. This practice should only be followed in the transitional period before policies are in place in the relevant Development Plan Document, as set out above. The Supplementary Planning Document will also need to be

in conformity with the strategic policies in (a) the Core Strategy Development Plan Document; (b) the policies in any other Development Plan Document, or where (a) and (b) do not apply, an existing development plan policy.

26. All local planning obligations policies should be in line with the guidance given in this Circular and should cover both allocated and windfall sites as well as setting out principles for general application. Where mitigation or compensation measures are required, planning obligations policies should be based on a clear assessment of the impacts likely to be created by development (including any disproportionate impacts on different sectors, groups or areas) and the nature and scale of the measures needed to address these impacts.

27. Where there are issues of strategic or regional importance that need to be addressed through planning obligations (for example, the need for pooled contributions towards major infrastructure in Growth Areas), it may be appropriate for these to be referred to in Regional Spatial Strategies, which will set a strategic framework to be interpreted at the local level through the Local Development Framework.

28. While local planning authorities take the lead in negotiating planning obligations with developers, it is important that all sectors and tiers of government or other public agencies with primary responsibility for physical and community infrastructure likely to be affected by development are involved at an appropriate level and in a focused way in the setting of planning obligations policies and where appropriate in the formulation of site-specific planning obligations requirements. An integrated approach such as this will also ensure a coherent approach to the need for infrastructure created by a number of developments.

Formulae and standard charges

29. Local authorities are encouraged to employ formulae and standard charges where appropriate, as part of their framework for negotiating and securing planning obligations. These can help speed up negotiations and ensure predictability, by indicating the likely size and type of some contributions in advance. They can also promote transparency by making indicative figures public and assist in accountability in the spending of monies. Such charges operate under the current system of legislation and as such are distinct from the Optional Planning Charge proposed by the Government in November 2003.

30. Local authorities should publish the levels of standard charges and formulae in advance in a public document (see paragraph 25). Local planning authorities may choose to provide for standard charges for one or more specific matters but there is no requirement to address any or all matters through standard charges and formulae – other matters may still be negotiated on a site-specific basis. It is for local planning authorities to decide which matters to address through standard charges and formulae.

31. Standard charges and formulae applied to each development should reflect the actual impacts of the development or a proportionate contribution to an affordable housing element and should comply with the general tests in this Circular on the scope of obligations. Their main purpose is to given greater certainty to developers and increase the speed of negotiations. Standard charges and formulae should not be applied in blanket form regardless of actual impacts, but there needs to be a consistent approach to their application. Whether local authorities seek a standard charge will depend upon the nature of the proposed development.

Standard agreements/undertakings

32. Local planning authorities are encouraged to use and publish standard heads of terms, agreements/undertakings or model clauses wherever possible in the interest of speed. Guidance on drafting is given in the accompanying good practice guidance (to be published with the final Circular), with the onus of proof being on those parties who wish to depart from this guidance. It is intended that any difficult clauses or terms in the standard document should be raised by developers in the course of pre-application discussion or negotiation with the local planning authority.

Use of independent third parties

33. In some instances and particularly in the context of large applications, where there is a willingness to reach agreement, but a failure to do so, the use of mediation can reduce the cost and length of the planning process, from the inception of a planning application through to the outcome of an appeal. Local planning authorities and developers may wish to consider using independent expert mediators to help in the process of negotiating planning obligations, perhaps for complex or major applications, or to help to facilitate in dispute resolution where disputes are unduly delaying negotiations.

34. In addition there may be circumstances in which factual information needs to be validated before negotiations can continue. In these cases the parties may wish to agree to involve an independent third party to help progress the negotiation. In cases where a dispute relates to the viability of a proposal the independent third party might have access to financial information provided by the developer on a strictly confidential basis.

35. In some instances, it may also be appropriate for third party expert advice to be used in the drawing up of planning obligations policies, as well as in the consideration of individual applications.

Cost recovery

36. Some contributions made by developers are required by local planning authorities to cover the costs incurred during the process of agreeing a planning obligation. Where it can be demonstrated that the contributions made by developers make a significant contribution to the speed and efficiency with which negotiations are completed and where the rate or level of such contributions is specified in advance, it may be acceptable for contributions to be made towards the funding of local authority planning obligations officers, legal fees, monitoring and implementation of obligations.

Public involvement

37. The process of setting planning obligations policies and negotiating planning obligations should be conducted as openly, fairly and reasonably as possible. Where applications involving planning obligations are considered by a planning committee, heads of terms for obligations should be included in committee papers and open to public inspection. Planning obligations must be registered as local land charges and members of the public should be given every assistance in locating and examining planning obligations which are of interest to them.

Unilateral undertakings

38. In most cases, it is expected that local planning authorities and developers will finalise planning obligations by *agreement*. However, where there is difficulty reaching a negotiated agreement, a developer may offer unilaterally to enter into a planning obligation. Further, where it is possible for a developer to ascertain the likely requirements of the local planning authority in advance, due to the presence of detailed policies (particularly those based on formulae and standard charges), the developer is encouraged to submit a unilateral undertaking with a planning application, in the interests of speed.

39. Unilateral undertakings, like other planning obligations, are usually drafted so that they come into effect at a time when planning permission is granted and provide that unless 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.

40. Unilateral undertakings are commonly used at planning appeals or inquiries where there are planning objections that only a planning obligation can resolve. Where a unilateral undertaking is offered at appeal or inquiry, it will be referred to the local planning authority to seek their views. Undertakings should be consistent with the policies set out in this Circular and should be submitted in their final form with the appeal.

Implementation of planning obligations

41. Once planning obligations have been agreed, it is important that they are implemented in an efficient and transparent way, in order to ensure that contributions are spent on their intended purpose and the associated development contributes to the sustainability of the area and does not have a negative effect on the local community. This will require monitoring by local planning authorities, which in turn may involve joint-working by different parts of the authority. The use of standardised systems is recommended, for example, IT databases, in order to ensure that information on the implementation of planning obligations is readily available to the local authority, developer and members of the public.

Other matters

Use of conditions or obligations

42. 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 Department of the Environment Circular 11/95 is preferable because it enables a developer to appeal to the Secretary of State regarding the imposition of the condition. The right of appeal where an obligation is concerned, on the other hand, is only relevant where an application has been refused due to the developer not meeting an obligation, or where a request to modify an obligation is refused (see paragraph 49 below). 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 could frustrate a developer's

right of appeal. Further, as per the guidance in Department of the Environment Circular 11/95, permission cannot be granted subject to a condition that the developer enters into a planning obligation under section 106 of the 1990 Act or an agreement under other powers.

