

# **Property managers in Scotland – a market study**

Annexe I - Local authority use of planning  
agreements

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# 1 LOCAL AUTHORITY USE OF PLANNING AGREEMENTS

1.1 Local authorities (LAs) are empowered to conclude agreements with developers to obtain payment towards the cost of maintenance of open space or transfer of the land itself.

1.2 Planning authorities' power to enter into legally binding contracts with developers is conferred by:

- Section 75 of the Town and Country Planning (Scotland) Act 1997 (section 75). This provides that 'a planning authority may enter into an agreement with any person interested in land in their district (in so far as the interest of that person enables him to bind the land) for the purpose of restricting or regulating the development or use of that land... any such agreement may contain such incidental and consequential provisions (including financial ones) as appear to the planning authority to be necessary or expedient'.<sup>1</sup> The Planning Etc (Scotland) Act 2006 makes provision for a number of changes to section 75 agreements which mean that they will more closely resemble their equivalent in England and Wales, planning obligations under s106 of the Town and Country Planning Act (1990) (as amended). It specifically permits a section 75 agreement based purely on a monetary contribution towards costs.
- Section 69 of the Local Government (Scotland) Act 1973 (section 69). This gives LAs a general power to make agreements with developers. It provides for the payment of money or the transfer of assets where this facilitates the discharge of the authority's functions. Authorities can 'do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of their functions'. This provision enables agreements to be made, for example, which are not limited in their purpose to restricting or regulating the

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<sup>1</sup> Draft circular on section 75 agreements published by Scottish Government paragraphs 3-4.

development or use of land, but could include the payment of money or the transfer of assets to a LA where this would facilitate the discharge of the authority's functions.<sup>2</sup>

- 1.3 Planning agreements under section 75 run with the land, and may be registered to bind successors in title. Thus if the site is sold to another party, that new party will be bound by the agreement. Agreements under section 69, on the other hand, do not run with the land. If a site is sold to another party then the agreement will no longer apply. As a result, only section 75 agreements are likely to be useful in situations where ongoing commitments for example, payments, are required and section 69 agreements are normally only useful in situations where a one-off payment is required.
- 1.4 Current Scottish Government policy on the use of planning agreements<sup>3</sup> states that planning agreements have a useful albeit limited role to play in the development management process. They should only be used where other measures, such as conditions on planning permission, cannot be used to address an obstacle to granting planning permission. However it acknowledges that many authorities feel that agreements provide an alternative and more effective means of enforcement without the risk of having a condition overturned or modified at appeal.<sup>4</sup>
- 1.5 The guidance identifies a number of criteria which a planning agreement should meet. Thus, for example, where a contribution is to be sought from a developer this must be related to the proposed development (such as where it would create a need for particular facilities) and related in scale and kind to the proposed development. It says that developers may, for example, reasonably be expected to pay for or contribute to the

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<sup>2</sup> Circular 12/1996 (*Town and Country Planning (Scotland) Act 1972: Planning Agreements*) Scottish Government paragraph 3.

<sup>3</sup> Set out in Circular 12/1996.

<sup>4</sup> Circular 12/1996 Scottish Government paragraph 6.

cost of infrastructure which would not have been necessary but for the development.<sup>5</sup>

- 1.6 The guidance makes specific provision for the use of agreements to fund land maintenance. It says that in some cases 'the obligations of a landowner or developer can be implemented, for example, by a one-off payment towards the cost of infrastructure provision or the maintenance of open space'. The provisions of such an agreement may not need to be enforced against successors in title by recording or registration.<sup>6</sup>
- 1.7 The Scottish Government has published for consultation a revised draft circular on section 75 agreements. This contains similar tests to be met in considering whether a section 75 agreement is appropriate to the previous circular. These are accompanied now by explicit guidance that planning authorities should wherever possible use planning conditions instead (while following guidance on the use of conditions<sup>7</sup>) or a general legal agreement such as section 69 rather than section 75 (a planning agreement) where only a one-off payment is required (as with infrastructure provision or the maintenance of open space).
- 1.8 The corresponding guidance in England and Wales on developer contributions says it may be appropriate for developers to pay for maintenance (even permanently) of facilities which are predominantly for the benefit of the users of the associated development. However, where an asset is intended for wider public use, the costs of subsequent maintenance should normally be borne by the LA.<sup>8</sup>
- 1.9 Scottish Government guidance on the use of agreements says planning authorities' development plans should give guidance on the particular circumstances in which they will seek to use agreements; some plans

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<sup>5</sup> Circular 12/1996 Scottish Government paragraphs 10-11.

