

Development Management

Practice Note

PRACTICE NOTE

21

Section 76 Planning Agreements

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An Roinn

Bonneagair

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Preamble

This Development Management Practice Note is designed to guide planning officers and relevant users through the legislative requirements relating to the use of planning agreements and deals primarily with procedures as well as good practice. It forms part of a series of practice notes stemming from the **Planning Act (Northern Ireland) 2011 (2011 Act)** and any related subordinate legislation. The emphasis is very much on advice but where explicit legislative requirements must be followed these will be highlighted.

Where appropriate this practice note may highlight:

- Relevant legislation;
- Procedural guidance;
- Definitions;
- Best practice examples / relevant case law.

This guidance is not intended to replace the need for judgement by planning officers and those involved in the application process. Nor is it intended to be a source of definitive legal advice. Reference should be made to the actual legislation referred to in this document and if any discrepancy or conflict exists between the Practice Note and legislation the provisions of the legislation will prevail.

1.0 Introduction

- 1.1 A planning agreement is a legally binding agreement between a council or, as the case may be, the Department and a person (or persons) with an estate in land i.e. the landowner and / or developer.
- 1.2 A planning agreement can play a meaningful role in the development management process as a valuable mechanism for securing planning matters arising from a development proposal. An agreement may mean that development can be permitted whilst potentially negative impacts on land use, the environment and infrastructure could be reduced, eliminated or mitigated.

2.0 Legislative Background

- 2.1 **Section 76 of the 2011 Act** enables the relevant authority, that is either a council or, as the case may be, the Department¹ to enter into a planning agreement with any person who has an estate in land.
- 2.2 **Section 76(1)** of the 2011 Act provides that any person with an estate in land may enter into an agreement with the relevant authority to:
- facilitate or restrict the development or use of the land in any specified way
 - require specified operations or activities to be carried out in, on, under or over land
 - require the land to be used in any specified way
 - require a sum or sums to be paid to the relevant authority or to a Northern Ireland government department on specified date / dates or periodically.

¹ Reference to the Department relates to the Department for Infrastructure (DfI) unless otherwise indicated.

2.3 **Section 76(2)** of the 2011 Act provides that a planning agreement may be:

- unconditional or subject to conditions
- impose any restriction or requirement (mentioned in subsection (1)(a) to (c) of section 76) for a defined period of time or indefinitely; and
- if it requires a sum or sums to be paid, require the payment of a specified amount or an amount determined in accordance with the instrument by which the agreement is entered into and, if it requires the payment of periodical sums, require them to be paid indefinitely or for a specified period.

2.4 A breach of a planning agreement may be enforced by way of a court injunction as per **Section 76(6)**.

Modification and discharge of planning agreements

2.5 **Section 77** of the 2011 Act allows an application to be made by a person against whom the agreement is enforceable to the relevant authority to modify or discharge the planning agreement. **Section 77(5)** prohibits the submission of an application to modify an agreement within five years unless a different time frame has been included in the planning agreement. **Section 78** allows the appeal of that application if the council or, as the case may be, the Department has not determined the application or has determined that it should not be unmodified or discharged.

2.6 **The Planning (Modification and Discharge of Planning Agreements) Regulations (Northern Ireland) 2015** covers the form and content of such applications and the processing arrangements.

3.0 Relevant Authority

3.1 In relation to a planning agreement proposed to be made in connection with an application for planning permission **Section 76(15)** of the 2011 Act defines relevant authority as: -

- where the application has been made to a council, and the council has an estate in the land to which the proposed agreements relates, the Department.
- where the application has been made to the Department, the Department.
- in any other case, the council in whose district the land to which the application relates is situated.

4.0 Strategic Planning Policy Statement (SPPS)

4.1 The SPPS details that the council or, as the case may be, the Department may consider the use of a planning agreement where what is required cannot be adequately addressed by the imposition of planning conditions² and:

- *is needed to enable the development to go ahead;*
- *will contribute to meeting the costs of providing necessary facilities in the near future;*
- *is otherwise so directly related to the proposed development and to the use of the land after its completion, that the development ought not to be permitted without it;*
- *is designed to secure an acceptable balance of users;*
- *is designed to secure the implementation of development plan policies in respect of a particular area or type of development; or*

² For further guidance in relation to planning conditions please see Development Management Practice Note 20 Use of Planning Conditions.