Other legislation

43. 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[4] or previous legislation; or agreements made under the Public Health Act 1936; or agreements about development in the vicinity of roads under section 278 of the Highways Act 1980 (as substituted by the New Roads and Street Works Act 1991) on which Department for Transport, Local Government and the Regions Circular 4/2001 gives advice.

Mineral developments

44. While the same guiding principles apply, it should be noted in connection with mineral developments, that special considerations apply to the use of planning obligations and to the imposition of conditions. These are set out in Minerals Planning Guidance Note 2 *Applications, Permissions and Conditions: July 1998* and Minerals Planning Guidance Note 7 *The Reclamation of Mineral Workings: November 1996*.

Persons interested in land

45. Attention is drawn to the statutory requirement that a developer must be a person interested in land in the area of a local planning authority before he can enter into a planning obligation. This differs from the requirements for planning permission more generally where a developer does not need to have an interest in a piece of land in order to gain planning consent. Before accepting that a planning obligation resolves planning objections to a proposed development, local planning 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.

Appeals and call-ins

46. 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 local planning authority seeks unreasonable planning obligations in connection with a grant of planning permission, it is open to the

4 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.

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. As with unilateral undertakings (paragraphs 38-40), in cases of appeal, it is essential that planning obligations are entered into prior to the inquiry and not left until the latter stages.

47. Where an appeal has arisen because of what seems to the Secretary of State to be an unreasonable requirement on the part of the local planning authority and a public local inquiry or hearing 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.

48. The Secretary of State 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 give consideration as to whether it is appropriate to exercise such powers where it appears that the guidance contained in this Circular is being ignored or misapplied.

Appeals against refusals to modify or discharge a planning obligation

49. Planning obligations can only be modified or discharged by agreement between the applicant and the local planning authority or following an application to the local planning authority five years after the obligation has been entered into. Where an application is made for modification or discharge and the authority decides that the planning obligation shall continue to have effect without modification (or fails to determine an application), the applicant has the right of appeal to the Secretary of State within [3 or 6] months. (See Annex A to this Circular for further details.) The Secretary of State will have regard to the policies explained in this Circular when determining such appeals.

6. Outline of Good Practice Guidance (Full version to be published by Halcrow Group consultants alongside final Circular)

The necessity test – assessing the viability of development

Where a developer is unable to meet the local planning authority's (LPA) requirements for the contributions necessitated by a development, the onus to demonstrate the lack of viability in the development lies with the developer. Viability testing can help to resolve differences between LPAs and applicants on section 106 (s106) contribution requirements and levels.

The GPG will refer to a number of different options and techniques for testing viability, for example:

- the use of the District Valuer;
- the use of independent valuation expertise (including software-based) and property market advice; and
- 'Open Book' Reviews.

The GPG will highlight examples from a number of LPAs in this respect and draw attention to the different circumstances that can relate to bringing forward brownfield sites.

Types of contribution

The GPG will cover the following types of contribution:

- phasing of payments (e.g. identification of appropriate payment dates based on agreed deliverables);
- maintenance payments (e.g. setting duration and scale of payments, based on needs assessment); and
- pooling of contributions (e.g. appropriate Local Development Framework policies and methodologies for assessing impacts and proportionate contributions)

A fast, predictable, transparent and accountable system

The negotiation of planning obligations must not unnecessarily delay the planning process.

The GPG will give advice on how delays can be avoided or minimised by reference to some organisational and capacity issues, for example:

- the ways in which LPAs can organise their activities internally, through for example: encouraging pre-application or 'early warning' discussions with applicants, adopting a development team and 'One Stop Shop' approach at the outset; and appointing a specific officer to be responsible for co-ordinating s106 obligations;
- publishing information packs including codes of practice, standard agreements, standard heads of terms and clauses and procedure notes; and
- improving skill levels, for example to enable LPAs to be more effective in negotiations and understanding development economics.

Local planning obligation policies

The Circular requires that Development Plan Documents (DPD) must set out high level planning obligations policies whereas Supplementary Planning Documents (SPD) should set out more detailed requirements for specific sites or areas.

The GPG will refer to a number of good examples where this approach is being taken forward, for example on:

- the use of DPD obligation policies to identify when contribution requirements will arise;
- the use of Area Action Plan policies for key areas of change providing greater spatial detail about the type and level of contributions sought;
- the use of SPD policies which provide greater detail about the assessment, scale and detail of contributions that will be sought, including the use of matrices;
- the need for all policies to be based on up-to-date needs and costs assessments to ensure that contribution requirements are reasonable; and
- the need to take a comprehensive approach to consultations on such policies with the public and key consultees/stakeholders.

Formulae and standard charges

The Circular encourages LPAs to employ formulae and standard charges, where appropriate, that are linked to the actual impacts of the development.

The GPG will give advice on:

- developing, consulting on and publishing formulae and standard charges to enable applicants to calculate contributions in areas such as education, affordable housing, public transport and other infrastructure. This will include using detailed needs and costs information for example from the DfES, Housing Corporation and Sport England; and
- different methods of monitoring and reviewing those formulae and standard charges so that they are regularly kept up-to-date using for example a number of different indexes.

The GPG will give examples of where SPD containing formulae and standard charges for infrastructure and service contributions have been used successfully.

Standard agreements / undertakings

The Circular encourages LPAs to use and publish standard heads of terms, agreements and undertakings or model clauses in order to assist applicants in the pre-application or early application stages of the planning process.

The GPG will give examples of where LPAs are already using standard heads of terms for a variety of purposes and will include guidance on drafting (currently being developed by ODPM and the Law Society). In addition it will refer to the benefits for applicants of the LPA having standardised forms to secure the provision of necessary information as soon as possible, for example the applicant's solicitor's name and address, registered title number, mortgagee details etc.

Use of independent third parties

The Circular advises that the use of third parties can reduce the cost and length of the planning obligations process.

The GPG will make reference to the use of independent parties for a range of purposes, including for example:

- giving advice on where this may be appropriate;
- giving advice on where such independent advice can be found, for example RTPI, RICS and ICE;
- advising what form this independent advice might take, for example, mediation, valuation and property market advice, needs assessments / infrastructure costings etc; and
- making reference to securing agreement with the applicant on contractual terms and conditions with third parties (i.e. costs of employing them, payment basis, confidentiality issues etc).