<sup>6</sup> Circular 12/1996 Scottish Government paragraph 18.

<sup>7</sup> Circular 4/1989: *The Use of Conditions in Planning Permissions* Scottish Government.

<sup>8</sup> ODPM Circular 05/2005 *Planning Obligations* paragraphs B18-B19.

already do this. It says it is important that the policies are as precise as possible.<sup>9</sup>

## **Current use of agreements to fund maintenance**

- 1.10 We received a mixed response to our questions to LAs in Scotland about the use of planning agreements to secure the transfer of land and lump sum payments for land maintenance. Some LAs use such agreements, others do not and some are considering doing so. For example, one LA said that it would not be workable to use agreements to fund maintenance. However, another said that it invariably took responsibility for maintenance through use of section 75 agreements in preference to use of planning conditions. It took title to the land and maintained the ground in perpetuity for a fixed charge per house. It said the long term provision of public open space was a legitimate infrastructure cost to be borne by the new development. Another LA (that does use planning conditions relating to maintenance) has recently used a planning agreement to secure ownership of a park and other open space land within a housing development site along with a financial contribution towards their future maintenance.
- 1.11 A recent research report commissioned by the Scottish Government said that the original purpose of planning agreements was to effect greater control over the nature, phasing or impact of development than could be achieved by the use of conditions alone. However, in recent years there has been an acknowledgement that planning agreements are no longer used just to mitigate the impact of development. Increasingly, planning authorities use agreements to secure contributions towards essential public infrastructure to serve such developments.<sup>10</sup>
- 1.12 This research into agreements concluded by Scottish planning authorities found a substantial increase in the number of these between 2004 and

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<sup>9</sup> Circular 12/1996 Scottish Government paragraph 14.

<sup>10</sup> McMaster, R. and U'ren, G. – Dundas and Wilson CS LLP; Carnie, J. Strand, G. and Cooper, S. – Bidwells (2008) *An Assessment of the Value of Planning Agreements in Scotland* Scottish Government Social Research paragraph 2.6 p.11.

2007. This occurred despite a decline in the number of planning applications and permissions for larger applications.<sup>11</sup> The proportion of planning permissions for major housing developments linked with an agreement rose from 11 per cent in 2004-05 to 18 per cent in 2005-06 and 17 per cent in 2006-07.<sup>12</sup>

1.13 However the research did not distinguish between agreements relating to provision of facilities and those relating to maintenance of facilities. A small number of LAs did not respond to the survey and some of the information provided is incomplete so the figures quoted are expected to be under-estimates.

1.14 The research analysed agreements by type of contribution. The categories that appear to relate to land maintenance are 'environmental/open space' and 'recreation'. The number of environmental/open space contributions secured by agreements (the vast majority of which related to major housing developments) rose from 15 in 2004-05 to 30 in 2006-07. The average value of these increased significantly with the result that the total value of contributions rose sharply from £146,000 in 2004-05 to £3.7million in 2006-07. Almost all the total value of contributions came to be accounted for by direct financial contributions and the value of in-kind contributions actually diminished in the period. Contributions received in-kind included provision of land for public open space and public open space improvements.<sup>13</sup>

1.15 There were also 84 recreation contributions in 2006-07, totalling £5.2million with £4.6million of this accounted for by direct financial

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<sup>11</sup> McMaster, R. and U'ren, G. – Dundas and Wilson CS LLP; Carnie, J. Strand, G. and Cooper, S. – Bidwells (2008) *An Assessment of the Value of Planning Agreements in Scotland* Scottish Government Social Research p.65.

