EXECUTIVE NOTE

THE PLANNING ETC. (SCOTLAND) ACT 2006 (SAVING AND TRANSITIONAL PROVISIONS) AMENDMENT ORDER 2011

SSI 2011/348

1 The above order amends the Planning etc. (Scotland) Act 2006 (Saving and Transitional Provisions) Order 2011 ("the 2011 Order"). It is made in exercise of the powers conferred on the Scottish Ministers by section 58(1) and(2) of the Planning etc.(Scotland) Act 2006 ("the 2006 Act") and all other powers enabling them to do so. The Order is subject to the negative procedure.

Introduction

2 Section 23 of the 2006 Act inserted a revised section 75 and new sections 75A to 75C into the Town and Country Planning (Scotland) Act 1997 (the 1997 Act). Under the old section 75 a person could enter into an agreement with the planning authority to restrict or regulate the development or use of land. The new section 75 re-enacts this provision. As under the old section 75 it remains possible for a person to enter into an agreement under section 75 with the planning authority containing obligations which restrict or regulate the development or use of land. In addition the new section 75 enable a person unilaterally to enter into such an obligation. The new section refers to obligations of this kind as 'planning obligations' irrespective of whether the obligation is constituted by means of an agreement with the planning authority or by a unilateral undertaking.

3 New section 75A establishes a formal process whereby a person against whom a planning obligation is enforceable can apply to a planning authority to have a planning obligation modified or discharged. New section 75B provides a right of appeal to Scottish Ministers in the event the request was refused or is not determined within the prescribed (two month) period.

4 The new provisions came into force on 1st February 2011 and the 2011 Order came into force on the same date. It was, and is, considered that as the new section 75 repeals and re-enacts (with modifications) the provisions of the old section 75 section 17(2) of the Interpretation Act 1978 operates so that any agreement entered into under the old section 75 would have effect as made under the new section 75. As such a pre-1st February 2011 section 75 agreement would contain planning obligations which are subject to the new application and appeal provisions in sections 75A and 75B. Certain planning authorities have, however, disputed that the new provisions in sections 75A and 75B apply in respect of an agreement entered into before 1st February 2011. This Order is made in order to clarify the position beyond any potential doubt.

5 The Order therefore amends the 2011 Order to state that, with limited exceptions, the provisions of the 1997 Act (as amended by the 2006 Act) apply to planning agreements made before 1 February 2011. The exceptions are that new section 75(5) and (6) and section 75C do not so apply. These exceptions mirror the provisions of article 3 of the 2011 Order.

Policy context

6 The intention to introduce a formal process for the modification or discharge of planning agreements or obligations set out in the White Paper: Modernising the Planning System in June 2005. In setting out the proposals the White Paper specifically stated the intention that the process should apply to both planning agreements and obligations (page 71 of the White Paper).

7 The intention in establishing a formal process for modification or discharge of agreements and obligations was to build on existing best practice where planning authorities and people subject to planning agreements could informally renegotiate them, should circumstances change. Where agreement was not possible however the only way to modify an agreement would be through legal action, which could be lengthy and extremely costly to all parties involved. The formal process provided a time limited and clear mechanism for modifications to be considered and included a right of appeal to Scottish Ministers. It is therefore simpler, more transparent and cheaper.

Consultation

8 As noted above the original intention to introduce the process for modification or discharge planning agreements or obligations was set out in the White Paper. Scottish Government consulted on the proposals in the White Paper prior to the introduction of the 2006 Act to Parliament.

9 The Scottish Government further consulted on secondary legislation required to implement the provisions of sections 75 -75B. Public consultation was carried out between April and July 2010 with an Analysis of responses published in November 2010. Those responding to the consultation included planning authorities, business and professional bodies and other public bodies including SEPA and SNH. The responses were broadly welcoming and supportive of the proposed Regulations.

10 Although the consultation did not include a specific question regarding the application of the new provisions to existing planning agreements, a number of consultees made reference to this in their responses. Overwhelmingly these comments were in favour of the provisions applying to existing agreements.

Financial Implications

11 A Business Regulatory Impact Assessment and Equalities Impact Assessment were conducted and consulted on as part of the process of implementing the original Regulations relating to planning obligations. These were conducted on the basis that the Regulations would apply to applications to modify or discharge existing planning agreements.