Cost recovery

The Circular confirms that it is legitimate for LPAs to recover some costs of agreeing planning obligations from applicants where it can be demonstrated that the contributions made by developers make a significant contribution to the speed and efficiency with which negotiations are completed.

The GPG will give examples of how LPAs are giving early warning and advice to applicants on this, and how these costs are estimated. It will make reference to:

- the recovery by LPAs of their reasonable costs during obligation negotiations, for example their legal fees and monitoring costs, the costs of s106 Officers and potentially the costs of obtaining independent advice, if necessary, to validate specific aspects of the application.

Public involvement

The Circular confirms that the process of setting planning obligation policies and negotiating planning obligations should be conducted as openly, fairly and reasonably as possible. In this context the GPG will advise on how this can be achieved through good communication and consultation with the public. For example:

- using the DPD preparation and review process, including the preparation of Statements of Community Involvement, to provide opportunities for public involvement in planning obligation policy development;
- facilitating public involvement in the consideration of and comment on planning applications where planning obligations are likely to be required via notification letters, notice of public and committee meetings etc;
- making heads of terms of planning obligations publicly available five days before the relevant committee meeting; and
- keeping s106 Registers and maintaining them as records of implementation of obligations.

Unilateral undertakings

The GPG will advise on how:

- LPAs can encourage the submission of standardised unilateral undertakings with a planning application, particularly where formulae and standard charges are published and used in order to promote speed and transparency.

Implementation of planning obligations

It is important that planning obligations, once entered into, are implemented in an efficient and transparent way. The GPG will give examples of how LPAs are achieving this and will focus on:

- establishing an obligation monitoring system, for example creating a database or s106 Register, to help co-ordinate obligation preparation, completion, monitoring and review;
- providing regular reports back to Councillors, Planning Committees, Cabinets, and Scrutiny Committees, and the wider community;
- mechanisms to ring-fence financial contributions for the specific purposes they are required for;
- liaison between County Councils and District Councils, where infrastructure and facilities are provided by one level of authority but the financial contribution is held by the other; and
- how financial contributions held by the LPA should be dealt with when development does not proceed.

Appendix A: Partial Regulatory Impact Assessment

Planning obligations – draft revised Circular (October 2004)

1. Title of proposal

1. *Draft revised Circular on planning obligations* (October 2004)

2. Purpose and intended effect of measure

Objective

2. This partial Regulatory Impact Assessment examines the Government's proposed new approach to planning obligations in England which seeks to improve the negotiation of obligations, through a final Circular to be issued in early 2005.

3. The broad objectives of the Government's reform of planning obligations have been to promote speed, predictability, transparency and accountability. These have been focussed in the new Circular on the specific objectives:

   - to contribute to the speeding up of the planning system and therefore delivery of development;
   - to ensure the continued delivery of affordable housing through planning obligations on a more consistent basis; and
   - to bring the planning obligations system into line with new system of spatial planning established by the Planning and Compulsory Purchase Act 2004.

4. The proposal will affect developers (including businesses), local authorities and local communities.

5. The proposal will affect England only. National policy for England is set out in Department of the Environment Circular 1/97 and the current legislative basis for planning obligations is section 106 of the Town and Country Planning Act 1990, as amended by section 12 of the Planning and Compensation Act 1991.

6. Scotland, Wales and Northern Ireland have separate arrangements:

   - In Scotland, the legislative basis for planning agreements is section 75 of the Town & Country Planning (Scotland) Act 1997. The relevant Circulars are Scottish Office Development Department Circulars 12/96 and 4/98.
   - In Wales, the legislative basis is the same as in England: section 106 of the Town and Country Planning Act 1990 (as amended by section 12 of the Planning and Compensation Act 1991). Policy is set out in Welsh Office Circular 13/97.
   - In Northern Ireland, the legislative basis is Article 40 of the Planning (Northern Ireland) Order 1991 (S.I. 1991/1220 (N.I.11)). The Department proposes to commence Article 23 of the Planning (Amendment) (Northern Ireland) Order 2003 (S.I. 2003/430 (N.I.8)) in spring 2005 – which will replace Article 40 of the 1991 Order with a new Article 40 and Articles

40A (Modification and discharge of planning agreements) and 40B (Appeals). Policy on developers' contributions and planning agreements is set out at paragraphs 61-66 of Planning Policy Statement 1: General Principles (1998).

Background

7. Planning obligations, also known as 'section 106 agreements', are typically agreements between local authorities and developers negotiated in the context of granting planning consent, though they can also be secured through unilateral undertakings by developers. The purpose of planning obligations is to make acceptable development which would otherwise be unacceptable in planning terms. Obligations can involve cash or in-kind contributions towards a range of infrastructure and services including local roads and public transport schemes, public spaces, community facilities and affordable housing.

8. The Government is seeking, through the proposed approach in the draft revised Circular, to improve the operation of the system of obligations, by promoting greater speed, predictability, transparency and accountability.

9. The Government has already addressed some problems with transparency through the Town and Country Planning (General Development Procedure) (Amendment) (England) Order 2002 {S.I. 2002/828} which came into effect on 1 July 2002 and requires details of the planning obligations for each development to be published in both Parts I and II of the local planning authority's Planning Register (i.e. before and after the grant of planning permission).

Current policy and case law

10. Current policy on the use of negotiated planning obligations is set out in Department of the Environment Circular 1/97 which encourages fair, open and reasonable negotiations and requires that obligations meet a number of policy tests i.e. that obligations are: necessary; relevant to planning; directly related to the development; fairly and reasonably related in scale and kind to the development; and reasonable in all other respects.

11. Case law (in particular Tesco 1995[5]) confirms a broader scope for obligations than current policy and only requires a connection between an obligation and development which is 'greater than *de minimis*'.

Risk assessment

12. The current system has been criticised for:

- *slowness:* protracted negotiations over section 106 agreements can delay development and are costly in terms of staff salaries and legal fees.
- *unpredictability:* developers are unclear about the size and type of obligations they are likely to be asked for.

