Communities and Local Government

Changes to Planning Obligations

a Planning-gain Supplement consultation

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December 2006
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1. Purpose of document

1. This document sets out for consultation the Government's proposals for a new system of planning obligations in England. Building on the previous proposals published in December 2005 as part of the Government's proposals for a "Planning-gain Supplement", it seeks views on more detailed aspects of the scope of the new system i.e. the range of items that should in future be contributed by developers through planning obligations. The document is concerned exclusively with how planning obligations would operate if a Planning-gain Supplement (PGS) is introduced.

2. The proposals for planning obligations contained in this document form part of a package describing how the Planning-gain Supplement would operate. This document should therefore be read in conjunction with the documents summarised in box 1.

Box 1: Summary of Planning-gain Supplement proposal as published on 6 December 2006

- Pre-Budget Report statement
- *Paying PGS* – a Planning-gain Supplement technical consultation paper (published by HM Revenue and Customs)
- *Valuing planning gain* – a Planning-gain Supplement consultation paper (published by HM Revenue and Customs)
- Summary of responses to 2005 consultation

These documents are available at www.hm-treasury.gov.uk or www.hmrc.gov.uk

2. Context

The Planning-gain Supplement (PGS)

3. As part of its response to Kate Barker's review of housing supply[1], published in 2004, the Government consulted on a proposal for a PGS, designed to capture a modest portion of the uplift in land value accruing to landowners as a result of the granting of planning permission[2, 3]. At the Pre-Budget Report 2006, the Government announced that it would move forward with the implementation of PGS if, after further consultation, it continued to be deemed workable and effective. The Government also said that a workable and effective PGS would not be introduced earlier than 2009 and published more detailed proposals for its operation, taking account of the issues raised during the 2005 consultation.

4. In recommending that a PGS should be introduced, Kate Barker proposed that planning obligations (or "s106 agreements"[4]) should be scaled back to cover only "direct impact mitigation" plus affordable housing[5], in order to "increase certainty" and reduce

1 *Delivering stability: securing our future housing needs*. Final report of Kate Barker's Review of Housing Supply, March 2004.
2 *Government Response to Kate Barker's Review of Housing Supply*, HM Treasury and Office of the Deputy Prime Minister, December 2005.
3 *Planning-gain Supplement: a consultation*. HM Treasury, Office of the Deputy Prime Minister and HM Revenue and Customs, December 2005.
4 Agreements made under s106 of the Town and Country Planning Act 1990 as substituted by s12 of the Planning and Compensation Act 1991 (see section 3 of this document).
5 Recommendation 24 of (1) above – *Delivering stability: securing our future housing needs*.

negotiation costs. In its 2005 consultation paper on the PGS, the Government accepted Kate Barker's rationale and set out some high level proposals for how such a scaling back might be achieved in practice. The Government's response included highways agreements in England (made under s278 of the Highways Act 1980[6]) in the analysis of planning obligations. This document continues the consideration of both s106 and s278 agreements and the general discussion of "planning obligations" relates to them both.

5. The Government's rationale for scaling back planning obligations is to a) improve the current system and b) ensure the two systems of PGS and planning obligations can operate alongside one another.

a) improving the current system

6. Echoing Kate Barker's objectives, the Government wishes to scale back planning obligations to reduce negotiation costs for developers and give greater certainty around the costs of developer contributions required.

b) ensuring planning obligations run smoothly alongside PGS

7. Scaling back is necessary in order to avoid contributions under two systems (i.e. direct planning obligation contributions and the use of PGS revenues) being required and then used for similar purposes (e.g. funding of education or community infrastructure), which could lead to perceptions of developers "paying twice" for the same thing. Scaling back should also facilitate the speedier agreement of planning obligations. Whilst the administration of PGS will be "light touch", paying PGS will involve some additional activity on behalf of the developer, so a trade-off in the time taken to negotiate planning obligations (for those developments where planning obligations previously applied) is desirable.

8. In scaling back planning obligations, the Government's objectives are as set out in box 2.

Box 2: The Government's objectives for a scaled-back system of planning obligations

The Government aims to deliver a system that:

- supports the overall aim of ensuring the right new development is delivered and accompanied by the right infrastructure; in the right place; at the right time; and in a way that gives developers confidence about delivery;
- supports wider Government objectives for sustainable development (for example, by managing demand for transport and promoting sustainable modes of transport);
- is simple for developers and local authorities to understand and administer;
- allows the speedy processing of planning applications and implementation of decisions;
- is transparent and explicitly relates contributions to the grant or refusal of planning permission – i.e. avoids the confusion often expressed by communities as to the weight given to apparently unrelated contributions when local authorities are determining applications; and
- allows the right balance to be struck in terms of achieving wider objectives for the levels of revenues raised by planning obligations and PGS, in a way that is fair across different localities

[6] As amended by the New Roads and Street Works Act 1991.

Scaling-back: the story so far

9. The Government's 2005 consultation paper on the Planning-gain Supplement[3] outlined some principles for a new scaled-back system of negotiated planning obligations, as shown in box 3.

Box 3: Key features of a new system of planning obligations, chapter 5 of "*Planning-gain Supplement: a consultation*" (2005) (pp23–29) (paragraph numbers refer)

- a new scope for planning obligations – the "development site environment" approach (*paras 5.15–5.16*)
- affordable housing retained within the scope of planning obligations (*para 5.20*)
- a new statutory limit (*para 5.15*)
- the value of contributions made through new system of planning obligations should be reflected in the Planning Value of a development (i.e. reflected in depressed valuations and liability to PGS) (*para 5.17*)

10. A large number of responses were received to the 2005 consultation paper specifically on the issue of scaling back planning obligations. These are summarised in the Government's summary of responses received to the consultation on PGS. In broad terms, however, respondents were supportive of the proposal to scale back planning obligations, but raised a number of specific concerns and questions, as shown in box 4.