12 The proposed Order does not therefore introduce any new elements; it is simply a clarification of our position. The Scottish Government is of the view therefore that further assessments are not required. A copy of the BRIA is attached below

Scottish Government

Built Environment Directorate

September 2011

Final Business and Regulatory Impact Assessment

Title of Proposal

The Town and Country Planning (Modification and Discharge of Planning Obligations) (Scotland) Regulations 2010

The Town and Country Planning (Modification and Discharge of Good Neighbour Agreement) (Scotland) Regulations 2010

Purpose and intended effect

- **Objectives**

The Scottish Government is seeking to implement provisions in the Planning etc. (Scotland) Act 2006 (the 2006 Act) to extend existing, and introduce new, provisions relating to planning obligations and to good neighbour agreements (GNAs).

The provisions of the 2006 Act introduce a formal process for the modification or discharge of planning obligations or GNAs. The provisions of the 2006 Act furthermore allow for regulations to be made in respect of these procedures. The proposed regulations set out;

- The information required to be submitted to planning authorities to support a request to modify or discharge a planning obligation or GNA;
- Timescales for applications for modification or discharge to be considered and decisions issued;
- Where an application for modification or discharge is rejected by a planning authority, the procedures for an appeal to be made to Scottish Ministers.

- **Background**

The Planning etc (Scotland) Act 2006 contains provisions which will replace the current section 75 of the Town and Country Planning (Scotland) Act 1997 and introduce several new sections (sections 75A to 75G respectively).

Section 23 of the 2006 Act will implement sections 75 to 75C relating to planning obligations (previously known as planning agreements or section 75 agreements). The principal changes are that there will be a formal mechanism for a person to request that an obligation be varied or discharged should circumstances change after the obligation has been concluded. There will be a right to appeal to Scottish Ministers if the planning authority refuses the request. Other changes include the introduction of unilateral obligations and a new power to allow planning authorities to take direct action to carry out works where a person does not comply with the terms of a planning obligation. Regulations are not required for the implementation of these other provisions.

Section 24 of the 2006 Act implements sections 75D to 75G which will introduce good neighbour agreements (GNAs). These are agreements which may be entered into between a developer or landowner and a community

body, such as a community council. GNAs are intended to build trust between the developer and the community and encourage businesses to take the views of local representative groups into account in the way they operate a site or facility. Issues covered could include, for example; hours of operation, patterns and frequency of vehicle movements, agreement on regular provision of information, environmental performance monitoring and agreement on site visits. The legislation does not permit GNAs to involve any payment of money to the community. As with planning obligations, the provisions relating to GNAs establish a formal process for the modification or discharge of the agreement and it is to these procedures that the proposed regulations relate.

- **Rationale for Government intervention**

A properly functioning planning system is essential to achieving the Scottish Government's central purpose of increasing sustainable economic growth. Planning obligations ensure that development is supported by the provision of the necessary infrastructure, while GNAs encourage public participation and involvement in development in their area.

At present, once a planning agreement is concluded, there is no formal process whereby it may be modified or discharged. As such any changes to the agreement (or obligation) can only be achieved through informal agreement and negotiation between the interested parties. This can result in protracted legal negotiations which can both seriously delay development and have significant cost and resource implications (for both the applicant and the planning authority) which might affect the viability of the development.

The introduction of formal procedures for the submission of an application to vary or discharge an obligation will ensure that any such application is handled following a set framework and timescales, promoting confidence in the planning system. It is our view, and that of developers who responded to the consultation, that the introduction of a formal process will encourage parties to get it 'right first time'.

Consultation

- **Within Government**

The Directorate for the Built Environment has consulted with colleagues in Scottish Government Legal Directorate and the Directorate for Planning and Environmental Appeals in the drafting of the proposed regulations.

- **Public Consultation**

The draft regulations were subject to public consultation between April and July 2010. A total of 28 responses were received. The draft regulations were reviewed and a number of minor changes made to reflect comments received.

- **Business**

The public consultation included a draft Regulatory Impact Assessment (RIA) and invited comments on it. Comments from business interests and representative bodies including Homes for Scotland, Scottish Property Federation, Scottish Renewables, Walker Group (Scotland) Ltd, ASDA, Forth

Ports PLC, Sainsburys and the Mobile Operators Association.

Options

Option 1 – Do nothing. Any modification of an obligation or agreement would need to be done through ad-hoc negotiations between the relevant parties.

Option 2 – Implement the provisions of the 2006 Act to introduce the formal process. Response to the public consultation clearly demonstrate that this is the preferred option, particularly amongst business respondents.