- *is intended to offset the loss of, or impact on, any amenity or resource present on the site prior to development.*

4.2 It should be recognised that no two developments or applications are identical and that circumstances will vary on a site by site basis, over different areas and over time. As such, it is not possible to indicate all appropriate circumstances for using planning agreements and the above list should be considered in this context. Councils should therefore take decisions based on the legislative provision in Section 76(1) of the 2011 Act, the policy provisions contained in the Strategic Planning Policy Statement (SPPS), the circumstances of the relevant development plan and the context of the proposed development.

4.3 Before entering into a planning agreement, the relevant authority may wish to be satisfied that it provides an acceptable means of overcoming the particular obstacles to development and that it is reasonable to enter into an agreement. All agreements should be reasonable in the particular circumstances of the case and should be fully justified and evidenced.

Developer contributions

4.4 The SPPS advises that contributions may be required in a variety of circumstances including:

- *where a proposed development requires the provision or improvement of infrastructural works over and above those programmed in a Local Development Plan.*
- *where earlier than planned implementation of a programmed scheme is required.*
- *where a proposed development is dependent upon the carrying out of works outside the site.*
- *where archaeological investigation or mitigation is required.*

Voluntary Contributions

- 4.5 In some circumstances community benefits³ may be offered on a voluntary basis by developers likely to be affected by a development. Whilst the Department is committed to ensuring that local communities benefit from development schemes in their area, such community benefits cannot be considered material considerations in decision-taking and are distinct from developer contributions and planning conditions.

5.0 Guiding Principles

- 5.1 The use of agreements should be considered as early as possible in the design and decision making process. An agreement does not, in itself, confer planning permission nor does it determine the outcome of a related application.
- 5.2 When considering the use of a planning agreement, it is fundamental to assess if the agreement sought or offered is necessary in planning terms, directly related to development with a functional or geographical link and related in scale and kind to the development.

Needed

- 5.3 Where a planning permission cannot be granted without some restriction then it may be more appropriate to firstly consider whether the restriction can be achieved by the use of a planning condition. The imposition of conditions is often simpler to administer and is subject to appeal. The terms of conditions imposed on a planning permission should not be re-stated in a planning agreement i.e. an agreement should not be entered into which requires compliance with the conditions imposed. Furthermore permission

³ The following judgment in the case of *R (Wright) v Forest of Dean District Council* [2016] may be of interest in relation to the issue of community benefits for a wind farm.

<http://www.landmarkchambers.co.uk/news.aspx?id=4090>

should not be granted subject to a condition that the developer enters into a planning agreement.

- 5.4 It is not considered appropriate to seek improvements, upgrades or replacement of infrastructure which do not arise directly from the proposed development.
- 5.5 A planning authority should also be clear that when deciding to use a planning agreement that it is necessary as successors in title must be bound by the required obligation, for example, when phased contributions to infrastructure are required. It should be noted that in some cases where no binding successor in title is required an agreement made under a different statute may be more appropriate, quicker and easier to agree. This could, for example, include the provision of associated roads infrastructure through **Article 122 of The Roads (NI) Order 1993**.

Contribute to Costs

- 5.6 A developer can be expected to pay for, or contribute to the cost of, facilities and infrastructure needed for the development. However, planning agreements must be related in scale and kind to the proposed development. In assessing any contributions the relevant planning authority may take into account the cumulative impact of the development over time and necessary ongoing monitoring costs where appropriate. However, contributions should always be proportionate to the scale of the proposal.
- 5.7 Negotiations on planning agreements may wish to take cognisance of the development viability. Where a planning agreement requires financial contributions, staged payments in line with the construction programme can help avoid prejudicing the overall project viability. It is in the interest of the council, or as the case may be the Department, to ensure the financial implications are fair and transparent and that contributions are utilised for the purposes for which they were originally received. This may involve publishing agreement on council websites.