Box 4: Summary of main points raised by consultees on scaled-back planning obligations proposals in "*Planning-gain Supplement: a consultation*" (2005)

Main points

- a number of positive responses, including many who welcomed the "development site environment approach" to scaling back of planning obligations
- proponents of the old and new systems alike called for an efficient, transparent and relatively simple system giving confidence over infrastructure provision
- there were calls for various points of clarification particularly on the scope and process of scaled back planning obligations and clarification on the mechanism for delivering infrastructure no longer included in the scope

Detailed issues:

- new arrangements could **penalise efficient local authorities** currently skilled at s106 negotiations
- proposed narrow scope of planning obligations could result in a **loss of flexibility** and a loss of the ability to provide in-kind for non-housing matters
- can **new arrangements for local authority provision** using PGS revenues meet actual needs for infrastructure and facilities? e.g. will small community infrastructure fall through the gap of s106 and PGS? Will the arrangements meet large infrastructure needs and address wider strategic issues? Will transport needs be in jeopardy?
- **retention of affordable housing** could still mean protracted negotiations
- local authorities may allow obligations to **'creep back' to a wider scope**
- local authorities may **refuse more applications** with scaled back planning obligations or use it as an excuse to refuse unpopular developments
- **drafting of a legal test** will be challenging

Misconceptions

- some respondents wrongly thought that **PGS funds would be controlled by central government**, leading to concerns over loss of local control and response to local needs
- other respondents did not appreciate that PGS would, once established, give local authorities a "**revenue stream**" with which to fund infrastructure, including in advance of development coming forward
- there was confusion surrounding the **scope of a development site environment approach**
- many respondents did not appreciate that scaled back planning obligations will be **reflected in the planning value** of a development when calculating liability to PGS

11. Taking account of the issues raised and further policy development, this document elaborates on the Government's proposals and seeks views on those aspects of the proposals that were not covered in detail in the earlier document.

Links to wider infrastructure delivery mechanisms

12. Reducing the range of items that can be negotiated through planning obligations means that in future some contributions to infrastructure previously made by developers will no longer be delivered directly through site-specific planning obligation "contracts". Instead, contributions to infrastructure falling outside the scope of planning obligations will be delivered through other public sector funding mechanisms, including through the use of PGS revenues.

13. It is essential that all necessary infrastructure is delivered on a timely basis alongside new development and in such a way as to offer confidence to developers and local communities, and the necessary levers to address potential shortcomings. It is therefore important that the arrangements set out in this document complement those set out elsewhere by the Government for the delivery of infrastructure by the wider public sector. As such, the proposals in this document should be read in parallel to those on the issue of revenue allocation and infrastructure delivery in the section on the Planning-gain Supplement in the 2006 Pre-Budget Report, and in particular the proposals for local authority arrangements for planning for infrastructure delivery. These proposals will also be developed further as the Comprehensive Spending Review 2007 policy review into Supporting Housing Growth continues its work.

14. In granting planning permission for new development, local planning authorities will in the future still need to be satisfied that the essential infrastructure requirements are addressed, whether by developers through planning obligations or by the public sector through other means. The final design of the system for infrastructure planning by local authorities will therefore be crucial to ensuring that planning permissions can be granted and developers given confidence about the delivery of infrastructure. Further discussion of where the boundary should lie between the two systems (planning obligations and wider infrastructure funding) follows in section 4 of this document.

Territorial extent of proposals

15. This document only concerns proposed changes to the system of planning obligations in England established under s106 of the Town and Country Planning Act 1990, as substituted by s12 of the Planning and Compensation Act 1991. PGS would apply to the United Kingdom as a whole and the Devolved Administrations are therefore also considering the interaction of their systems of planning obligations with the new arrangements. Officials from Communities and Local Government, HM Treasury and HM Revenue and Customs and the Devolved Administrations are working together on these issues.

Next steps

16. This document launches a 12 week public consultation on the Government's proposals for revising planning obligations in England in the context of PGS introduction. Once the responses made during the consultation have been considered, it is anticipated that any draft legislation would be subject to further scrutiny.

How to respond

17. We would welcome your views on the proposals in this consultation document, and in particular on the "consultation questions" included in section 4 and summarised at the end of the document (appendix A). Any comments should be sent to the address below by 28 February 2007. Further information on this consultation is at appendices B and C.

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3. Planning obligations – overview of current system

Current scope of planning obligations system

18. Recent research by Sheffield University and Halcrow Group consultants for Communities and Local Government (*Valuing Planning Obligations, May 2006*) found that planning obligations were currently used to cover a wide range of matters.

19. Box 5 shows the typology of planning obligations that was adopted by Sheffield University in their research. The typology used was based on the work of GVA Grimley (2004) and Campbell et al (2001), supplemented by a web search of the obligation policies of a range of local authorities and the results of scoping case studies.

Box 5: Current use of planning obligations

Affordable Housing

a) On site provision of various tenures: social rented, shared ownership, key worker etc. Units developed and transferred to a registered social landlord (RSL): revenue from transfer depends upon agreement.

b) Off site provision: development and transfer of units on another site owned by the developer/landowner.

c) On-Site provision of land only: land transferred to a RSL or local authority (LA) for free or at a rate below the market value.

d) Off-Site provision of land only

e) Commuted sum: payment of a sum in lieu of actual provision of units.

f) Other affordable housing contributions.

Open Space and the Environment

a) Provision of open space either within a development or as a direct payment to the LA. Landscaping. *Usually a formula calculation*.

b) General environmental improvements.

c) Ecology and nature conservation, countryside management and Community forests.

d) Allotments.

e) Sport facilities: sport fields, club houses etc.

