Law Society of Scotland

☐Consultation

Consultation on aspects of planning obligations

November 2019

Introduction

This consultation seeks the views of our members and interested stakeholders on the subject of planning obligations, under section 75(1)(a) of the Town and Country Planning (Scotland) Act 1997 ('the Act'). We would be pleased to hear from you with your views.

You can read more about the consultation on our website.

Responding to the consultation

Data protection and privacy policy

In accordance with the General Data Protection Regulation and the Data Protection Act 2018, the Law Society of Scotland is committed to the protection of your data and processing it within the required legal bases. Although we may rely on our legitimate interest in understanding the views of our members, the public and stakeholders, by participating in this consultation, to the extent that any personal data is provided, you are providing us with the required consent under Articles 6 and 9 of the Regulation, and/or the relevant provisions of the Data Protection Act 2018, for us to process that data. This data will be analysed by us and used to produce a thematic report that will be publicly available. There is an opportunity to provide detailed information throughout the consultation. Please take care not to provide any information that may allow another person to be identified. If a response provides information that we believe is personal data and/or identifies another individual, we may redact it accordingly. For information about how we use your personal data see our privacy policy at www.lawscot.org.uk.

Please respond to this consultation by sending your response:

by email to policy@lawscot.org.uk

or

by post to Planning Obligations Consultation, Policy Team, Law Society of Scotland, Atria One, 144 Morrison Street, Edinburgh, EH3 8EX.

Consultation responses should be submitted **by 10am on Monday 3 February 2020**.

Please ensure that you complete the 'about you' questions at section 1. Following the closing date, we will analyse all responses. We intend to publish a summary of the outcome of the consultation and do not intend to publish responses in full. Where you have provided relevant details, we may attribute comments from you/your organisation's response to you/your organisation.

The findings of the consultation will be reported to Scottish Government and will contribute to Scottish Government's review of the Circular[1].

A summary of the consultation questions can be found at page 12.

Comments or questions

If you have any comments or questions about this consultation, please send them to policy@lawscot.org.uk.

[1] Planning Obligations and Good Neighbour Agreements Circular 3/2012

Section 1 – about you

1. Are you responding as (select as many as apply):
   a) A solicitor in private practice ☐
   b) A solicitor for a planning authority ☐
   c) A non-solicitor member of staff of a planning authority ☐
   d) An organisation ☐
   e) A member of public ☐
   f) Other, please give details? Trade Association ☒

2. If you are willing to have your comments attributed to you/your organisation, please provide you/your organisation's name.

Scottish Property Federation

3. If you are willing to be contacted by the Law Society of Scotland in relation to any future discussions on planning obligations, including focus group events and discussions with Scottish Government, please provide contact details.

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Scottish Property Federation,
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Edinburgh,
EH1 1QB

Email: mcatterall@bpf.org.uk

Telephone: 0131 220 6304

Section 2 – preliminary matters

Model agreements and in-house styles

Many planning authorities have model agreements or in-house styles for planning obligations. Where the terms of these are generally accepted, this can help to streamline the negotiation process. Sometimes these model agreements are publicly available.

Questions

4. Should all planning authority model agreements be publicly available and accessible online?

Our members could support this proposal. However, it is important that the agreement is workable from a developer's perspective. It should be made clear at the outset that that the model agreement is a starting point for negotiation and that clauses may be modified or deleted if there are good practical or commercial reasons for doing so.

5. Should planning authorities consult with stakeholders on their model agreement and any changes? Please explain your reasons.

Yes. This could narrow the issues that will be the subject of negotiation and help avoid delays in settling the draft agreement. However, the consultation exercise and who should be consulted must be focused and should not result in changes to the model agreement being implemented slowly, or impact on already stretched resources in planning authorities.

6. What are your views on having a Scotland-wide model planning obligation and/or having standardised wording for an obligation?

Our members would be supportive provided it resulted in a workable agreement that takes into account the commercial realities facing developers and creates consistency.