<sup>12</sup> McMaster, R. and U'ren, G. – Dundas and Wilson CS LLP; Carnie, J. Strand, G. and Cooper, S. – Bidwells (2008) *An Assessment of the Value of Planning Agreements in Scotland* Scottish Government Social Research p.28 (table 4.5).

<sup>13</sup> McMaster, R. and U'ren, G. – Dundas and Wilson CS LLP; Carnie, J. Strand, G. and Cooper, S. – Bidwells (2008) *An Assessment of the Value of Planning Agreements in Scotland* Scottish Government Social Research p.57 and tables 5.1 p.44, 5.2 p.45, 5.3 p.46.

contributions. These were more than double the amounts of 2004-05 but a drop on the figures for 2005-06. The most common contributions were towards new sports pitches, provision of equipped play areas and improved play facilities.<sup>14</sup>

- 1.16 Section 69 agreements accounted for £0.6million of open space/environment contributions and £8.3million of recreation contributions between 2004-05 and 2006-07. Section 75 agreements accounted for £3.7million of open space/environment contributions and £5.0million of recreation contributions in the same period.<sup>15</sup>
- 1.17 The research found increased use of section 69 to secure developer contributions generally. By the end of the period they were responsible for the majority of contributions. Section 69 agreements were generally used to secure direct up-front financial contributions, often linked with formula based developer contribution policies based on what a developer's contribution for specific purposes might be. The section 69 process is seen as being quicker and enables the authority to issue a decision notice more quickly. It appears that authorities prefer to use section 75 for very large financial contributions where payment is to be phased and linked to specific stages of the development.<sup>16</sup>
- 1.18 There appears to be much scope for LAs to extend their use of agreements to enable them to gain the funding to take on land maintenance (as well as the land itself). LAs with a dedicated officer or team secured almost five times as many contributions and for a wider range of purposes as those without. Yet according to this study only about a quarter of the LAs who responded to the survey have appointed

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<sup>14</sup> McMaster, R. and U'ren, G. – Dundas and Wilson CS LLP; Carnie, J. Strand, G. and Cooper, S. – Bidwells (2008) *An Assessment of the Value of Planning Agreements in Scotland* Scottish Government Social Research p.57-8 and tables 5.1 p.44, 5.2 p.45, 5.3 p.46.

<sup>15</sup> McMaster, R. and U'ren, G. – Dundas and Wilson CS LLP; Carnie, J. Strand, G. and Cooper, S. – Bidwells (2008) *An Assessment of the Value of Planning Agreements in Scotland* Scottish Government Social Research p.41.

<sup>16</sup> McMaster, R. and U'ren, G. – Dundas and Wilson CS LLP; Carnie, J. Strand, G. and Cooper, S. – Bidwells (2008) *An Assessment of the Value of Planning Agreements in Scotland* Scottish Government Social Research pp.2, 40, 65-6.

(or plan to appoint) an officer or team dedicated to planning contributions.<sup>17</sup> Most LAs have developer contribution policies in their Development Plan and two thirds have specific Supplementary Planning Guidance on this issue. LAs operating formula based policies secure around £2million per annum more (across all categories of contribution) than those without. However, only one third of LAs have policies involving a formula for calculating the amount of contribution that will be sought.<sup>18</sup>

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<sup>17</sup> McMaster, R. and U'ren, G. – Dundas and Wilson CS LLP; Carnie, J. Strand, G. and Cooper, S. – Bidwells (2008) *An Assessment of the Value of Planning Agreements in Scotland* Scottish Government Social Research table 6.1.

<sup>18</sup> McMaster, R. and U'ren, G. – Dundas and Wilson CS LLP; Carnie, J. Strand, G. and Cooper, S. – Bidwells (2008) *An Assessment of the Value of Planning Agreements in Scotland* Scottish Government Social Research p.4.