- **Sectors and groups affected**

Planning obligations are between a person or persons with an interest in the land and the planning authority. GNAs are agreements between a person or persons with an interest in the land and a community body. GNAs and planning obligations therefore mainly affect developers, landowners, community groups and planning authorities. Landowners and developers may include individual persons as well as business interests.

- **Benefits**

Option 1

There are no clear benefits associated with maintaining the status quo. There has been in recent years a significant increase in the use of planning agreements. In turn there has been an increase in the number of situations where changes to the agreement are subsequently sought, particularly in the light of the current financial situation. Both business and planning authority interests have expressed dissatisfaction with the absence of a formal process for considering proposed changes.

There are currently no provisions in planning legislation governing the use of good neighbour agreements.

Option 2

The introduction of a formal process for altering or discharging planning obligations or GNAs should benefit all parties with an interest in the obligation or GNA. At present any change to an obligation after it has been signed and recorded has to be made through mutual agreement with no clear timescales or process and, critically, no requirement for either party to even consider the other parties request. Such negotiations can take considerable time and involve substantial legal costs, significantly affecting the viability of a development. The formal process will ensure that reasonable requests are considered within a set timescale and through a set process, ensuring certainty and clarity in the decision making process, which will benefit the parties involved.

The existence of a formal process for reviewing and potentially modifying the terms of an obligation will encourage the parties involved to ensure the obligation is fit for purpose during the initial drafting while also providing

confidence and reassurance that the planning system can adapt to changing requirements and circumstances.

While there will be costs involved in preparing and considering an application for modification or discharge, the regulations set out what information is required to be submitted, how the application is to be handled and the timescale. All parties involved will benefit from this in being able to more accurately calculate, and therefore control, costs and manage resources. The requirement to determine applications within a set time period will assist developers in business planning and will minimise the potential risk that development will be delayed.

- **Costs**

Option 1
Due to the ad-hoc nature of any negotiations to amend planning obligations at present, it is not possible to provide figures for the costs involved. Anecdotal evidence from legal professionals and business interests indicates that such negotiations can incur significant legal costs, particularly where the matter is complex or becomes protracted. It is not uncommon for discussions to last several months or even years. Businesses are often expected to contribute towards the costs of any legal fees incurred by the planning authority in considering the proposed amendments.

As noted above under benefits, there is no current legislative framework for GNAs in the planning system.

Option 2
It would not be appropriate to set out an exact figure for the cost of any application to modify or discharge an obligation or GNA. Planning obligations range from being very straightforward to extremely complicated. Where an obligation requires a financial contribution the amounts involved can vary hugely, ranging from contributions worth several millions at one end of the scale down to less than a hundred pounds at the other end of the scale.

Where an obligation is the subject of an application to modify or discharge it, there will clearly be costs associated with this process and, if necessary, any subsequent appeal. These costs would depend to a greater or lesser degree on the complexity of the individual obligation and the nature of the modifications sought. It is our view that in the vast majority of applications the costs incurred in respect of a formal review process would, in the vast majority of cases, be less than or equal to those that would be incurred through ad hoc negotiations. We do not anticipate that introducing a formal process for handling applications to vary an obligation will in itself increase the number of persons seeking to vary the terms of an obligation. There would therefore be on overall increase in costs associated with the new provisions.

The same would apply to GNAs, although it is our view that, given their nature, these would tend to be less complex and the potential costs of varying the agreement therefore proportionately lower. We also expect that there will

be far lower numbers of GNAs than planning obligations and correspondingly fewer applications to vary or discharge such agreements. There is also a requirement in the legislation that parties must attempt to resolve disputes over changes to a GNA through informal means before submitting a formal application. Evidence that they have done so is required to be submitted along with the application.

Responses to the consultation from business sector respondents indicated clearly that they consider the potential benefits of the proposed legislative changes outweigh the costs and will encourage parties to 'keep matters simple and not forge over-complicated forms of agreement.' Respondents also noted their view that, provided obligations and agreements were properly negotiated in the first instance there would only be a need for modification in a minority of cases and therefore that the costs to both applicants and planning authorities should not rise significantly.