Transport and Travel Schemes

a) Traffic/highway works, temporary or permanent.

b) Traffic management/calming.

c) Parking: management or parking restrictions, car restrictions and car free areas provision of parking areas.

d) Green transport/travel plans.

e) Public and local transport improvements.

f) Pedestrian crossings, pedestrianisation, street lighting.

g) Provision or improvement of footpaths or pathways etc.

h) Cycle routes, management, safety.

Community Works and Leisure

a) Community centres: construction, funding, improvement etc.

b) Community/cultural/public art.

c) Town centre improvement/management.

d) Library, museum and theatre works/funding.

e) Childcare/crèche facilities, provision and funding.

f) Public toilets.

g) Opening hours or noise restrictions.

h) Health services: community healthcare, construction of surgeries etc, healthcare funding.

i) CCTV and security measures.

j) Waste and recycling facilities.

k) Religious worship facilities.

l) Employment and training.

m) Local regeneration initiatives.

Education

a) Schools: development or funding for education at all levels; nursery, primary, secondary, higher etc.

Other

a) Other

Problems experienced with the current system of planning obligations

20. The responses to the 2005 consultation on PGS identified a number of frustrations with the current system of planning obligations which respondents felt should be addressed. Whilst stakeholders recognised that the system has improved considerably in recent years, and that some local authorities have developed excellent practices in this area, box 6 summarises some of the main concerns still raised.

Box 6: **Current arrangements for planning obligations in England: key problems and deficiencies**

- highly variable application. Due to differences in skills and capacity, there are wide variations between local authorities as to the size and type of contributions sought
- lack of certainty for developers over what contributions will be required
- lack of transparency
- can cause delays to planning system
- can lead to accusations of "buying and selling" planning permission, because contributions do not appear to be the key to making otherwise unacceptable development acceptable

21. Many of these problems have been addressed to some extent through recent guidance issued by central government (Circular 5/05 and the Practice Guidance on Planning Obligations issued in August 2006) and progress made by local authorities in developing improved planning obligations policies and implementing smarter practices. The Audit Commission's toolkit "*Securing Community Benefits through the Planning Process*" also seeks to address some of the issues outlined above through a suite of guidance documents for different audiences.

22. However, for the reasons set out in paragraph 5 above, the introduction of a Planning-gain Supplement gives rise to the need for a new scope for planning obligations.

4. Proposals for a new system

23. This section of the consultation paper sets out the Government's proposals and seeks respondents' views on the future scope of planning obligations, as follows:

    i) the development site environment approach – discussion, including interaction with European legislation

    ii) treatment of in-kind contributions of land for public and community facilities on large sites

    iii) developer contributions to affordable housing

    iv) transport contributions, and the future of agreements under s278 of the Highways Act 1980

    v) implications of the new scope for the relationship between planning obligations and planning conditions.

i) The "development site environment" approach – discussion

24. The 2005 consultation paper on the Planning-gain Supplement described in broad terms the conceptual boundary of the proposed new scope of planning obligations. The "test" for whether a planning requirement to be fulfilled by a developer[7] would in future fall within or outside the scope of planning obligations (see box 7 opposite) was based on the nature of the relationship between the requirement and the development. If the requirement related directly to the viability of the **physical environment of the development site** or the **need for a proportion of housing to be affordable**, it could continue to be the subject of a planning obligation. If, on the other hand, the requirement related to the site's social or community infrastructure, it would no longer be included within scope.

25. The consultation revealed that drawing a clear boundary between appropriate and inappropriate obligations in this way would appear to support a number of the Government's objectives described in box 2.

26. Responses to the consultation on this issue also revealed some misunderstanding of the proposed "development site environment" test, since many respondents made comments under the misconception that off-site matters would in future be excluded from the scope of planning obligations. Rather, the Government's proposed test included things which were off-site so long as they fulfilled the requirement of *an appropriate relationship to* the physical environment of the site.

[7] Where "developer" is anyone applying for planning permission and/or carrying out development work.

Box 7: **Principles for matters to be included in new development-site environment approach to planning obligations (from *Planning-gain Supplement: a consultation* (2005))**

a) the provision of affordable housing: i.e. necessary to contribute to the securing of the relevant proportion of affordable housing in a residential or mixed-use development, as required by the application of the Local Development Framework (LDF) policy to the site;

b) direct replacement/substitution: i.e. necessary to replace/substitute directly for the loss or damage to a facility or amenity caused by the development; or

c) development-site acceptability: i.e. necessary to make the development-site acceptable in terms of the following attributes:

- connectivity to access points;
- physical safety;
- environmental quality;
- biodiversity;
- design or landscaping;
- archaeological protection;
- mix of uses; and/or
- operational effectiveness (of the site and others functionally linked to it).

The exact nature and scale of the obligation requirements could still be governed by tests of relevance to planning; direct relationship to the development; reasonableness; and proportionality.

27. In light of the responses to the 2005 consultation document and other discussions with stakeholders, the Government's proposed scope for planning obligations remains that of the "development site environment approach". **Whilst there remain a number of detailed issues to be resolved in finalising the approach, the next steps in developing this approach and ultimately setting it on a statutory basis will be for the Government to consult stakeholders on how the provisions will be included in legislation.**

28. It remains the Government's intention to define the future scope of planning obligations in legislation, using a set of criteria-based tests, such as those included in box 7 above. These tests would be based on the principles that define an appropriate relationship between the developer's contribution and the development. Alternative approaches, such as lists of infrastructure items, have been considered, but a criteria-based approach is preferred as it is likely to be the most responsive to site-specific circumstances and should avoid lengthy discussions over the treatment of items that would inevitably be excluded from any list, however apparently exhaustive. The Government would seek to ensure that the drafting of the criteria was sufficiently clear to reduce the time needed for negotiations, and would consult stakeholders in doing so, whilst recognising the challenges inherent in defining a clear scope.

