

New Policy Document for Planning Obligations

Consultation questions

We are seeking your views on the following questions on the Government's proposal for a new policy document on the use of planning obligations.¹ **If possible, we would be grateful if you could please respond by email.** Alternatively, we would be happy to receive responses by post.

Email responses to: planning.obligations@communities.gsi.gov.uk

Written responses to:

Natasha Trinidad
Communities and Local Government
Zone 1/E2
Eland House
Bressenden Place
London
SW1E 5DU

(a) About you

(i) Your details

Name:	Stephen Russell
Position:	Policy and Public Affairs Officer
Name of organisation (if applicable):	Landscape Institute
Address:	33 Great Portland Street London W1W 8QG
Email Address:	stephenr@landscapeinstitute.org
Telephone number:	020 7299 4537

(ii) Are the views expressed on this consultation an official response from the organisation you represent or your own personal views?

Organisational response
Personal views

¹ CLG (2010) New Policy Document for Planning Obligations: Consultation
(see: www.communities.gov.uk/planningandbuilding/planning/planningpolicyimplementation/planningobligations)

(iii) Please tick the *one* box which best describes you or your organisation:

- Private developer or house builder
- Housing association or RSL
- Land owner
- Voluntary sector or charitable organisation
- Business
- Parish council
- Local government (i.e. district, borough, county, unitary, etc.)
- Regional government
- National Park
- Other public body (please state)
- Other (please state)

(iv) What is your main area of expertise (please tick as many boxes that apply)?

- Planning
- Legal
- Housing
- Economic or commercial development
- Environment
- Transport
- Other (please state)

(v) Do your views or experiences mainly relate to a particular geographical location?

- South West
- South East
- East of England
- East Midlands
- West Midlands
- North West
- Yorkshire and The Humber
- North East
- London
- All of England
- Wales
- Other (please comment)

(vi) Would you be happy for us to contact you again in relation to this consultation?

- Yes
- No

Introductory comments

The Landscape Institute wishes to make the strongest representations and express its grave concerns with regard to some of the proposals contained within Sections 3 and Sections 5. These appear to have serious adverse and, presumably, unintended consequences with regard to the establishment and ongoing management and maintenance of green infrastructure, open space, areas of biodiversity or nature conservation value, play facilities and other similar landscape-related land uses. The implications of the proposals within this document appear to be entirely contrary to both the previous and the new government's clearly stated support for green infrastructure and to seriously threaten its future provision.

It is appreciated that the new coalition government may introduce substantial changes to the Community Infrastructure Levy (CIL) and, indeed, to the proposals within this document. It is further appreciated that this document appears to have been drafted to avoid overlap with or duplication of provision as recently introduced through CIL. Notwithstanding these considerations, our response is based upon the proposals as drafted and their implications if put into practice. It is hoped also that this response will inform any proposals for alternative initiatives that may emerge from the new government.

It may be helpful as background to set out why landscape-related issues in particular need to be treated with special regard through the planning system.

Firstly it should be appreciated that green infrastructure embraces diverse elements including street trees, green roofs, parks, gardens, sports pitches, play areas, nature reserves, amenity space and accessible countryside. It is widely acknowledged that, in addition to their obvious primary functions, these elements are important for community cohesion, good place-making and, increasingly for their contribution to climate change adaptation, for example, the March 2010 report of the Environmental Audit Committee on the subject.

Regeneration and new development, in combination with the need to respond to climate change and the energy efficiency agenda, will inevitably place additional demands on the services that may be provided by green infrastructure. These will include technical requirements such as flood risk alleviation, water management and urban cooling effects. There are many competing demands on the finite availability of land, particularly within and surrounding urban areas. In many or most cases, these will need to be met by developing the multifunctionality of existing land use and enhancing the capacity of existing open space. The opportunities for such interventions will frequently be delivered by changing ways in which existing publicly owned and accessible land is managed.

It should also be appreciated that landscape areas are, as a general principle, relatively inexpensive to lay out and implement when compared to buildings. They do, however, require considerably greater maintenance and management resources, particularly during the early years of their establishment. Young trees and plants or newly created habitats are especially vulnerable to damage or disturbance and are therefore very dependent for their success on regular maintenance and management. Established landscape elements such as mature trees and existing habitats will also be very susceptible to environmental change that may result from new development and its associated direct and indirect impacts, both cumulatively and in combination. The establishment and growth of new planting and the potential adverse effects of construction on existing trees may well require monitoring for an extended period (e.g. ten years or so) depending on the circumstances.

The planning system is currently able to make allowances for these effects, many of which are within the public domain and not directly associated with a particular development site, by seeking contributions from developers to offset the ongoing additional costs, over and above those directly associated with implementation.