5 *Tesco Stores Ltd v. Secretary of State for the Environment [1995]* held that a local planning authority would not be acting unlawfully by taking into account a planning obligation that did not comply with the policy test provided the matters provided through the planning obligation were capable of being material planning considerations. In order to be a material consideration, the matter should have some connection with the development that was more than '*de minimis*'.

- *lack of openness:* the way in which planning obligations have been agreed in the past has given rise to suspicions that planning permissions are bought and sold by developers and local authorities.
- *lack of accountability:* there is uncertainty over how funds gathered by section 106 agreements are spent.

13. It is difficult to state precisely the scale of the problems described above, since much evidence is anecdotal and has not been collated systematically. However, it is clear that there is widespread discontent with the operation of the system and there is little doubt these problems occur regularly.

14. The improvements to planning obligations policy could significantly help address these problems by improving speed, predictability, transparency and accountability.

3. Options

15. In developing this set of proposals we have considered four options:

Option A: **Do nothing i.e. leave the current policy and legislative framework in place.**

16. This would involve taking no action and so retaining Circular 1/97 and section 106 of the Town and Country Planning Act 1990 (as amended by section 12 of the Planning and Compensation Act 1991).

Option B: **Reform planning obligations policy to improve negotiations, as set out in the draft Circular.** ***The Government's preferred option.***

17. The proposed new policy on negotiated planning obligations would amend current policy by (paragraph numbers refer to Annex B to the draft Circular in Chapter 5 of the consultation document):

a. simplifying and clarifying the policy test for planning obligations, placing greater emphasis on the requirement for obligations to be necessary in order to make the development acceptable in planning terms (see draft Circular, paras 1-10)

b. creating a new typology for the use of planning obligations: prescribing the nature of a development; compensating for loss or damage; and mitigating the impacts of development (see draft Circular, paras 3 11-16)

c. clarifying policy on contributions for affordable housing, making clear that such obligations are being used to prescribe the nature of development, rather than compensating for or mitigating impacts (see draft Circular, paras 12-14)

d. clarifying guidance on maintenance payments, allowing local authorities to require contributions for maintenance of public infrastructure for limited periods until it can be supported by mainstream public funding, but to agree time limits and payment amounts in advance (see draft Circular, para 18)

e. clarifying guidance on pooling contributions, seeking to ensure they are linked to specific infrastructure and involve a fair and equitable distribution of costs (see draft Circular, paras 19-21)

f. placing stronger emphasis on national, regional and local policies, so that it is acceptable to require development to contribute through planning obligations to matters contained within policies which have been fully scrutinised. The revised draft Circular also sets out arrangements for publishing planning obligations policies in the new Local Development Framework system of Development Plan Documents (DPDs) and Supplementary Plan Documents (SPDs) (see draft Circular, paras 8, 24-27)

g. encouraging a joined-up approach across all public sector infrastructure providers (see draft Circular, para 28)

h. encouraging the use of standard charges and formulae, to give greater certainty to developers and to speed up negotiations. Local authorities will be permitted to publish standard charges and formulae in advance in a public document, to reflect the actual impacts of the development or a proportionate contribution to affordable housing (see draft Circular, paras 29-31)

i. encouraging the use of standard heads of terms, agreements/undertakings or model clauses, to speed up negotiations (see draft Circular, para 32)

j. permitting the use of third parties to provide mediation or to validate factual information, to help progress a negotiation (see draft Circular, paras 33-35)

k. setting out the basis on which local planning authorities should seek contributions from developers to cover the costs incurred in negotiating planning obligations i.e. where such contributions make a significant difference to the speed and efficiency with which the obligation is finalised (see draft Circular, para 36)

l. encouraging the use of unilateral undertakings, in the interests of speed, where developers are able to ascertain in advance the likely requirements of a local planning authority (see draft Circular, para 38-40)

m. stressing the importance of monitoring the implementation of planning obligations in a systematic and transparent way, noting the importance of information being available to other local authority departments, developers and members of the public (see draft Circular, para 41)

n. recommending reducing the time limit from 6 months to 3 months for appeals relating to refusals by local planning authorities of applications for the modification and discharge of planning obligations (see Annex A, para A38).

Option C: **Extend the scope of obligations to a *'de minimis'* connection with the development in line with case law.**

18. This would reconcile policy and case law in the practice of planning obligations and negotiations. It would also remove the current asymmetry whereby a local planning authority may only seek obligations which meet the five tests in Circular 1/97, but a developer may offer wider contributions provided they are material considerations.

Option D: As Option B, but table regulations now.

19. This option would set the scope of obligations at the same boundary as Option B. However, it would differ significantly from Option B in that new regulations would set out in legislation a new basis for the scope of planning obligations, which would take precedence over case law. This change would make the tests in Option B the only boundary for the acceptability of planning obligations and remove confusion about what can properly be covered. It would also rule out any contributions beyond the Secretary of State's policy tests and in practice would reduce the scale of contributions from developers.

4 and 5. Costs and benefits

Assumptions

Impact on Land and Property Prices

20. We assume house prices and commercial lease and sale prices will not be significantly affected by the proposals. Prices in the property market tend to be set by the existing market, rather than new developments.

21. Greater certainty over the size of the section 106 contribution should reduce the burden on developers by making it easier to pass the cost of negotiated planning obligations back to landowners (including public sector landowners). However, in practice developers may face part of the cost, particularly where the price of land has been fixed prior to the granting of planning permission. We do not expect land supply to be significantly affected, since in the majority of cases, landowners are still able to make a profit compared to current uses of land.

22. Where the cost of planning obligations is less clear, e.g. when a developer is asked to provide an item in kind, and less certain, it is likely to be more difficult to pass the cost back though a lower price paid for land.

Availability of Data

23. Until recently it has been difficult to obtain accurate information on the scale and content of planning obligations across England, since the contents of planning obligations were not required to be made public. However information is now more readily available as, since 1 July 2002, local authorities have been required to place details of planning obligations on the Planning Register Parts I and II. It would, however, be a substantial task to collate this information to estimate national figures.

Value of Planning Obligations

24. A study by Heather Campbell and others[6] in 2001 is perhaps the most accurate report available on the value of planning obligations in England and Wales. This study, drawing on information from 45 local authorities, estimated the average size of planning obligations as £148,730 in Northern England and £753,830 in Southern England. It also recorded the proportion of permissions which

6 Campbell *et al* 'Planning obligations and the mediation of development' (November 2001) (RICS Foundation Research paper Vol.4 No.3).

had involved planning obligations in the year ending June 1998: 1.5% of all developments; 17.6% of all major developments; and 25.8% of major residential developments. The 2001 study does not estimate the national quantum of contributions each year in England and Wales. However, a simple extrapolation from the 2001 study puts the overall sum at between £1bn and £2bn a year. This figure should be treated with some caution, but provides an indication of the order of magnitude.