There is a risk that the model agreement could include clauses that may frustrate development. It is therefore vital that there is scope for these to be modified or deleted following negotiation between the applicant and planning authority. It would also be helpful if the model agreement is supported by guidance that emphasises this principle and/or provides examples of where planning authorities should adopt a flexible approach. See comments at 5 on consultation on a model agreement.

There has been considerable disparity between planning authorities in their approach to negotiating planning obligations. For example, some authorities are willing to accept the exclusion of s.75C (continuing liability of former owners) recognising the commercial implications for an applicant and the often negligible benefits to the authority in terms of its ability to enforce planning

obligations. Other authorities adopt a much more rigid approach and are unwilling to undertake such a discussion.

Heads of terms and processing agreements

It may be advantageous for planning authorities and landowners to agree heads of terms for a planning obligation and a processing agreement to set out a timescale for completion of the planning obligation at an early stage and for these to be enshrined in the relevant officer's report. Although not binding, these can form a useful guide to streamline negotiations and assist in the completion of planning obligations.

Questions

7. What are your views in relation to agreement of heads of terms and processing agreements?

Our members are supportive of this provided planning authorities have the necessary resources to meet the agreed deadlines. It is crucial that failure to meet a deadline is not used by the planning authority or objectors as a reason for referral of the application back to planning committee. This must be made clear in both guidance and the committee resolution and compliance should be linked to performance statistics.

Our members are also of the view that heads of terms should also be agreed prior to the related planning application going to Committee, which could lead to greater clarity and no unwelcome surprises.

Parties to the agreement

The Act does not preclude parties other than the landowner and the planning authority being a party to a planning obligation.

For example, it is common practice for a heritable creditor to enter the planning obligation as a consenter. Not to do so may breach a loan facility or standard security. A heritable creditor could be bound by the obligation as if it were a person deriving title from the landowner by calling up the standard security and entering into possession. Alternatively, a heritable creditor may issue a separate consent letter.

Occasionally, a developer who is not otherwise a party to a planning obligation or a tenant with a registered lease may also be a party to planning obligation as they have an interest in the land.

Questions

8. What is your view on a planning authority requiring a heritable creditor to be a party to a planning obligation?

In principle, it is a matter between a landowner and its heritable creditor only as to whether it is necessary for a heritable creditor to be party to a deed, depending on the terms of the security.

There is no requirement for a planning authority to insist on heritable creditors being a party to the s.75. S.75(11) specifies that a heritable creditor falls within the meaning of "owner" for the purposes of s.75(5) where it is in lawful possession of security subjects. Accordingly, planning obligations could technically be enforceable against a heritable creditor irrespective of whether they are a signatory to the deed. The exception to this would be if the agreement specifies that only the person entering into a planning obligation is to be bound by it.

9. Are there any other parties who you consider should be a party to a planning obligation? Please provide your reasons.

The parties to the agreement should be the planning authority responsible for enforcing the obligations and those who will be responsible for discharging the obligations. The developer, who is to acquire an interest in the site, and will be principally responsible for the discharge of planning obligations should also be a signatory.

Our members would not be supportive of including other parties as this could cause undue delay and dilute terms that are otherwise acceptable to the planning authority and the applicant. Apart from the landowner and the local authority, the only other party that might be included would be the developer/applicant, as the receipt of planning permission may be a pre-requisite of purchase requiring the existing landowner/seller to be a party.

Site area

The relevant legislation and guidance are silent as to whether a planning obligation should apply to the whole 'red line' planning application site. A planning application site may be in multiple ownerships. There may be parcels of land or adopted roads over which a planning obligation need not extend as the land to be included in the obligation carries adequate protection for the enforcement and delivery of the obligation. In some circumstances, the site area may extend beyond the area which needs to be covered by the planning obligation.

Questions

10. What are your views on a planning obligation applying to the whole 'red line' site?

Planning authorities should principally be concerned with binding the minimum land interests necessary in order to effectively implement the planning obligations.

Our members are of the view that the S75 burdens should only be imposed on the part of a site which contains substantial development and not road improvement areas, or areas where new services will be laid.