***Consultation question 1*: Do you agree that a criteria-based approach to defining the scope of planning obligations is the best way forward? If not, what approach would you recommend?**

Ensuring compliance with European Community legislation, such as the Environmental Impact Assessment (EIA) Directive

29. The Government wants to ensure that the future scope of planning obligations still enables the provision of any measures required after consideration of environmental assessments required under European legislation, such as the Environmental Impact Assessment Directive (85/336/EEC amended by 97/11/EC). This issue was raised as a possible concern during the consultation process.

30. Under the current system local authorities can ensure that works needed to prevent, reduce and offset any significant adverse effects on the environment are undertaken and maintained by a s106 agreement or through the imposition of a negatively worded or "Grampian" condition.

31. A scaled-back system of planning obligations would include contributions intended to make a development site acceptable, including in terms of its environmental quality. It is therefore anticipated that most works to mitigate harmful environmental effects would still fall within the scope of planning obligations, and could still either be ensured by a condition or, under the proposed development site environment approach, by a planning obligation.

32. Where the mitigation of harmful environmental effects would require works that would fall outside the scope of the new scaled-back system of planning obligations and would therefore be the responsibility of a public body to fulfil, the decision maker would need to take account of commitments to provide the infrastructure set out in public bodies' plans. This is necessary in order to allow decision makers to satisfy themselves that the impacts of developments would be mitigated and that planning permission could therefore be granted. These plans are likely to include the new arrangements for "infrastructure delivery planning" referred to in the 2006 Pre-Budget Report if implemented. These arrangements are being considered as part of the Comprehensive Spending Review 2007 policy review into Supporting Housing Growth.

***Consultation question 2*: Do you agree that the scaling back of planning obligations will not undermine the operation of EIAs for the reasons set out above?**

ii) In-kind contributions of land for public and community facilities on large sites

33. According to the criteria in box 7 above, contributions towards community and social **facilities** associated with a new development would in future not be included within the scope of planning obligations. However, a separate decision is needed on the treatment of the **land** on which the facilities are located.

34. Planning obligations have in the past played an important role in ensuring that land within large developments or on linked sites owned by the developer can be devoted to facilities and infrastructure required by the planning system and for operation by the public sector or transferred to community ownership by the public sector (e.g. open space, schools, clinics, libraries, sports facilities etc). This has helped deliver an important

objective in ensuring infrastructure / facilities are integrated within developments and not located inappropriately, for example, far away from housing developments.

35. **Excluding provision of land for public and community facilities** from the scope of planning obligations in future would ensure a greater "scaling back", thereby adding initially to the simplicity and speed of the system. However, these benefits may in reality be outweighed by the need for parallel negotiations between the landowner and relevant public sector body over the purchase or lease of land within the development site for the public and community facilities. Such negotiations would be necessary in order to ensure the facilities were still located in a sustainable and integrated way. Alternatively, this option could result in public and community facilities being located in unsustainable locations.

36. **Including provision of land for public and community facilities** within the scope of planning obligations, on the other hand, would ensure that facilities were integrated within developments, but would result in more expansive negotiations. There is also the added complexity that a public facility located on a large development site may be larger than is required by that site alone (so as to address cumulative impacts), such that the developer would be making a contribution of land larger than that arising from the need for facilities generated by just his/her development alone. This could lead to potential unfairness, as other nearby developers would not make any such contributions of land.

37. Irrespective of whether land is included within the scope of planning obligations or not, the importance of designing effective infrastructure delivery arrangements that facilitate the timely delivery of the built elements of infrastructure alongside new developments is recognised in this context, in order to avoid the possibility of land for public and community facilities sitting empty due to delays in public sector infrastructure delivery.

> ***Consultation question 3*: Do you think that land for public or community facilities on large sites should be included in the scope of planning obligations in future, or excluded? How should "large" sites be defined?**

iii) Affordable housing

Background

38. Many developers currently make contributions to affordable housing through planning obligations, in the context of the grant of planning permission. In 2003–4, around £600m worth of contributions was made in this way[8], and around 16,500 units of affordable housing that were delivered included some element of developer contribution.

39. Developer contributions to affordable housing through the planning system have been part of the planning obligations framework for over 15 years. They were originally referred to in Department of the Environment Circular 16/91, but since that time, the practice of negotiating such contributions has increased markedly. In Circular 5/05, the practice was covered explicitly in Secretary of State's policy, noting that the seeking of

[8] *Valuing planning obligations* (2006) DCLG (Sheffield University and Halcrow Group).

affordable housing contribution by local authorities was not related to the usual "impact mitigation" role of planning obligations, but was instead related to their role in "prescribing the nature of the development", and particularly its mix of housing tenures.

Proposals so far

41. In the December 2005 consultation paper on the Planning-gain Supplement, the Government set out its intention to accept Kate Barker's recommendation and retain affordable housing contributions within the future scope of planning obligations. This was considered essential in order to ensure future access to land for affordable housing to deliver mixed communities in sometimes high value areas where land would otherwise be difficult to secure.

42. In response, many respondents raised concerns that the retention of affordable housing contributions within planning obligations could undermine the objectives of speedy negotiations and predictability for developers, because of the problems experienced with the current system that particularly affect affordable housing negotiations.

43. The 2005 consultation paper proposed to address some of these problems by seeking greater consistency in approach between local authorities and to prevent attempts to maximise value capture through the planning system rather than to address affordable housing need. The following paragraphs give more detail of the outcome of this work and the next steps proposed.