Directly Related

- 5.8 Planning agreements should relate to the development being proposed, such as where a proposed development would create a direct need for particular facilities or place additional requirements on infrastructure (cumulative impact)⁴. There should be a link between the development and any mitigation offered including any financial contribution. In addition, when determining whether an agreement is required, account should be taken of any other existing agreements or conditions related to infrastructure that applies to the development.

Balance of Users

- 5.9 An agreement can be used to secure the provision of a certain development type or land use if it is considered that this is deficient within an area and there is an evidential context for this.

Development Plan Policies

- 5.10 An agreement should serve a purpose related to the use and development of the land. This judgement should include consideration of a range of legislative and policy requirements including the development plan policies and any associated guidance. This should help developers and other interests to be aware when formulating development proposals of the likelihood of a planning agreement being sought and the likely requirements of the agreement.

⁴ In considering agreements the relevant authority should have regard to EIA and HRA requirements. In an EIA the 'entire project' should be considered as per Article 5 of the EIA Directive. The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2015 prohibits a planning authority from granting planning permission for EIA development or any subsequent consent without first considering environmental information. In *R (Brown) v Carlisle City Council* the court found that planning agreements provide sufficient detail to allow an assessment of the works proposed in an agreement and they should be included in the EIA of the development proposal. The Conservation (Natural Habitats etc) Regulations (Northern Ireland) 1995 prohibit a planning authority from giving any consent or approval without first making an appropriate assessment.

Loss or Impact

- 5.11 A planning agreement can be used to offset a negative impact on the environment or local amenity that cannot be resolved satisfactorily through the use of conditions where it is appropriate to do so. A planning agreement could be used provided it would clearly overcome or mitigate those identified barriers to the grant of planning permission.

6.0 The Plan Led System

- 6.1 The local development plan (LDP) should be the point at which consideration of the potential need for and use of planning agreements begins. It would be advisable for a planning authority, in line with legislation and the SPPS, to include policies on the use of planning agreements in their LDP. This creates an opportunity to involve the local community and development industry in the process of policy development and to clarify at the earliest stage the expected nature, scope and levels of contributions that may be sought from developers.
- 6.2 When drafting local development plans and any associated guidance councils should work with infrastructure providers, other local authority departments and consultees to undertake a robust assessment of infrastructure requirements, provision of services, the funding implications and timescales involved. From this, the level of provision that needs to be provided in planning agreements could be identified. Broad principles, including the items for which contributions will be sought and the occasions when they will be sought should be set out in the local development plan, and be subject to scrutiny and examination.
- 6.3 It is important that all planning agreement policies are informed by a sound and robust evidence base.

7.0 Examples of the use of Planning Agreements

- 7.1 The use of agreements to secure matters that are material to the consideration of the application is a case by case judgement and is not a replacement for planning conditions where they are more appropriate. The following highlight some broad examples, subject to legislative requirements, of where planning authorities might consider the use of a planning agreement.
- 7.2 **Removal of planning rights:** It may be appropriate to use an agreement to make acceptable the granting of consent to extinguish extant permissions or permitted development rights. This could be at the site of the application or on lands within the applicant's control. Such an approach has been used to remove extant consent or consents for retail developments to address policy concerns over cumulative retail impact on a protected centre. The removal of permitted development rights may be considered appropriate where a finite limit is required to an operation or development. This may be appropriate for mining, quarrying and the working of minerals or waste disposal with restrictions on new plant.
- 7.3 **Securing a specific use or user:** A planning agreement can potentially be used to ensure a development is occupied by a defined use or user. For example it may be used to secure a proportion of affordable housing or social housing in a new development or a mix of tenure in a housing development. This could be where a need has been established, possibly through a policy requirement or as a key site requirement of an LDP and where a condition may not give the appropriate level of detail or security of outcome to be delivered.
- 7.4 **A replacement use or facility:** An agreement could be used to ensure that a use or a facility that will be displaced by a development is replaced elsewhere. It may be used to secure the provision of alternative open space, wildlife habitat or a community facility to make good a loss on the application site.