A planning obligation may be entered into in order to require completion of infrastructure works prior to the occupation of a certain number of those units. In such circumstances, the planning

obligation may only need to bind the land upon which the residential units must be constructed. The same principle may apply in other scenarios. For example, where binding land interests necessary to access the development site may be sufficient to control the development.

It has become common practice for planning authorities to adopt an overly simplistic approach of requiring that all parties with a land interest within the red line are signatories to the s.75 agreement. This can frustrate development unnecessarily. A landowner could be prevented from undertaking a development on their land because a tenant, who has no control over the landowner's activities, will not sign up to a s75 agreement. This can result in considerable delay in realising the benefits of new development.

Some of our members have suggested that there should be a mechanism that would allow "carve-out" of a part-owner's obligations within the red line where it can be demonstrated that they have entered into formal contractual arrangements with the initial owners, who remain liable for over-arching obligations. For example, where a house builder buys part of a masterplan site over which s.75 obligations apply. The housebuilder will typically make payment to the first owner with contract arrangements in place that the house builder's land payment includes the appropriate share of s.75 obligations, and these are to be remitted to the Council under wider arrangements for staged s.75 payments.

Section 3 – application of the obligation

Planning consent

The relevant legislation and guidance are silent as to whether a planning obligation should apply to a particular planning consent. Some planning authorities provide for a planning obligation to apply only to a particular planning application. If this approach is taken, and a revised application is submitted (including a section 42 application to vary conditions), a new planning obligation will be required. Other planning authorities include clauses in the planning obligation which seek to ensure that that obligation applies to the original application and to any variations under a section 42 application, subject to certain parameters, for example, no material change to the development or the policy requiring developer contributions.

Question

11. What are your views about providing for section 42 applications to be included in a planning obligation, the result of which would mean that a new planning obligation may not be required?

Our members support this proposal. There can be unnecessary delay and cost negotiating modifications to planning agreements in order to extend the obligations to a new s.42 permission.

Continuing liability for former owners

The default position under section 75C of the Act is that, unless the contrary is set out in the planning obligation, former owners (once the ownership has been transferred) continue to be bound by the planning obligation until such time as it has been met in full. The Circular does not address the issue of when it is appropriate to state the contrary in the planning obligation. A planning obligation which has not excluded liability for former owners may cause difficulties for landowners when disposing of their interest as they will continue to be liable should the current owner default.

Questions

12. In your view, in what circumstances would it be appropriate to exclude continuing liability for former owners?

Our members are firmly of the view that s.75C should be deleted from the 1997 Act. The wording in this section makes no allowance for breaches that are outside the control of the former owner. S.75C can lead to protracted negotiations between a seller and buyer, and risks frustrating the sale of projects.

13. In what way can the interests of the planning authority be sufficiently protected without continuing liability for a former owner?

A planning authority has the option to enforce planning obligations against current owners who have the benefit of the planning permission by virtue of their land interest. The current owners should also have acquired the site in the full knowledge that it would have to comply with the planning obligations and remedy any pre-existing breaches.

Enforceability against successors in title

This principally relates to residential developments where the dwelling houses or flats will be sold to individual purchasers and their successors (commonly referred to as 'ultimate owners').

Under the Act, a planning obligation runs with the land and is therefore enforceable against any landowner. In practice, this may expose an ultimate owner to liability under the agreement where the landowner has not complied with its obligations. This could adversely impact upon the ability of a house purchaser to secure lending. In negotiating planning obligations, parties can agree to expressly exclude liability of an ultimate owner. The Circular is currently silent on this matter.

Question

14. What are your views as to excluding liability of an ultimate owner in a residential development?

Our members are of the view that enforcing planning obligations against individual occupiers is unnecessary as the obligations are enforceable against the developer, or its successors, who will retain an interest in the common parts and shared infrastructure of the development. In some cases it may be that obligations have been discharged at the point where individual plots are purchased. The power to enforce against individual occupiers could also frustrate the sale of units.