44. The two areas which emerged as those which would have the greatest impact on improving the system were clarifying the **statutory and policy basis for securing affordable housing contributions** and giving greater certainty over the **value of the contribution** which developers were expected to make.

iv) A clear legal and policy basis for affordable housing contributions

45. Some of the problems experienced by developers and local authorities during negotiations for affordable housing contributions are understood to arise because these arrangements have evolved over time as an offshoot of the planning obligations system. Policy has largely followed practice, rather than vice versa.

46. In designing new arrangements, the Government is keen to create a clear and explicit basis for the delivery of affordable housing through the planning system. In practice, this means reviewing whether improvements could be made to the current legal basis for planning obligations, to make clearer the intended use of planning obligations for affordable housing contributions. It will also entail the production of clear policy statements on the provision of affordable housing through planning obligations, to complement Planning Policy Statement 3 (Housing) (PPS3). In particular, the new arrangements would need to make clear in Local Development Frameworks the link between housing need, planning policies and the developer contribution being made – a relationship that has not always been clear in the past.

47. We would expect to consult further on how this link should be made explicit when putting forward draft regulations and Circulars for implementing the new arrangements for planning obligations.

v) A common starting point for the value of developer contributions to affordable housing

48. A further criticism of the current arrangements for affordable housing contributions through the planning system is the lack of predictability for developers as to the value of the contribution likely to be sought from them, to accompany the contributions from the Registered Social Landlord, Housing Corporation or other funding source as appropriate.

49. Whereas the application of the relevant Local Development Framework policy to a new development should make clear the mix of housing that should be delivered, and there remains an expectation that the developer will be responsible for delivering the affordable units alongside the market units, the **value** of contribution the developer can reasonably be expected to make to the delivery of the affordable units is often not clear.

50. At present, contributions tend to be made either in-kind or, exceptionally, as their financial equivalents, along the lines described in box 8.

Box 8: Illustration of range of developer contributions towards affordable housing

The application of a hypothetical Local Development Framework policy to a site allocated for housing may require that for a development of 20 units, 8 must be affordable (based on a threshold of 15 units and a 40% requirement for affordable housing). The developer is expected to **deliver** all of the units, but the **financing** of them falls to three parties – the developer, the Registered Social landlord and in this illustrative case, the Housing Corporation.

Under the current arrangements, it is often not clear to the developer what value of contribution will be required. For instance, the following could be required:

a) the value of a portion of the land to support the 8 affordable units

b) the value of the land to support the 8 affordable units

c) the value of the land and its servicing to support the 8 affordable units

d) some other contribution based on a formula developed by the local authority.

In other circumstances, the developer may provide:

e) the value of the land to support the units, plus a contribution to the build costs

51. The lack of clarity for a developer approaching a negotiation as to what value of contribution is likely to be sought can result in protracted discussions with the local planning authority and complex negotiations with landowners over the costs of development. The Government is therefore proposing the introduction of **a common starting point in negotiations for the value of developer contributions to affordable housing** to be implemented through Local Development Frameworks.

52. A range of options has been considered for the common starting point for the value of contributions through a brief survey of the current practices described in box 8 above and taking account of existing policies in English and Scottish local authorities. For example Scottish Executive's policy in Planning Advice Note 74 (para 38) uses discounted serviced land as a common currency for affordable housing negotiations. Consideration of these examples would suggest that *a contribution by the developer in the form of, or equivalent to the value of, the land necessary to support the required number of affordable units on the development site* would represent a reasonable starting point for negotiations.

53. However, the Government would like to seek the views of stakeholders on the best common starting point for the value of contributions towards affordable housing, taking account of the issues discussed below. The Government will also be carrying out a short research study to ascertain what values of contribution are currently being made by developers and what the implications of a common starting point for negotiations would be for a range of case study schemes.

Issues arising in establishing a common starting point

54. By making a common value of developer contribution the starting point for negotiations, however, the Government does not want to be overly prescriptive in a way that would preclude the negotiation of alternative outcomes that are necessary to meet the planning requirements of an individual site. For example, where a site is heavily contaminated, it may be necessary for the parties to the negotiation to agree a reduced contribution by the developer in order to allow the costs of remediation to be met. In such circumstances, however, the onus would be on the developer to demonstrate that the viability of the site was such that it was unable to support the common value of contribution taken as the starting point. On the other hand, where a developer wished to make a contribution that was greater than the common starting point, this would also be possible under the proposed arrangements, for example to support innovative funding models which currently don't require grant. However, the new system would include a presumption that local authorities should not seek contributions greater than the common starting point unless justified by Local Development Framework policies.

55. The clear objective of such an approach remains the promotion of predictability in affordable housing negotiations. This objective is also supported by the work underway by English Partnerships, the Advisory Team for Large Applications (ATLAS) and the Housing Corporation on process frameworks to help guide local planning authorities and applicants in the negotiation of affordable housing. These frameworks include the use of "cascade agreements" and other mechanisms that may be included in planning obligations, designed to set out alternative affordable housing outcomes for large developments, where the availability of public subsidy is unclear at the time of the negotiation. The aim is to increase certainty and reduce the time needed for negotiation, whilst still ensuring acceptable outcomes are achieved in terms of the mix of housing required in the context of the Local Development Framework.

56. In recommending a common starting point for the value of developer contributions, the Government is ***not*** proposing changes to the *delivery arrangements* for affordable housing. The presumption would continue that whatever common starting point of contribution was established, affordable housing should continue to be delivered by the developer, and on-site wherever possible. Taking the example of the value of the land needed to support the affordable units, therefore, the Government would expect that in many cases, the developer's contribution would be in the form of the land on which the affordable units would be built.