This can be achieved through commuted sums based upon the costs associated with maintenance and management of new or enhanced open space provision for an agreed period of establishment. This is commonly applied in the case of major developments that may incorporate their own new public or community open space provision. It is also applied to build the capacity of existing open space provision where a new development places additional demands but is unable to make direct provision within the development site boundaries – a common situation in inner urban areas or for smaller-scale developments which have a cumulative impact. It may also be achieved through pooled contributions, based upon a tariff, where the combined effect of development may have an indirect impact on sites of international importance such as habitats and this needs to be mitigated.

A significant example of this is the Thames Basin Heaths SPA, distributed within the boundaries of eleven local authorities and three counties. The planning authorities concerned have developed and implemented a strategy to enable housing development within a 5km zone of the SPA supported by tariff based contributions used to create SANGs (Suitable Alternative Natural Greenspace). The creation of these is enabling the delivery of 20,000 houses that would otherwise not be acceptable under European law because of their indirect effects on an internationally protected site. The effectiveness of SANGs in unlocking a previous moratorium on sub-regional development remains dependent on an assurance of their maintenance in perpetuity, requiring significant contributions for ongoing management. In many cases, the land allocated for SANG use is existing publicly owned open space incorporating significant enhancements to facilities and management regimes. These new areas of accessible land are, in many cases, located discretely from the development sites that may have contributed to their provision.

This type of pooled tariff-based scheme is likely to become increasingly important as a means of developing networks of multi-functional green infrastructure. This should be located where it is most needed or where it may be most effective (e.g. technically such as in flood alleviation or providing for additional street trees in urban areas).

We understand that CIL can be used for capital expenditure and that it cannot be applied to ongoing maintenance costs. The Landscape Institute had assumed that maintenance costs essential for good landscape establishment would continue to be covered through planning obligations secured through Section 106 agreements. The proposals in this document effectively preclude this.

There are two serious implications that are likely to result from this revision. The first is that local authorities will suffer an immediate cessation of a previously reliable (and largely uncontroversial) source of funding for open space establishment and green infrastructure development. The second is that many local authorities are quite likely to take the view that the provision of any new public open space or green infrastructure may present an unacceptable or untenable burden on limited public funds. Such provision may therefore be resisted rather than welcomed, with serious adverse and widespread effects on local environmental and quality of life interests.

The Landscape Institute therefore earnestly requests that the proposals relating to the application of planning obligation contributions to maintenance, to tariffs and to pooled funds be reconsidered in respect of green infrastructure, open space, biodiversity and other landscape-related provision within the public domain.

(b) Consultation questions

Question 1: Key principles

The policy content of *Circular 5/05: Planning Obligations* has largely been retained in the *Key Principles* section of the Annex.

1(a) – Do you agree with the principles set out in paragraphs PO1.1 to PO1.5?

Yes

No

1(b) – If yes, do you have any comments on the drafting of these policies or think that any additional principles should be provided (please state why in either case)?

PO1.3 – A local authority (or a number of local authorities acting in concert) may seek to establish or develop a green infrastructure network or Suitable Alternative Natural Greenspace areas or similar landscape-related provision to mitigate the impact of development on, for example, climate change, energy efficiency, biodiversity, recreational access or other amenity provision. In such cases, the provision necessary to make such development sustainable may be made initially through public funding but the capital and revenue costs of this should be recoverable through tariff-based contributions either through CIL or planning obligations or a combination of the two.

PO1.4 – There may be some merit in central government providing guidance on and examples of standard heads of terms, agreements or undertakings or model clauses, with particular regard to the landscape-related issues emphasised in this response. The Landscape Institute would welcome the opportunity to contribute to such guidance.

1(c) – If no, please state which principles you disagree with and why?

n/a

Question 2: Three tests

The Community Infrastructure Levy (CIL) regulation 122 will place into law the three tests described in this section, which will make it unlawful for a planning obligation, concerning a development that is capable of being charged CIL, to be taken into account in determining a planning application. The three tests are proposed to remain a material consideration for all other uses of planning obligations.

2(a) – Do you agree with the principles set out in paragraph PO2.1?

Yes

No

2(b) – If yes, do you have any comments on the drafting of these policies or think that any additional principles should be provided (please state why in either case)?

n/a

2(c) – If no, please state which principles you disagree with and why?

Principles (i) and (iii) are agreed but Principle (iii) raises the question of defining what is meant by a direct relationship with a development. There is a growing awareness in planning terms, reinforced by legal judgement, that development may have indirect effects that, taken in combination or cumulatively, require mitigation. This may be covered by the wording in (ii) regarding functional, as opposed to geographical, relationships. However, it seems very likely that a lack of clarity on this issue will result in substantial legal debate which it would be helpful to anticipate and avoid.