- 7.5 **Comprehensive development of a site:** In situations where it is minded to grant permission for development on land owned by several parties, it may be appropriate to ensure that the development of the site is achieved at one time. This may be where a single access road serves the site or is to be constructed and failure of one of the owners to implement their part, or the emergence of a ransom situation could prejudice the whole development.
- 7.6 **Restricting the use of a site:** It may be appropriate to secure a restriction on planning permission prohibiting certain users, actions or operations. This may relate to occupancy or, in relation to the development and operation of public car parks by the private sector, the relevant authority may require developers to enter into a planning agreement to control the use of parking spaces in order to deter long-stay commuter parking. It might, for example, include restrictions on the leasing of car parking spaces. Relevant policies should support the restrictions or request for contributions.
- 7.7 **Completion of specified works:** It may be appropriate to secure the phasing of a development or completion of certain works by agreement that cannot be covered by a condition. For example, planning permission could be granted for a development where, by means of an agreement, the developer agrees to restore a listed building on the same site.
- 7.8 Other examples may include necessary ongoing monitoring of works or provision of financial guarantees, particularly where these may be required by legislative provisions.

8.0 Development Management Process

- 8.1 The negotiation of planning agreements should not unduly delay the development project or the development management process. There is no statutory time limit on the processing of a planning agreement. However, it is best practice to ensure that they are negotiated as effectively as possible to enable decisions to be made within the statutory time limits. All parties

should proceed as quickly as possible towards the resolution of the main terms of the agreement. This should occur where possible during a pre-application discussion⁵. Investing time and resources at the pre-application stage can save time and resources in the medium and longer term and help speed up the delivery of planning agreements.

- 8.2 A planning agreement is a material consideration in considering an application and, therefore, should be completed before permission can be issued.
- 8.3 Planning agreements should always be between willing parties. Applicants do not have to agree to a proposed planning agreement. However, if the barriers to the grant of planning permission have not been addressed this may lead to a refusal of planning permission or non-determination of the application. An appeal may be made against the non determination or refusal of planning permission.

9.0 Payments

- 9.1 Where planning agreements require payment to the relevant authority or a Northern Ireland Department as set out in **Section 76(1)(d) and 76(1)(e)** of the 2011 Act, this only permits such agreements to require payments to be made to these bodies and any attempt to specify payments to be made directly to another body would fall outside Section 76(1). In order to establish the appropriate level of payment to a Northern Ireland Department, it would be good practice for the planning authority determining the planning application to engage directly with that Department.
- 9.2 It is advised that in consideration of the purposes for which sums may be required and used under section 76 planning agreements that :-

⁵ Further information relating to Pre-Application Discussions can be found in Development Management Practise Note 10 Pre-Application Community Consultation.

1. The purposes must fall within the purposes of section 76(1)(a) to (e) and should not be used for some ulterior non-planning purpose.

2. The requirement for a planning agreement must be reasonable in any event i.e. entry into the agreement must not be *Wednesbury*⁶ unreasonable and must have regard to relevant planning policy.

9.3 Agreements may wish to include clauses regarding how contributions are spent to ensure they are utilised for the purposes for which they were requested. An agreement may also include clauses regarding the return of a payment if it is not spent by the recipient authority within a set period of time. This will help avoid monies secured for one scheme being used for another if the development subject to agreement does not take place. The agreement may also denote the penalty for non payment.

10.0 Registering the Planning Agreement

10.1 A council or, as the case may be, the Department must place a planning agreement on the Statutory Charges Register as per the requirement in **Section 245** of the 2011 Act which amends the **Land Registration Act (NI) 1970**. This will make the agreement a matter of public record and ensure that the provisions of the agreement are enforceable against successive owners of the site to which the agreement relates to. Modifications to a planning agreement or its discharge should be notified by the relevant planning authority to Land Registry and copies provided.