57. However, in the case of flatted blocks or "pepper-potted" units, the contribution would need to be calculated on an equivalent basis, possibly with reference to a formula. Further, in exceptional cases where an off-site contribution, or a financial payment in lieu of on-site provision was agreed, the contribution should normally be equivalent in value to that of the common starting point for an on-site contribution. These circumstances will be dealt with in future consultations on the application of the policy.

58. Use of a common starting point for the value of developer contributions to affordable housing would also require consideration of how agreement can be reached between the parties on the value of the land in question. It is expected that there will be opportunities for local authorities and developers to build on existing methods of assessing land values used in the context of planning obligations. There are also expected to be synergies with the methods of valuation used for the purposes of calculating PGS liability.

59. The setting of a common starting point for negotiations should also give greater clarity to local authorities assessing the economic viability or otherwise of proposed targets for affordable housing, and the likely levels of finance available for affordable housing, in line with PPS3.

60. The introduction of a common starting point for the value of developer contributions to affordable housing will also have implications for the allocation of Housing Corporation Social Housing Grant to sites delivered through the planning system including greater clarity over developer contributions. The current proposals should therefore be read on the understanding that they are subject to changes in the Housing Corporation's criteria for grant-funding sites, in order to support the new arrangements.

***Consultation questions 4–7*:**

4. Do you agree with the proposals to establish a clear legal and policy basis for affordable housing contributions?

5. Do you agree with the proposals to establish a common starting point for the value of affordable housing contributions?

6. Can you envisage any unintended consequences of the above approach?

7. What common starting point would you recommend? What would be the impact of this option on a) development viability and b) affordable housing delivery?

vi) Use of planning obligations / highways agreements for managing the transport impacts of new development

61. Applying the "development site environment" approach to the use of planning obligations to manage the transport impacts of development is complicated by the *dynamic* nature of transport and the Government's policy of encouraging development that reduces the need to travel, especially by car, and promotes more sustainable transport choices for both people and for moving freight.

62. The December 2005 consultation paper on PGS proposed that limiting obligations to matters necessary to secure the "accessibility" of a site might be an appropriate boundary for reasonable planning obligations/highways agreements for transport. However, this definition needs further development in light of the Government's wish both to manage demand for transport and to encourage the public sector to deal with infrastructure on a more strategic basis.

63. This section of the document therefore seeks consultees' views on which aspects of transport provision might best be included within planning obligations or highways agreements in future and which aspects might better be dealt with directly by the public sector using PGS and other revenues.

64. The current discussion excludes consideration of the management of the transport impacts of major transport infrastructure projects such as ports and airports since these issues are the subject of review by Sir Rod Eddington's Transport Study and the Ports Policy Review.

65. The discussion focuses instead on the future arrangements for transport-related planning obligations for all other types of development. The first section considers the implementation of demand management measures and developer contributions towards the cost of **highway** improvements; the second section then considers developer contributions towards **other modes of transport**. The discussion in this section does not distinguish between planning obligations under s106 or highways agreements under s278 of the Highways Act 1980, although consideration of the different powers used is included in paragraph 78.

a) Use of developer contributions for road transport infrastructure

66. Decisions on the future role of planning and highways agreements need to take account of:

- the need to **manage demand for transport**, in line with the Government's policy on road transport;
- the need to ensure that, where network improvements are required to accommodate additional traffic generated by developments, these **improvements are carried out in the right place, at the right time, and in a way that offers confidence to developers about delivery**;
- the need to ensure that improvements needed to **manage the cumulative impact** of developments on the highway network are properly planned and equitably funded; and
- the need to retain a sensible and consistent **scope for the new system of planning obligations** that does not cause delay to the planning process.

67. The current system of planning obligations and highways agreements plays a dual role in managing demand for transport, i.e.

i) it enables the implementation, monitoring and enforcement of Travel Plans and associated demand management measures that often need to bear on the successive users of a site; and

ii) it incentivises developers to manage their sites' traffic generation by linking the contribution they are required to make to the impact that their development has on the network.

68. The majority of demand management measures relate directly to the use of the development site. In many cases, these measures involve actions that parties with an

interest in the site must carry out, and which could not easily be fulfilled by the public sector. For example, the users of a site may be required to put in place measures to allow the implementation, monitoring and enforcement of a Travel Plan, such as the appointment of a Travel Plan Co-ordinator, carrying out surveys or collecting data and requirements for payments if targets are not met. They may also be required to implement measures to influence trip and mode choice such as providing public transport information, supporting car-sharing/pooling, implementing parking controls and encouraging cycling and walking. And they may be required to put in place works and measures to manage access to and egress from the development site onto the road network (for example, traffic lights).

69. Given the *direct* relationship between these measures and the use of the development site, and the difficulty that the public sector may have implementing many of them, the Government proposes that these matters should remain within the scope of planning obligations, where it is not possible for them to be dealt with through planning conditions.

> ***Consultation question 8*: Do you agree that measures to implement Travel Plans and demand management measures directly related to the environment of the development site should remain within the scope of planning obligations?**

70. The current arrangements for planning and highways agreements also *indirectly* incentivise developers to manage their sites' traffic generation by linking the contribution required to the impact of the development on the network. Removing the link between the impact of a development on the network and the contributions required could therefore be argued to weaken incentives on developers to manage demand for transport. This could suggest that it would be counterproductive to scale back the scope of developer contributions for transport on an equivalent basis to that for other forms of infrastructure.