In particular, this would have implications for area-based or sub-regional green infrastructure provision. This would assist in making the cumulative impact of any new development more sustainable without there being a direct or significant relationship (in isolation) between a single development unit and the measures that might be applied.

Question 3: Maintenance payments

The policy content of *Circular 5/05: Planning Obligations* has largely been retained in the *Maintenance Payments* section of the Annex.

3(a) – Do you agree with the principles set out in paragraphs PO3.1 to PO3.3?

Yes

No

3(b) – If yes, do you have any comments on the drafting of these policies or think that any additional principles should be provided (please state why in either case)?

n/a

3(c) – If no, please state which principles you disagree with and why?

PO3.3 includes substantial alterations to previous policy guidance by deleting the wording 'As a general rule' and 'normally' from the original text. This has the (presumably intended) effect of excluding in all cases any maintenance contributions from developers for assets intended for the wider public (as opposed to predominantly individual-related) us.

As explained above in some detail, this revision to policy is likely, taken in combination with the proposals for CIL, to result in local authorities being very reluctant to promote green infrastructure, new public open space, recreational or play provision or nature conservation facilities because of the ongoing revenue cost

implications. Moreover, as landscape-related provision is relatively inexpensive to implement but does require substantial post-completion resources to become properly established over a period of time, this new policy approach is likely to have an adverse effect on the provision or improvement of such facilities generally.

Provided that there is some certainty with regard to the payments required, experience indicates that developers are willing to provide commuted sums for the medium to long-term establishment, maintenance and management of open space. These sums can be factored into land acquisition values and financial forecasts. The proposed changes in this document are likely to remove a significant funding stream relied upon by local authorities (and other agencies) which is vital to ensure the delivery of good quality landscape that responds to the increasing pressure of new development.

In the case of green infrastructure, there is likely to be an increasing need to ensure adequate funding to enhance the quality or increase the range of functions provided by existing public open space (including streets, civic spaces and waterways as well as public parks and gardens). In urban areas, these are likely to be increasingly important in meeting the needs of growing populations and mitigating the effects of new development. It is therefore essential that new development should, wherever appropriate and justified, make a contribution to the improvement or enhancement over time of assets within the public domain and therefore used by the public. As things stand, CIL allows for no contribution to such ongoing costs.

Question 4: Relationship with conditions

The policy content of *Circular 5/05: Planning Obligations* has largely been retained in the *Relationship with Conditions* section of the Annex. The use of planning conditions has been subject to a separate consultation, launched on 21 December 2009, to replace the existing policy in Circular 11/95 with a new policy Annex as part of the Development Management Planning Policy Statement (which has also been subject to consultation from the same date).^{2, 3}

4(a) – Do you agree with the principles set out in paragraphs PO4.1 to PO4.2?

Yes (subject to comments below)

No

4(b) – If yes, do you have any comments on the drafting of these policies or think that any additional principles should be provided (please state why in either case)?

There may be cases where the requirements of a condition require supplementary or related action that is most effectively delivered through a planning obligation. For example, a planning condition may require that a management plan for the creation of a nature reserve or the restoration of a historic landscape should be submitted and approved prior to the commencement or occupation of a development. A planning obligation might then also be applied to ensure that the long-term implementation of

² CLG (2009) Improving the use and discharge of planning conditions: Consultation (see: www.communities.gov.uk/publications/planningandbuilding/improvingplanningconditions)

³ CLG (2009) Development Management: Proactive Planning from Pre-Application to Delivery- Consultation (see: www.communities.gov.uk/publications/planningandbuilding/developmentmanagementconsult)

such a management plan is effectively resourced and properly carried out over an extended period.

This example does not necessarily reflect duplication but there is clearly a close relationship between the use of the condition which would be realistically enforceable in the short term (i.e. up to occupation of the development) and the use of a legal agreement to effectively ensure long-term delivery. The policy should avoid doubt by referring to and allowing for such distinctions.

4(c) – If no, please state which principles you disagree with and why?

n/a

Question 5: Pooled contributions

The legal framework with which planning obligations may be used to seek pooled contributions for infrastructure items that are capable of being funded by the Community Infrastructure Levy (CIL) has been changed by CIL regulation 123. Policies in this section of the Annex reflect these new legal developments.

5(a) – Do you agree with the principles set out in paragraphs PO5.1 to PO5.6?