Costs by sector;

- Developers – costs would be incurred in the preparation and submission of an application or an appeal. Where a modification of a GNA was successfully sought by a community group then there is a possibility that there may be increased costs in complying with the revised agreement. There is no fee associated with an application for modification or discharge or an appeal to the Scottish Ministers.
- Landowners – may incur costs similar to developers for the preparation and submission of an application or appeal.
- Public sector – planning authorities will have to allocate resources to the processing of applications in respect of both GNAs and planning obligations. There is potentially an issue that if a developer contribution is reduced following a successful application then there could be a negative impact on infrastructure provision. The alternative however is that the development does not proceed and there is no contribution at all.
- Community groups (GNAs only) – may incur costs in preparing an application or a submission in response to an application by the other party to the agreement.

Scottish Firms Impact Test

Comments on the draft regulatory impact assessment were received from business interests and representative bodies including Homes for Scotland, Scottish Property Federation, Scottish Renewables, Walker Group (Scotland) Ltd, ASDA, Forth Ports PLC, Sainsburys and the Mobile Operators Association. Comments have been incorporated into this BRIA. The

respondents welcomed the new proposals: Asda, for example, commented that 'we consider that the benefits will potentially outweigh the costs, provided planning authorities are encouraged to keep matters simple and not forge over-complicated forms of agreement. …Having a clear set of procedures and a statutory time frame will be very helpful and should save time and money.'

Homes for Scotland indicated that, if obligations were properly negotiated in the first instance, there would be a need to modify obligation in 'a minority of cases'. They shared the view that there would be no significant cost implications.

Other respondents also generally welcomed the new proposals and agreed that if an agreement or obligation were properly negotiated in the first instance, then it was unlikely that there would be a need to change the provisions of the agreement at a later date. There was also clear agreement that the introduction of formal procedures and requirements for decisions to be made within set timescales could reduce delay, uncertainty, and potential legal costs, thereby benefitting those involved in the process.

- **Competition Assessment**

The proposals are not expected to impact significantly more on some firms than others nor restrict new entrants to the market. The legislation does not extend the circumstances where a planning obligation would be sought; therefore it does not place any additional burden, over and above what is already in place, on businesses. This has been confirmed with the Office of Fair Trade.

Where a firm is approached by a community body to enter into a GNA there may be costs associated with the negotiating and operating of the agreement. We envisage that GNAs will most likely be applied in the case of large scale or 'bad neighbour' developments and would be unlikely to affect the type of development undertaken by individuals or small scale developers. It should also be borne in mind that there is no legal requirement for a firm to enter into a GNA.

- **Test run of business forms**

No new forms will be introduced as a result of this legislation therefore there is no requirement for a test run.

Legal Aid Impact Test

We do not believe that the proposed regulations would create any additional pressures on legal aid resources. This view has been confirmed with colleagues with policy responsibility for legal aid.

Enforcement, sanctions and monitoring

The regulations would not create any additional need for enforcement or monitoring of obligations or agreements, as they would simply allow for the variation or discharge of existing obligations or GNAs.

Implementation and delivery plan

Post-implementation review

The Government will monitor the impact of the changes through monitoring the number of applications to planning authorities and will liaise with the Directorate of Planning and Environmental Appeals to collect information on the number of appeals made to Scottish Ministers. Reaction to how the changes have worked in practice and any particular areas of concern or uncertainty are likely to become quickly apparent through representations made by planning authorities, community bodies and business.

Summary and recommendation

- **Summary costs and benefits table**

Benefits	**Costs**
Formal process will; • Set time periods for consideration of application and decision to be made, allowing more accurate forward planning of development projects. • Clear process for consideration of application will increase confidence in, and transparency of, decisions. • Defined process will allow all parties greater control over costs and resources. • Allow obligations to be reassessed and altered where a change in circumstances would otherwise create barriers to development. • Right of appeal to Scottish Ministers where application is refused • Encourage better initial negotiation and drafting of obligations/GNAs.	• Regulations set out the information and supporting evidence that are to be submitted by the applicant. There will be costs for the applicant involved in the preparation of this material. • In respect of GNAs, community bodies may incur costs in preparing or responding to an application. • Planning authorities will incur costs in considering applications **As noted above, we consider that it is not possible to accurately forecast exact costs associated with particular applications. It is our view that the potential for costs associated with an application to modify or discharge an obligation or GNA will be significantly lower than those that may currently be incurred, and that the introduction of clear guidance and timescales for determining applications will restrict the potential for excessive costs.**

Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs I am satisfied that

business impact has been assessed with the support of businesses in Scotland.

Signed: STEWART STEVENSON

2 December 2010