In relation to major developments there are sometimes ongoing s.75 obligations after individual purchases have taken title. However, in almost all circumstances individual owners of residential units should be excluded from s.75 obligations. The only exception could be where planning permission has been granted for single residences and s.75 obligations have been applied on grant of consent.

Enforceability against statutory undertakers

Statutory undertakers (as defined in section 214 of the Act) may wish to own land in a development for their infrastructure. A statutory undertaker may not to wish to acquire a site where that would expose them to liability under a planning obligation. In negotiating a planning obligation, parties may agree to expressly exclude liability of a statutory undertaker. The Circular is currently silent on this matter.

Question

15. What are your views as to excluding liability of a statutory undertaker?

Our members have indicated that a planning authority will accept the exclusion of such interests. This is on the basis that statutory undertaker's are simply performing a statutory function on the land, which benefits from planning permission (rather than holding the benefit of the consent itself).

Statutory undertakers have the ability to take title by means of a statutory conveyance, meaning that the burdens otherwise affecting the title are not transmitted to the undertaker.

Enforceability of planning obligations

Planning authorities sometimes seek to include provision in an agreement that in the event of a material breach of the obligation, the planning authority is entitled to revoke the planning permission to which the obligation relates without the payment of compensation. Such an approach may not be acceptable to funders nor ultimate owners. The impact of development may not be offset.

Questions

16. What are your views on such a provision?

Our members are of the view that such clauses are inappropriate. There are already various contractual remedies available to the planning authority for enforcing obligations and ensuring compliance. This is in addition to mechanisms in the agreement for remedying disputes such as expert determination clauses. Revoking the planning permission would be a draconian step and associated provisions in planning agreements risk compromising projects. Permission could be revoked following even minor breaches, or this power could be used by planning authorities to cancel development it was no longer in favour of.

Our members are firmly of the view that revoking planning permission should in no circumstances be a power available to a planning authority. Only in extreme cases could this be used by the Courts to allow the legal impact of the grant of planning permission to be fully considered, where the owners have not caused a breach.

17. Are there any alternative approaches that could be adopted?

No comment

Section 4 – settlement, registration and post-implementation

Settlement procedures and reports on title

There are differences in practice in how planning authorities and developers approach the settlement of transactions involving planning obligations. There appear to be differences in the approaches of planning authorities in the title reports (legal and continued reports) and undertakings they require before planning permission is released. We consider that there would be merit in a standard approach.

Questions

18. What reports and other pre-settlement documentation do you consider is required before planning permission is released?

The planning authority should see the titles, a legal report and a plans report where appropriate. If the developer is responsible for registering the planning obligation, the planning authority may also wish to see the application for registration and receive a signed or certified copy of the planning obligation.

There should be clear Legal Report and the Registers of Scotland acknowledgement of receipt of the application to register the s.75 agreement. If the local authority does not intend to examine the title, a Report on Title will also be necessary, and can be useful in reducing the time taken in the overall process.

19. Can you suggest any ways in which the settlement process can be streamlined while ensuring that the interests of the planning authority are protected?

Our members have suggested that planning permission should be released following receipt of the Keeper's acknowledgement rather than registration.

Signing by counterpart is commonplace in England and could be utilised more in Scotland in order to facilitate early settlement.

Some of our members have suggested the use of a Report on Title.

Recording or registration of a planning obligation

It is common for the parties to a planning obligation to agree that planning permission will be granted at the point or shortly after the Keeper acknowledges receipt of the planning obligation and not when it is registered or recorded. This is to prevent what may be an uncertain and lengthy delay in issuing the permission. There is a possibility that the Keeper will subsequently reject a planning obligation, for example where there is an error in the deed, meaning it needs to be amended and re-presented for recording or

registration. If this occurs, the planning authority may be vulnerable because planning permission has been issued and the landowner could refuse or be unable to complete a new planning obligation.

This matter may be covered by a separate undertaking or by provisions in a planning obligation whereby the landowner undertakes to complete any required remedial work in a set time frame and to ensure that a replacement obligation is recorded or registered.