25. Evidence gathered informally by ODPM in summer 2003 about major developments in London and the South East shows a wide range in the value of obligations. With many developments, there is no obligation and with minor developments the figure is often below £10,000. More sizeable developments commonly have obligations between £10,000 and £100,000 and major developments often pay £100,000 to £1 million. A small number of very large developments involve contributions of over £1 million.

26. Some examples of typical levels of contributions indicated by local planning authorities are:

- one West Country urban local planning authority would ask for, as part of a typical development for 54 dwellings, £45,000 towards the provision of open/recreation space.
- one suburban London Borough would ask for £1000 per 2 bedroomed house, £2000 per 3 bedroomed house and £2,500 per 4 bedroomed house towards education provision.

27. Some examples of actual contributions in cases are:

- a development of 6 offices in a Home County provided £70,000 through a section 106 agreement towards the local transport strategy and highway works.
- a 55,000 sq m factory and office development in South East England provided £265,000 towards transport improvements.

Speed of Negotiations

28. The evidence gathered by ODPM in 2003 (see para 25 above) suggests the time taken to negotiate planning obligations varies considerably. It is common for negotiations to last a total of 1 to 8 months. A smaller number take longer, up to 4 years; and a very few take 5 years or more.

Business sectors affected

29. The proposals will affect those sectors that promote development with local impacts since planning obligations can be drawn up between local authorities and any persons with an interest in land.

30. In practice, the latter are usually developers at the time of the grant of planning permission. The proposals could affect all types of development, including offices, retail, industrial, education, health, housing, leisure, services and other employment and also householders. However, there is no presumption that all development will attract an obligation.

Compliance issues

31. Compliance with the proposals will take the form of:

- for local authorities: setting out policies in Local Development Frameworks and involving stakeholders; working up standard charges and formulae; conducting negotiations in line

with the guidance in the revised Circular; working up standard agreements; monitoring implementation of obligations and operating mediation or validation arrangements. It is important to note that many of the proposals in the revised Circular, particularly from paragraphs 22-41 of Annex B are voluntary, making it difficult to predict the likely behaviour of different types of authorities.

- for business: making contributions; as stakeholders in the development of Local Development Frameworks; conducting negotiations in line with the guidance in the revised Circular; demonstrating the viability of development; drafting unilateral undertakings; and administering maintenance payments.
- for local communities: participating in the drafting of Local Development Frameworks, including policies on planning obligations and formulae to calculate costs.

4. Costs

Option A: **Do nothing i.e. leave the current policy and legislative framework in place.**

32. The current system is criticised for its slowness, unpredictability, lack of openness and lack of accountability. Uncertainty about the contributions likely to be sought and delays in negotiation create costs for business and local planning authorities. The lack of openness and accountability also undermine the credibility of the planning system.

Option B – **Reform planning obligations policy to improve negotiations, as set out in the draft Circular.** ***The Government's preferred option.***

Impact on private sector

33. In most cases, contributions are likely to be of a similar size to current practice, which would not increase costs to the private sector. It is possible that in some instances, the greater emphasis on the Local Development Framework may mean that a more strategic approach to infrastructure provision is taken thereby increasing the contributions sought in high-value areas where additional infrastructure is required to support growth (e.g. Growth Areas).

34. The proposals may increase the frequency of use of planning obligations if it becomes easier to conclude them and this would increase contributions from the private sector. Use of planning obligations appears to have already become more widespread throughout the 1980s and 1990s. Studies have found that their occurrence rose from 0.5%-1.0% of applications in the late 1980s to 1.5% at the end of the 1990s.

35. There may also be additional costs to the private sector in terms of the administration of a greater number of planning obligations and the use of mediation or other services on a cost recovery basis.

Impact on public sector

36. More staff time and resources may be required to work up more detailed and comprehensive policies on negotiated planning obligations in Local Development Frameworks. Preparation of any formulae will require staff time and resources, though the forthcoming Good Practice Guide to be published in early 2005 should assist in this task.

37. However, local authorities already invest substantial resources in working up planning obligations policies in local plans. One study found that 85% of local planning authorities already include policies on negotiated planning obligations in their local plans[7]. Further, any additional costs in working up these policies are likely to reduce the costs of negotiation and to some extent represent a front-loading of costs. There may also be cost implications for local planning authorities wishing to pursue the good practice proposed in the draft revised Circular in paras 22-41, although this will vary by local planning authority.

Impact on local community

38. The proposed policy changes should impose no direct costs on the local community. However, greater consultation over local planning obligations policies could require more time from those who participate.

Option C – **Extend the scope of obligations to a *de minimis* connection with the development in line with case law.**

Impact on private sector

39. This option would legitimise larger contributions than at present from developers, and in practice contributions would in many cases be larger.

40. This option would create more uncertainty over the scope of obligations than preferred Option B, since Option B involves close reference to the Local Development Framework, whereas Option C would not provide as clear a definition of the proper boundary to the scope of obligations. Because of this uncertainty, developers would be less likely to be able to pass back the costs to the landowner and more likely to have to demonstrate the viability of their development to show how much they could afford in contributions.

Impact on public sector

41. This option would require more work in drawing up Local Development Framework policies, since a wider range of contributions would need to be addressed. Also, since contributions would not be linked to Local Development Framework policies, as in Option B, local planning authorities would probably need to draw up lists prioritising contributions in their local plans. The wider range of contributions possible could lead to longer negotiations and require more skills in testing the viability of development.

Impact on local community

42. This option could require more work in drawing up Local Development Framework policies, since a wider range of potential contributions would need to be addressed.

Option D – **As Option B, but table regulations now.**

Impacts on private sector

43. The costs of this option are similar to Option B.

7 'Planning Obligations and the Mediation of Development' by John Henneberry and Heather Campbell, University of Sheffield, RICS Foundation (2001).

Impacts on public sector

44. By setting the legal boundary for obligations at the tests in the draft revised Circular, as in Option B, this option would rule out contributions beyond those tests and so would reduce the current scale of contributions from developers towards local infrastructure.