⁶ A reasoning or decision is *Wednesbury* unreasonable (or irrational) if it is so unreasonable that no reasonable person acting reasonably could have made it (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948)*).

11.0 Monitoring and Enforcement of a Planning Agreement

11.1 It would be good practice for a council or, as the case may be, the Department to have a mechanism and procedure for confirming that infrastructure and facilities to be provided under planning agreements are delivered. If the agreement is not being adhered to in a manner to the satisfaction of the appropriate planning authority, then consideration should be given to enforcement action⁷.

11.2 **Section 76(4)** of the 2011 Act allows the council or the Department to take action against:

- the person entering into agreement; and
- any person deriving title from that person⁸.

11.3 Any restriction imposed under a planning agreement is enforceable by injunction as per Section 76(6) of the 2011 Act allowing action to be taken if there is a clear breach of the agreement. Section 76(7) and (8) also allows the enforcing of operations required by the agreement. The council or, as the case may be, the Department can enter land and carry out operations after giving at least 21 days notice to the relevant person, with the possibility that any reasonable cost of the enforcement action can be recovered. Anyone who wilfully obstructs the implementation of action under Section 76(7)(a) shall be guilty of an offence liable to summary conviction to a fine not exceeding level 3 (£1,000) on the standard scale.

11.4 There is no time limit for enforcement action against the breach of a planning agreement⁹. However, if the breach relates to a matter that has potential for

⁷ This could be either enforcement action through planning legislation, a civil action by council as a breach of an agreement or a combination of both.

⁸ Persons who have disposed of their estate in the land cease to be bound by the planning agreement and therefore cannot be subject to enforcement action as per Section 76(5) of the 2011 Act.

⁹ The time limits in Section 132 of the Planning Act (Northern Ireland) 2011 do not apply to planning agreements.

significant environmental or human health impacts, it is advised that action be instigated as soon as possible¹⁰.

12.0 Modification and Discharge of a Planning Agreement

12.1 **Section 77(1)** of the 2011 Act prohibits the modification or discharge of an agreement except:

- by agreement with the person on whom the agreement is enforceable
- via an appeal with the Planning Appeals Commission (PAC) under **Section 78(1)** of the 2011 Act where no determination has been made on an application to modify or discharge.
- via an appeal with the PAC under **Section 78(1)** of the 2011 Act where it is determined that a planning agreement shall continue to have effect without modifications.

Application

12.2 An application for modification or discharge cannot be made within five years of the date of the application unless an alternative period has been agreed.

12.3 **Regulation 2 of The Planning (Modification and Discharge of Planning Agreements) Regulations (Northern Ireland) 2015** (the 2015 Regulations) sets out that the application shall be made on a form from the appropriate authority and that as well as the information required by the form, a map identifying the land to which the agreement relates and any other information that the applicant considers to be relevant¹¹.

¹⁰ The provisions of The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2015 and The Conservation (Natural Habitats etc) Regulations (Northern Ireland) 1995 should be considered.

¹¹ An example form is available on the Planning Portal at:
http://www.planningni.gov.uk/index/advice/fees_forms/mda1.pdf

- 12.4 In the case of an application to modify, only the modifications specified in the application can be considered. It is important therefore to ensure that the modifications are set out in the application form. An applicant should not specify a modification imposing an obligation on any other person against whom the planning agreement is enforceable.

Notification

- 12.5 **Regulation 3** of the 2015 Regulations requires that an applicant seeking to modify or discharge an agreement should give notice of the application at least 21 days before the date of the application to any third party on whom the agreement is enforceable. The notice for this is set out in Schedule 1 Part 1 of the 2015 Regulations.
- 12.6 The applicant is required to take reasonable steps to ascertain the name and address of every such person. Where the names and addresses are not known the applicant must publish notice of the application in at least one newspaper circulating in the locality in which the land is situated, during the 21 day period immediately preceding the application.
- 12.7 To verify that an applicant has undertaken all reasonable steps under Regulation 3(5) a certificate of compliance with the notification requirements has to be submitted with the application. The template for this is provided in Part 2 of Schedule 1 of the 2015 Regulations.