We are aware of planning authorities seeking to reserve the right to revoke the associated planning permission without the payment of compensation where a planning obligation is rejected for recording or registration, particularly where there is a refusal to comply with a request to rectify the issue causing the rejection or where an insolvency event[2] has occurred. A difficulty with this approach is that the planning obligation may be rejected sometime after a transaction has settled, and the price paid on the basis that permission has been granted. This approach could be unacceptable to a landowner, ultimate owner or funder but could leave the planning authority with no means to implement the planning obligation.

Questions

20. Do you have any views as to how to ensure planning authorities are protected in circumstances where a planning obligation is rejected for recording or registration and planning permission has been granted including if there is an insolvency event?

Our members have suggested an undertaking on the part of the owner and the developer to notify the Council if any application for registration has been rejected, and to take all reasonable steps to amend the agreement and resubmit for registration.

Responsibility for recording/registration of planning obligations

A planning obligation must be registered in the Land Register or recorded in the Register of Sasines in order to transmit its obligations to successors in title. There seems to be variable practice as to which party takes responsibility for registration or recording.

Questions

21. Do you have a view as to which party should be responsible for recording or registering the planning obligation?

[2] "Insolvency event" is generally defined as: the occurrence in relation to any party bound by this agreement of any of the following events: (a) the party becoming apparently insolvent; (b) the making of an order that they be wound up or the passing of a resolution for voluntary winding up; (c) the appointment of an administrative receiver or receiver and manager in respect of any of their assets and undertakings; (d) the making of any bankruptcy order or order for sequestration; (e) the making of any voluntary arrangement (corporate or individual) for a composition of debts; (f) the application for, or the appointment of, an administrator or the making of an administrative order; (g) the party being struck off the Register of Companies; (h) the appointment of a liquidator; (i) the possession of any of the party's property under the term of a floating charge; or (j) any similar event which in the opinion of the planning authority is of like effect.

The solicitors for the developer should be responsible, so that they can monitor the date of acknowledgement of the deed by Registers of Scotland, and then follow up the issue of the planning decision notice with the local authority.

Planning authorities generally wish to register the deed so that they have control of this process alongside the release of the permission. Our members would like to see more flexibility by authorities and allow developers to register the planning obligation, which could speed up the process and allow developers to ensure compliance with contractual timescales.

Unused financial contributions

It is common for planning obligations to provide for unused financial contributions paid to a planning authority to be returned to the payer if they are not used or expended within a particular period of time. That period can vary between planning authorities which may be due to the differing timescales for delivering the relevant infrastructure.

Questions

22. Do you have a view as to whether unused contributions should be returned to the payer?

Time limit conditions for the return of unexpended funds are equitable and appropriate. If the planning authority has not used funds for the identified purposes (or over-estimated the funds required) within a reasonable timeframe then monies should be returned to the developer. The funds may otherwise be used by the planning authority for purposes unrelated to mitigating the development.

23. If so, what should be the appropriate period that applies?

This depends on what the funds are being used for. Financial contributions should only be sought by the planning authority at the point where they are actually required e.g. to fund road improvements prior to the occupation of a development. The s.75 agreement should be structured accordingly, and monies should not therefore remain unspent for several years. Our members have suggested that five years is a reasonable time frame for the return of monies and reflects what planning authorities would typically accept. A shorter timeframe may be appropriate if there is no realistic prospect of the funds being used.

Section 5 – other comments

This consultation focusses on those matters raised in this consultation document. However, we may consider any other comments received.

Question

24. Do you have any further comments on planning obligations?

Our members have suggested that there should be a standard form document for the issue of s.75A decisions. The decision notices must be in a form that is capable of being registered and the standard form document should therefore be approved by the Keeper.

Our members are of the view that the greater use of model agreements would assist in completing matters more quickly. This could result in a reduction of cases where the local authority's representation is passed to an external firm of solicitors resulting in increased levels of negotiation and cost for the developer.