45. Other costs of this option are similar to Option B.

Impact on local community

46. By setting the legal boundary for obligations at the tests in the draft revised Circular, as in Option B, this option would rule out contributions beyond those tests and so would reduce the scale of contributions from developers.

47. Other costs of this option are similar to Option B.

5. Benefits

Option A – Do Nothing

48. Doing nothing would provide continuity in policy and would avoid costs to parties involved in adjusting their practices to the new proposed approach. It would retain the current approach to negotiations, there being widespread consensus that negotiations can be a helpful approach to dealing with obligations and that current policy in general terms offers a reasonable approach.

Option B – Reform planning obligations policy to improve negotiations, as set out in the draft Circular. *The Government's preferred option.*

Impact on private sector

49. The increased certainty encouraged by the proposals (e.g. through a plan-led approach and use of standard formulae and charges) is likely to reduce risk and uncertainty of negotiations. More certainty is likely to make it quicker and cheaper for developers to arrange finance. Increased certainty will also help developers in negotiations over land prices.

50. The ability to negotiate planning obligations more quickly (or to submit unilateral undertakings) will reduce developers' legal fees. Faster negotiations will also reduce the overall time between the planning stages of development and its disposal, which could significantly reduce both ripening and waiting costs.

51. Greater flexibility in the payment profile (e.g. through phased payments – see paragraph 17 of Annex B to draft Circular) may bring contributions more in line with the development cycle and therefore more convenient for the developer. It may enable developments to proceed where previously substantial up-front payments had meant developments were not viable.

52. The plan-based approach outlined in the Circular will also benefit developers by facilitating delivery of strategic infrastructure (see paragraph 33 above). Although it may impose some additional costs on developers, a more strategic approach to infrastructure provision including through the pooling of contributions should help to share cost burdens, overcome co-ordination failures and increase the certainty of delivery. It should also make development more acceptable to the local community, thereby overcoming NIMBY attitudes.

Impact on public sector

53. Many of the proposals are aimed at increasing the speed and certainty of negotiations. For example, setting out policies in the Local Development Framework and introducing standard charges should enable local authorities to conclude negotiations more quickly and easily.

54. Faster negotiations will reduce staff time and other resources. Where third party mediators are employed, the call on local authority resources could be significantly reduced, if the developer could be asked to cover the cost.

55. Greater certainty in delivery of infrastructure – along with greater flexibility in payments – are likely to make it easier for local authorities to deliver plan objectives.

Impact on local community

56. Clear policies in Local Development Frameworks will provide greater predictability about developer contributions and the wider plan-making process will allow the local community an increased role in deciding what might be provided through planning obligations. Voluntary pooling among local authorities will assist funding of services and infrastructure shared by more than one community and is likely to broaden the range of infrastructure that might be provided.

Option C – Extend the scope of obligations to *de minimis* connection with the development in line with case law.

Impact on private sector

57. This option would increase the amount of visible contributions made by developers in an area that could improve public attitudes to development and tackle NIMBYism.

Impact on public sector

58. This option would increase the policy scope of obligations and so would widen the range and increase the size of contributions which local planning authorities could seek from developers. Thus more infrastructure could be provided through the planning system.

Impact on local community

59. This option would increase the range and quantity of benefits secured for the local community through planning obligations.

Option D – As Option B, but table regulations now.

Impact on public sector

60. The benefits of this option are largely as Option B, plus reducing the length of negotiations by avoiding debates over acceptability of obligations.

Impact on private sector

61. By setting the legal boundary for obligations at the tests in the draft revised Circular, as in Option B, this option would rule out contributions beyond those tests and so would reduce the scale of contributions from developers. This should reduce the length of negotiations by avoiding debates over acceptability of obligations.

62. Other benefits of this option are largely as Option B.

Impact on local community

63. The benefits of this option are largely as Option B.

6. Equity and fairness

64. The new approach set out in the consultation document should be applied equally and fairly to all new development. There will be variation among local authorities, reflecting local circumstances. However, the same broad approach will be applied nationally and within each local authority, the same policies should be applied to all development.

Race Equality and Disability Discrimination

65. The content of planning obligations will largely be determined by the policies in Local Development Frameworks, which must be prepared in line with the general duty in the Race Relations (Amendment) Act 2000 to promote race equality and in compliance with the Disability Discrimination Act 1995, which places a duty on all those responsible for providing a service to the public not to discriminate against disabled people by providing a lower standard of service. The draft Circular reinforces this point in the particular context of planning obligations by saying that:

> '26. Where mitigation or compensation measures are required, planning obligations policies should be based on a clear assessment of the impacts likely to be created by development (including any disproportionate impacts on different sectors, groups or areas) and the nature and scale of the measures needed to address these impacts'.

Rural Proofing

66. It is not envisaged that the proposed approach will disadvantage rural interests, since the approach concerns the framework for seeking planning obligations rather than their individual content, which will be determined by national policy documents as applied at the regional and local level. Further, paragraph 26 of the draft Circular encourages local planning authorities to consider any disproportionate impacts on different areas in drafting planning obligations policies and scrutiny of Local Development Frameworks offers an opportunity for any discriminatory policies to be rectified.

Public Sector Threshold Test

67. While the overall aim of the proposed approach is to save time and money on the part of local planning authorities, it is likely to lead to an increase in resources devoted by local planning authorities at the plan-making stage, but a decrease in resources required with individual negotiations, which should proceed more quickly as a consequence of clearer policies and more predictable contributions.

68. It is difficult to quantify the precise cost of the proposed approach, partly due to the absence of data, and partly since one cannot predict precisely how the parties involved in obligations will respond to the proposals (see paragraph 31 above). The main cost increase to the public sector would be through increased workload for staff in local planning authorities.

69. It is possible that the proposals could lead to an increase in costs at or above the Public Sector Threshold of £5 million. Since there are just under 500 local authorities in England this would only require an increase of just over £10,000 in each local authority. As an example, an increase in detailed coverage in Local Development Frameworks could require additional staff resources amounting to such a cost.

70. However, equally, the proposed approach could reduce staff resources devoted to planning obligations by speeding up negotiations, which can consume large amounts of staff time.

7. Small firms' impact test

71. The suggested new approach is unlikely to have a significant impact on small businesses. Planning obligations are usually made in relation to a grant of planning permission and many small businesses simply rent existing premises and do not seek planning permission for major projects, so are unlikely to encounter planning obligations.