71. A second consideration is the need, as with other forms of infrastructure, to ensure that highways improvements needed to support development are produced in a way that plans for offers confidence to developers about delivery. Unlike the position for other forms of infrastructure, the current separate legislative regime allows developers to contract for the provision of any highway improvements needed to support their development directly with the relevant highway authority (under s278 of the Highways Act 1980), as opposed to via the planning authority. Under the proposed changes, some infrastructure previously delivered directly through such "contracts" would instead be delivered through the use of PGS and other revenues. One implication of this is that, while the potential complexity of negotiations for developers might be reduced, developers would lose some of the levers they currently have to ensure the delivery of highways improvements. There might therefore be advantages in retaining a broader scope of planning agreements for these works.

72. On the other hand, the Government also wishes to ensure that the cumulative impacts of successive developments on the transport network are dealt with on a strategic and equitable basis. The use of PGS as revenue stream held by local authorities should constitute a fairer way of getting developers to contribute to the costs they impose on the transport network and eliminate the problem of "free-riding" by earlier developers

who are currently often subsidised by later projects that push transport networks over capacity. PGS should also enable better planning and prioritisation of infrastructure. These considerations might recommend a more significant curtailment of the scope of planning obligations and wider application of PGS and other funding streams to the provision of transport infrastructure.

73. In seeking to achieve the dual objectives of demand management and of a more strategic approach to the cumulative impacts of development, whilst retaining a narrower scope of planning obligations, the Government invites the views of stakeholders on the following options for the new scope of planning obligations for road infrastructure (other than for direct demand management and implementation of travel plans, which are dealt with above):

Option A: Works needed to allow access to and from the site to the ***nearest point on the transport network*** compatible with safety and its operational effectiveness

Under this option, developers would (in addition to on-site works and measures and the demand management measures set out above) only be required to provide directly, or contribute directly to, the necessary access(es) to connect the development safely and effectively to the immediate road network. The public sector would then be responsible for any improvements or capacity enhancements required on the wider network in order to accommodate additional trips generated by the development site, beyond the junction at which the site access roads joined the existing road network. In practice, the contributions made by developers towards access under this option could range from a dropped kerb for a single new dwelling, to a dual carriageway access road and new junction, for a major distribution centre.

Option B: Transport provision to allow access to and from the site to the ***nearest appropriate transport network*** in terms of capacity

Under this option, developers would (in addition to on-site works and measures and the demand management measures set out above) be required to contribute directly to any improvements/capacity enhancements required in order to accommodate additional trips generated by the development site, up until the point at which the existing road network could accommodate the additional demand generated. The appropriate level of connection would be defined by the development site's Transport Assessment, which should be produced in accordance with the Government guidance on Transport Assessment. In practice, it is anticipated that, for minor sites, a connection to the nearest point of access on the local road network would probably suffice; for major sites, improvements to the connection to the Primary Route Network might be required; for very significant sites, improvements to the connection to the motorway network might be necessary.

74. It should be noted that neither option would affect the Secretary of State's power under Article 14 of the Town and Country Planning (General Development Procedure) Order 1995 to give a direction restricting the grant of planning permission by the local planning authority for a proposed development. The Secretary of State would continue

to be able to give a direction restricting the grant of planning permission until appropriate improvements to the strategic road network had been carried out, the difference being that the works would no longer be funded by direct developer contributions through "s278 agreements" but rather through PGS and other revenues.

Table 1: **Advantages and disadvantages of the two options**

	Within the scope of planning obligations	Outside the scope of planning obligations	Pros and cons
Option A	Direct demand management plus transport provision to allow access to and from the site to the ***nearest transport network***	All other road transport provision	+ Maximises the local authority's ability to manage cumulative impacts strategically. + Highly equitable – little danger of free riding + Increases simplicity of planning obligations negotiations – Does not allow the incentivisation of developers to manage demand – Gives developers fewer direct levers to ensure development-critical transport infrastructure is delivered
Option B	Direct demand management plus transport provision to allow access to and from the site to the ***nearest appropriate transport network*** in terms of capacity	Improvements required on the wider network beyond this and road transport provision not arising from specific developments;	+ Allows stronger incentivisation of developers to manage demand + Gives developers strong levers to ensure transport infrastructure is delivered – Reduces the local authority's ability to manage cumulative impacts strategically – Large danger of free riding – Reduce simplicity of planning obligations negotiations and possibility of delays

***Consultation question 9*: Which of the above options for developer contributions to transport infrastructure should the Government pursue in order best to balance the objectives of;**

- **managing demand for road transport;**
- **the need to ensure network improvements are provided in a timely manner;**
- **the need for transport impacts to be dealt with on a cumulative and strategic basis alongside other forms of infrastructure; and**
- **the need to create a scope for planning obligations which is sensible and consistent and does not lead to delay? Are there any other options?**

b) Use of developer contributions for other forms of transport infrastructure

75. Decisions around the new scope of planning obligations also need to take account of the need for developments to be properly supported by other forms of transport infrastructure such as walking and cycling, bus, train, tram and water-borne.

76. For these non-car-based forms of infrastructure, it is proposed that an equivalent "test" should be applied as that under **Option A** above (i.e. direct provision by developers of only that infrastructure needed to secure safe and effective access to the transport network). This is because of the highly cumulative nature of demand for them, for example, in the case of bus and rail, and the desire to streamline planning obligations as far as possible. Thus, the Government's preferred option is that for non-road forms of infrastructure, acceptable planning obligations should (consistent with the development-site environment approach) in future only cover the provision of items necessary to make the development accessible in terms of its on-site layout and connectivity to access points. In practice, under this proposal, one might expect future contributions from smaller developments to include matters such as cycle paths from the developed site to existing networks or bus shelters and from much more major developments, new tram stops or piers.