Yes

No

5(b) – If yes, do you have any comments on the drafting of these policies or think that any additional principles should be provided (please state why in either case)?

n/a

5(c) – If no, please state which principles you disagree with and why?

5.3(i) refers to the pooling of planning obligations from developers being allowable where contributions are towards infrastructure or services, that are not capable of being funded by CIL.

The ongoing establishment, maintenance and management of green infrastructure, open space and other landscape-related land uses cannot be funded by CIL. Policy PO3.3 implies that where these are for wide public use, they cannot be funded through planning obligations. This leaves a significant funding gap for an important area of public provision which is closely related to the effects of new development.

5.3(ii) refers to infrastructure provision that can be, but is not, funded by CIL, being limited to no more than five separate planning obligations. Whilst it is accepted that CIL may be the most appropriate mechanism for multiple developments contributing to infrastructure, this seems to be a very low limit, particularly where multiple small-scale developments in existing urban areas may need to make a contribution to local infrastructure provision (e.g. play facilities, nature conservation, street improvements etc).

5.5 – the use and publication of standard charges and formulae is supported, with the

proviso that these will need to be regularly reviewed and potentially index-linked to ensure currency of application. Some guidance on content, reference sources and model templates from central government might be helpful in reducing (or justifying) the sometimes wide discrepancies that currently exist between different local authorities.

Question 6: Planning framework

The policy content of *Circular 5/05: Planning Obligations* has largely been retained in the *Planning Framework* section of the Annex. Some policies have been revised to reflect wider changes to the planning system as set out in Planning Policy Statement 12: Local Spatial Planning.

6(a) – Do you agree with the principles set out in paragraphs PO6.1 to PO6.4?

Yes
No

6(b) – If yes, do you have any comments on the drafting of these policies or think that any additional principles should be provided (please state why in either case)?

No comment

6(c) – If no, please state which principles you disagree with and why?

n/a

6(d) – Do you think that local communities have sufficient opportunity to comment on proposed developer contribution policies to ensure that local needs arising from new development are properly understood and addressed?

Yes
No

6(e) – If not, how do you think this might be improved?

n/a

Question 7: Transparency and accountability

The policy content of *Circular 5/05: Planning Obligations* has largely been retained in the *Transparency, reporting and implementation* section of the Annex.

7(a) – Do you agree with the principles set out in paragraphs PO7.1 to PO7.4?

Yes
No

7(b) – If yes, do you have any comments on the drafting of these policies or think that any additional principles should be provided (please state why in either case)?

No comment

7(c) – If no, please state which principles you disagree with and why?

n/a

The Government has set out in the Empowerment White Paper *Communities in Control: Real People, Real Power* (launched in July 2008) its desire to explore whether it can strengthen the information provided to local communities about how planning obligations have been delivered by developers (for example, information about when payments have been made) and how the local authority has put those contributions to use. Greater transparency will enable local communities to hold local authorities to account if infrastructure agreed in a planning obligation and paid for by a developer does not come forward. It will also help ensure that local authorities do not amass significant levels of unspent developer contributions without good reason.

7(d) – Do you agree with the proposal at Paragraph PO7.3 that local planning authorities should publish on their websites on a quarterly basis details of all planning obligations agreed and delivered during that period, including any monies that remain unspent and their intended use?

Yes

No

7(e) – If no, what else do you think could be done to improve the transparency of planning obligations to provide information to the public?

n/a

Question 8: Appeals modifications and discharge

The policy content of *Circular 5/05: Planning Obligations* has largely been retained in the *Appeals modifications and discharge* section of the Annex.

8(a) – Do you agree with the principles set out in paragraph PO8.1?

Yes

No

8(b) – If yes, do you have any comments on the drafting of these policies or think that any additional principles should be provided (please state why in either case)?

No comment

8(c) – If no, please state which principles you disagree with and why?

n/a

Question 9: Guidance

The Government is intending to review and replace the current *Planning Obligations: Practice Guidance*, which was published in 2006, in light of the policy changes set out in this document, as well as building upon the latest best practice and taking

account of the introduction of CIL.

9(a) – Do you agree that new guidance on the use of planning obligations should be provided?

Yes

No

9(b) – If yes, who do you think would be best to provide such guidance? And,9(c), what issues or topics should be covered specifically in any new guidance?

Provisions relating to the special requirements of open space, green infrastructure and associated landscape-related uses, their establishment and ongoing maintenance and management

Question 10: Any other questions

10(a) – Do you have any other comments that you would like to make about matters raised in the draft policy Annex which are not covered by the questions above?

Yes

No

10(b) – If yes, please comment.

Please see the comments (starting on page 3) prefacing the responses to the specific questions.