72. Nevertheless, some small businesses will encounter planning obligations, for example small housebuilders, though the proposed policies should mean, as for any other party, that any obligations should not be disproportionate to the development.

73. Also, as for other developers:

- small businesses would have the right to apply for modification and discharge of a planning obligation five years after it was agreed by both parties.
- Local Development Frameworks can set out where development will not normally be asked to make contributions and a small business could choose to build there.

74. ODPM has consulted the Federation of Small Businesses, the Forum for Private Businesses and the British Chambers of Commerce about the experience of small businesses with planning obligations; and about the content of the new policies. Within Government, DTI's Small Business Service and the Office of Fair Trading have been consulted.

75. These initial soundings confirm our view that for the generality of small businesses planning obligations are not a significant issue and that for those small businesses that may be affected (e.g. house builders), the proposals would not have a disproportionate impact. Notwithstanding this, as part of the formal consultation ODPM would very much welcome representations from small businesses and their representative organisations.

8. Competition assessment

76. Most sectors are unlikely to be affected by the proposal, since it will have little impact on sale prices or rents for occupiers. The land and property development market is most likely to be affected. However, we expect the impacts to be relatively small, with no significant changes to the market structure.

Markets Affected

77. Assessing the market share of companies in land and property markets is not straightforward. A range of agents may carry out property development and changes to property. Potential developers include occupiers, construction firms, financial institutions and specialist developers.

78. The proposal could affect all sectors, since all new developments could attract planning obligations. However, sales of new development make up only a small part of total property transactions. Therefore we expect that there will be no significant impacts on final sale price of property or on the majority of occupiers.

79. Given that we expect no major impacts on occupation of property, the competition assessment is focused on the development and real estate market. Figures from the real estate market indicate that it is not particularly concentrated and that no firm has more than a 10% share. For example:

- In 2000, the 80 largest firms involved in real estate activities – including development, sale and letting – accounted for around 10% of turnover[8].
- In 2001 the 56 largest construction firms accounted for 12% of output in the industry[9].
- In 2003 the largest real estate firm – Land Securities – made up 21% of total market capital of real estate companies on the Stock Exchange[10].

80. In addition, there are a large number of small, locally based firms for which data are not available, indicating that the market is relatively competitive.

81. There may be impacts on the market for third-party expertise in assisting local planning authorities in drafting negotiated planning obligations.

Market Impacts

Costs

82. The proposals are expected to have only a minor impact on developers. In general, they will clarify rather than increase the cost of planning obligations. In some cases there may be an additional financial cost, but we expect that in the majority of cases any additional cost will be passed back to the landowner – though it might not be possible to pass back the full cost where the price of land has been fixed prior to the obligation being agreed.

83. The proposals should not lead to significantly higher start-up costs for businesses. Planning obligations only apply to new developments – for which we do not expect a significant price change – and not to new firms setting up in existing property.

84. Ongoing costs may be higher. The proposal allows for greater flexibility in payments, including ongoing payment. However, this flexibility should not entail higher costs, just different timing.

8 Source: Office for National Statistics.

9 Source: DTI (2002) Construction Statistics Annual.

10 Source: London Stock Exchange.

Sectors

85. The proposals will not tend to favour one sector over another. The size of the obligation is linked to the impact of the development, with larger developments tending to attract larger planning obligations. Sector is only a minor factor in determining scale of planning obligation, relative to Local Development Framework policies, land type, scale and local geography.

Market Structure

86. The proposal is unlikely to affect the market structure of either developers or of those involved in assisting with the preparation of negotiated planning obligations. The value of planning obligations tends to be small relative to the markets concerned.

9. Enforcement and sanctions

87. Local planning authorities, as responsible public bodies are expected to comply with Government policy. As stated in the draft Circular 'The Secretary of State therefore expects local planning authorities and developers to adhere to the guidance set out in the 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' (para 48).

88. Planning obligations are a binding legal agreement between the parties, usually local planning authority and developer. As such, they are enforceable by the Courts. Enforcement of a planning obligation depends on the nature of the breach. Section 106 of the Town and Country Planning Act 1990 provides two means. The first, in section 106(5), is by injunction, which involves civil proceedings. However, failure to comply with an injunction can be contempt of Court, which can result in fines or imprisonment. The second, in section 106(6), enables the local authority in certain circumstances to enter the land, carry out the operations required by the obligation, and recover the cost from the person against whom the obligation is enforceable. That again would be by civil action, although there are criminal penalties in section 106(8) against persons obstructing the exercise of the power of entry who are liable on summary conviction to a fine not exceeding Level 3 on the standard scale.

10. Monitoring and review

89. In the normal course of business, the Government monitors the implementation of policies and will do so with the proposed new approach to planning obligations, for example through, meetings with stakeholders, professional conferences and seminars, casework and correspondence.

90. In the context of work in developing the Optional Planning Charge (OPC) and Planning-gain Supplement (PGS), the Government will also consider the ongoing operation of the system for negotiating planning obligations.

11. Consultation

Recent discussion of planning obligations reform

Recent reform proposals

91. The proposals form part of the Government's programme to improve the operation of the planning system in England, which was set out initially in the Planning Green Paper (December 2001).

92. The Government has been reviewing planning obligations policy and actively seeking the views of stakeholders since late 2001. The consultation document *Reforming Planning Obligations: Delivering A Fundamental Change* (December 2001) proposed a radical change of planning obligations to a tariff-based system. It also examined three other options of: (A) maintaining the policy tests of Circular 1/97; (B) allowing local authorities freedom to negotiate within the scope of case law; and (C) a system of impact fees. The main objectives of the consultation paper were to promote speed, certainty, transparency and propriety. The consultation ended on 18 March 2002 and ODPM received over 600 responses. On 18 July 2002 the ODPM statement *Sustainable Communities – Delivering through Planning* announced that the Government would continue to pursue reform to meet these objectives; but would not pursue legislation for tariffs.

93. The Progress Report on *Sustainable Communities – Delivering through Planning* published on 6 June 2003 reported that ODPM was in the process of reviewing the operation of section 106 obligations and would consult on new guidance at the earliest opportunity.