77. There are obvious links between the test for road transport contributions set out above and the test for non-road transport contributions described here, especially given the integrated nature of travel planning. On the one hand, from the point of view of streamlining planning obligations negotiations, it would be preferable for contributions to all modes of transport to be dealt with consistently. On the other hand, managing demand for transport and ensuring that improvements are carried out on a timely basis and in a way that offers confidence to developers, mean that consideration needs to be given to a solution that reflects the unique circumstances of providing road network improvements.

> ***Consultation question 10*: Do you agree with the proposal to define the new scope for planning obligations for non-road infrastructure as described above i.e. those contributions required to allow "connection to access points", but to exclude more strategic contributions or those which are better dealt with on a cumulative basis?**

Types of developer contribution to transport infrastructure

78. Under current arrangements, developer contributions to transport infrastructure are made under both planning obligations (s106 agreements), usually for direct demand management measures and non-road infrastructure and highways agreements (s278 agreements), for contributions to works to the road network. In considering the future of planning obligations, the Government is examining whether in future all contributions in England should be made under a single instrument, to which local planning authorities and highways authorities (including the Secretary of State, acting through the Highways Agency) would be signatories for the relevant provisions. A single form of obligation would reduce complexity in negotiations, and allow more synergy between road and non-road transport contributions. Depending on the outcome of the consultation in response to questions 8 to 10 above and the workability of the proposal, the Government's preferred option is the creation of a single instrument. Any changes to this effect would not affect the non-development control aspects of s278.

***Consultation question 11*: Do you agree that in future all planning obligation contributions, including towards highways works, should if possible be made under a single agreement, to which highways authorities would also be parties where relevant? Do you see any downsides to this approach?**

v) Use of planning obligations versus planning conditions

79. Several respondents to the 2005 PGS consultation paper noted that it appeared to be potentially possible to deal with many of the matters within the proposed scaled-back scope of planning obligations using planning conditions. This led some stakeholders to ask whether the current policy expectation that planning obligations will only be used where it is not possible for a planning condition to achieve the desired purpose (paragraph B41 ODPM Circular 5/05) would be made statutory.

80. The key differences between planning obligations and planning conditions are as follows:

Table 2: **Features of planning obligations and planning conditions**

Planning conditions	Planning obligations
Form part of the planning permission	Are separate to the planning permission
Can be appealed	Cannot be directly appealed
Cannot include financial contributions	Can include financial contributions
Should meet the "Newbury" test[9] re. precision	Not subject to the "Newbury" test
Are not usually detailed or complex	Can be very detailed and complex
Cannot allocate responsibilities to particular parties	Allows the allocation of specific actions to specific parties

81. Table 2 demonstrates that there will be circumstances in which very similar contributions could in one instance be made using a condition whereas in another this would not be possible for example, an in-kind contribution to open space versus a financial contribution of the same value. This has led some stakeholders to suggest that the Government could use legislation to require local authorities to use conditions wherever possible, in order to ensure the developer has a right of appeal. Whilst this could be advantageous, it could also reduce flexibility for both parties; limit the level of detail that could be included; and limit the possibility of allocating specific responsibilities to individual parties. It is therefore proposed that whilst the policy presumption that obligations are only used where cannot be used should be reinforced, it should not be enshrined in legislation.

***Consultation question 12*: Do you agree with the proposal to reinforce the current policy presumption that planning obligations should only be used where it is not possible to use a planning condition, but not to provide for this in legislation?**

[9] *Newbury DC v Secretary of State for the Environment (1981) A.C.578.*

Appendix A: consultation questions

1. Do you agree that a criteria-based approach to defining the scope of planning obligations is the best way forward? If not, what approach would you recommend?

2. Do you agree that the scaling back of planning obligations will not undermine the operation of EIAs for the reasons set out above?

3. Do you think that land for public or community facilities on large sites should be included in the scope of planning obligations in future, or excluded? How should "large" sites be defined?

4. Do you agree with the proposals to establish a clear statutory and policy basis for affordable housing contributions?

5. Do you agree with the proposals to establish a common quantum for such contributions?

6. Can you envisage any unintended consequences of the above approach?

7. What common quantum would you recommend? What would be the impact of this option on a) development viability and b) affordable housing delivery?

8. Do you agree that measures to implement Travel Plans and demand management measures directly related to the environment of the development site should remain within the scope of planning obligations?

9. Which of the above options for developer contributions to transport infrastructure should the Government pursue in order best to balance the objectives of; managing demand for road transport; the need to ensure network improvements are provided in a timely manner; the need for transport impacts to be dealt with on a cumulative and strategic basis alongside other forms of infrastructure; and the need to create a scope for planning obligations which is sensible and consistent and does not lead to delay? Are there any other options?

10. Do you agree with the proposal to define the new scope for planning obligations for non-road infrastructure as described above i.e. those contributions required to allow "accessibility to access points", but to exclude more strategic contributions or those which are better dealt with on a cumulative basis?

11. Do you agree that in future all planning obligation contributions, including towards highways works, should if possible, be made under a single agreement, to which highways authorities would also be parties where relevant? Do you see any downsides to this approach?

12. Do you agree with the proposal to reinforce the current policy presumption that planning obligations should only be used where it is not possible to use a planning condition, but not to provide for this in legislation?

Appendix B: 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
http://www.cabinetoffice.gov.uk/regulation/consultation/code/index.asp

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

Albert Joyce,
Communities and Local Government Consultation Co-ordinator,
Zone 6/H10, Eland House, Bressenden Place, London, SW1E 5DU;
or by e-mail to:
albert.joyce@communities.gsi.gov.uk

Please note that **responses to the consultation itself** should be sent to the contact shown within the main body of the consultation.

Appendix C: Consultees

Communities and Local Government welcomes responses to this consultation document from any member of the public.

Communities and Local Government 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 specialist groups
- Members of the public who have requested a copy.