Consultation

- 12.8 **Regulation 4** of the 2015 Regulations requires the council or, as the case may be, the Department to publicise an application received for modification or discharge of an existing planning agreement by:
- publishing notice of the application in at least one newspaper circulating in the locality in which the land to which the application relates is situated; and

- publishing notice of the application on their website.

12.9 The notice published should invite representations to be made within 4 weeks from the date of the notice being first published in the press or appearing on the relevant authority's website. A copy of the application shall be made available for inspection during the period allowed for making representations. **Section 77(2)** of the 2011 Act requires the Department to consult with the relevant district council prior to determining an application for modification or discharge.

Determination

12.10 A determination shall not be made prior to the expiry of the period for making representations. **Section 77(7)(a) to (c)** of the 2011 Act allows a determination to be made to allow:

- a planning agreement to continue without modification.
- a planning agreement to be discharged if it is concluded it no longer serves a useful purpose.
- a planning agreement to be modified if it is concluded that the agreement is still useful after the proposed modification.

12.11 Where it is determined by the relevant authority that an agreement is to remain unmodified, full reasons for this should be provided as well as highlighting the applicant's right to lodge an appeal under **Regulation 5(3)** of the 2015 Regulations with the PAC within 4 months of the date of the notice. If it is concluded an application should be discharged, this is in effect an approval of an application to discharge. In cases where it is concluded modification is acceptable **Section 76(9)** of the 2011 Act denotes that the agreement shall be enforceable as if it had been entered into on the date on which the notice for the determination was given to the applicant.

12.12 **Regulation 5** of the 2015 Regulations requires written notice of the determination to be provided to the applicant within 16 weeks from receipt of the application, or such period as agreed in writing with the applicant.

Appeals

12.13 **Section 78** of the 2011 Act sets out the right to appeal against the determination under Section 77. An appeal may be lodged when a determination is not made within 16 weeks. In these circumstances no notice will have issued and for appeal purposes the planning agreement remains in place without modification.

12.14 If it is determined by the relevant council or, as the case may be, the Department that the agreement shall not be modified, then any appeal must be lodged by the applicant within four months of the date of the notice of the determination.

13.0 Council Planning Agreements

13.1 In circumstances where a planning application has been made to a council and the council has an estate in the land to which the proposed agreement relates under Section 76(15) of the 2011 Act the Department is the determining authority. Where a council is seeking a modification or discharge of the planning agreement processed by the Department, it must under Section 77(4) of the 2011 Act apply to the Department.

14.0 Planning Agreements by the Department

14.1 **Section 76(3)** of the 2011 Act requires the Department to consult with the relevant District Council prior to entering into a planning agreement. The Department will normally issue a Notice of Opinion (NOP) with a

determination issuing after completion of the NOP process and planning agreement.

15.0 Transitional Arrangements

15.1 Schedule 2 of The Planning (Modification and Discharge of Planning Agreements) Regulations (Northern Ireland) 2015 covers transitional provisions for planning agreements made under Article 40 of the Planning (Northern Ireland) Order 1991. An agreement made under the provisions of Article 40 shall be treated as if this has been made by the council under Section 76 of the 2011 Act and therefore the provisions of Section 77 apply¹² to the councils.

16.0 Skills and Competences

16.1 Developing, agreeing, implementing and monitoring planning agreements, involves a wide range of competences and skills, some of which are of a specialised nature.

16.2 The types of skills required within planning authorities to develop policies on planning agreements through the local development plan and also to secure individual agreements through the development management process include good negotiation, project management, co-ordination, communication, technical, development / economic viability and legal skills. It is important that all involved in the process possess these necessary skills to enable them to carry out their role effectively.

¹² Under Schedule 2(3) the Department of Infrastructure retains responsibility for the Article 40 Agreement with George Best Belfast City Airport Limited and the Department of Environment (NI).



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