94. On 6 November 2003, ODPM published a consultation document *Contributing to sustainable communities – a new approach to planning obligations* which set out proposals to revise policy on negotiations, bringing policy into line with best practice and case law and to establish an Optional Planning Charge, as an alternative to negotiations. The consultation closed on 8 January 2004 and ODPM received over 350 responses.

95. Sections 46 and 47 of the Planning and Compulsory Purchase Act 2004 set out a legislative basis for planning contributions, which gives the Secretary of State powers to make Regulations, subject to affirmative resolution procedure in Parliament[11].

96. In 2003-04, Kate Barker conducted a Review of Housing Supply for the Government and in her Final Report *Delivering Stability: Securing our Future Housing Needs* (March 2004), recommended a Planning-gain Supplement which would capture some of the value increase from the grant of planning permission for residential development.

97. Following this, a Parliamentary Written Statement on 17 June 2004 by Keith Hill, Minister of State for Housing and Planning, stated that the Government would publish a draft Circular on negotiated agreements in autumn 2004, to be followed by a final Circular in early 2005, accompanied by a Good Practice Guide. He said that work on proposals for the Optional

11 Section 106 of the Town and Country Planning Act 1990 (as amended by Section 12 of the Planning and Compensation Act 1991) will remain in place until Parliament approves new Regulations. Section 106 will be deleted at the same time as the Regulations come into force. Placing all legislation on planning contributions in or subject to Sections 46 and 47 of Planning and Compulsory Purchase Act 2004 will ensure the legislative basis is unified.

Planning Charge would continue, in parallel with the timetable for the proposed Planning-gain Supplement on which the Chancellor has said he will make a decision by the end of 2005.

98. It is expected that regulations will be tabled in 2006 or 2007, in the light of decisions on the Planning-gain Supplement. The Government intends to publish them in draft for public consultation and, under the affirmative resolution procedure, the regulations must be debated and voted upon in Parliament before they are enacted.

99. In March 2004, ODPM set up an Advisory Group on planning obligations, comprising major stakeholders: British Property Federation; Chartered Institute of Housing; Confederation of British Industry; House Builders Federation; Local Government Association; National Housing Federation; Planning Officers Society; Royal Institution of Chartered Surveyors; Royal Town Planning Institute. The Group met six times between May and September to consider proposals for planning obligations reform. The Housing Corporation also attended to discuss affordable housing issues. ODPM found the Group to be a useful forum for engaging with and facilitating discussion among stakeholders.

100. The ODPM Progress Report *Sustainable Communities – Delivering through Planning* on 17 June 2004 noted that the Government was working with the Advisory Group and others in taking forward planning obligations reform.

Current consultation

101. We are now consulting publicly on a draft revised Circular on policy on planning obligations in England (negotiations only). It is published for public consultation. The Government will take account of the views expressed in consultation responses in considering the content of the final version of the Circular, due in 2005.

102. In preparing this Partial Regulatory Impact Assessment, we have consulted the Confederation of British Industry and the Institute of Directors, as well as the Federation of Small Businesses, the Forum for Private Businesses and the British Chambers of Commerce.

Public consultation

103. In formulating the proposals in the draft Circular, ODPM has taken careful account of discussions of the Advisory Group between May and September 2004, the views expressed in response to the December 2001 and November 2003 consultations and the views of other stakeholders whom officials have met in various bilateral meetings and conferences.

Within Government

104. Other Government departments, the Small Business Service and the Office of Fair Trading have been consulted on this proposal.

105. These proposals have not been scrutinised by the Panel for Regulatory Accountability since the system of negotiation planning obligations is already established in legislation and policy and so is deemed to have policy approval and also since the proposals are intended to save time and money for business, local authorities and other parties involved and not to add new

burdens. Further, the Government has already discussed the main issues in the proposals with major stakeholders through the Advisory Group on planning obligations which met between May and September.

12. Summary and recommendation and Ministerial declaration

106. These will be included in the Final Regulatory Impact Assessment.

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Appendix B: Proforma for consultation responses

Name of respondent/organisation:

Brief description of organisation (if applicable):

If replying on behalf of a representative body, please provide a brief description of the people/organisations you represent:

Contact information, if you would be willing to discuss your response further with ODPM officials if appropriate (optional):

Any special requests re. handling of response:

a) Revised Circular and Good Practice Guidance

Circular para no.	Topic	Comments
1-10	Retention/simplification of policy tests	
3, 11-16	Typology for use of planning obligations	
12-14	Contributions for affordable housing	
18	Maintenance payments	
19-21	Pooled contributions	
8, 24-27	Local planning obligations policies	
28	Joining-up across public sector	
29-31	Formulae and standard charges	
32	Standard agreements/undertakings	
33-35	Use of independent third parties	
36	Cost recovery	
38-40	Use of unilateral undertakings	
41	Monitoring and implementation of obligations	
	Other	

Comments on proposed structure of Good Practice Guidance

b) Appeal time limits for modification and discharge of planning obligations
(See page 15 of consultation document)

☐ I think that the time limit for appeals should remain at 6 months

☐ I think that the time limit for appeals should be reduced to 3 months in line with other appeals

☐ Other (please state)

Reasons for view

Appendix C: Statement of consultation

The consultation criteria

The Government has adopted a code of practice on consultations. The criteria below apply to all UK national public consultations on the basis of a document in electronic or printed form. They will often be relevant to other sorts of consultation.

Though they have no legal force and cannot prevail over statutory or other mandatory external requirements (e.g. under European Community Law), they should otherwise generally be regarded as binding on UK departments and their agencies, unless Ministers conclude that exceptional circumstances require a departure.

1. **Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.**

2. **Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.**

3. **Ensure that your consultation is clear, concise and widely accessible.**

4. **Give feedback regarding the responses received and how the consultation process influenced the policy.**

5. **Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.**

6. **Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.**

The full consultation code may be viewed at
www.cabinet-office.gov.uk/regulation/Consultation/Introduction.htm

Are you satisfied that this consultation has followed these criteria? If not, or you have any other observations about ways of improving the consultation process please contact

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London,
SW1A 2WH

or by e-mail to:
david.plant@odpm.gsi.gov.uk

Appendix D – Consultees

ODPM welcomes responses to this consultation document from any member of the public.

ODPM is also sending copies of the consultation document, seeking comment, to:

- all local planning authorities in England
- professional organisations, interest groups and representative bodies in planning, housing, the development industry and business
- academics and consultants in planning, housing, the development industry and business
- other special interest groups
- members of the public who have requested a copy.